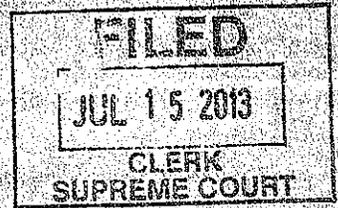


KENTUCKY SUPREME COURT
2012-SC-000626-D



COMMONWEALTH OF KENTUCKY On Behalf of
the COMMERCIAL MOBILE RADIO SERVICE
EMERGENCY TELECOMMUNICATIONS BOARD APPELLANT/APPELLEE

v. ON REVIEW FROM COURT OF APPEALS
NOS. 2010-CA-001185 and 2010-CA-001266

and

JEFFERSON CIRCUIT COURT
NO. 08-CI-10857

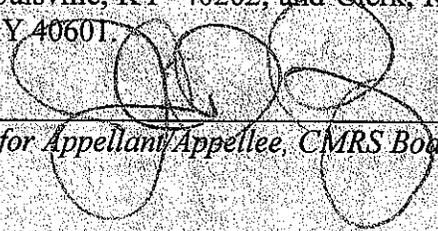
VIRGIN MOBILE U.S.A., L.P. APPELLEE/APPELLANT

**BRIEF OF APPELLANT
CMRS BOARD**

Jonathan D. Goldberg
Jan M. West
Jennifer K. Luhrs
GOLDBERG SIMPSON, LLC
9301 Dayflower Street
Prospect, KY 40059
Phone:(502) 589-4440 / Fax:(502) 581-1344
Counsel for Appellant/Appellee, CMRS Board

CERTIFICATE OF SERVICE

It is hereby certified that true and accurate copy of the foregoing was served by U.S. Mail this 10th day of July, 2013 on: Timothy J. Eifler, Douglas F. Brent, Mark T. Hurst, Stoll Keenon Ogden PLLC, 2000 PNC Plaza, 500 West Jefferson Street, Louisville, KY 40202; Charles W. Schwartz, Skadden, Arps, Slate, Meagher & Flom LLP, 1000 Louisiana Street, Suite 6800, Houston, TX 77002; Mark A. Loyd, John K. Bush, Bingham, Greenebaum Doll LLP, 3500 National City Tower, 101 South Fifth Street, Louisville, KY 40202; Sheryl G. Snyder, Thomas P. O'Brien, III, Cory J. Skolnick, Frost Brown Todd LLC, 400 West Market Street, 32nd Floor, Louisville, KY 40202; Hon. James M. Shake and Hon. F. Kenneth Conliffe, Jefferson Circuit Court, Judicial Center, 700 West Jefferson Street, Louisville, KY 40202; and Clerk, Ky. Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.


Counsel for Appellant/Appellee, CMRS Board

INTRODUCTION

This case involves whether prepaid wireless telephone providers were required to collect and to remit 911 fees (referred to as “CMRS service charges”) to the Commercial Mobile Radio Service Emergency Telecommunications Board (the “CMRS Board”) pursuant to statutes enacted in 1998, and further, whether the CMRS Board was entitled to its attorneys’ fees for pursuing those unremitted fees from prepaid providers. The Jefferson Circuit Court awarded summary judgment to the CMRS Board in the amount of \$547,945.67, plus post-judgment interest and attorneys’ fees, pursuant to KRS 65.7621, *et seq* (the “CMRS Act”) for unremitted CMRS service charges owed by Virgin Mobile U.S.A., L.P. (“Virgin Mobile”). The Kentucky Court of Appeals upheld the summary judgment in favor of the CMRS Board for unremitted CMRS service charges, but reversed the trial court’s attorneys’ fee award. The CMRS Board appeals the Kentucky Court of Appeals’ reversal of the attorneys’ fee award, asserting that the trial court did not abuse its discretion in awarding attorneys’ fees to the prevailing party, the CMRS Board. This Court also granted Virgin Mobile’s motion for discretionary review of the trial court’s summary judgment in favor of the CMRS Board holding that Virgin Mobile, a prepaid wireless provider, was required to collect and to remit CMRS service charges to the CMRS Board.

STATEMENT CONCERNING ORAL ARGUMENTS

The CMRS Board believes oral arguments will assist this Court in understanding the purpose and intent of the CMRS Act and the statutory provision allowing an award of attorneys' fees to the prevailing party in an action to collect CMRS service charges.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE..... 1

I. Procedural History..... 1

II. Background..... 2

A. The Creation of the CMRS Board and the CMRS Fund..... 2

 KRS 65.7621-65.7643 2

 1998 Ky. Acts 535 2

 KRS 65.7621(19)..... 2

 KRS 65.7627..... 2

 1998 Ky. Acts 535 §4..... 2-3

 KRS 65.7629(3)..... 3

 KRS 65.7635..... 3

 KRS 65.7621(6)..... 3

 KRS 65.7621(7)..... 3

 KRS 65.7621(10)..... 3

 KRS 65.7629(3)..... 3

 KRS 65.7627..... 3

 KRS 65.7621(9)..... 3

 KRS 65.7635(1)..... 3

 KRS 65.7635(4)..... 3

 KRS 65.7623..... 4

 1998 Ky. Acts 535 §2..... 4

 KRS 65.7629..... 4

KRS 65.7629(14).....	4
KRS 65.7639.....	4
B. The Prepaid Business Model.....	4
C. Virgin Mobile’s Remittance and Communications with the CMRS Board Prior to June, 2005.....	4
KRS 65.7621, <i>et seq.</i> (CMRS Act).....	4-5
KRS 65.7639.....	5
D. Virgin Mobile’s Request For a Refund.....	5
KRS 65.7635(1).....	5
E. The 2006 Amendments to the CMRS Act.....	6
KRS 65.7635(1)(a-c).....	6
KRS 65.7627(6), (7) and (10).....	6
KRS 65.7627.....	6
F. Virgin Mobile Refuses to Remit Service Charges.....	6
III. CMRS Collection Suits Against Prepaid Providers.....	7
KRS 65.7635.....	8
KRS 65.7635(5).....	8
<i>CMRS Board v. TracFone Wireless, Inc.</i> , 735 F. Supp.2d 713 (W.D. Ky. 2010).....	9
KRS 65.7635(5).....	9
<i>CMRS Board v. TracFone Wireless</i> , 2011 WL 4007668 (W.D. Ky, 09/08/11).....	9-10
<i>CMRS Board v. TracFone Wireless, Inc.</i> , 712 F.3d 905 (6th Cir. 2013).....	10
<i>Imwalle v. Reliance Med Prods., Inc.</i> , 515 F.3d 531, 551 (6th Cir. 2008).....	10
ARGUMENT.....	11
KRS 65.7635(5).....	11

	<i>Gentry v. Gentry</i> , 798 S.W.2d 928 (Ky. 1990).....	11
I.	The Court of Appeals Did Not Apply the Correct Standard of Review of the Trial Court’s Award of Attorneys’ Fees to the CMRS Board.....	11
	KRS 65.7635(5)	12
	<i>King v. Grecco</i> , 111 S.W.3d 877, 883 (Ky. App. 2002).....	13
	<i>Com. v. English</i> , 993 S.W.2d 941, 945 (Ky. 1999).....	13
	<i>Walters v. Moore</i> , 121 S.W.3d 210, 215 (Ky. App. 2003).....	13
	<i>Commonwealth v. Cincinnati, N.O. & T.P. Ry. Co.</i> , 155 S.W.2d 460 (Ky. App. 1941).....	13
	<i>Commonwealth v. Thomas</i> , 298 S.W.2d 302, 303 (Ky. 1957).....	13
	<i>Brooks v. Lexington-Fayette Urban County Housing Authority</i> , 332 S.W.3d 85, 91 (Ky. App. 2009).....	14
	KRS 411.080.....	14
II.	KRS 65.7635(5) Is Not a “Penal” Statute but Designed to Encourage the CMRS Board to Enforce the CMRS Act.....	15
	KRS 65.7635(5).....	15-16
	KRS 65.7621 to 65.7643.....	15
	<i>CMRS Board v. TracFone Wireless</i> , 2011 WL 4007668 (W.D. Ky, 09/08/11).....	15
	<i>LWD Equipment, Inc. v. Revenue Cabinet</i> , 136 S.W.3d 472 (Ky. 2004).....	16
	<i>Alexander v. S & M Motors, Inc.</i> , 28 S.W.3d 303, 305 (Ky. 2000).....	16
	KRS 65.7621, <i>et seq.</i> (1998 CMRS Act).....	16
III.	Whether or Not Virgin Mobile Had a Good Faith Belief that Prepaid Providers Were not Required to Pay CMRS Service Charges Has No Bearing on the CMRS Board’s Entitlement to Attorneys’ Fees, and, Virgin Mobile did Not Act in “Good Faith.”.....	16
	KRS 65.7621, <i>et seq.</i> (1998 CMRS Act).....	16, 18, 19

KRS 65.7635.....	17
KRS 365.886.....	17
KRS 304.39-220.....	17
KRS 65.7635(5).....	17
<i>Aesthetics in Jewelry, Inc. v. Brown ex rel. coexecutors</i> , 339 S.W.3d 489, 498 (Ky. App. 2011).....	18
<i>Healthcare of Louisville v. Kiesel</i> , 715 S.W.2d 246, 248 (Ky. App. 1986).....	18
<i>Bowling v. Lexington-Fayette Urban County Government</i> , 172 S.W.3d 333, 343 (Ky. 2005).....	18
<i>Meyers v. Arcadia Realty Foundation, Inc.</i> , 367 S.W.2d 836, 838 (Ky. 1963)...	18
CONCLUSION	19

STATEMENT OF THE CASE

I. Procedural History

The Jefferson Circuit Court awarded summary judgment to the CMRS Board in the amount of \$547,945.67, plus post-judgment interest and attorneys' fees. [A copy of the Opinion and Order entered March 25, 2010, is attached hereto at Appendix Tab 1, R. 184-191; and a copy of the Opinion and Order entered June 8, 2010, is attached hereto at Appendix Tab 2, R. 248-253]. This judgment includes CMRS service charges which Virgin Mobile refused to pay from the period of June, 2005 until January, 2007. The judgment also includes CMRS service charges that Virgin Mobile voluntarily paid to the CMRS Board for a three year period between 2002 and May, 2005, prior to the prepaid wireless industry adopting a unilateral position that the CMRS service charges did not apply to prepaid services. Virgin Mobile took back these amounts, over the objection of the CMRS Board, by imposing a "credit" on future amounts that Virgin Mobile admits it owed beginning in July, 2006.

The Kentucky Court of Appeals upheld the trial court's summary judgment and award of damages in favor of the CMRS Board. (A copy of the Opinion entered June 29, 2012, is attached hereto at Appendix Tab 3). However, inexplicably, and without indicating how the trial court abused its discretion, or even a finding of abuse of discretion, the Court of Appeals reversed the award of statutory attorneys' fees in favor of the CMRS Board. The Court of Appeals found that the CMRS Board was not entitled to recover any of its attorneys' fees incurred in collecting the CMRS service charges from Virgin Mobile, concluding that Virgin Mobile acted in "good faith" in contesting whether providers of prepaid wireless services were required to pay CMRS service charges.

The CMRS Board appeals the Kentucky Court of Appeals' reversal of the attorneys' fee award in favor of the CMRS Board, asserting that it is entitled to statutory attorneys' fees incurred in collecting CMRS service charges from Virgin Mobile.

II. Background

A. The Creation of the CMRS Board and the CMRS Fund

This is a case of statutory interpretation. The essential facts are not in dispute. In 1998, the Kentucky legislature enacted KRS 65.7621-65.7643; Created 1998 Ky. Acts 535, effective July 15, 1998 (hereinafter the "CMRS Act" or the "1998 statutes"). The purpose of the CMRS Act was to develop throughout Kentucky a statewide enhanced wireless 911 service ("E911") for wireless telephone users (i.e., cell phones).

Through the CMRS Act, the legislature directed that the E911 system would connect wireless 911 calls "to appropriate public safety answering points ("PSAPs") by selective routing based on the geographical location from which the call originated." KRS 65.7621(19). In addition, the CMRS Act mandates that the E911 system has the capability of allowing the 911 service called to identify the phone from which the call was made and to geographically locate the position of the person making the call. *Id.* In other words, a cell phone user anywhere within the state can make a 911 call that is directed to the appropriate emergency dispatcher within the user's calling area. The identity of the user and the location of the cell phone can be identified immediately, and if the person making the 911 call is unable to speak, emergency service can be dispatched immediately to that person's location. *Id.*

In order to provide for the infrastructure essential to create the wireless E911 system, the legislature also established the "CMRS Fund." KRS 65.7627, 1998 Ky. Acts

535 §4, effective July 15, 1998. The CMRS Fund was financed by a service charge of 70 cents per month per “CMRS connection” (the “CMRS service charge”).¹ The term “CMRS connection” was defined in the 1998 statutes, and is currently still defined, as a “mobile handset telephone number assigned to a CMRS customer.” KRS 65.7621(6).² Each “CMRS customer,” i.e., cell phone user, is required to pay the CMRS service charge to subsidize the cost of implementing and maintaining the E911 system. *See* KRS 65.7621(6); KRS 65.7621(7); KRS 65.7621(10); KRS 65.7629(3). Most importantly, the CMRS Act mandates that the CMRS service charge “have uniform application within the boundaries of the Commonwealth.” KRS 65.7627.

A CMRS “provider” was defined in the 1998 statutes as a “person or entity who provides CMRS to an end user, including resellers.”³ KRS 65.7621(9). Each “CMRS provider,” i.e., the wireless provider, such as Virgin Mobile, has always been required to act as a “collection agent” for the CMRS Fund. KRS 65.7621(9); KRS 65.7635(1). As enacted, KRS 65.7635(1) directed CMRS providers to collect the service charge as part of their “normal billing process.” From the collected service charge, each CMRS provider is entitled to retain 1.5% as reimbursement for the cost of collection. KRS 65.7635(4).

¹ KRS 65.7629(3), as enacted, stated: “The CMRS service charge shall be seventy cents (\$0.70) per month per CMRS connection, and shall be collected in accordance with KRS 65.7635 beginning August 15, 1998.” Many states refer to this service charge as an “E911 fee.”

² There has never been a dispute that Virgin Mobile’s prepaid customers have a CMRS connection, as defined by KRS 65.7621(6).

³ There has never been a dispute that Virgin Mobile is a “CMRS provider” as defined by KRS 65.7621(9).

The CMRS Board was established by the legislature pursuant to KRS 65.7623. 1998 Ky. Acts 535 §2. The CMRS Board is charged with administering the CMRS Act and maintaining the CMRS Fund. *See* KRS 65.7629. The CMRS Board is also charged with ensuring that “all carriers have an equal opportunity to participate in the wireless E911 system.” KRS 65.7629(14). Since 2001, the CMRS Act has required CMRS providers to “provide a quarterly report to the [CMRS] board of the number of subscribers receiving bills in each zip code serviced by the provider that quarter, if needed.” KRS 65.7639.

B. The Prepaid Business Model

Virgin Mobile, a prepaid wireless provider, began doing business in Kentucky in August, 2002. [R. 12-25]. Unlike the postpaid business model, in which the wireless customer signs a service contract and is billed regularly, prepaid wireless service customers do not enter into long-term service contracts with providers, but they purchase wireless service in advance in a predetermined amount of dollars or units (i.e., a “pay as you go” plan). [R. 12-25 and 33-37]. The dollars or units that a prepaid customer purchases are exhausted in real time as the customer uses the prepaid service. [R. 12-25].

C. Virgin Mobile’s Remittance and Communications with the CMRS Board Prior to June, 2005

The CMRS Board had always considered prepaid wireless services subject to the CMRS Act. [See David Lucas “Lucas” Depo.⁴ at pp. 35, 39, 59, 71, 84, attached as Exhibit 4 to CMRS Board’s Memorandum in Support of its Motion for Summary

⁴ David Lucas was the CMRS Board’s chair at the time the lawsuit was filed and was designated by the CMRS Board as its corporate representative. (Mr. Lucas is not a member of the Board currently.) (Lucas Depo, p. 9, lines 9-11; p. 14, lines 16-23).

Judgment filed under seal on December 23, 2009 (“CMRS Board’s Sealed Memo”). Virgin Mobile began voluntarily remitting the service charge to the CMRS Board when it began doing business in Kentucky, without question or protest. [R. 12-25]. Virgin Mobile also voluntarily made quarterly reports to the CMRS Board pursuant to KRS 65.7639 with respect to “the number of subscribers receiving bills in each zip code served by the provider during that quarter.” [See, Exhibit 3 to CMRS Board’s Sealed Memo, subscriber count report based on zip code].⁵

In September, 2004, the CMRS Board issued a letter to all wireless providers in the Commonwealth indicating that the Act did apply to prepaid services. [See, Exhibit 5 to CMRS Board’s Sealed Memo]. Virgin Mobile did not respond to this letter. [See Gary Wagner “Wagner” Depo. at pp. 100-101, attached as Exhibit 2 to CMRS Board’s Sealed Memo]. Virgin Mobile ceased paying the service charge in June, 2005, and did not begin remitting the service charge again until January, 2007. [Wagner Depo., at pp. 75-76]. Virgin Mobile had voluntarily remitted approximately \$286,807.20 in service fees to the CMRS Board from August, 2002 to May, 2005.

D. Virgin Mobile’s Request For a Refund

On October 6, 2005, Virgin Mobile sent a letter to the CMRS Board requesting a refund in the amount of \$286,807.20 for past amounts remitted. [See, Exhibit 9 to CMRS Board’s Sealed Memo]. Virgin Mobile claimed the CMRS service charge was not applicable to prepaid services because prepaid providers did not send their customers “bills.” See KRS 65.7635(1). The CMRS Board denied Virgin Mobile’s request for a

⁵ Virgin Mobile made these quarterly reports during the time period that Virgin Mobile ceased remitting the service charge. [See also Exhibit 22 to CMRS Board’s Sealed Memo, Affidavit of Tandy Hubbard, Policy Advisor, Kentucky Office of the 911 Coordinator].

refund by letter dated December 1, 2005, maintaining that the CMRS Act applied to all wireless service, without regard to payment methodology. [See, Exhibit 11 to CMRS Board's Sealed Memo]. Virgin Mobile did not sue the Commonwealth of Kentucky for the refund amount. [Wagner Depo., p. 147, Exhibit 2 to CMRS Board's Sealed Memo].

E. The 2006 Amendments to the CMRS Act

The 2006 Kentucky General Assembly passed HB 656 amending the CMRS Act. The purpose of the 2006 amendments, in part, was to reinforce its application to prepaid services. *See* KRS 65.7635(1)(a-c). In addition to providing three new collection methodologies for prepaid providers, the 2006 amendments also created a grant fund and changed the distribution formula for PSAPs.

Importantly, the 2006 amendments did not change the definitions of a "CMRS connection" or a "CMRS customer," and only minimally amended the definition of a "CMRS provider." *See* KRS 65.7627(6), (7) and (10). The 2006 amendments did not add a definition for "prepaid CMRS connection," "prepaid CMRS customer," or "prepaid CMRS provider." The 2006 amendments did not change or enlarge the uniform application of the CMRS service charge to all CMRS connections. *See* KRS 65.7627.

F. Virgin Mobile Refuses to Remit Service Charges

The CMRS Board sent a letter to Virgin Mobile on May 2, 2006, informing Virgin Mobile of the 2006 amendments. [Exhibit 12 to CMRS Board's Sealed Memo]. On October 4, 2006, the CMRS Board sent a letter to Virgin Mobile demanding that Virgin Mobile again begin remitting the service charges. [Exhibit 13 to CMRS Board's Sealed Memo]. In response, Virgin Mobile sent the CMRS Board a letter on October 17, 2006, proposing that Virgin Mobile would take a credit in the amount of the allegedly

erroneously-paid service charges (\$286,807.20) applied towards future service charges owed to the CMRS Board. [Exhibit 14 to CMRS Board's Sealed Memo].

On January 23, 2007, Virgin Mobile sent another letter to the CMRS Board indicating that it would begin remitting service charges as of January 1, 2007, but that it would be unilaterally taking a credit for amounts it previously paid. [Exhibit 16 to CMRS Board's Sealed Memo]. On February 15, 2007, the CMRS Board responded to Virgin Mobile's letter and reiterated that Virgin Mobile was not entitled to take a credit since the CMRS Act had always applied to prepaid services. [Exhibit 17 to CMRS Board's Sealed Memo].

Virgin Mobile implemented this credit strategy over the CMRS Board's objections. [Wagner Depo., pp. 183-184, Exhibit 2 to CMRS Board's Sealed Memo]. This credit was not exhausted until November, 2008, and therefore Virgin Mobile did not begin to remit CMRS service charges in Kentucky until November, 2008. [Wagner Depo., pp. 86-93. *See also* Exhibit 1 to CMRS Board's Sealed Memo, a table created by Virgin Mobile showing how the credit was calculated and applied].

III. CMRS Collection Suits Against Prepaid Providers

As a result of the parties' dispute, the CMRS Board filed this action against Virgin Mobile, and a separate action against TracFone Wireless, Inc. (another large prepaid wireless provider), in the Jefferson Circuit Court, seeking a declaration that the CMRS Act has been applicable to all wireless services, both postpaid or prepaid, since its enactment in 1998. [R. 1-8]. TracFone removed its action to the U.S. District Court for the Western District of Kentucky, Louisville Division, before the Honorable Judge John G. Heyburn, II ("Judge Heyburn").

On March 25, 2010, Judge Kenneth Conliffe, sitting as a special judge in Division Two of the Jefferson Circuit Court, entered summary judgment in this case in favor of the CMRS Board, awarding a judgment in the amount of \$547,945.67, plus post-judgment interest. [Appendix Tab 1, R. 184-191]. This judgment represents the amount that Virgin Mobile voluntarily paid, but then took back by imposing its credit strategy (the refund amount), and additional amounts that Virgin Mobile refused to remit between June, 2005 and January, 2007, prior to the 2006 amendments. The Jefferson Circuit Court concluded that the 1998 statutes levied the CMRS service charge on *all* CMRS connections (whether the service was paid for on a postpaid or a prepaid basis) and that the language in KRS 65.7635 regarding collection of the fee on a “monthly” and “billing” basis did not obviate prepaid providers’ obligations to collect and to remit the CMRS service charge. *Id.*

On a motion to alter, amend or vacate, the Jefferson Circuit Court, Judge James Shake, granted the CMRS Board’s motion for attorneys’ fees as permitted by KRS 65.7635(5). [Appendix Tab 2, R. 248-253]. The CMRS statute authorizes an award of reasonable attorneys’ fees to the prevailing party in an action brought to collect CMRS service charges. The trial court awarded the CMRS Board attorneys’ fees in the amount of \$137,869.03, finding that the amount of the fees was reasonable. [R. 253]. The attorneys’ fee award represented approximately 25% of the amount of the judgment. The trial court rejected Virgin Mobile’s argument that the court should take into account Virgin Mobile’s “good faith belief” that it had no obligation to pay the CMRS service charges. [R. 248].

On August 18, 2010, in the CMRS Board's litigation with TracFone, Judge Heyburn also entered summary judgment in favor of the CMRS Board on the issue of the CMRS Act's application to prepaid services. *CMRS Board v. TracFone Wireless, Inc.*, 735 F. Supp.2d 713 (W.D. Ky. 2010). Although Judge Heyburn looked to the opinion of the Jefferson Circuit Court for guidance and concluded that "Judge Conliffe undertakes this difficult analysis in a convincing, well-reasoned and most thorough manner," the Court undertook its own exhaustive analysis of the statutes, of Kentucky law, and of the criticisms raised by TracFone against Judge Conliffe's opinion. Judge Heyburn came to the same conclusion as the Jefferson Circuit Court. Judge Heyburn concluded "[t]he [1998] statute[s], at its most basic level and in no uncertain terms, requires [prepaid CMRS providers] to collect the service fees from [their] Kentucky customers." *Id.* at 722.

In *TracFone* Judge Heyburn also granted the CMRS Board's request to recover attorneys' fees pursuant to KRS 65.7635(5). See *CMRS Board v. TracFone Wireless*, 2011 WL 4007668 (W.D. Ky, September 8, 2011). Judge Heyburn also rejected TracFone's argument that an award of attorneys' fees to the CMRS Board was not warranted, as TracFone claimed it did not act in bad faith in failing to pay CMRS service charges. In this regard, the Court held:

Whether to award attorney's fees to a prevailing party remains in the Court's discretion. However, these circumstances seem to exemplify those in which an award of fees is appropriate. Here, the case for attorney's fees does not arise due to some bad faith or egregious conduct by Defendant. Far from it. TracFone had some reasonable grounds for believing that its actions were appropriate and it had the means to defend itself. The CMRS Board could have let the matter slide or even settled for a nominal amount. Instead, the Board, at some risk and expense to itself, sought to enforce its view of the statute. **The attorney's fee provision is**

designed to encourage precisely this choice. These circumstances present a reason to award reasonable fees, rather than to deny them. *Id.*, p. 2 (emphasis added).

The Court further considered the amount of attorneys' fees requested by the CMRS Board and found the hours to be "quite reasonable" considering the complexity of the case, the quality of the representation, and the "insultingly low" hourly rate (\$125.00 per hour). *Id.* p. 2.

The Sixth Circuit in *CMRS Board v. TracFone Wireless, Inc.*, 712 F.3d 905 (6th Cir. 2013) affirmed Judge Heyburn's decision that the 1998 CMRS statutes required prepaid providers to collect and remit CMRS service charges to the CMRS Board. The Sixth Circuit found no ambiguity in the CMRS statutes as to the obligation of all CMRS providers, including prepaid providers, to remit the service charges regardless of the providers' billing methods. The Court found that "it is not the responsibility of the legislature to contemplate all of the possible billing methods of CMRS providers to collect the fee when it has made a clear directive that the statute applies to all providers equally". *Id.* at 914.

The Sixth Circuit also found that the CMRS Board was entitled to attorneys' fees as the prevailing party in the litigation and that the district court did not abuse its discretion in awarding the fees. *Id.* at 916 (citing *Imwalle v. Reliance Med Prods., Inc.*, 515 F.3d 531, 551 (6th Cir. 2008)) (reviewing an order granting attorneys' fees for an abuse of discretion).

Contrary to the Jefferson Circuit Court, the U.S. District Court for the Western District of Kentucky, and the Sixth Circuit, the Court of Appeals reversed the attorneys' fees award to the CMRS Board. Although the Court of Appeals agreed that Virgin

Mobile was obligated to collect and to remit CMRS service charges, the Court of Appeals found that Virgin Mobile disputed the payment of the CMRS service charges in good faith; therefore, the trial court “exceeded” its discretion in awarding statutory attorneys’ fees to the CMRS Board. The Kentucky Court of Appeals found that the CMRS Board was not entitled to recover any portion of its attorneys’ fees incurred in collecting CMRS service charges from Virgin Mobile. (Opinion, Appendix Tab 3, p. 30).

ARGUMENT

The Circuit Court did not abuse its discretion in holding that the CMRS Board was entitled to its attorneys’ fees pursuant to KRS 65.7635(5)⁶. The Kentucky Court of Appeals erred in finding that the trial court exceeded its discretion in awarding attorneys’ fees to the CMRS Board. The Court reversed the trial court’s award of statutory attorneys’ fees to the CMRS Board based upon its finding that Virgin Mobile acted in good faith, despite the fact that the CMRS statutes do not require that the losing party act in bad faith in order to award attorneys’ fees to the prevailing party.

I. The Court of Appeals Did Not Apply the Correct Standard of Review of the Trial Court’s Award of Attorneys’ Fees to the CMRS Board

Virgin Mobile asserted that the Circuit Court abused its discretion in awarding attorneys’ fees to the CMRS Board. Virgin Mobile claimed that it acted in good faith in refusing to collect and remit CMRS service charges prior to the 2006 amendments and

⁶ The decision whether to award attorneys’ fees is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990). Virgin Mobile did not dispute the reasonableness of the amount of attorneys’ fee award. Virgin Mobile only disputes the CMRS Board’s entitlement to attorneys’ fees.

should not be responsible for paying the CMRS Board's attorneys' fees.⁷ The trial court rejected Virgin Mobile's "good faith" argument. However, the Kentucky Court of Appeals inexplicably agreed with Virgin Mobile, finding that the trial court exceeded its discretion in awarding attorneys' fees.

In its Opinion and Order, the Court of Appeals first noted that it agreed with the CMRS Board and the circuit court that KRS 65.7635(5) does authorize an award of attorneys' fees, and rejected Virgin Mobile's argument that the statute was solely intended to deter providers who converted customers' monies by collecting the service charges but failing to remit them to the CRMS Board (*See* Opinion, Appendix Tab 3, p. 29). Virgin Mobile essentially argued that since it did not collect the service charges from its customers and put those service charges in its own pocket, rather than remitting to the CMRS Board, it should not be liable for attorneys' fees. The Court acknowledged that if Virgin Mobile's interpretation of the statute was correct, all prepaid providers, whether acting in good or bad faith, could refuse to collect and remit the service charge and evade responsibility for the CMRS Board's attorneys' fees and costs. Nevertheless, the Court found "in this particular instance" Virgin Mobile disputed payment of the service charge in good faith, therefore the trial court "exceeded" its discretion in ordering Virgin Mobile to pay the attorneys' fees of the Board (*See* Opinion, Appendix Tab 3, p. 30).

When a statute authorizes an award of attorneys' fees, the decision of the trial court to award fees is within the sound discretion of the court and will not be disputed on

⁷ The CMRS Board disputes that it is "good faith" to stop remitting a fee based on a new industry interpretation of the law and then unilaterally obtain a refund for past amounts voluntarily paid by imposing a credit on amounts indisputably owed in the future.

appeal absent an abuse of discretion. *King v. Grecco*, 111 S.W.3d 877, 883 (Ky. App. 2002). Whether there has been an abuse of discretion requires a determination of whether “the trial judge’s decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles.” *Com. v. English*, 993 S.W.2d 941, 945 (Ky. 1999). The Court in *Walters v. Moore*, 121 S.W.3d 210, 215 (Ky. App. 2003), further elaborated on the trial court’s ability to evaluate a request for attorneys’ fees stating:

In light of a [trial] court’s superior understanding of the litigation and the desirability of avoiding frequent appellate review of what are essentially factual matters, an award of attorney’s fees under [the statute] is entitled to substantial deference. An abuse of discretion exists when the reviewing court is *firmly* convinced that a mistake has been made.

Thus, it is only in rare cases in which the trial court has clearly made a mistake and the appellate court is convinced that a mistake has been made that a trial court’s award of attorneys’ fees should be overturned.

In this case, the Court of Appeals did not apply the appropriate standard of review. The Court did not analyze whether the trial court abused its discretion by issuing a decision that was arbitrary, unreasonable, unfair or unsupported by sound legal principles. Instead, the Court simply found that the trial court “exceeded” its discretion, relying on taxpayer cases which are inapplicable herein. The Court of Appeals stated that *Commonwealth v. Cincinnati, N.O. & T.P. Ry. Co.*, 155 S.W.2d 460 (Ky. App. 1941) and *Commonwealth v. Thomas*, 298 S.W.2d 302, 303 (Ky. 1957) held that a “good faith basis for the dispute can obviate the need for assessment of **attorney’s fees.**” (See Opinion, Appendix Tab 3, p. 30, emphasis added). However, those cases held that denial of **penalties and interest** was appropriate where there was a good faith dispute by taxpayers as to whether a particular tax was owed. The taxpayer cases are not applicable herein as

they did not address whether the losing party's good faith would have any bearing on an award of statutorily permitted attorneys' fees.

In fact, the Kentucky Court of Appeals previously only reviewed an award of attorneys' fees to ensure that the amount of attorneys' fees awarded was reasonable. In *Brooks v. Lexington-Fayette Urban County Housing Authority*, 332 S.W.3d 85, 91 (Ky. App. 2009), the Court of Appeals reviewed an award of attorneys' fees under KRS 411.080. The Court determined that the only requirement for awarding attorneys' fees under the statute was that the award be reasonable. *Id.* at 91. The Court merely reviewed the award to determine whether the amount awarded was excessive, and did not address the good or bad faith of the losing party.

In this case, the Court of Appeals failed to analyze whether the trial court's decision was an abuse of discretion by being arbitrary, unreasonable, unfair or unsupported by valid legal principles. The Court simply found that the trial court "exceeded" its discretion in awarding attorneys' fees to the CMRS Board. There is no indication that the Court of Appeals was "firmly convinced" the trial court had made a mistake in awarding attorneys' fees to the prevailing party. The standard of review applied by the Court of Appeals is not supported by precedent in Kentucky; therefore, the CMRS Board respectfully requests that this Court reject the Court of Appeals' reversal of the award of attorneys' fees to the CMRS Board.

II. **KRS 65.7635(5) Is Not a “Penal” Statute but Designed to Encourage the CMRS Board to Enforce the CMRS Act**

KRS 65.7635(5) provides:

All CMRS service charges imposed under KRS 65.7621 to 65.7643 collected by each CMRS provider, less the administrative fee described in subsection (4) of this section, are due and payable to the board monthly and shall be remitted on or before sixty (60) days after the end of the calendar month. **Collection actions may be initiated by the state, on behalf of the board, in the Franklin Circuit Court or any other court of competent jurisdiction, and the reasonable costs and attorneys’ fees which are incurred in connection with any such collection action may be awarded by the court to the prevailing party in the action.** (emphasis added).

Virgin Mobile claimed this statute is “penal” and should not be applied to Virgin Mobile, as it had a good faith belief that prepaid providers were not required to pay CMRS service charges.

KRS 65.7635(5) is not a “penal” statute. KRS 65.7635(5) permits an award of attorneys’ fees to the “prevailing party” – in this case the CMRS Board. The ultimate goal of statutory construction is to carry out the intent of the legislature. In this case, the legislature intended to provide for an award of attorneys’ fees to the prevailing party in any collection action instituted pursuant to KRS 65.7635(5). As noted by Judge Heyburn in the *TracFone* case, even if Virgin Mobile (and TracFone) had a good faith belief that the statute was not applicable to prepaid providers, the attorneys’ fee provision was designed to encourage the CMRS Board to incur the risk and expenses required to enforce the CMRS Act, without fear that the substantial attorneys’ fees incurred in litigation would not be reimbursed.

Virgin Mobile's interpretation of KRS 65.7635(5) as "penal" is illogical and would provide an incentive for CMRS providers to simply refuse to collect the CMRS service charge and gamble that the CMRS Board will not have the resources to pursue them. Virgin Mobile's construction of KRS 65.7635(5) is not in keeping with the clear legislative intent, and should be rejected. *See e.g. LWD Equipment, Inc. v. Revenue Cabinet*, 136 S.W.3d 472 (Ky. 2004) (rejecting construction of tax exemption based on the business model of the defendant because doing so would defeat the intent of the legislature).

Kentucky courts addressing statutory attorneys' fees provisions have held that "permitting an additional recovery of attorney fees and litigation costs is intended to compensate the prevailing party for the expense of bringing an action under the statute." *Alexander v. S & M Motors, Inc.*, 28 S.W.3d 303, 305 (Ky. 2000). In *Alexander* the court addressed a portion of the Kentucky Consumer Protection Act which allows the trial court to award attorneys' fees to the prevailing party and found that the fee provision was included in the statute to encourage enforcement of the Act. *Id.* at 305. The CMRS Board undertook litigation against prepaid providers at great expense and risk. However, the CMRS Board was 100% successful in its claims against Virgin Mobile for CMRS service charges due and owing pursuant to the 1998 CMRS Act. Consequently, the trial court did not abuse its discretion in its award of attorneys' fees to the CMRS Board.

III. Whether or Not Virgin Mobile Had a Good Faith Belief that Prepaid Providers Were not Required to Pay CMRS Service Charges Has No Bearing on the CMRS Board's Entitlement to Attorneys' Fees, and, Virgin Mobile Did Not Act in "Good Faith."

The Court improperly considered and relied on Virgin Mobile's alleged good faith dispute regarding the applicability of the 1998 CMRS Act to prepaid providers.

There is no common law or statutory authority for the appellate court's reversal of the trial court's award of attorneys' fees based on a finding that Virgin Mobile acted in good faith. KRS 65.7635 provides for the prevailing party to recover attorneys' fees in order to encourage the CMRS Board, a state agency with limited resources, to pursue wireless providers who fail to remit CMRS service charges. As the statute does not impose a penalty upon providers who fail to pay the service charges, a collection action is the only recourse available to the CMRS Board against providers who fail to fulfill their statutory duty to pay service charges to assist in supporting the 911 infrastructure in the Commonwealth. The statute does not limit recovery of attorneys' fees to cases in which the provider has acted in "bad faith."

The Kentucky legislature has enacted statutes which impose an award of attorneys' fees as a penalty to discourage bad faith or unreasonable conduct; however, KRS 65.7635 is not such a statute. There are numerous examples of Kentucky statutes that allow prevailing parties to recover attorneys' fees only if the losing party acted in bad faith. *See, e.g.*, KRS 365.886 ("If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorney's fees to the prevailing party") and KRS 304.39-220 ("a reasonable attorney's fee ... may be awarded by the court if the denial or delay was without unreasonable foundation"). KRS 65.7635(5) does not contain similar limiting language.

The courts that have considered the bad faith of a party in awarding attorneys' fees have done so only where: (1) the prevailing defendant sought attorneys' fees and the court considered whether the plaintiff's claim was not advanced in good faith or (2) the

statute required a finding of bad faith or willful violation of the statute to support an attorneys' fee award. For example, in *Aesthetics in Jewelry, Inc. v. Brown ex rel. coexecutors*, 339 S.W.3d 489, 498 (Ky. App. 2011), the court considered whether the lack of bad faith of the plaintiff in advancing the claim should result in an award of fees to the defendant, the prevailing party. The court refused to award the defendant his attorneys' fees, so as not to discourage plaintiffs from pursuing claims under the Kentucky Consumer Protection Act. The court in *Healthcare of Louisville v. Kiesel*, 715 S.W.2d 246, 248 (Ky. App. 1986) considered the good faith of a party in assessing whether attorneys' fees should be assessed against the losing party, the employer in a Kentucky Wage and Hour Act claim. However, the applicable statute allowed the court discretion not to award attorneys' fees if the employer showed that its acts or omissions under the Wage and Hour Act were made in good faith. Similarly, the court in *Bowling v. Lexington-Fayette Urban County Government*, 172 S.W.3d 333, 343 (Ky. 2005) found that the prevailing party was required to show that the losing party acted in bad faith, as the statute at issue only allowed an attorneys' fee award for willful violation of the statute.

In *Meyers v. Arcadia Realty Foundation, Inc.*, 367 S.W.2d 836, 838 (Ky. 1963), the Court not only noted that the taxpayers had acted in good faith but that "they acted promptly to have their tax liability determined." Even assuming Virgin Mobile's "good faith" or "bad faith" in challenging the application of the CMRS Act is relevant, Virgin Mobile arguably did not act in good faith in its dispute with the CMRS Board. Certainly, Virgin Mobile did not act promptly to have its liability for CMRS service charge determined – it never sought an Attorney General's opinion or filed a declaratory

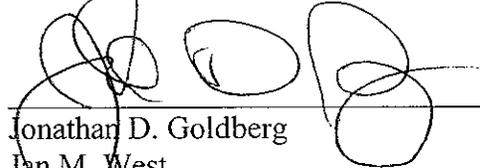
judgment action. Virgin Mobile simply unilaterally took a “credit” for past CMRS service charges that it previously voluntarily remitted (based on an abrupt change in industry interpretation of similar statutes across the nation), over the express objection and direction of the CMRS Board. [Exhibit 17 to CMRS Board’s Sealed Memo]. As the Court of Appeals correctly held, the CMRS Act clearly applied to all wireless providers and customers, and Virgin Mobile attempted to create an exemption based on its chosen billing model. The CMRS Board contends that such an approach is not indicative of “good faith” behavior. The Court of Appeals erred in concluding Virgin Mobile acted in good faith as would obviate the CMRS Board’s right to attorneys’ fees.

Because there are no other penalties in the statute for a non-compliant CMRS provider, Virgin Mobile could simply refuse to comply and risk that the CMRS Board would not have the resources or the time to take action. The effect of the Court of Appeals’ decision is to discourage the CMRS Board from pursuing wireless providers who fail to pay CMRS service charges and to encourage wireless providers to refuse to remit the fees, as there is no recourse for non-compliance included in the CMRS collection statute. This result is the opposite of the legislature’s intent in enacting a statute that allows the prevailing party in a collection action to recover reasonable attorneys’ fees.

CONCLUSION

Based on the foregoing, the CMRS Board respectfully requests that this Court reverse the decision of the Kentucky Court of Appeals that the CMRS Board is not entitled to an award of attorneys’ fees and costs incurred in its collection action against Virgin Mobile.

Respectfully Submitted,

A handwritten signature in black ink, appearing to be "Jonathan D. Goldberg", written over a horizontal line.

Jonathan D. Goldberg

Jan M. West

Jennifer K. Luhrs

Goldberg Simpson, LLC

Norton Commons

9301 Dayflower Street

Prospect, KY 40059

Phone:(502) 589-4440 / Fax:(502) 581-1344

Counsel for Appellant/Appellee,

Commercial Mobile Radio Service

Emergency Telecommunications Board

APPENDIX

	RECORD	TAB
March 25, 2010, Opinion and Order of Jefferson Circuit Court	184-191	1
June 8, 2010, Opinion and Order of Jefferson Circuit Court	248-253	2
June 29, 2012, Opinion of Kentucky Court of Appeals	Appeal record	3