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## Annual Survey of Virginia Law: Antitrust Law

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# ANTITRUST LAW\*

*Michael F. Urbanski\*\**

## I. INTRODUCTION

Increasingly, the state and federal antitrust laws are being invoked in a wide variety of civil, criminal, commercial and professional disputes. While the availability of treble damages and an award of costs and attorneys' fees to a prevailing plaintiff<sup>1</sup> likely provides the impetus for the assertion of civil antitrust claims, such claims have met with little success in Virginia during 1988 and 1989. Rather, antitrust defendants have substantially prevailed by asserting defenses based on, inter alia, antitrust immunity; the failure to establish the required nexus with interstate commerce; the failure to prove the existence of a conspiracy; the failure to appropriately define the relevant market, and the failure to demonstrate antitrust injury.

## II. CIVIL ACTIONS

### A. *Antitrust Immunity Issues*

The staggering cost of defending an antitrust claim provides a strong incentive for a defendant to seek resolution of an action prior to a trial on the merits. One frequently employed method is the assertion of antitrust immunity, which has emerged as a recurrent theme in recent Virginia decisions.

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\* This article addresses legislation from the 1989 Session of the General Assembly, state and federal antitrust enforcement efforts and decisions of the Court of Appeals for the Fourth Circuit and state and federal courts of Virginia from January 1988 to June 1989.

The author appreciates and acknowledges the assistance of James P. Wheeler, Assistant Attorney General, Antitrust and Consumer Litigation Section, Commonwealth of Virginia, Office of Attorney General, for information regarding Virginia state antitrust enforcement actions.

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1. VA. CODE ANN. § 59.1-9.12(b) (Repl. Vol. 1987); 15 U.S.C. § 15(a) (1982).

### 1. *Parker v. Brown* State Action Immunity

The doctrine of state action immunity was first enunciated by the Supreme Court in *Parker v. Brown*,<sup>2</sup> where the Court held that the Sherman Act was not intended to prohibit states from imposing restraints on competition. "Although *Parker* involved an action against a state official, the [c]ourt's reasoning extends to suits against private parties."<sup>3</sup>

The circumstances under which the state action doctrine immunizes private conduct were refined in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*<sup>4</sup> The Court's opinion in *Midcal* establishes a two-pronged test for determining whether state regulation of private parties invokes state action immunity. "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy."<sup>5</sup> Second, the state must actively supervise any private anticompetitive conduct.<sup>6</sup>

Federal courts sitting in Virginia and Virginia state courts have considered the state action doctrine five times in 1988 and 1989.<sup>7</sup> In each case, the courts grappled with the scope of *Parker v. Brown* immunity. While each case is necessarily limited to its facts,

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2. 317 U.S. 341, 351 (1943). In *Parker*, the Supreme Court exempted from the antitrust laws the conduct of California in regulating the marketing of raisins.

3. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 (1985).

4. 445 U.S. 97 (1980); see also *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). The Court in *Southern Motor Carriers Rate Conference, Inc.* took the *Midcal* analysis one step further and addressed whether state compulsion is required to immunize the actions of private parties. Discounting reliance on *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), for the establishment of a compulsion requirement, the Court held that state compulsion is not a prerequisite to a finding of state action immunity:

A private party acting pursuant to an anti-competitive regulatory program need not "point to a specific, detailed legislative authorization" for its challenged conduct. As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied. (citation omitted).

*Southern Motor Carriers Rate Conference, Inc.*, 471 U.S. at 61.

The *Hallie* Court applied the "clearly articulated state policy" test to municipalities but held that active state supervision is not required to immunize their conduct from the antitrust laws. *Hallie*, 471 U.S. at 47.

5. *Midcal*, 445 U.S. at 105.

6. *Id.*

7. *Pendleton Constr. Corp. v. Rockbridge County, Va.*, 837 F.2d 178 (4th Cir. 1988); *Hillman Flying Serv., Inc. v. City of Roanoke*, 1988-1 Trade Cas. (CCH) ¶ 68,069 (4th Cir. 1988); *Mahendra Shah v. Memorial Hosp.*, 1988-2 Trade Cas. (CCH) ¶ 68,199 (W.D. Va. 1988); *Reynolds Metals Co. v. Commonwealth Gas Serv., Inc.*, 682 F. Supp. 291 (E.D. Va. 1988); *Avins v. Virginia Council*, 11 Va. Cir. 191 (1988).

it is interesting to note that while governmental entities were consistently found to possess *Parker v. Brown* immunity, efforts by private entities to extend the reach of the state action doctrine to encompass their activities were less successful.

In the only Virginia state court case, *Avins v. Virginia Council*,<sup>8</sup> the Circuit Court for the City of Alexandria held that the regulation of education is state action exempt from the antitrust laws. In *Avins*, the plaintiff filed a complaint against the Virginia Council of Education and the Attorney General of Virginia because of certain Council actions regarding the Northern Virginia Law School. Specifically, the plaintiff contended that the actions of the Council in refusing to transfer course credits constituted an unreasonable restraint of trade in violation of the Sherman Act. Sustaining a demurrer to the antitrust claim, the court reasoned that:

[N]othing could more clearly be state action than the education of a state's citizen. Even without the clearly enunciated state policy as set forth in the Code of Virginia, §§ 23-265 *et seq.*, there could be no doubt that education, even higher education, and its regulation, is a matter of direct state action by the legislature.<sup>9</sup>

The Court of Appeals for the Fourth Circuit enunciated an expansive application of the state action doctrine in *Hillman Flying Service, Inc. v. City of Roanoke*.<sup>10</sup> In *Hillman*, the court determined that the doctrine immunized not only the conduct of the City of Roanoke in regulating airport services, but also that of the City's alleged co-conspirator, Piedmont Aviation. In *Hillman*, an air carrier service firm filed suit against the City of Roanoke and Piedmont Aviation, Inc., alleging an antitrust conspiracy to restrict competition at the Roanoke Regional Airport designed to prevent service firms, other than defendant Piedmont Aviation, from providing aviation fuel service. The City of Roanoke denied Hillman's application to become an aviation fuel vendor because its operations did not meet minimum space requirements imposed by city ordinance.<sup>11</sup>

As to the City of Roanoke, the Fourth Circuit recognized that the Code of Virginia vests regulatory authority over airports in

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8. 11 Va. Cir. 191 (1988).

9. *Id.* at 193.

10. 1988-1 Trade Cas. (CCH) ¶ 68,069 (4th Cir. 1988).

11. *Id.* at 58,479.

municipalities. As a result, "Roanoke's implementation of fuel service space requirements and its decisions regarding leasing of space"<sup>12</sup> followed a "clearly articulated state policy" and, accordingly, were protected by state action immunity.<sup>13</sup>

The court in *Hillman* applied this doctrine to also immunize also Piedmont Aviation, reasoning that:

Piedmont also cannot be held liable for entering into contracts and providing services in accordance with the Roanoke Code, even if it obtained monopoly power by doing so. State action immunity extends to private parties when the clearly articulated state policy is also accompanied by active state supervision. Since the ordinance was pursuant to state policy, Piedmont's contracting and performance under that ordinance, as enforced by the City and airport officials, should also be protected. In short, a private company should not be liable for lobbying lawfully and fully complying with the resulting law.<sup>14</sup>

In a similar decision, terming the district court's opinion<sup>15</sup> "unassailable," the Court of Appeals for the Fourth Circuit in *Pendleton Construction Corp. v. Rockbridge County, Virginia*,<sup>16</sup> affirmed the district court's grant of state action immunity to allegations by Pendleton, a road contractor, that the Rockbridge County Board of Supervisors and Rockbridge County conspired with a competing contractor and quarry operator to deny plaintiff permits to mine stone for a road repair project.<sup>17</sup> The district court carefully followed an analogous opinion from Maryland,<sup>18</sup> and held Virginia's statutory zoning scheme to constitute a clearly articulated and affirmatively expressed state policy immunizing the County and its Board of Supervisors from antitrust liability.<sup>19</sup>

In *Reynolds Metals Co. v. Commonwealth Gas Services, Inc.*,<sup>20</sup> defendants asserted that the actions of the defendant natural gas

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12. *Id.* at 58,479-80.

13. *Id.*

14. *Id.* (citation omitted).

15. *Pendleton Constr. Corp. v. Rockbridge County, Virginia*, 652 F. Supp. 312 (W.D. Va. 1987).

16. 837 F.2d 178, 179 (4th Cir. 1988).

17. *Id.*

18. *Racetrac Petroleum, Inc. v. Prince George's County*, 601 F. Supp. 892 (D. Md. 1985), *aff'd*, 786 F.2d 202 (4th Cir. 1986).

19. *Pendleton*, 652 F. Supp. at 318-20.

20. 682 F. Supp. 291 (E.D. Va. 1988).

transportation companies were exempt from the antitrust laws under the state action doctrine and the doctrine of primary jurisdiction.<sup>21</sup> Reynolds, a natural gas consumer, contended that defendants unlawfully refused to transport natural gas from independent producers and exploited their exclusive control over gas transportation to Richmond to force Reynolds and other consumers to purchase defendants' gas.<sup>22</sup>

Defendants filed tariffs and were regulated by the Virginia State Corporation Commission ("SCC"). Not surprisingly, these defendants argued that the state action doctrine barred Reynolds from challenging state regulated transportation policies. Specifically, defendants contended that a reference in a September 1986 SCC order to "voluntary" participation in transportation programs evidenced a state policy permitting public utilities to refuse to provide transportation services.<sup>23</sup> Defendants also argued that the SCC's awareness of their transportation policies and lack of action regarding them indicated the SCC's tacit approval.<sup>24</sup> The district court rejected these arguments, finding that the 1986 SCC order and other SCC actions indicated a state policy favoring open access to natural gas transportation services.<sup>25</sup>

In the hospital peer review context, a federal district court in Virginia denied state action immunity, ruling that Virginia did not actively supervise the peer review process at a private hospital.<sup>26</sup> In *Mahendra Shah*, Judge Kiser applied the Supreme Court's opinion in *Patrick v. Burget*.<sup>27</sup> In *Patrick*, the Supreme Court held that

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21. *Id.* at 293. The doctrine of primary jurisdiction recognizes the regulatory expertise of administrative agencies and suspends the judicial process "pending referral of such issues to the administrative body for its views." *United States v. Western Pac. R.R.*, 352 U.S. 59, 63-64 (1956).

In *Reynolds Metals*, defendants sought to apply this doctrine, arguing that the SCC and FERC should adjudicate issues regarding natural gas transportation. Reynolds contended that a stay was not appropriate because there were no existing or potential administrative proceedings that could resolve any issues relating to Reynolds' antitrust claims and further that then allegations involved violations of the antitrust laws rather than a tariff dispute. The district court agreed, reasoning that the SCC and the FERC were not designed to address the relief sought and that FERC lacked jurisdiction over retrospective claims. *Reynolds Metals*, 682 F. Supp. at 294-95.

22. *Reynolds Metals*, 682 F. Supp. at 292-93.

23. *Id.* at 294.

24. *Id.*

25. *Id.*

26. *Mahendra Shah v. Memorial Hosp.*, 1988-2 Trade Cas. (CCH) ¶ 68,199 (W.D. Va. 1988).

27. *Id.* at 59,325 (citing *Patrick v. Burget*, 108 S. Ct. 1658 (1988)).

Oregon's regulation of physicians and hospitals did not constitute active supervision of the physician peer review process sufficient under *Midcal* to immunize the conduct of physicians and a private hospital arising out of the exclusion of a physician from the hospital's medical staff.<sup>28</sup> Defendants in *Mahendra Shah* sought to distinguish *Patrick*, contending that the Virginia statutory and regulatory scheme, unlike that of Oregon, provides for reporting of staff privileging decisions to state agencies and authorizes aggrieved physicians to seek injunctive relief in state court.<sup>29</sup> Despite significant statutory and administrative differences, the district court rejected this contention, ruling that state agencies have no involvement in or authority over peer review decisions and that injunctive relief was "not a review of the merits of the privilege determination required for state action immunity."<sup>30</sup>

## 2. Local Government Antitrust Act of 1984

The Local Government Antitrust Act of 1984 ("LGAA")<sup>31</sup> was enacted to clarify antitrust immunity of local governments.<sup>32</sup> Two

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28. *Patrick v. Burget*, 108 S. Ct. 1658, 1663-66 (1988).

29. *Shah*, 1988-2 Trade Cas. (CCH) at 59,325.

30. *Id.* Following *Patrick*, the Eleventh Circuit in *Bolt v. Halifax Hosp. Medical Center*, 851 F.2d 1273, 1282 (11th Cir.), *vacated*, 861 F.2d 1233 (11th Cir. 1988), *aff'd on other grounds*, 874 F.2d 755 (11th Cir. 1989), concluded that Florida's regulatory scheme, which provided for "probing judicial review of medical staff privilege peer review decisions," constituted sufficient active supervision to warrant state action immunity. On rehearing en banc, however, appellee hospitals and medical staffs waived state action immunity. 874 F.2d at 756.

In addition, Justice Whiting's opinion in *Medical Center Hosps. v. Terzis*, 235 Va. 443, 367 S.E.2d 728 (1986), arguably constrains the application of the state action doctrine in Virginia. In *Terzis*, the court limited judicial review of privileging decisions pursuant to VA. CODE ANN. § 32.1-134.1 (Repl. Vol. 1985), to a consideration of whether the reasons given for staff privilege decisions are within the statutory criteria. *Terzis*, 235 Va. at 446, 367 S.E.2d at 730. The *Patrick* limitation on state action immunity for health care providers involved in peer review may be less critical in light of the immunity provisions of the Health Care Quality Improvement Act of 1986. 42 U.S.C. §§ 11101-11152 (Supp. 1987).

31. 15 U.S.C. §§ 34-36 (Supp. 1984).

32. The legislative history of the LGAA noted concern over an "increasing number of antitrust suits, and threatened suits, that could undermine a local government's ability to govern in the public interest." H.R. Rep. No. 965, 98th Cong., 2d Sess. 2, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4602, 4603. 15 U.S.C. § 35(a) provides that "[n]o damages, interest on damages, costs or attorney's fees may be recovered under Section 4, 4A or 4C of the Clayton Act (15 U.S.C. §§ 15, 15a or 15c) from any local government, or official or employee thereof acting in an official capacity." This statute was apparently a reaction to the Supreme Court's opinion in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982).

In *Boulder*, the Court refused to exempt a Colorado city's actions regarding its regulation of cable television. The Court was unpersuaded by the city's argument that the Colorado

decisions by the Court of Appeals for the Fourth Circuit have applied this recently enacted immunity statute and affirmed district court dismissals of antitrust challenges involving, respectively, a Virginia airport and a North Carolina hospital. As was true of its application of state action immunity, the Fourth Circuit in *Hillman* had little trouble immunizing certain defendants' conduct under the LGAA. The district court dismissed the conspiracy allegations against the city, members of the Roanoke City Council, Roanoke Airport Advisory Commission and the manager of the Roanoke Regional Airport, reasoning that:

In light of Congress' desire to grant broad immunity from noncriminal acts by local officials and the broad authority that Virginia grants to municipalities to operate local airports, Hillman has failed to state a claim upon which relief can be granted under the Clayton Act for damages against the municipal defendants.<sup>33</sup>

Without elaboration, the Court of Appeals for the Fourth Circuit held that LGAA immunity immunized the City from any claim for damages asserted by Hillman.<sup>34</sup>

*Sandcrest Outpatient Services v. Cumberland County Hospital System, Inc.*,<sup>35</sup> involved the extension of LGAA immunity to non-governmental entities. From 1981 to 1986, Sandcrest Outpatient Services ("Sandcrest") provided physician services to a hospital emergency room. When the emergency room contract was awarded to a competitor in 1986, Sandcrest filed suit, alleging a conspiracy to restrain trade in violation of section 1 of the Sherman Act<sup>36</sup> and

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Constitution delegated regulation of cable television to municipalities by means of its "home rule" amendment, reasoning:

The *Parker* state-action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution. But this principle contains its own limitation: Ours is a "dual system of government," *Parker*, 317 U.S. at 351 (emphasis added), which has no place for sovereign cities.

*Boulder*, 455 U.S. at 53.

Because Colorado had taken no position on the regulation of cable television, the Court held that the city's conduct did not meet the *Parker*, "clearly articulated and affirmatively expressed as state policy" test as refined by *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

33. *Hillman Flying Serv., Inc. v. City of Roanoke*, 652 F. Supp. 1142, 1146 (W.D. Va. 1987).

34. 1988-1 Trade Cas. (CCH) ¶ 68,069, at 58,479 (4th Cir. 1988).

35. 853 F.2d 1139 (4th Cir. 1988).

36. 15 U.S.C. § 1 (1982). "Every contract, combination in the form of trust or otherwise, in conspiracy, in restraint of trade or commerce among the several States, or with foreign



state law.<sup>37</sup>

The Court of Appeals for the Fourth Circuit affirmed the district court's grant of summary judgment and held that the conduct of the defendants was immune from antitrust challenge under the LGAA.<sup>38</sup> Sandcrest did not challenge the district court's determination that the hospital system was a local governmental unit for purposes of the LGAA. Rather, on appeal, Sandcrest challenged the district court's application of LGAA immunity to the contract managers of the hospital, the hospital administrator and chief of staff. The Fourth Circuit held that these parties, even though non-governmental, were entitled to immunity because the challenged conduct was clearly articulated and affirmatively expressed as state policy and actively supervised by the state.<sup>39</sup>

In so doing, the Fourth Circuit held that "an affirmative grant of explicit authority is not required for an employee or government official to be acting in an official capacity under the LGAA,"<sup>40</sup> and rejected the argument that the immunity contained in the LGAA was unavailable in the context of an unauthorized conspiracy, reasoning that "[i]f this view was accepted, the fundamental purpose of the LGAA's immunity provisions would be substantially undercut."<sup>41</sup> Noting that hospitals may lawfully make the kind of management decisions involved in this case, the

argument that allegations of a conspiracy convert otherwise authorized conduct into unauthorized conduct would require consideration of whether the subjective motives or intentions of the appellees were to benefit themselves rather than the hospital. The LGAA makes no provision for consideration of a defendant's motives, and an allegation that an act was done pursuant to a conspiracy is akin to an allegation that it was done in bad faith or with malice.<sup>42</sup>

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nations, is hereby declared to be illegal."

37. *Sandcrest*, 853 F.2d at 1141.

38. *Id.* at 1144.

39. *Id.* at 1143; see also *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). The Fourth Circuit relied on the legislative history of the LGAA which stated that the extension of that immunity to nongovernmental entities "shall apply by analogy to the conduct of a local government in diverting the actions of nongovernmental parties, as if the local government were a state." *Sandcrest*, 853 F.2d at 1143 (citing H.R. Conf. Rep. No. 1158, 98th Cong., 2d Sess. 3 (1984), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 4602, 4602).

40. *Sandcrest*, 853 F.2d at 1145; see *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 94 (2d Cir.), cert. denied, 479 U.S. 872 (1986).

41. *Sandcrest*, 853 F.2d at 1146.

42. *Id.*

### 3. *Noerr-Pennington* Doctrine

The *Noerr-Pennington* doctrine exempts efforts to petition the government from antitrust liability.<sup>43</sup> Under this doctrine, joint lobbying and other efforts to “influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.”<sup>44</sup> *Noerr-Pennington* immunity has been expanded beyond efforts to influence legislation to include activity directed at courts and administrative agencies.<sup>45</sup> In three recent cases, the federal courts in Virginia had little difficulty applying the *Noerr-Pennington* doctrine to immunize alleged concerted action.

In *Hillman Flying Service, Inc. v. City of Roanoke*,<sup>46</sup> the Court of Appeals for the Fourth Circuit held that Piedmont Aviation’s efforts to convince City of Roanoke officials “to pass, retain or enforce the city ordinances are protected under the so-called *Noerr-Pennington* doctrine, even if made with the sole purpose of eliminating competition.”<sup>47</sup> The court similarly rejected Hillman’s efforts to invoke the sham exception.<sup>48</sup>

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43. See *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conf. v. Noerr Motor Freight Inc.*, 365 U.S. 127 (1961).

44. *Pennington*, 381 U.S. at 670.

45. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

46. 1988-1 Trade Cas. (CCH) ¶ 68,069 (4th Cir. 1988).

47. *Id.* at 58,479.

48. *Id.* In *Noerr*, the Court noted that “[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.” 365 U.S. at 144.

In *California Motor Transport*, the Court noted:

There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. Opponents before agencies or courts often think poorly of the other’s tactics, motions, or defenses and may readily call them baseless. One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the fact-finder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. However, once it is drawn, the case is established that abuse of those processes produced an illegal result, *viz.*, effectively barring respondents from access to the agencies and courts. Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of ‘political expression.’

404 U.S. at 513.

Moreover, in *Pendleton Construction Corp. v. Rockbridge County, Virginia*,<sup>49</sup> the district court held that the actions of a contractor in attempting to influence the Rockbridge County Board of Supervisors fell within the parameters of *Noerr-Pennington*. The court also rejected the plaintiff's attempt to invoke the sham exception, noting that the actions of the defendant "had neither the purpose nor effect of barring plaintiff's access to governmental process."<sup>50</sup> Plaintiff had failed to demonstrate any abuse of process; in fact, defendant's success before both the Board of Supervisors and the Circuit Court of Rockbridge County "belies any sham use of the governmental process."<sup>51</sup>

Similarly, in *Dixie-Narco, Inc. v. Steeley*,<sup>52</sup> the Fourth Circuit immunized litigation efforts under *Noerr-Pennington* and rejected plaintiff's suggestions of sham behavior.<sup>53</sup> Dixie-Narco, a soft drink vending machine company, sued a former employee's competing business for breach of fiduciary obligations. The former employee, Steeley, counterclaimed, alleging interference with his business activities in violation of the Sherman Act. The Fourth Circuit disagreed as follows:

Despite Steeley's protestations to the contrary, his antitrust and business interference allegations focused almost exclusively on interference by Dixie-Narco's litigation efforts. The district court properly ruled that Dixie-Narco had a protected right to pursue judicially its claims against Steeley. . . . The district court held, and we agree, that the corporation's litigation efforts did not fall within the "sham" exception to the *Noerr-Pennington* doctrine.<sup>54</sup>

Thus, while the sham exception was asserted in each of these cases, the federal courts in Virginia made short shrift of these contentions, immunizing competitive efforts in the legislative and judicial arenas.<sup>55</sup>

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49. 652 F. Supp. 312 (W.D. Va. 1987).

50. *Id.* at 320 (quoting *Racetrac Petroleum, Inc. v. Prince George's County*, 601 F. Supp. 892 (D. Md. 1985), *aff'd*, 786 F.2d 202 (4th Cir. 1986)).

51. *Pendleton*, 652 F. Supp. at 320.

52. 1988-2 Trade Cas. (CCH) ¶ 68,380 (4th Cir. 1988).

53. *Id.* at 60,097.

54. *Id.* Considering the rationale employed by the district court in *Pendleton*, it is interesting to note that the district court in *Dixie-Narco* rejected the sham exception despite the fact that both it and the jury found Dixie-Narco's claims to be baseless.

55. So as not to be discouraged, however, practitioners representing antitrust plaintiffs should note that on March 10, 1989, a Texas federal court jury returned a \$345 million

## B. *Jurisdictional Issues*

In two hospital staff privilege cases, the Western District of Virginia has split over whether plaintiff physicians demonstrated a nexus with interstate commerce sufficient to state a Sherman Act claim.

In *Mahendra Shah v. Memorial Hospital*,<sup>56</sup> plaintiff urologist alleged that competing physicians and hospital employees conspired to destroy his Danville, Virginia medical practice. Plaintiff alleged the involvement of interstate commerce because some patients travelled from North Carolina to Virginia for treatment, payments for urological services were made by out of state payees, medical equipment was purchased from out of state suppliers, and plaintiff attended some out of state medical seminars.

Recognizing that Danville is "about four miles from the North Carolina border" and that "at least 10% of the hospital's patients are from outside Virginia," Judge Kiser ruled that a question of fact existed as to whether the requisite nexus with interstate commerce existed.<sup>57</sup> The court declined to decide whether the appropriate jurisdictional test required a showing that the alleged restraint affected interstate commerce or merely that the defendant's general business activities affected interstate commerce.<sup>58</sup>

Regardless of which test applies, Shah has alleged facts establishing the nexus with interstate commerce. Plaintiff has alleged that TMH DUC and the individual physicians treat patients traveling in interstate commerce, thus meeting the broader standard. He has also alleged a restraint which drove him out of the practice of urology and prevents other urologists from practicing in the area. The alleged restraints would necessarily affect the number of urologists practicing in Danville and the competitive pricing of their services. These restraints would inevitably have an effect on patients desiring urologic services, in Danville, including those traveling interstate, from North Carolina or elsewhere.<sup>59</sup>

Despite the court's assumption regarding Shah's ability at trial

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verdict for the plaintiff in a sham exception case. *ETSI v. Burlington Northern, Inc.*, No. B-84-979 (E.D. Tex. Mar. 10, 1989).

56. 1988-2 Trade Cas. (CCH) ¶ 68,199 (W.D. Va. 1988).

57. *Id.* at 59,326.

58. *Id.*; see *McLain v. Real Estate Bd. Inc.*, 444 U.S. 232 (1980).

59. *Shah*, 1988-2 Trade Cas. (CCH) at 59,326.

to establish the requisite jurisdictional nexus, Shah presented little evidence at the summary judgment stage to establish that the removal of one physician could substantially and adversely affect interstate commerce. While the court recognized that ten percent of the hospital's patients were not Virginia residents, Shah presented no evidence that the alleged conspiracy would affect the interstate flow of patients, supplies or reimbursement. While certainly a split in authority exists, prior precedent within the Court of Appeals for the Fourth Circuit and the majority of the decided cases raise a question as to Shah's jurisdictional proof.<sup>60</sup>

In *Thompson v. Wise General Hospital*,<sup>61</sup> Judge Williams adopted the more limited jurisdictional test espoused by the majority of the circuits.<sup>62</sup> "Accordingly, although the plaintiff can base antitrust jurisdiction on the broad range of the defendants' activities rather than just those activities that he especially challenges, the alleged effect on interstate commerce still must be more than merely derisory."<sup>63</sup> Based on this test, Judge Williams found plaintiff's conclusory jurisdictional allegations insufficient.

There is nothing in the complaint to indicate that there are so few doctors in Wise County, Virginia, that the gain or loss of one of them would have a noticeable effect on the amount of competition. Nor is there any particular showing of how the plaintiff's loss of patients would affect interstate commerce. There is no allegation that a significant number of Dr. Thompson's patients came to him from outside of Virginia. And although some courts have held that an ef-

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60. See, e.g., *Sarin v. Samaritan Health Center*, 813 F.2d 755 (6th Cir. 1987); *Doe v. St. Joseph's Hosp.*, 788 F.2d 411 (7th Cir. 1986); *Stone v. William Beaumont Hosp.*, 782 F.2d 609, 613-14 (6th Cir. 1986); *Seglin v. Esau*, 769 F.2d 1274 (7th Cir. 1985); *Hayden v. Bracy*, 744 F.2d 1338, 1342-43 (8th Cir. 1984); *Furlong v. Long Island College Hosp.*, 710 F.2d 922 (2d Cir. 1983); *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715 (10th Cir. 1980); *Williams v. St. Joseph Hosp.*, 629 F.2d 448 (7th Cir. 1980); *Harron v. United Hosp. Center, Inc.*, 522 F.2d 1133, 1134 (4th Cir. 1975), *cert. denied*, 424 U.S. 916 (1976); *Anesthesia Advantage v. Metz Group*, 708 F. Supp. 1171 (D. Colo. 1989); *Litman v. A. Barton Hepburn Hosp.*, 679 F. Supp. 196 (N.D.N.Y. 1988); *Rosenberg v. Healthcorp Affiliates*, 663 F. Supp. 222 (N.D. Ill. 1987); *Mamakos v. Huntington Hosp.*, 653 F. Supp. 1447 (E.D.N.Y. 1987); *Kling v. St. Paul Fire & Marine Ins. Co.*, 626 F. Supp. 1285 (C.D. Ill. 1986); *Capili v. Shott*, 487 F. Supp. 710 (S.D. W. Va. 1978), *aff'd*, 620 F.2d 438 (4th Cir. 1980).

61. 707 F. Supp. 849 (W.D. Va. 1989).

62. See *Seglin v. Esau*, 769 F.2d 1274, 1280 (7th Cir. 1985); *Hayden v. Bracy*, 744 F.2d 1338, 1342-43 (8th Cir. 1984); *Furlong v. Long Island College Hosp.*, 710 F.2d 922, 926 (2d Cir. 1983); *Cordova & Simonpietri Ins. Agency v. Chase Manhattan Bank*, 649 F.2d 36, 45 (1st Cir. 1981); *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 722-24 (10th Cir. 1981) (en banc).

63. *Thompson*, 707 F. Supp. at 855.

fect on interstate commerce can be found in a denial of privileges case from the loss of Medicare and Medicaid payments (or medical insurance payments), and purchase of out of state medical supplies, . . . any effect in this case — even if it had been alleged, which it was not — would be *de minimis* in light of the fact that Dr. Thompson relocated his practice within Virginia.<sup>64</sup>

The *Shah* and *Thompson* decisions are difficult to reconcile. Perhaps the Court of Appeals for the Fourth Circuit will clarify the operative test and evidentiary standard in the *Thompson* case, which is currently on appeal.

### C. Market Definition Issues

A significant element of plaintiff's proof in any Sherman Act claim is the relevant market allegedly restrained or monopolized.<sup>65</sup>

In *Mahendra Shah v. Memorial Hospital*,<sup>66</sup> the district court rejected defendant's summary judgment argument that plaintiff insufficiently defined the relevant market. The court held that market definition "is an issue of fact to be determined by the jury."<sup>67</sup>

On the other hand, the district court in *Steuer & Latham, P.A. v. National Medical Enterprises, Inc.*,<sup>68</sup> was not so reticent. In that case, two pathologists brought an antitrust suit after their pathology services contracts with defendant hospital were cancelled in favor of another physician. Alleging violations of sections 1 and 2 of the Sherman Act, the plaintiffs asserted that the relevant geographic market was a single hospital's service area. The district court rejected this geographic market, noting that "[t]he case law likewise makes clear that plaintiffs' claim that the relevant antitrust market consists of a single hospital is patently absurd."<sup>69</sup> The court further reasoned that plaintiff offered no evidence of elasticity of demand and barriers to entry. "Absent such evidence, which plaintiffs have the burden of introducing, there is no basis for inferring that a service area constitutes a geographic market, or that

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64. *Id.*

65. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *Consul, Ltd. v. Transco Energy Co.*, 805 F.2d 490, 495 (4th Cir. 1986); *Satellite Television v. Continental Cablevision*, 714 F.2d 351, 357 (4th Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984).

66. 1988-2 Trade Cas. (CCH) ¶ 68,199 (W.D. Va. 1988).

67. *Id.* at 59,329.

68. 672 F. Supp. 1489 (D.S.C. 1987), *aff'd*, 846 F.2d 70 (4th Cir. 1988).

69. *Id.* at 1514.

the patient origin data pertinent to that service area constitute 'market share' information."<sup>70</sup> Not satisfied with its finding that the plaintiff had failed to adduce appropriate evidence as to geographic market, the court crafted its own geographic market larger than that advocated by the plaintiff, largely employing hospital admission and payment statistics. Having appropriately defined the geographic market, the court held that:

CMH's low shares in these markets, along with its steadily declining occupancy rates, . . . and the excess capacity at competing hospitals demonstrate that CMH has no market power and thus has neither the incentive nor the ability to reduce competition in any properly defined market for hospital services. Any attempt by CMH to engage in anticompetitive conduct would only cause additional patients to be lost to competing hospitals.<sup>71</sup>

Once again, the decisions in *Mahendra Shah* and *Steuer & Latham, P.A.*, are seemingly inconsistent with the South Carolina district court holding plaintiff to a stricter evidentiary burden at the summary judgment stage.

The district court in *United States v. Carilion Health System*,<sup>72</sup> reached similar conclusions regarding hospital markets to the *Steuer & Latham, P.A.* court in the context of an Antitrust Division challenge to an affiliation of two Roanoke not-for-profit hospitals. Critical to the court's ultimate conclusion that no unreasonable restraint of trade would result from the proposed affiliation was its determination that the relevant product and geographic markets were substantially broader than those advocated by the Antitrust Division. While the Antitrust Division contended that the relevant market was acute inpatient hospital services in the Roanoke Valley, the judge and the advisory jury both found that the relevant product market included acute inpatient hospital services and certain outpatient health care services provided by various types of outpatient facilities.<sup>73</sup>

The court also rejected the jury's finding and the Antitrust Division's contention that the geographic market was limited to the Roanoke Valley. Instead, it defined the market as all counties and

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70. *Id.* at 1511.

71. *Id.* at 1514-15.

72. 707 F. Supp. 840 (W.D. Va. 1989).

73. *Id.* at 847.

independent cities from which Roanoke Memorial Hospital (one of those affected by the affiliation) drew at least 100 patients a year. In stark contrast to the narrow geographic market advocated by the Antitrust Division (containing only three acute care hospitals), the court's geographic market contained approximately twenty other hospitals. The court added that the geographic market for tertiary (highly specialized) care extended even further and included major teaching medical centers in Charlottesville and Richmond, Virginia, and Winston-Salem and Durham, North Carolina.<sup>74</sup>

The court's market definition rulings recognizes the significant role played by outpatient services in today's health care market and the reality that Roanoke is a regional medical center. These factors contributed significantly to the court's finding that the proposed affiliation did not present an unreasonable restraint of trade.<sup>75</sup>

#### D. *Sherman Act Section 1 Conspiracy Issues*

In a variety of contexts, the federal courts in Virginia have shouldered the burden imposed upon them by the 1986 Supreme Court trilogy of summary judgment cases<sup>76</sup> and have largely refused to allow antitrust conspiracy allegations to survive summary judgment.<sup>77</sup> Dismissal typically results from plaintiffs' inability to prove conspiracy or establish antitrust injury.

##### 1. Cases Involving the Manufacturer/Dealer Relationship

Antitrust actions filed by terminated dealers face little prospect of success following the Supreme Court's pronouncements in *Mon-santo v. Spray-Rite Service Corp.*,<sup>78</sup> *Matsushita Electric Industrial Co. v. Zenith Radio*,<sup>79</sup> and *Business Electronics Corp. v.*

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74. *Id.* at 847-48.

75. Juxtaposed with the *Carilion* opinion is the Illinois federal court decision halting the merger of two Rockford, Illinois hospitals. *United States v. Rockford Memorial Corp.*, 1989-1 Trade Cas. (CCH) ¶ 68,462 (N.D. Ill. 1989). Resolution of the two divergent approaches to nonprofit hospital affiliations lies with the appellate courts.

76. See *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574 (1986).

77. It is significant to note at the outset that the courts did not apply the per se rule to any of these Sherman Act conspiracy cases.

78. 465 U.S. 752 (1984).

79. 475 U.S. 574 (1986).



*Sharp Electronics Corp.*,<sup>80</sup> and the Fourth Circuit's opinions in *Terry's Floor Fashions, Inc. v. Burlington Industries*,<sup>81</sup> *National Marine Electronic Distributors, Inc. v. Raytheon Co.*,<sup>82</sup> and *Garment District, Inc. v. Belk Stores Services, Inc.*<sup>83</sup>

Following these cases, in order to survive summary judgment on a Sherman Act section 1 claim, a terminated dealer must meet a rigid standard, mustering evidence "that tends to exclude the possibility of independent action" and "that reasonably tends to prove . . . a conscious commitment to a common scheme designed to achieve an unlawful objective."<sup>84</sup> In applying this standard to the antitrust claims of a terminated distributor, the Supreme Court held that a conspiracy cannot be inferred merely from the complaints of other distributors to the manufacturer, and the subse-

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80. 485 U.S. 717 (1988).

81. 763 F.2d 604 (4th Cir. 1985). The plaintiff, a carpet retailer, brought suit against Eatman's, a competitor, and Lees, its supplier, alleging a conspiracy in violation of section 1 of the Sherman Act, stemming from Lees' termination of Terry's as a distributor.

The Court of Appeals for the Fourth Circuit followed *Monsanto* holding that a conspiracy is not established by proof that a manufacturer terminated a distributor following, or even in response to, complaints by other dealers. *Id.* at 611.

82. 778 F.2d 190 (4th Cir. 1985). In *Raytheon*, the Court of Appeals for the Fourth Circuit held that there was sufficient evidence to prove that other dealers made complaints to Raytheon about plaintiff dealer, National, and that they even threatened to cease doing business with Raytheon if the relationship with National was not terminated. The court further found that Raytheon's decision to terminate National as a dealer was made in the context of these complaints and that the complaints played a part in the decision. Nevertheless, the court held that this was insufficient to prove a conspiracy to restrain retail price competition:

Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about 'in response to' complaints, could deter or penalize perfectly legitimate conduct. . . . To bar a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational dislocation in the market.

*Id.* at 193 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984)); see also *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 102 (4th Cir. 1987).

83. 799 F.2d 905 (4th Cir. 1986). In *Garment District*, the Court of Appeals for the Fourth Circuit, relying on *Monsanto* and *Raytheon*, held that a large distributor may apply certain pressure to its manufacturer to terminate its relationship with another distributor without violating section 1 of the Sherman Act. *Garment District*, a discount distributor, claimed that Belk, a large competitor, operating 200 stores, had coerced the manufacturer into terminating *Garment District's* distributorship by threatening to discontinue the manufacturer's line of clothing. The court rejected *Garment District's* claims stating that, without more, a manufacturer's termination of a discounting distributor in response to Belk's complaint is insufficient to prove an illegal price-fixing conspiracy. *Id.* at 911.

84. *Monsanto*, 465 U.S. at 768. To date, efforts in Congress to repeal this evidentiary standard and allow dealer termination cases to pass the summary judgment stage by merely proving the existence of competing dealer complaints have failed. See, e.g., *Freedom From Vertical Price Fixing Act of 1987*, H.R. Rep. No. 421, 100th Cong., 1st Sess. 2 (1987).

quent termination of the distributor:

To permit the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to treble damage liability would both inhibit management's exercise of its independent business judgment and emasculate the terms of the statute.<sup>85</sup>

In *Hubs & Wheels, Inc. v. Goodyear Tire & Rubber Co.*,<sup>86</sup> plaintiffs alleged that Goodyear conspired with a large regional dealer, Appalachian Tire Products ("ATP"), to terminate Hubs & Wheels' dealer contract with Goodyear.<sup>87</sup> Considering as true plaintiff's evidence that Goodyear terminated the dealer contract at ATP's request, the court found the evidence insufficient to establish a conspiracy violative of section 1 of the Sherman Act. The court noted that plaintiff's evidence, at most, established a termination by Goodyear in response to ATP's complaint. Citing *Matsushita* for the proposition that conduct that is as consistent with permissible competition as with conspiracy does not, standing alone, support an inference of antitrust conspiracy, Judge Williams rejected the antitrust conspiracy claim.<sup>88</sup>

*G. Heileman Brewing Co. v. Stroh Brewing Co.*,<sup>89</sup> was an appeal of the dismissal of Heileman's suit challenging Stroh's termination of its regional distribution agreement. While the opinion largely focused on the applicability of Maryland's Beer Franchise Act,<sup>90</sup> and the Fourth Circuit remanded the case for consideration consistent therewith, the court noted in a footnote that:

We reserve judgment at this time on the antitrust implications of the notice requirement. However, based on the Maryland court's emphasis on the manufacturer-distributor relationship of Stroh and Heileman, our initial impression is that the notice provision is not a

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85. *Monsanto*, 465 U.S. at 764 (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 n.2 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)).

86. No. 86-0071-A (W.D. Va. Nov. 28, 1988).

87. Plaintiff Dotson, the owner of Hubs & Wheels, Inc. asserted in that capacity, antitrust allegations in the amended complaint. Judge Williams, following *Associated General Contractors v. Carpenters*, 459 U.S. 519, 535-46 (1983), dismissed Dotson's antitrust claims, ruling that he lacked standing to assert them. *Hubs & Wheels, Inc. v. Goodyear Tire & Rubber Co.*, No. 86-0071-A (W.D. Va. Sept. 1, 1988).

88. *Id.* at 14.

89. 843 F.2d 169 (4th Cir. 1988).

90. Maryland's Beer Franchise Fair Dealing Act, MD. ALCO. BEV. CODE ANN. Art. 2B, §§ 203A-203G (Repl. Vol. 1987).

Sherman Act violation on its face.<sup>91</sup>

While not specifically a dealer termination case, *C-Z Farm, Inc. v. American Horse Shows Association*,<sup>92</sup> contains some elements common to those cases. Plaintiff C-Z Farm sued defendant American Horse Shows Association ("AHSA") claiming that AHSA breached its membership contract with C-Z Farm and violated federal antitrust laws by refusing to sanction a C-Z horse show. C-Z alleged a conspiracy between AHSA and the Virginia State Horse Show arising out of AHSA's decision to recognize the Virginia State Horse Show rather than the C-Z horse show. The Court of Appeals for the Fourth Circuit agreed with the district court's dismissal of the antitrust allegations, reasoning:

C-Z Farm did not properly allege an agreement in restraint of trade, and its monopolization claim under Section 2 of the Sherman Act did not state a proper claim for a refusal to deal with respect to an essential facility. Absent an antitrust challenge to the AHSA's 250-mile rule or AHSA's protection of a previously recognized horse show, the gravamen of C-Z Farm's Sherman Act claims is not that an impairment of the process of competition gave rise to the antitrust injury, but simply that it did not prevail in its competition with the Virginia State Horse Show for recognized status.<sup>93</sup>

## 2. Cases in the Health Care Context

Despite repeated rejection by the Court of Appeals for the Fourth Circuit,<sup>94</sup> cases involving hospital staff privileges and exclusive contracts continue to proliferate in the district courts. In the hospital staff privileges context, three of the four suits considered in 1988 did not survive motions for summary judgment.

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91. 843 F.2d at 172 n.2. It is difficult to discern from the Fourth Circuit's opinion its rationale for an oblique reference to antitrust law in a case seemingly devoid of antitrust allegations. Moreover, if the notice requirement to which the court refers is mandated by Maryland state law and enforced by its courts, it appears that *Parker v. Brown* state action immunity would apply.

92. No. 87-3628 (4th Cir. Apr. 13, 1988).

93. *Id.* at 5.

94. *See, e.g.*, *White v. Rockingham Radiologists*, 820 F.2d 98 (4th Cir. 1987); *Cooper v. Forsyth County Hosp. Auth., Inc.*, 789 F.2d 278 (4th Cir.), *cert. denied*, 479 U.S. 972 (1986); *Harron v. United Hosp. Center, Inc.*, 522 F.2d 1133, 1134 (4th Cir. 1975), *cert. denied*, 424 U.S. 916 (1976); *Capili v. Shott*, 487 F. Supp. 710 (S.D. W. Va. 1978), *aff'd.*, 620 F.2d 438 (4th Cir. 1980).

In the only antitrust action to survive summary judgment, Judge Kiser in *Mahendra Shah v. Memorial Hospital*<sup>95</sup> was faced with seemingly conflicting claims of conspiracy, motivated alternatively by anticompetitive aims or racial and national origin discrimination. Judge Kiser resolved the conflict by granting summary judgment as to the plaintiff's civil rights claims and denying the defendants' motion for summary judgment as to the plaintiff's antitrust claim.

The district court rejected the plaintiff's civil rights allegations due to insufficient proof of racial motivation yet denied the defendants' motion for summary judgment as to antitrust conspiracy, ruling that a question of fact existed. The court recognized that plausible procompetitive reasons existed for the alleged delays in granting staff privileges and refusal to cover for plaintiff's practice.<sup>96</sup> Nevertheless, the court noted that an inference of anticompetitive behavior could also be drawn. Central to an understanding of Judge Kiser's opinion is his distinction of *White v. Rockingham Radiologists, Ltd.*, and *Cooper v. Forsyth County Hospital Authority, Inc.*, prior Fourth Circuit precedent rejecting antitrust staff privileges claims. Judge Kiser held:

By contrast, there is no single entity to whom we can assign responsibility for the actions aggrieving Shah, and there is no single, clear rationale underlying them . . . . The implication of a conscious commitment to a common scheme is dramatically greater where defendants are alleged to have taken general independent actions whose effect is to drive plaintiff from the marketplace.<sup>97</sup>

The court also rejected the defendants' contention that the alleged elimination of one physician failed to satisfy the *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*<sup>98</sup> antitrust injury standard, ruling that Shah's allegations of loss of patients and business were sufficient.<sup>99</sup>

In a companion case, *Purnima Shah v. Memorial Hospital*,<sup>100</sup> the court granted defendants' motion for summary judgment as to both antitrust and civil rights allegations. Purnima Shah, an anes-

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95. 1988-2 Trade Cas. (CCH) ¶ 68,199 (W.D. Va. 1988).

96. *Id.* at 59,328.

97. *Id.* at 59,328-29.

98. 429 U.S. 477, 489 (1977).

99. 1988-2 Trade Cas. (CCH) at 59,327.

100. 1988-2 Trade Cas. (CCH) ¶ 68,198 (W.D. Va. 1988), *aff'd, per curiam*, No. 88-2912 (4th Cir. May 22, 1989).

thesiologist, asserted allegations similar to her husband's, and complained that she was driven from Danville by delays in obtaining her credentials and a conspiracy to deny her referrals.

The court dismissed the plaintiff's Sherman Act conspiracy claims, ruling that the "plaintiff's claim of conspiracy is undermined by evidence in the record substantiating the reasonableness of the [delay in granting staff privileges and restriction of staff privileges]." <sup>101</sup> The court stated:

This [c]ourt is not competent to judge the severity of Shah's problems or to pass on her overall competency as an anesthesiologist. In light of this documentation that at least some problems existed, I cannot find the hospital's decision to restrict her privileges was more likely motivated by a conspiracy than by concern for patient care. <sup>102</sup>

Quoting *White v. Rockingham Radiologists, Ltd.*, <sup>103</sup> for the proposition that "[c]onduct as consistent with permissible competition as with illegal conspiracy does not itself support an inference of antitrust conspiracy," Judge Kiser granted summary judgment as to Shah's antitrust allegations and dismissed the action.

As in the *Shah* cases, *Thompson v. Wise General Hospital*, <sup>104</sup> involved allegations of both civil rights and antitrust violations. While the court in *Mahendra Shah* found that the gravamen of the plaintiff's complaint was of a restraint of trade nature, the court in *Thompson* found to the contrary, reasoning that:

Finally, there is considerable authority over the years for the proposition that the courts should not allow plaintiffs, by charging conspiracies in restraint of trade to turn every case into a Sherman Act matter. . . . The basis of Dr. Thompson's action is and has always been racial discrimination; the antitrust counts were sprung on the court and the defendants out of a clear blue sky by the last of the attorneys in his employ. The court has nonetheless given them careful consideration, but notes that in the cases where courts have upheld the bringing of antitrust complaints race has not been an issue. . . . Since the real issue here is the allegation of racial animus, which the Sherman Act was obviously not intended to address, the

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101. *Id.* at 59,322.

102. *Id.* at 59,322-23.

103. 820 F.2d 98, 102 (4th Cir. 1987).

104. 707 F. Supp. 849 (W.D. Va. 1989).

court finds the line of cases limiting the practical reach of the Sherman Act to be persuasive.<sup>105</sup>

Most recently, Judge Michael, in *Oksanen v. Page Memorial Hospital*,<sup>106</sup> dismissed a physician's staff privileges case. In *Oksanen* the plaintiff failed to present evidence satisfying the *Monsanto* conspiracy standard, despite factual findings by the court of actions taken by the other members of the small medical staff of the Luray, Virginia hospital to revoke Dr. Oksanen's privileges amid public outcry regarding these efforts. Significantly, in *Oksanen*, the court rejected plaintiff's contention that a hospital medical staff may constitute a conspiracy in and of itself.<sup>107</sup>

Allegations of unlawful exclusive contracts in the medical arena have fared no better. In *Steuer & Latham, P.A. v. National Medical Enterprises, Inc.*,<sup>108</sup> plaintiff pathologists alleged violations of the Sherman Act arising out of the termination of their contract to provide pathology services at the Cherokee Memorial Hospital in South Carolina. The Fourth Circuit affirmed the district court's dismissal of the tying and conspiracy allegations, holding that no antitrust injury resulted from plaintiffs' allegations and that the plaintiffs' had failed to establish the existence of two separate products or a conspiracy meeting the *Monsanto* standard. Following *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,<sup>109</sup> and *Brown Shoe Co. v. United States*,<sup>110</sup> the district court held that the plaintiffs did not demonstrate any injury to competition by substituting one exclusive contractor for another. The plaintiffs contended that competition had been injured by the fact that prices for pathology services were higher than those that were charged by the plaintiffs when they were contract pathologists at Cherokee Memorial Hospital. The court rejected this contention, noting that "[e]ven assuming that this assertion were true, it would not establish injury to competition because the relevant inquiry is not whether prices have increased, but whether they have increased over the competitive level. Plaintiffs, however, failed to offer any evidence regarding competitive pricing levels."<sup>111</sup>

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105. *Id.* at 855-56 (citation omitted).

106. No. 88-0166-H (W.D. Va. June 16, 1989).

107. This contention was based on the Third Circuit's opinion in *Weiss v. York Hosp.*, 745 F.2d 786, 814 (3rd Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985).

108. 672 F. Supp. 1489 (D.S.C. 1987), *aff'd.*, 846 F.2d 70 (4th Cir. 1988).

109. 429 U.S. 477, 488 (1977).

110. 370 U.S. 294, 320 (1962).

111. *Steuer & Latham*, 672 F. Supp. at 1502.

The court addressed plaintiffs' exclusive dealing claims by focusing on whether the arrangement foreclosed competition among producers or suppliers in a substantial share of the affected market. Citing plaintiffs' problems with its definition of the product and geographic markets, the court noted that foreclosure of an opportunity at a single hospital cannot constitute a violation of the antitrust laws.<sup>112</sup>

Similar claims were dismissed arising out of a hospital's relationship with durable medical equipment suppliers. In three related cases, *Advanced Health-Care Services, Inc. v. Twin County Community Hospital*; *Advanced Health-Care Services, Inc. v. Radford Community Hospital*; and *Advanced Health-Care Services, Inc. v. Giles Memorial Hospital*,<sup>113</sup> plaintiff's alleged that each of the three hospitals entered into an exclusive contract with another defendant to provide respiratory care, discharge services and durable medical equipment for the hospitals. Plaintiff contended that the hospitals' referrals to the defendant distributors foreclosed durable medical equipment competition in violation of Sherman Act sections 1 and 2 and Clayton Act section 3. The court dismissed the Sherman Act allegations,<sup>114</sup> finding that the plaintiff failed to bring forth any evidence of predatory conduct on the part of the defendants. In this regard, the court noted that the plaintiff allegations that the defendant did not advertise plaintiff services but rather promoted their own did not constitute a predatory act.<sup>115</sup>

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112. *Id.* at 1516.

113. Nos. 88-0344-R, 88-0345-R, 88-0346-R (W.D. Va. Dec. 29, 1988).

114. Judge Turk also rejected the plaintiff's Clayton Act section 3 claim for two reasons. First, the court found section 3 inapplicable because plaintiff's narrow allegations demonstrated that it alleged only that it had been excluded from supplying patients discharged from defendant hospitals, and accordingly, did not compete with the defendant durable medical equipment suppliers to supply equipment to hospitals or distributors. Second, as to the sales of durable medical equipment to patients being discharged from the three hospitals, the court noted that:

[p]laintiff does not allege, however, that transactions between the distributors and patients involve agreements by any patients, either express or tacit, not to buy or lease equipment from plaintiff or other competitors of the distributors. The transactions between the new distributing companies and patients who are being discharged from the three hospitals, as plaintiff allege them, therefore, do not run afoul of Clayton Act § 3.

*Advanced Health-Care Serv.*, Nos. 88-0344-R, 88-0345-R, 88-0346-R, slip op. at 31.

115. *Id.* at 35; see *Aspen Skiing Co. v. Aspen Highlands Corp.*, 472 U.S. 585 (1985); *United States v. Griffith*, 334 U.S. 100 (1948); *Smith Kline Corp. v. Eli Lilly & Co.*, 575 F.2d

In the *Twin County* and *Giles* cases, the plaintiff sought leave to amend her complaint to assert predatory conduct as well as a violation of the essential facilities doctrine. Judge Turk denied the amendment, ruling that it would be futile to permit an amendment which fails to state a claim.<sup>116</sup> Following *United States v. Griffith*,<sup>117</sup> *Smith Kline Corp. v. Eli Lilly*<sup>118</sup> and *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*,<sup>119</sup> Judge Turk again ruled that plaintiff's allegations of predatory acts did not rise to the requisite level.<sup>120</sup>

### 3. Exclusive Contracts

In addition to the health care cases discussed above, in *Stephen Jay Photograph, Ltd. v. Olan Mills, Inc.*,<sup>121</sup> the district court rejected the plaintiff's contention that the designation by Tidewater, Virginia, high schools of Olan Mills as official school photographer was an exclusive contract violative of the Sherman and Robinson-Patman Acts.<sup>122</sup> The court rejected plaintiff's Sherman Act claims, reasoning that no unlawful conspiracy could be implied simply because the alleged conspirators had entered into a contract. The court noted that:

[T]he unlawful and unilateral conduct of one alleged conspirator cannot be imputed to the other alleged conspirator merely because the parties have entered into an otherwise lawful contractual arrangement. The defendants' action in signing the various contracts to become official school photographers are not evidence of a conscious commitment to deprive plaintiffs access to the relevant market, absent direct or circumstantial evidence of the collateral agreement, tacit or express, to engage in unlawful conduct.<sup>123</sup>

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1056 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978).

116. *Advanced Health-Care Serv., Inc. v. Twin County Community Hosp.*, No. 88-0344-R and *Advanced Health-Care Serv., Inc. v. Twin County Community Hosp.*, No. 88-0346-R (W.D. Va. Mar. 21, 1989); *see, e.g., Foman v. Davis*, 371 U.S. 178, 182 (1962); *Island Creek Coal Co. v. Lake Shore, Inc.*, 832 F.2d 274, 279 (4th Cir. 1987); *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir.), *cert. dismissed*, 448 U.S. 911 (1980).

117. 334 U.S. 100 (1948).

118. 575 F.2d 1056 (3d Cir.), *cert. denied*, 429 U.S. 838 (1978).

119. 738 F.2d 1509 (10th Cir. 1984), *aff'd on other grounds*, 472 U.S. 585 (1985).

120. *Advanced Health-Care Serv., Inc. v. Twin County Community Hosp.*, No. 88-0344-R and *Advanced Health-Care Serv., Inc. v. Twin County Community Hosp.*, No. 88-0346-R (W.D. Va. Mar. 21, 1989).

121. 713 F. Supp. 937 (E.D. Va. 1989).

122. *See infra* note 149 and accompanying text.

123. 713 F. Supp. at 947.



Once again, the court held that plaintiff's evidence did not tend to exclude the possibility that the defendants acted independently.<sup>124</sup>

#### E. *Sherman Act Section 2 Monopolization Issues*<sup>125</sup>

Consistent treatment of Sherman Act claims has been the hallmark of recent Virginia federal court opinions, with section 1 conspiracy claims and section 2 monopolization claims standing or falling together.<sup>126</sup> In dismissing section 2 claims, the courts have routinely cited plaintiff's failure to establish the requisite willful acquisition or maintenance of monopoly power.

For example, in *Steuer & Latham, P.A. v. National Medical Enterprises, Inc.*,<sup>127</sup> the court rejected plaintiff's monopolization claim because the plaintiff failed to prove that pathology services constituted an appropriate product market. The court next rejected the plaintiff's allegation of monopolization of the medical-surgical services market because the defendant hospital was neither a provider nor a consumer of these services.<sup>128</sup> The court similarly dismissed the plaintiff's attempted monopolization claims, ruling that the defendants had "neither the incentive nor the ability to injure competitor in any relevant market,"<sup>129</sup> thus lacking the specific intent to monopolize.

Similarly, in *Oksanen v. Page Memorial Hospital*,<sup>130</sup> the court

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124. *Id.* at 947-48. The court based its dismissal of the Sherman Act section 2 allegations of a shared monopoly between two defendant photography firms on its section 1 ruling, quoting *White v. Rockingham Radiologists*, 820 F.2d 98, 104 (4th Cir. 1987), for the proposition that "one who does not compete in a product market or *conspire with a competitor* cannot be held liable as a monopolist in the market." *Id.* at 948. (emphasis added).

125. See 15 U.S.C. § 2 (1982). "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . ." *Id.*

126. For example, the court in *Advanced Health-Care* dismissed the sections 1 and 2 Sherman Act claims for failure to adduce evidence of any unlawful predatory act. See *supra* notes 113-16 and accompanying text. The courts in *Purnima Shah*, *Stephen Jay Photography*, and *Oksanen* also dismissed conspiracy to monopolize claims once plaintiff's section 1 claims failed. The court in *Purnima Shah* implicitly recognized that as the defendant hospital did not provide anesthesiology services, plaintiff's only viable Sherman Act section 2 claim regarding this product market was her conspiracy to monopolize theory. 1988-2 Trade Cas. (CCH) ¶ 68,198, at 59,322 (W.D. Va. 1988), *aff'd*, No. 88-2912 (4th Cir. 1989).

127. 672 F. Supp. 1489 (D.S.C.), *aff'd*, 846 F.2d 70 (4th Cir. 1988).

128. *Id.* at 1521 (quoting *White v. Rockingham Radiologists*, 820 F.2d 98, 104-05 (4th Cir. 1987)).

129. *Id.* at 1520.

130. No. 88-0166-H (W.D. Va. 1989).

rejected the Sherman Act section 2 claims because proof of the willful acquisition or maintenance of monopoly power was absent.<sup>131</sup>

The defendants have submitted strong evidence that the various actions taken against Dr. Oksanen do not suggest the willful maintenance of monopoly power, but were motivated by professional concerns over the impact of Dr. Oksanen's behavior on hospital morale and, ultimately, on patient care. In response, the plaintiff has rested on his pleadings, setting forth no specific facts upon which a reasonable jury could rely in order to find that the defendants willfully acquired and maintained their assumed monopoly power.<sup>132</sup>

Consistently, the district court in *Mahendra Shah v. Memorial Hospital*,<sup>133</sup> overruled defendants' motions for summary judgment as to both Sherman Act sections 1 and 2 claims. In *Mahendra Shah*, the defendants contended that regardless of the section 1 allegations, a neurologist could not be found to violate section 2 in a market defined by the plaintiff to consist of "urologic services." The court disagreed, finding that "one need not be a direct competitor to be liable for attempted monopoly under Section 2" because the requisite monopoly power may be acquired either by virtue of the defendant's business or by means of a conspiracy.<sup>134</sup> Accordingly, as the plaintiff's antitrust conspiracy claim survived summary judgment, the attempted monopolization and conspiracy to monopolize claims were also allowed to continue.

In *Environmental Instruments, Inc. v. Sutron Co.*,<sup>135</sup> defendant Sutron filed an attempted monopolization counterclaim to a patent infringement lawsuit. The Eastern District of Virginia held that to establish an antitrust violation, Sutron must prove the existence of a specific attempt to monopolize and a dangerous probability that the attempt would be successful in achieving a monopoly.<sup>136</sup> Noting that Sutron failed to establish that Environmental Instruments

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131. "The offense of monopoly under section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

132. *Id.* at 27-28 (citations omitted).

133. 1988-2 Trade Cas. (CCH) ¶ 68,199 (W.D. Va. 1988).

134. *Id.* at 59,329.

135. 688 F. Supp. 206 (E.D. Va. 1988).

136. *Id.* at 217-18.

engaged in inequitable conduct in obtaining the patent, the court summarily dismissed the claimed antitrust violation.<sup>137</sup>

Finally, two Virginia federal district courts dismissed essential facilities doctrine<sup>138</sup> arguments because such doctrine can only be asserted by a competitor of the alleged monopolist.<sup>139</sup> Additionally, in *Reynolds Metals*, Judge Merhige declined to consider whether a monopoly leveraging claim<sup>140</sup> states an independent claim, finding the plaintiffs' proof of the willful acquisition or maintenance of monopoly power sufficient to state "traditional [Section] 2 claims."<sup>141</sup>

### F. Mergers and Acquisitions

In one of the first antitrust challenges by the Antitrust Division of the Department of Justice to the affiliation of two nonprofit hospitals,<sup>142</sup> the Antitrust Division contended that the proposed affiliation of Carilion Health System (which operates Roanoke Memorial Hospital ("RMH")) with Community Hospital of Roanoke Valley ("CHRV") violated section 1 of the Sherman Act and section 7 of the Clayton Act.<sup>143</sup> The court's denial of the Division's

137. *Id.* at 218.

138. "The 'essential facilities' doctrine imposes on the owner of a facility that cannot reasonably be duplicated and which is essential to competition in a given market a duty to make that facility available to its competitors on a nondiscriminatory basis." *Ferguson v. Greater Pocatello Chamber of Commerce Inc.*, 848 F.2d 976, 983 (9th Cir. 1988); *see also* *Fishman v. Estate of Wirtz*, 807 F.2d 520, 539-41 (7th Cir. 1986); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1519-21 (10th Cir. 1984), *aff'd on other grounds*, 472 U.S. 585 (1985); *MCI Communications v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992-93 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

139. *Advanced Health-Care*, Nos. 88-0344-R, 88-0346-R (W.D. Va. Mar. 21, 1988); *Reynolds Metals Co. v. Columbia Gas Sys., Inc.*, No. 87-0446-R (E.D. Va. Aug. 17, 1988) (citing *Ferguson*, 848 F.2d at 982-84; *MCI v. AT&T*, 708 at 1132-33, 1147 n.100).

140. *Reynolds Metals*, No. 87-0446-R, slip op. at 5. The court defined "monopoly leveraging" as follows:

Monopoly leveraging, the use of monopoly power in one market to gain an unwarranted competitive advantage in another, has been recognized in the Second and Ninth Circuits. *E.g.*, *M.A.P. Oil Co. v. Texaco, Inc.*, 691 F.2d 1303 (9th Cir. 1982); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). On the other hand, this theory has been criticized by the D.C. Circuit, *A.I.A.W. v. N.C.A.A.*, 735 F.2d 577 (D.C. Cir. 1984), and various legal scholars.

*Id.*

141. *Id.* at 6.

142. *United States v. Carilion Health System*, 707 F. Supp. 840 (W.D. Va. 1989).

143. *Id.* at 841.

effort to block the affiliation is notable in a number of respects.

Judge Turk dismissed the Clayton Act section 7 claim before trial, reasoning that it applied only to stock transactions and asset acquisitions subject to the jurisdiction of the FTC. As the proposed affiliation involved nonstock, nonprofit institutions, the court found section 7 of the Clayton Act inapplicable.<sup>144</sup>

The Sherman Act Section 1 case, tried before an advisory jury instructed on the Rule of Reason, largely focused on market definition, efficiencies and economies, quality of care issues and the likely competitive affect of the proposed affiliation.<sup>145</sup> The court rejected the Antitrust Division's contention that an unreasonable restraint of trade would result from the affiliation as being inconsistent with the evidence and further ruled, based on expert testimony, that the alleged increase in concentration would not necessarily translate into a price increase.<sup>146</sup> Central to the court's ruling on anticompetitive effect was its finding that "as a general rule hospital rates are lower, the fewer the number of hospitals in an area. In addition, charitable, nonprofit hospitals tend to charge lower rates than for-profit hospitals. Relative to other products and services consumers buy, hospital services are not price sensitive in a relevant market."<sup>147</sup> The court found the proposed affiliation did not constitute an unreasonable restraint of trade violative of section 1 because of (a) evidence of strong existing competition from Lewis-Gale Hospital (an HCA affiliate); (b) the procompetitive motivation for the affiliation; (c) the affiliating entities' complimentary nature; (d) the restraint on price increases imposed by the Virginia Health Services Cost Review Council and the boards of directors of the affiliating nonprofit institutions; (e) economic

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144. *Id.* at 841 n.1. Section 7 of the Clayton Act provides:

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce . . . , in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18 (1982).

As the affiliating entities were nonstock corporations, the proposed affiliation did not involve an acquisition of stock or share capital. Moreover, as both entities were nonprofit, they also were not subject to the jurisdiction of the FTC. *Carilion*, 707 F. Supp. at 891 n.1.

145. *Carilion*, 707 F. Supp. at 842.

146. *Id.* at 849.

147. *Id.* at 846.

efficiencies and capital avoidance savings; and (f) the likely enhanced quality of care.

A hearing on the Antitrust Division's appeal was conducted on October 3, 1989 before the Fourth Circuit and the parties are presently awaiting the court's opinion.

### G. *Price Discrimination*

Recent Virginia case law involving the Robinson-Patman Act is indicative of the judicial disfavor in which such suits are held.

In *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*,<sup>148</sup> the Eastern District rejected the plaintiff's assertion that commission payments to schools by competing photographers constituted commercial bribery violative of section 13(c) of the Robinson-Patman Act.<sup>149</sup> The district court noted that the Virginia Attorney General has twice addressed this issue and disagreed with the Attorney General's 1976 opinion that any payment made to a school to influence its choice of supplier violates Section 13(c).<sup>150</sup> While the district court agreed with the Attorney General's finding that the schools act as intermediaries for students and parents, it did not consider the contracts to constitute commercial bribery because such arrangements were not secret.<sup>151</sup> The court also rejected Jay's argument that the school district did not provide services to the defendant photographers commensurate with the commissions paid, reasoning that as long as the services provided to the school were more than de minimis, it would not retrospectively weigh the consideration in the contract bargained for by the parties.<sup>152</sup>

The Court of Appeals for the Fourth Circuit in *Clark Oil Co. v.*

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148. 713 F. Supp. 937 (E.D. Va. 1989).

149. *Id.* at 943. Section 13(c) of the Robinson-Patman Act states that:

[I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

15 U.S.C. § 13(c) (1982).

150. *Stephen Jay Photography*, 713 F. Supp. at 940-41.

151. *Id.* at 941.

152. *Id.* at 942-43.

*Texaco, Inc.*,<sup>153</sup> affirmed the Maryland district court's dismissal of a Robinson-Patman claim filed by a Texaco oil distributor. Plaintiff alleged price discrimination based on hauling allowances granted other distributors by Texaco and claimed the denial of this allowance to Clark Oil caused it not to be competitive for retail service station business. The Fourth Circuit recognized that plaintiff Clark Oil differed in its relationship with Texaco and the other Texaco distributors whom Clark Oil claimed received favorable prices.<sup>154</sup> While Clark Oil was a seller to end users of Texaco's products, the alleged favored distributors sold primarily to gasoline stations rather than end users. Moreover, in return for the hauling allowances, Texaco imposed other requirements, e.g., storage credit and sales quotas on the distributors other than Clark Oil. Perhaps of greater significance, however, was the fact that many of these other distributors paid a delivery price even though they hauled the oil from Texaco's terminal themselves, justifying the hauling allowance. Unlike these customers, Clark Oil paid a terminal price.<sup>155</sup>

Finally, in four related suits for payment on open account for goods sold and delivered, the circuit courts in Roanoke and Botetourt Counties, following the opinions of the Supreme Court's in *Bruce's Juices, Inc. v. American Can Co.*,<sup>156</sup> and the Supreme Court of Virginia in *Azalea Drive-In Theatre, Inc. v. Sargoy*,<sup>157</sup> denied defendants' affirmative defense based on the Virginia price discrimination statute.<sup>158</sup>

### III. VIRGINIA ATTORNEY GENERAL CIVIL ENFORCEMENT ACTIVITIES

The Antitrust and Consumer Litigation Section of the Attorney General's office has announced settlements of civil enforcement actions in the soft drink, consumer electronics and mobile home industries over the last year.

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153. No. 86-1244 (4th Cir. 1988).

154. *Id.* at 4.

155. *Id.* at 2-3.

156. 330 U.S. 743 (1947).

157. 215 Va. 714, 214 S.E.2d 131, *cert. denied*, 423 U.S. 940 (1975).

158. *GCC Beverages, Inc. v. Granco, Inc.*, No. CL85000627 (Roanoke 1988); *GCC Beverages, Inc. v. Blantom Corp.*, No. CL85000626 (Roanoke 1988); *GCC Beverages, Inc. v. BRB Corp.*, No. 85000025 (Botetourt County 1988); *GCC Beverages, Inc. v. Bland A. Painter, Jr.*, No. 85000024 (Botetourt County 1988).

### A. *Soft Drink Settlements*

In 1988, the Attorney General filed civil antitrust suits against Allegheny Bottling Co., the Mid-Atlantic Bottling Co., Inc., General Cinema Beverages of Virginia, Inc., General Cinema Beverages of Washington, D.C., Inc., and Coca-Cola Bottling Company of Roanoke, Inc., alleging conspiracies to fix soft drink prices in Richmond, Norfolk, Roanoke and the Washington D.C. metropolitan areas. Each suit was subsequently settled, requiring defendants to pay amounts ranging from \$10,000 to \$30,000 to a settlement account to be held in escrow for the benefit of all governmental entities which purchased soft drinks. The settlement agreements provide each relevant political subdivision in the area of the conspiracy the opportunity to obtain a pro rata share of the settlement proceeds based on its population.

### B. *Consumer Electronics Settlement*

In March 1989, the Attorney General filed suit in federal court in New York alleging a nationwide conspiracy to fix the retail price of Panasonic and Technics consumer electronics merchandise. The complaint alleged that Panasonic announced a new corporate policy to raise profits in the retail sale of its consumer electronic products and repeatedly attempted to coerce retailers to adhere to the retail prices fixed by Panasonic. The settlement agreement contemplates Panasonic's compliance with the antitrust laws; required Panasonic to reaffirm to each retailer, dealer and distributor of its products the right to independently set its prices; and requires Panasonic to establish a settlement account to refund consumer purchasers of certain Panasonic products.

### C. *Mobile Home Consent Decrees*

In May 1988, two consent decrees were entered in the Circuit Court of Fairfax County arising out of allegations of the unlawful tying of mobile home lot leases to sales of new or used mobile homes.<sup>159</sup> The terms of the *Faigen* consent decrees required defendants to pay \$50,000, enjoined them from tying leases of mobile home lots to mobile home sales, required them to undertake steps to formally comply with the terms of the consent decree and

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159. Commonwealth v. Faigen, No. 106612, (Fairfax May 5, 1988); Commonwealth v. Epps, No. 106898, (Fairfax May 26, 1988).

granted inspection rights to the Attorney General for ten years. The *Epps* consent decree similarly enjoined defendants from unlawfully tying mobile home lot leases and sales, secured defendants cooperation in additional investigation and litigation, required defendants to formally comply with the decree and permitted Attorney General inspections for ten years.

#### IV. STATE LEGISLATIVE ACTIVITIES

##### A. *Recovery of Attorneys' Fees and Costs Under Virginia Antitrust Act*

In three opinions handed down by the Circuit Court of Prince William County in 1986 and 1987, the court held that defendants engaged in a per se violation of the Virginia Antitrust Act<sup>160</sup> by tying mobile home leases to sales of mobile homes.<sup>161</sup> Nevertheless, as the Attorney General only sought injunctive relief pursuant to section 59.1-9.15(a) of the Code of Virginia,<sup>162</sup> the court denied the plaintiff's petition for recovery of attorneys' fees and costs.<sup>163</sup>

As a result, section 59.1-9.15(a) of the Code of Virginia was amended by the General Assembly in 1988 to add the following language: "In any such action or proceeding in which the plaintiff substantially prevails, the court may award the cost of suit, including a reasonable attorney's fee, to such plaintiff."<sup>164</sup>

##### B. *Extension of Joint Subcommittee to Study Insurance Antitrust Exemption*

The 1989 General Assembly approved House Joint Resolution 382 which continued the activities of the joint subcommittee studying (1) the reinsurance practices of insurance companies; (2) the exemption from the antitrust laws granted to the insurance industry, and (3) the availability and affordability of liability insurance.

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160. VA. CODE ANN. §§ 59.1-9.1 to -9.18 (Repl. Vol. 1987 & Cum. Supp. 1989). "Every contract, combination or conspiracy in restraint of trade of commerce of this Commonwealth is unlawful." *Id.* at § 59.1-9.5.

161. *Commonwealth v. Winslow*, 8 Va. Cir. 198 (1986 & 1987); *Commonwealth v. Winslow*, 9 Va. Cir. 130 (1987).

162. *See* VA. CODE ANN. § 59.1-9.15(a) (Repl. Vol. 1987).

163. Section 59.1-9.15(a) of the Code of Virginia, empowers the Attorney General to seek injunctive relief on behalf of the Commonwealth for violations of the Virginia Antitrust Act. It is silent as to recovery of attorney's fees and costs. *Id.* However, suits to "recover the actual damages sustained, reasonable attorney's fees and the costs of suit" are allowed. *Id.* § 59.1-9.15(a),(b) (Repl. Vol. 1987).

164. *Id.* § 59.1-9.15(a) (Cum. Supp. 1989).



### C. *Miscellaneous Trade Legislation*

In other legislative actions of interest, the 1989 General Assembly amended the Mobile Home Lot Rental Act<sup>165</sup> to prohibit the demand of certain fees by landlords;<sup>166</sup> recodified the Wine Franchise Act;<sup>167</sup> amended the Beer Franchise Act<sup>168</sup> to delete an exception for unilateral amendment of a wholesaler's contract by a brewery and to provide that contracts between breweries and beer wholesalers are governed by the laws of Virginia;<sup>169</sup> added new provisions regarding illegal copying of recordings;<sup>170</sup> amended the Virginia Membership Camping Act<sup>171</sup> to limit the number of membership camping contracts a registered operator may sell;<sup>172</sup> added the Prizes and Gift Act requiring disclosures on offerings of prizes or gifts;<sup>173</sup> restructural sections relating to the regulation of cemeteries, and pre-need funeral and burial contracts;<sup>174</sup> added the Credit Services Business Act,<sup>175</sup> and added the Virginia Public Telephone Information Act relating to provision of information as to long distance telephone service available from public telephones.<sup>176</sup>

## V. CRIMINAL ACTIONS

### A. *Sentencing*

In *United States v. Allegheny Bottling Co.*,<sup>177</sup> the court imposed a novel sentence and terms of probation upon Allegheny Bottling Company ("Allegheny Pepsi") as a result of its conviction of price

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165. *Id.* §§ 55-248.41 to -248.51 (Repl. Vol. 1986 & Cum. Supp. 1989).

166. *Id.* § 55-248.45 (Cum. Supp. 1989).

167. *Id.* §§ 4-118.42 to -118.61.

168. *Id.* §§ 4-118.3 to -118.20:1 (Repl. Vol. 1988 & Cum. Supp. 1989).

169. *Id.* §§ 4-118.7, -118.16 (Cum. Supp. 1989).

170. *Id.* §§ 59.1-41.1 to -41.4, -41.6.

171. *Id.* §§ 59.1-313 to -335 (Repl. Vol. 1987 & Cum. Supp. 1989).

172. *Id.* §§ 59.1-313, -317, -325 (Cum. Supp. 1989).

173. *Id.* §§ 59.1-415 to -423.

174. *Id.* §§ 54.1-2800, 57-35.11 (Cum. Supp. 1989); *see also* *Guardian Plans, Inc. v. Teague*, No. 88-3101 (4th Cir. Mar. 7, 1989) (upholding the constitutionality of the licensure requirements and telephone solicitation restrictions of Virginia's funeral laws).

175. *Id.* §§ 59.1 -335.1 to -335.12.

176. *Id.* §§ 59.1-424 to -428.

177. 695 F. Supp. 856 (E.D. Va. 1988).

fixing under section 1 of the Sherman Act. Allegheny Pepsi, along with several of its officers, had been convicted of conducting a price fixing conspiracy with Mid-Atlantic Coca-Cola Bottling Company ("Mid-Atlantic Coke"). The conspiracy involved an agreement to adhere to the prices established in promotional letters published by Mid-Atlantic Coke and Allegheny Pepsi.<sup>178</sup> Breaking new ground, the court found that a corporation could be imprisoned within the meaning of the Sherman Act and sentenced Allegheny Pepsi to three years imprisonment and a \$1,000,000 fine. Suspending the prison term and \$50,000 of the fine, the court placed Allegheny Pepsi on probation for three years. As a condition of probation, Allegheny Pepsi was required to provide employees of comparable salary to those convicted to perform full-time community service for periods of either one or two years in the geographic areas in which Allegheny's price fixing activities occurred. As a further condition of probation, the court imposed upon the company restrictions on the disposition of its assets.<sup>179</sup>

The district court's opinion was short-lived, however, in an unpublished per curiam opinion, the Court of Appeals for the Fourth Circuit reversed that portion of Allegheny Pepsi's sentence which provided for imprisonment, probation and special conditions of probation.<sup>180</sup> Citing *Melrose Distillers, Inc. v. United States*,<sup>181</sup> the Fourth Circuit noted that:

[T]he Supreme Court clearly held that a corporation may not be sent to jail. The language of 15 U.S.C. § 1 is abundantly clear that \$1,000,000 is the maximum a corporation may be fined for violating this section, and there are no additional or alternate sanctions which would even suggest imprisonment or probation of a corporation.<sup>182</sup>

## B. Convictions

In *United States v. Gravelly*,<sup>183</sup> the Court of Appeals for the Fourth Circuit upheld defendant's conviction on charges arising out of a conspiracy to fix soft drink prices. The court ruled, inter

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178. *Id.* at 857.

179. *Id.* at 858-59.

180. *See* *United States v. Allegheny Bottling Co.*, No. 88-5146 (4th Cir. 1989) (per curiam).

181. 359 U.S. 271 (1959).

182. *Allegheny Bottling Co.*, No. 88-5146, slip op. at 10.

183. 840 F.2d 1156 (4th Cir. 1988).

alia, that the evidence was sufficient in fact and law to support the verdict as to the section 1 Sherman Act conviction. Gravely argued that market study evidence negated a conclusion that the market was the subject of price fixing. The court found the market study argument to be specious for three reasons: (1) horizontal price fixing is a per se violation of the Sherman Act and thus the prosecution need not prove an adverse affect on competition; (2) a Sherman Act violation is established even if a conspiracy is unsuccessful; and (3) proof of the conspiracy was provided by the efforts of the conspirators to enforce their agreement, by policing and subsequent meetings.<sup>184</sup>

The court also rejected Gravely's argument that the interstate commerce requirement was not met. The court noted that the jury was instructed on both alternative tests for interstate commerce: the "in the flow of commerce" test and the "effect on commerce test."<sup>185</sup> Noting that the soft drink bottlers involved in the conspiracy maintained offices in a number of states, that Pepsi-Cola is made from ingredients from all over the world and that it is bottled in Maryland and shipped to Virginia, the court held that there was ample evidence for a jury to find that a conspiracy in canned soft drinks in Virginia had a substantial effect on interstate commerce.<sup>186</sup>

The Court of Appeals for the Fourth Circuit also held in *Gravely* that the lower court properly charged the jury concerning the relationship of the Robinson-Patman Act and the Sherman Act. Gravely argued that an exchange of price lists between competitors was not an illegal price fixing conspiracy but rather an attempt to perfect the Robinson-Patman Act's "meeting competition" defense.<sup>187</sup> Recognizing that the Supreme Court in *United States v. United States Gypsum Co.*,<sup>188</sup> had rejected the assertion that the Robinson-Patman Act insulates price list exchanges from Sherman Act scrutiny, the court held the charge that "the Robinson-Patman Act is not a defense to price fixing" properly stated the law.<sup>189</sup>

Also of some interest to practitioners in the field of criminal an-

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184. *Id.* at 1161.

185. *Id.* at 1161-62 (citing *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 242 (1980)).

186. *Gravely*, 840 F.2d at 1162.

187. *Id.*

188. 438 U.S. 422 (1978).

189. *Gravely*, 840 F.2d at 1162.

titrust law is the Fourth Circuit's opinion in *In re Grand Jury Subpoena*.<sup>190</sup> There the court held that third party deponents in a civil action could not have a grand jury subpoena quashed on the grounds that the deposition testimony sought was sealed by a protective order issued by a district court sitting in another jurisdiction. The Fourth Circuit affirmed the Maryland district court's holding that a civil protective order could not be used to shield discovery materials from a subpoena issued by a grand jury.<sup>191</sup> The court adopted a strict rule holding that grand jury subpoenas took precedence on all occasions over documents under Rule 26(c)<sup>192</sup> protective orders. The court rejected a case-by-case approach finding that the grand jury's need to gather evidence was an overriding interest and that only assertion of the right against self-incrimination can insure a witness that his fifth amendment rights will be protected.<sup>193</sup>

### C. Price Fixing Indictments, Information and Convictions

The government was especially active in 1988 and 1989 in its criminal investigation of price fixing in the soft drink industry.<sup>194</sup> In addition to the convictions noted earlier, several cases have resulted in pleas of guilty or *nolo contendere*.

## V. CONCLUSION

While frequently asserted in civil actions, antitrust claims are difficult to prosecute and prove. Successful plaintiffs must clear threshold statutory and judicial hurdles involving issues of sufficiency of pleadings, antitrust immunity, jurisdiction, market definition, antitrust injury and standing before consideration of their claims on the merits. For these reasons and others, civil antitrust plaintiffs have not fared well in recent years in Virginia. On the other hand, state civil enforcement involving tying arrangements

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190. 836 F.2d 1468 (4th Cir. 1988).

191. *Id.* at 1478.

192. FED. R. Civ. P. 26(c).

193. *In re Grand Jury Subpoena*, 836 F.2d at 1477.

194. *United States v. Rissmiller*, No. 87-00061 (W.D. Va. 1987); *United States v. Seven-Up, Dr. Pepper Bottling Co.*, No. 88-12 (W.D. Va. 1988); *United States v. Thurman*, No. 88-13 (W.D. Va. 1988); *United States v. Lively*, No. 88-00016 (W.D. Va. 1988); *United States v. Coca-Cola Bottling Co. of Roanoke, Inc.*, No. 88-39 (W.D. Va. 1988); *United States v. Beach*, No. 88-51 (W.D. Va. 1988); *United States v. All-American Bottling Corp.* No. 88-38 (W.D. Va. 1988).

and price fixing conspiracies, and federal criminal enforcement, largely limited to price fixing conspiracies, have successfully resulted in consent decrees, guilty and *nolo contendere* pleas throughout Virginia.