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## Annual Survey of Virginia Law: Antitrust and Trade Regulation

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## ANTITRUST AND TRADE REGULATION\*

*Michael F. Urbanski\*\**

### I. INTRODUCTION

In this past year, as in previous years, Virginia courts have imposed strict requirements on plaintiffs bringing antitrust claims. While antitrust claims remain popular, many have foundered because the plaintiff either failed to show the existence of an antitrust conspiracy or antitrust injury, or the plaintiff inadequately defined the market allegedly affected by the antitrust violation. The courts' exacting scrutiny extends beyond the elements of the action itself to procedural rules, evidentiary requirements and remedies. While one Fourth Circuit case suggests a slight relaxation in the analysis of state action immunity, the apparent adoption of the "market screen" analysis in the Fourth Circuit imposes a threshold burden on private plaintiffs of showing that the defendant has market power.

### II. FEDERAL CIVIL ACTIONS

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

With one exception, the federal courts in Virginia have consistently rejected antitrust conspiracy claims. In the one case in which such a claim survived, the Fourth Circuit expressed its characteristic unwillingness to disturb a jury verdict.

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\* This article addresses legislation from the 1989 Session of the General Assembly and federal antitrust enforcement efforts and decisions of the United States Supreme Court, the Court of Appeals for the Fourth Circuit, and the state and federal courts of Virginia from June, 1989 to June, 1990.

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## 1. Cases Involving the Manufacturer/Dealer Relationship

Antitrust actions filed by terminated dealers face little prospect of success following the United States Supreme Court's pronouncements in *Monsanto Co. v. Spray-Rite Service Corp.*,<sup>1</sup> *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,<sup>2</sup> and *Business Electronics Corp. v. Sharp Electronics Corp.*,<sup>3</sup> and the Fourth Circuit's opinions in *Terry's Floor Fashions, Inc. v. Burlington Industries, Inc.*,<sup>4</sup> *National Marine Electronic Distributors, Inc. v. Raytheon Co.*,<sup>5</sup> and *Garment District, Inc. v. Belk Stores Services, Inc.*<sup>6</sup> Now, in order to survive summary judgment on a Sherman Act section 1 claim,<sup>7</sup> a terminated dealer must meet a rigid standard, providing evidence "that tends to exclude the possibility of inde-

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1. 465 U.S. 752 (1984).

2. 475 U.S. 574 (1986).

3. 485 U.S. 717 (1988).

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

5. 778 F.2d 190 (4th Cir. 1985). In *Raytheon*, 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 it did not terminate its relationship with National. *Id.* at 191. 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. *Id.* at 192. 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).

6. 799 F.2d 905 (4th Cir. 1986). In *Garment District*, 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 § 1 of the Sherman Act. *Id.* at 909. *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. *Id.* at 907. The court rejected this claim, stating that without more, a manufacturer's termination of a discounting distributor in response to Belk's claim is insufficient to prove an illegal price fixing conspiracy. *Id.* at 911.

7. 15 U.S.C. § 1 (1988) provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

pendent action" and "that reasonably tends to prove . . . a conscious commitment to a common scheme designed to achieve an unlawful objective."<sup>8</sup> In applying this standard, the Supreme Court held that a conspiracy cannot be inferred merely from the complaints of other distributors to the manufacturer and the subsequent 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>9</sup>

In 1989, the Fourth Circuit continued this trend by rejecting three attacks on a manufacturer's use of territorial restrictions on the sale of its products, affirming the district court's denial of relief to the dealer in each case. *Parkway Gallery Furniture v. Kittinger/Pennsylvania House Group, Inc.*<sup>10</sup> was the first of two opinions written by Judge Sprouse in 1989 regarding challenges by discount furniture retailers to changes in manufacturers' sales policies that prohibited extraterritorial sales. In *Parkway*, Pennsylvania House, the manufacturer, adopted changes in its retail marketing policy prohibiting dealers from soliciting or selling its furniture by mail or telephone to customers residing outside specified areas of retail responsibility.<sup>11</sup> The policy change resulted from complaints by other Pennsylvania House dealers throughout the country that they were losing sales to North Carolina discount dealers.<sup>12</sup> Pennsylvania House discussed the new policy with its dealers both before and after the policy was implemented.<sup>13</sup> Feedback from the dealers was favorable, including responses that they "totally agree," "will abide totally," or that they were willing to "come around."<sup>14</sup> Other dealers informed plaintiff's customers of the policy change and one Pennsylvania House dealer notified Pennsylvania House of a policy violation and sought enforcement.<sup>15</sup>

Based on these allegations, plaintiff North Carolina furniture discounters alleged a *per se* unlawful price fixing conspiracy and a

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8. *Monsanto*, 465 U.S. at 768.

9. *Id.* at 764 (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 n.2 (3rd Cir. 1980)).

10. 878 F.2d 801 (4th Cir. 1989).

11. *Id.* at 802.

12. *Id.*

13. *Id.*

14. *Id.* at 802-03.

15. *Id.*

conspiracy in restraint of trade between Pennsylvania House and some of its dealers.<sup>16</sup> After highlighting the holdings of the Supreme Court in *Monsanto* and *Matsushita*, Judge Sprouse cited *Garment District* for the proposition that "[t]his Court has similarly been sensitive to *Monsanto's* requirement that there be clear evidence of concerted activity."<sup>17</sup> The North Carolina discounters first argued that *Monsanto* "does not apply to nonprice restriction claims because the Supreme Court intended the *Monsanto* conditions to serve as a breakwater against the harsh effects of the *per se* rule in price fixing cases."<sup>18</sup> Judge Sprouse rejected this contention, noting that he did "not discern such a limiting intent in the *Monsanto* opinion,"<sup>19</sup> and held that "the rules laid down in *Monsanto* and *Matsushita* are not restricted to price-fixing cases, and we thus conclude that something more than a bare complaint and a response to it is necessary to support an inference of a conspiracy in a nonprice restriction claim."<sup>20</sup>

Judge Sprouse also rejected the discounters' second argument that the facts alleged provided the "something more" required by *Monsanto*, reasoning that "[a]ny evidentiary fact may support a wide range of inferences, but the discrete inferences necessary under *Monsanto* to support a conspiracy theory simply do not flow . . . [from the evidence] that Pennsylvania House sought assurances from its dealers that they would comply with its new marketing policy."<sup>21</sup> In so ruling, the court expressly disagreed with recent opinions of the Eighth<sup>22</sup> and Eleventh Circuits,<sup>23</sup> holding that dealer termination and/or discipline, coupled with communications by a manufacturer to a complaining dealer to the effect that "the problem has been taken care of"<sup>24</sup> or "corrective action has been taken,"<sup>25</sup> satisfied *Monsanto*. Judge Sprouse explained that, "In our view, however, those decisions have in effect misconstrued 'tends to exclude the possibility' of independent conduct

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16. *Id.*

17. *Id.* at 804.

18. *Id.* at 805.

19. *Id.*

20. *Id.*

21. *Id.* at 806.

22. *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F.2d 323, 328 (8th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988).

23. *Helicopter Support Sys. v. Hughes Helicopter, Inc.*, 818 F.2d 1530, 1535-36 n.6 (11th Cir. 1987).

24. *McCabe's Furniture*, 798 F.2d at 328.

25. *Helicopter Support Sys.*, 818 F.2d at 1535.

. . . to mean something like 'arguably consistent with the possibility of a conspiracy.'"<sup>26</sup>

In his second opinion rejecting dealers' challenges of territorial restraints imposed by furniture manufacturers, Judge Sprouse, in *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Industries, Inc.*,<sup>27</sup> affirmed the district court's denial of a preliminary injunction to fifteen plaintiff North Carolina furniture retailers.<sup>28</sup> Plaintiffs sought injunctive relief from the imposition by Thomasville Furniture of a new sales policy limiting out of state sales similar to the Pennsylvania House policy at issue in *Parkway*.<sup>29</sup>

Employing the four-prong preliminary injunction test set forth in *Blackwelder Furniture Co. v. Seilig Manufacturing Co.*,<sup>30</sup> the Fourth Circuit denied injunctive relief, reasoning that the balance of harms weighed in favor of the manufacturer, that the retailers failed to establish a strong showing of probable success and that the evidence presented did not indicate that the public interest supported entry of the injunction.<sup>31</sup> Assessing the balance of harms in the case, the court pointed out that damage to plaintiffs' customer goodwill was limited because plaintiffs could continue to fill customer orders at their showrooms.<sup>32</sup> Also, plaintiffs obviously were not struggling for survival given that total sales of Thomasville's furniture, only some of which were eliminated by Thomasville's new policy, constituted only seventeen percent of plaintiffs' total sales.<sup>33</sup> Noting that a strong showing of probable success could counteract a weak showing as to the balance of harms, the court went on to assess the retailers' likelihood of success on the merits.<sup>34</sup> The Fourth Circuit recognized that because vertical non-price restraints are subject to analysis under the rule of reason,<sup>35</sup> a threshold consideration is whether the defendant had market

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26. 878 F.2d at 806 n.4 (quoting *Matsushita*, 475 U.S. at 588).

27. 889 F.2d 524 (4th Cir. 1989).

28. *Id.* at 530.

29. *Id.* at 525.

30. 550 F.2d 189, 196 (4th Cir. 1977).

31. *Murrow*, 889 F.2d at 527-28.

32. *Id.* at 526.

33. *Id.* at 527.

34. *Id.* at 527.

35. The Fourth Circuit quoted from *Continental T.V. v. GTE Sylvania*, 433 U.S. 36, 49 (1977), that under the rule of reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Id.*

power.<sup>36</sup> Finding that the retailers utterly failed to define a relevant product or geographic market, the court concluded that no showing of market power could be established. Adopting a version of the "market power screen" threshold test employed by several circuits,<sup>37</sup> the Fourth Circuit concluded its analysis, holding that "a finding of no market power precludes any need to further balance the competitive effects of a challenged restraint."<sup>38</sup>

Finally, in *Purity Products, Inc. v. Kohlberg, Kravis, Roberts & Co.*,<sup>39</sup> plaintiff, a distributor of food products in the Washington/Baltimore market, challenged its termination as an authorized wholesale distributor of Tropicana products.<sup>40</sup> The termination arose as a result of Purity's extraterritorial sales in the New York area in which Tropicana operated its own sales force.<sup>41</sup> Tropicana justified its policy of selling only to wholesalers who agree to geographically restrict their sales as a means of ensuring the quality of its perishable products and proper allocation of its promotional and advertising allowances.<sup>42</sup> In its *per curiam* opinion, the Fourth Circuit ruled that there was insufficient evidence of concerted activity to sustain the antitrust claims.<sup>43</sup>

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36. *Id.* at 528 (citing *Valley Liquors v. Renfield Importers*, 822 F.2d 656, 666 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987)); *accord* *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 483 F. Supp. 750, 761 (D. Md. 1980), *aff'd*, 683 F.2d 15 (4th Cir.), *cert. denied*, 454 U.S. 864 (1981). *Cf.* *Military Serv. Realty v. Realty Consultants*, 823 F.2d 8239, 832 (4th Cir. 1987).

37. Under this approach, "courts have narrowed the unlimited inquiry necessary under the rule of reason by requiring at the threshold that the plaintiff attacking a vertical non-price restraint prove the defendant's substantial power in a relevant market." *Assam Drug Co., Inc. v. Miller Brewing Co., Inc.*, 798 F.2d 311, 315-16 (8th Cir. 1986). *See, e.g.*, *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 221 (D.C. Cir. 1986); *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588, 596 (7th Cir. 1984); *Graphic Products Distributors, Inc. v. Itek Corp.*, 717 F.2d 1560, 1568-69 (11th Cir. 1983); *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1202 (6th Cir. 1982), *cert. denied, sub nom. Service Merchandise Co. v. Amana Refrigeration, Inc.*, 466 U.S. 931 (1984); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982); *Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292, 298 (5th Cir. 1981); *O.S.C. Corp. v. Apple Computer, Inc.*, 601 F.Supp. 1274, 1291 n.8 (C.D. Cal. 1985), *aff'd*, 792 F.2d 1464 (9th Cir. 1986).

38. *Id.* at 529; *See* *Satellite Television & Associated Resources v. Continental Cablevision of Virginia*, 714 F.2d 351, 355 (4th Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984).

39. No. 89-2322 (4th Cir. Sept. 11, 1989).

40. *Id.*

41. *Id.*, slip op. at 3.

42. *Id.*

43. *Id.* at 5.

## 2. Other Sherman Act Conspiracy Cases

Hospital staff privilege cases have fared little better with the Fourth Circuit than have dealer termination cases. The court summarily rejected appeals of two dismissals of hospital staff privilege cases in 1989. In a *per curiam* opinion, the Fourth Circuit affirmed Judge Glen Williams' dismissal of a black physician's antitrust conspiracy and civil rights claims against three southwest Virginia hospitals arising out of the termination of his hospital privileges.<sup>44</sup> In similar fashion, the court also summarily rejected a challenge to the district court's disposal of an Indian anesthesiologist's antitrust and civil rights claims on summary judgment.<sup>45</sup> While a panel of the court initially reversed the district court's dismissal, the full court granted appellee's petition for rehearing *en banc*, which is presently pending.<sup>46</sup>

In *Tempkin v. Lewis-Gale Hospital, Inc.*,<sup>47</sup> the United States District Court for the Western District of Virginia once again rejected the application of the antitrust laws to hospital staff issues, disposing of a physician's antitrust action against a hospital and multispecialty clinic, ruling that the amended complaint was insufficient to state an antitrust claim. In *Tempkin*, a psychiatrist and his nurse-practitioner wife brought a Sherman Act suit alleging a conspiracy to remove him as medical director of a hospital-based rehabilitation unit, and further alleging administrative delays and policies designed to prevent husband and wife from working together.<sup>48</sup> Judge Turk dismissed the section 1 claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure because plaintiffs failed to make any allegations regarding the hospital's

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44. *Thompson v. Wise Community Hosp.*, No. 89-2055 (4th Cir. Jan. 30, 1990). This district court opinion was discussed in Urbanski, *Antitrust Law: Annual Survey of Virginia Law*, 23 U. RICH. L. REV. 455, 466 (1989). *Thompson* is significant, of course, for Judge Williams' interpretation of the second prong of the *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980), jurisdictional test, requiring antitrust plaintiffs to prove that the substantial effect on interstate commerce flows from the antitrust violation, rather than the general business activity of the alleged antitrust violators.

45. *Purnima M. Shah v. Memorial Hosp.*, 1988-2 Trade Cas. (CCH) ¶ 2912 (4th Cir. May 22, 1989). The district court opinion was discussed in Urbanski, *supra* note 44, at 473-74. *Purnima M. Shah* is significant in the hospital staff privileges context because it authorized, pursuant to *Monsanto and Matsushita*, the grant of summary judgment based on a showing that the adverse credentialing activity was founded upon documented concerns regarding the practitioner's competency.

46. *Oksanen v. Page Memorial Hosp.*, 912 F.2d 73 (4th Cir. 1990).

47. 1989-2 Trade Cas. (CCH) ¶ 68,865 (W.D. Va. 1989).

48. *Id.*

market power or injury to competition.<sup>49</sup>

The Fourth Circuit addressed Sherman Act conspiracy issues in two other cases. In *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*,<sup>50</sup> competing commercial photographers appealed from the district court's entry of summary judgment denying their claims under section 1 of the Sherman Act alleging that two competing commercial photographers had conspired with local high schools to restrain trade in the high school yearbook and portrait photography markets. Plaintiffs alleged that the two defendant commercial photographers contracted with all twenty-two high schools in the Norfolk area to photograph students for school yearbooks.<sup>51</sup> Under the contracts, the photographers took student yearbook pictures and paid the schools a percentage of profits earned on optional student portrait photographs.<sup>52</sup> After the photographs were taken, both the schools and the photographer sent letters to students and parents encouraging portrait purchases and disclosing that a percentage of the profits would be returned to the school.<sup>53</sup> The marketing system of coordinating the yearbook pictures and portraits, coupled with the school's endorsement, gave the two contracting photographers a competitive advantage in selling portraits.<sup>54</sup>

The United States District Court for the Eastern District of Virginia determined that the plaintiffs had not met their burden under *Monsanto*, and consequently granted summary judgment on the section 1 conspiracy claim.<sup>55</sup> On appeal, the Fourth Court affirmed, rejecting the assertions that plaintiffs' *Monsanto* burden had been satisfied.<sup>56</sup> The district court held that the record did not support an inference of conspiracy between the schools and competing photographers to exclude plaintiffs from the competitive contract negotiation process because plaintiffs had only made a token effort to negotiate contracts with area high schools.<sup>57</sup> Further, it held that the schools' endorsement letters did not indicate a conspiracy, but rather were "readily explainable as legitimate acts

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49. *Id.* at 62,552.

50. 903 F.2d 988 (4th Cir. 1990).

51. *Id.* at 990.

52. *Id.*

53. *Id.*

54. *Id.*

55. 713 F. Supp. 937, 947-48 (E.D. Va. 1989).

56. 903 F.2d at 996.

57. *Id.* at 995.

consistent with their contractual responsibilities.”<sup>58</sup>

In *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*,<sup>59</sup> the only case in which an alleged antitrust conspiracy was found to exist, plaintiff billboard company sued its rival and the City of Columbia, South Carolina, alleging violations of sections 1 and 2 of the Sherman Act.<sup>60</sup> It claimed that city ordinances preventing Omni from constructing billboards in areas where Omni’s competitor, Columbia Outdoor Advertising (“COA”), already had billboards were passed as a result of a conspiracy between COA and the City of Columbia.<sup>61</sup>

Following a jury verdict for Omni, the district court granted defendant’s motion for a judgment notwithstanding the verdict on the grounds that *Parker v. Brown*<sup>62</sup> state action immunity barred the action against the city. The Fourth Circuit first overruled the district court, invoking the conspiracy exception,<sup>63</sup> and then proceeded to assess plaintiff’s evidence of a conspiracy, which included a history of ordinances that protected COA’s dominant position in the market and evidence that COA had provided free political billboards to the mayor and key city councilmen.<sup>64</sup> The court noted that while COA and the city advanced neutral, non-competitive reasons for the adoption of the ordinances,

[t]heir problem on appeal, however, is that the jury heard all of the evidence and was required to examine the evidence in its entirety, discarding whatever evidence it considered unreliable and giving weight to all it considered credible. In that important context, and when viewed in the light most favorable to Omni, the evidence tends “to exclude the possibility” that the City and COA acted independently. Rather, it tends to prove that the City and COA “had a conscious commitment to a common scheme” designed to stifle competition and preserve COA’s monopoly.<sup>65</sup>

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58. *Id.* (citing *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 102 (4th Cir. 1987)). The court noted that plaintiffs had apparently abandoned their exclusive dealing claim based on the contracts as “they neither explained to the district court how the contracts operated to restrain trade nor stressed this point on appeal.” *Id.*

59. 891 F.2d 1127 (4th Cir. 1989), *cert. granted*, 110 S. Ct. 3211 (June 18, 1990).

60. *Id.* at 1129.

61. *Id.* at 1130.

62. 317 U.S. 341 (1943).

63. *Omni*, 891 F.2d at 1132. The *Omni* court’s state action immunity analysis is discussed in Section II of the opinion.

64. *Id.* at 891 F.2d at 1132-37.

65. *Id.* at 1136 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)).

Certiori was granted in *Omni*. It is one of only two antitrust cases to be heard by the United States Supreme Court for the October Term, 1990.

B. *Sherman Act Section 2 Monopolization Issues*<sup>66</sup>

Monopolization issues were addressed by the Virginia federal courts on motions to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure which, by and large, was a successful defensive tactic. Perhaps motions to dismiss are successful in cases involving section 2 of the Sherman Act because of the myriad of elements developed in the case law that constitute each offense,<sup>67</sup> and because of the reluctance on the part of the courts to expend significant judicial resources on claims which simply make no economic sense.<sup>68</sup>

For example, the trial courts in *Official Airline Guides, Inc. v. American Society of Travel Agents, Inc.*,<sup>69</sup> *Tempkin v. Lewis-Gale Hospital, Inc.*,<sup>70</sup> *Spire Corp. v. International Telephone & Telegraph Corp.*<sup>71</sup> and *General Medical Corp. v. Wyngarden*<sup>72</sup> dismissed Sherman Act section 2 allegations for plaintiffs' failure to state a claim. In *Official Airline Guides*, Judge Bryan considered "implausible" plaintiff's claims that the relevant product market consisted only of the annual meeting of defendant trade associa-

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66. 15 U.S.C. § 2 (1988) provides: "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. . . ."

67. To prevail on a monopolization claim, plaintiff must allege that the defendants: (1) possess monopoly power in a particular relevant market; (2) have willfully acquired and/or maintained such power; and (3) that such acts have resulted in antitrust injury. *Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1347 (9th Cir. 1986); *Bhan v. NME Hospitals, Inc.*, 669 F. Supp. 998, 1022 (E.D. Cal. 1987). To assert a claim of attempted monopolization, plaintiff must allege: (1) that the defendants had a specific intent to monopolize a relevant market; and (2) that a dangerous probability of success in monopolization exists. *White Bag Co. v. Int'l Paper Co.*, 579 F.2d 1384, 1387 (4th Cir. 1974); *Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Virginia*, 714 F.2d 351, 358 (4th Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984). A claim for conspiracy to monopolize must allege: (1) a conspiracy; (2) overt acts in furtherance of this conspiracy; (3) a substantial effect on interstate commerce; and (4) a specific intent to monopolize. *See also Hospital Building Co. v. Trustees of Rex Hosp.*, 691 F.2d 678 (4th Cir. 1982), *cert. denied*, 464 U.S. 890, 904 (1983).

68. *See Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

69. No. 89-1114-A (E.D. Va. Sept. 8, 1989).

70. 1989-2 Trade Cas. (CCH) ¶ 68,865 (W.D. Va. 1989).

71. No. 88-0271-R (W.D. Va. Oct. 3, 1989) (mem. op.).

72. No. HA-98-3 (City of Richmond Cir. Ct. Apr. 20, 1990).

tion and dismissed the action.<sup>73</sup> In *Tempkin*, Judge Turk dismissed the section 2 claims on jurisdictional grounds, ruling that plaintiffs' amended complaint lacked allegations of a substantial effect on interstate commerce.<sup>74</sup> Noting that "[t]he burden of proof is upon plaintiff to allege sufficient facts which would establish an antitrust violation if proved,"<sup>75</sup> Judge Turk recognized that "plaintiffs' antitrust allegations are mere conclusions and a recitation of the statutory language and are, therefore, insufficient to withstand a motion to dismiss."<sup>76</sup> Similarly, in *Spire*, Judge Turk found plaintiffs' section 2 allegations to be "no more than a recitation of statutory language and are insufficient to withstand a motion to dismiss."<sup>77</sup> Judge Turk noted that plaintiff failed to allege facts supporting the conclusion that defendant possessed monopoly power, that it willfully acquired and/or maintained such power, and that the alleged violation resulted in antitrust injury.<sup>78</sup> Judge Turk went beyond these pleading deficiencies and held that plaintiff's allegations merely constituted vertical expansion<sup>79</sup> and breach of contract, but did not constitute a predatory act rising to the level of violating section 2 of the Sherman Act.<sup>80</sup> In *Wyngarden*,

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73. *Official Airline Guides*, No. 89-1114-A, slip op. at 19.

74. *Tempkin*, 1989-2 Trade Cas. (CCH) ¶ 68,865 at 62,552. Judge Turk held that the mere recitation that the antitrust violations have occurred "in and through interstate commerce" were conclusory allegations failing to state a claim. *Id.* at 62,550. Judge Turk held that plaintiffs' allegations amounted to "purely personal complaints regarding their individual inability to work where and how they prefer, their reduced income, and Dr. Tempkin's inability to obtain malpractice insurance at favorable rates." *Id.* The court noted further that there was no allegation that a significant number of Dr. Tempkin's patients came from outside of Virginia or that the alleged antitrust violation prevented Dr. Tempkin from treating them as he continued to practice psychiatry in Roanoke. *Id.* While plaintiff alleged that, as a result of the alleged anticompetitive conduct, patients were referred to another Roanoke practitioner, the court correctly noted that even if those allegations were true, there "would be no gain or loss in the number of patients affecting interstate commerce." *Id.*

75. *Id.* at 62,551 (citing *Dunn & Mavis, Inc. v. No-Car Driveway, Inc.*, 691 F.2d 241 (6th Cir. 1982)).

76. *Tempkin*, 1989-2 Trade Cas. (CCH) at 62,551 (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985)); *Reynolds Metals Co. v. Columbia Gas System, Inc.*, 669 F. Supp. 744 (E.D. Va. 1987).

77. *Spire*, No. 88-0271-R, mem. op. at 4.

78. *Id.*

79. *Id.* (citing *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2nd Cir. 1979)).

80. *Spire*, mem. op. at 5. As was the case in *Tempkin*, Judge Turk also dismissed the complaint in *Spire* for lack of antitrust standing. In each case, citing *Volasco Products Co. v. Lloyd A. Fry Roofing*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 370 U.S. 907 (1963), Judge Turk held that plaintiffs alleged injury was too far removed from any injury to competition. In *Tempkin*, for example, plaintiff psychiatrist alleged that the relevant product market was "comprehensive acute inpatient rehabilitation medicine" which required a hospital setting and which plaintiffs alone could not provide. *Tempkin*, 1989-2 Trade Cas.

the Circuit Court for the City of Richmond likewise sustained a demurrer to an attempted monopolization claim when the cross-bill made only a passing reference to the relevant market and contained no allegations as to the defendant's specific intent, market power or to a dangerous probability of success.<sup>81</sup>

In contrast with its strict approach in the cases described above, the Fourth Circuit in *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Industries, Inc.*,<sup>82</sup> reversed and remanded the lower court's dismissal of Sherman Act section 2 claims for the "unprecedented prolixity" of plaintiff's forty page complaint and plaintiff's failure to allege specific intent to monopolize.<sup>83</sup> Citing the "rigorous standard on dismissals" of antitrust cases imposed by the Supreme Court in *Hospital Building Co. v. Trustees of Rex Hospital*,<sup>84</sup> the Fourth Circuit held that the district court abused its

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(CCH) ¶ 68,865 at 62,551. Finding that plaintiffs were neither competitors nor consumers in the product market alleged, Judge Turk reasoned that standing was lacking. *Id.* In *Spire*, plaintiff was a supplier of photocathodes, a component part of the night vision optics manufactured by defendants. Defendant's rejection of plaintiff's photocathodes gave rise to the antitrust allegations; Spire contended that the rejection was designed to drive it from the market. Denying standing, Judge Turk held that "[t]he allegations in plaintiff's complaint establish that Spire, a supplier of component parts, is in a position too remote and too far removed from any injury to competition in ITT's market to recover damages resulting from any claimed violation of the antitrust laws in the night vision products market." *Spire*, mem. op. at 3.

81. *Wyngharden*, No. HA-98-3 at 1.

82. 889 F.2d 524 (4th Cir. 1989).

83. See *White Bag Co. v. International Paper Co.*, 579 F.2d 1384, 1387 (4th Cir. 1974).

84. 425 U.S. 738, 746 (1976). In *Rex*, the court stated:

We have held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." And in antitrust cases, where "the proof is largely in the hands of the alleged conspirators," dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.

*Id.* at 746 (citations omitted).

Of course, *Rex* was decided ten years before the summary judgment trilogy of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574 (1986), in the heyday of *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962), (holding that summary judgment should be used infrequently in antitrust cases). While, of course, the 1986 decisions are Rule 56 rather than Rule 12(b)(6) decisions, given the staggering cost of antitrust discovery, one questions whether the § 2 reversal inappropriately elevates procedure over substance by allowing plaintiffs to amend their § 2 claim following the court's finding that defendant Thomasville had no market power as it sold less than three percent of the wood furniture and one percent of the upholstered furniture in the relevant geographic market. Perhaps the reversal can be explained more readily by the district court's failure to provide any explanation for its denial of leave to amend. *Murrow*, 889 F.2d at 529-530. By contrast, Judge Turk in *Templin* denied plaintiffs an opportunity to amend their complaint a second time, finding that as the court lacked subject matter jurisdiction, a second amendment would be futile

discretion by refusing to allow plaintiff the opportunity to cure the pleading deficiencies by amendment.<sup>85</sup>

Finally, in *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*,<sup>86</sup> the Fourth Circuit affirmed the dismissal of plaintiff's allegation that two competing commercial photographers had conspired to monopolize the high school student portrait market in violation of section 2 of the Sherman Act. Plaintiff's evidence of a *per se* horizontal price fixing conspiracy between the two successful companies consisted of the presence of one company's price list in the files of the other and virtually identical prices.<sup>87</sup> While recognizing that *United States v. Container Corp.*<sup>88</sup> invalidated an agreement to exchange current price information upon request, the court held that:

The record before us does not support an inference that appellees agreed to share price information. The fact that the price information about one company is found in a competitor's files or an employee reports a competitor's pricing policy to his home office and the two companies charge similar prices for their products, without more, cannot support an inference that the two competitors entered into an agreement to share prices. To successfully raise an inference that two competitors agreed to share price information, a complainant must produce some evidence which tends to exclude the possibility that the competitors acted independently. Here, the record supports only the conclusion that there was no agreement, informal or otherwise, to exchange price information and Olan Mills obtained the price list without the knowledge or approval of Kinder-Care.<sup>89</sup>

The court summarily rejected plaintiff's allegation of *per se* horizontal market allocation, ruling that "neither in the district court nor on appeal did appellants offer any support for this allegation."<sup>90</sup>

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and inappropriate under *Foman v. Davis*, 371 U.S. 178, 182 (1962).

85. *Murrow*, 889 F.2d at 529-30.

86. 903 F.2d 988 (4th Cir. 1990).

87. *Id.* at 995.

88. 393 U.S. 333, 334-45 (1969).

89. *Stephen Jay Photography*, 903 F.2d at 996.

90. *Id.*

### C. Mergers and Acquisitions

In an unpublished opinion, the Fourth Circuit rejected a novel challenge by the Antitrust Division of the Department of Justice and affirmed the celebrated judgment of the United States District Court for the Western District of Virginia allowing two Roanoke hospitals to affiliate.<sup>91</sup> The Fourth Circuit's opinion was the first time that a circuit court of appeals considered the merger of non-profit hospitals.<sup>92</sup> Assessing the district court's opinion under the "clearly erroneous" standard, the Fourth Circuit affirmed both

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91. *United States v. Carilion Health Sys.*, 1989-2 Trade Cas. (CCH) ¶ 68,859 (4th Cir. 1989). The district court opinion is discussed in Urbanski, *supra* note 44, at 480-82.

92. The Seventh Circuit rejected the acquisition by a for-profit hospital chain of two hospitals in Chattanooga, Tennessee in *Hosp. Corp. of America v. Federal Trade Commission*, 807 F.2d 1381 (7th Cir. 1981). See also *In re American Medical Int'l, Inc.*, Trade Reg. Rep. (CCH) ¶ 22,170 (F.T.C. 1984) (where the FTC invalidated a California hospital acquisition).

In a companion case to *Carilion*, *United States v. Rockford Memorial Corp.*, 898 F.2d 1278 (7th Cir. 1990), the Seventh Circuit affirmed the district court's rejection of a non-profit hospital merger in Rockford, Illinois pursuant to § 7 of the Clayton Act.

In *Rockford*, the district court ruled that § 7 of the Clayton Act was applicable to non-profit entities and enjoined the proposed hospital merger. The Seventh Circuit expressed reluctance to address the question of the application of § 7 of the Clayton Act because it believed that the jurisdiction of the FTC (upon which the scope of § 7 is based) was properly delineated in § 11 of the Clayton Act rather than § 4 of the Clayton Act as contended by the government. Because the reference to the jurisdiction of the FTC under § 11 of the Clayton Act was not argued (and thus waived), the court expressly declined the invitation to rule on the applicability of § 7 to non-profit entities. While expressly declining to rule, however, the court expressed *in dicta* that it believed that § 7 of the Clayton Act applies to non-profit mergers by reference to § 11 of the Clayton Act. *Rockford*, 898 F.2d at 1281. The court nevertheless determined that there is no substantive difference between judging the lawfulness of a merger under § 1 of the Sherman Act and § 7 of the Clayton Act. *Id.* Finding that the district court correctly defined the relevant market, the court found an unreasonable restraint of trade resulting solely from "immense shares in a reasonably defined market" reviewed under the deferential "clearly erroneous" standard. *Id.* at 1285. The court concluded that:

The principles of civil procedure do not require that the plaintiff make an airtight case, only that his case satisfy some minimum threshold of persuasiveness and be better than the defendant's case. The government showed large market shares in a plausibly defined market in an industry more prone than many to collusion. The defendants responded with conjectures about the motives of nonprofits, and other will o' the wisps, that the district judge was free to reject, and did. The judge's findings establish a violation of section 1 under the standards of *Columbia Steel*, and the judgment must therefore be affirmed without our needing to decide whether the district judge was correct in holding that section 7 does reach mergers between nonprofit corporations.

*Id.* at 1286. The Seventh Circuit rejected the Fourth Circuit's decision in *Carilion* primarily due to its brevity and unpublished status and Judge Turk's opinion because of its ostensible inconsistency with its own opinion in *Hospital Corporation of America*. Differences between the *Rockford* and *Carilion* cases are discussed in Poff, *Nonprofit Hospital Mergers: A Study of the Roanoke and Rockford Decisions*, 6(9) Hosp. L. Newsl. 1 (1989).

Judge Turk's market definition<sup>93</sup> and his conclusion that under the rule of reason, the affiliation would not result in an unreasonable restraint of trade.<sup>94</sup> The court also upheld the district court's finding that the accumulation of a larger market share does not presumptively lead to anticompetitive effects in the relevant market.<sup>95</sup> In reaching this conclusion, the court cited substantial competitive pressure from the excess capacity of existing hospital competitors and outpatient alternatives and the substantial savings to be generated by the merger.<sup>96</sup> Prior to trial, Judge Turk had granted summary judgment, rejecting the government's claim under section 7 of the Clayton Act, and ruling that as nonprofit corporations are beyond the jurisdiction of the Federal Trade Commission ("FTC"), section 7 is inapplicable to mergers of nonstock, nonprofit entities.<sup>97</sup> While the government maintained that in *United States v. Philadelphia National Bank*,<sup>98</sup> the United States Supreme Court interpreted section 7 to apply to all mergers, the Fourth Circuit declined to address that issue as the government took the position, relying on *United States v. First National Bank of Lexington*,<sup>99</sup> that there was no analytical distinction between Sherman Act section 1 claims and Clayton Act section 7 claims.<sup>100</sup>

#### D. Price Discrimination

The United States Supreme Court has decided that not every functional discount<sup>101</sup> asserted in defense of a price discrimination

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93. See *infra* text accompanying notes 165-189 for analysis of market definition issues.

94. *Carilion*, 1989-2 Trade Cas. (CCH) ¶ 68,859.

95. *Id.* at 62,526.

96. *Id.*

97. Section 7 of the Clayton Act, 15 U.S.C. § 18, provides that "[n]o person shall acquire 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 one or more persons engaged in commerce . . ." where the effect may be substantially to lessen competition, or to tend to create a monopoly.

98. 374 U.S. 321 (1963).

99. 376 U.S. 665 (1964).

100. *Carilion*, 1989-2 Trade Cas. (CCH) ¶ 68,859 at 62,515 n.1.

101. A "functional discount" is a common business pricing practice. It has been defined by one court as follows:

A functional discount occurs where a buyer is permitted to purchase a product for a lower price than another buyer because of the different levels of distribution occupied by the buyers or because the buyers perform different functions in the seller's marketing system. The primary justification for the discount is to compensate the buyer for its cost of performing functions ordinarily performed by the seller.

*Hasbrouck v. Texaco, Inc.*, 634 F. Supp. 34, 36 (E.D. Wash. 1985), *aff'd*, 110 S. Ct. 2535 (1990).

claim is entitled to a judgment of legitimacy. In *Texaco, Inc. v. Hasbrouck*,<sup>102</sup> the Court addressed whether a supplier's functional discounts to a few of its distributors violated the Robinson-Patman Act.<sup>103</sup> Texaco sold gasoline directly to respondents and several other retailers while it granted substantial discounts to two distributors.<sup>104</sup> The two favored distributors did not themselves compete with respondents; however, they did pass along discounts to customers who did.<sup>105</sup> During the nine year period at issue, stations supplied by the two distributors prospered while respondents' sales suffered.<sup>106</sup>

Texaco first argued that a price differential between customers at different levels of distribution is not "discrimination in price" within the meaning of the Act.<sup>107</sup> Finding that to hold otherwise would create a blanket exemption for all functional discounts, the Court held that price discrimination "is merely a price difference" and the Act prohibits such price differences offered to wholesalers and retailers.<sup>108</sup>

Texaco also argued that, as a seller, it should not be held liable for the independent pricing decisions of its customers. The Court generally agreed with the premise of Texaco's argument, noting that the predicate of functional discounts is a price differential that recognizes and reimburses the distributor for actual marketing functions performed for the seller.<sup>109</sup> The Court held, however, that there simply was no substantial evidence indicating that the discounts to Texaco's distributors constituted reasonable reimbursement for the value to Texaco of their actual marketing functions.<sup>110</sup>

The Fourth Circuit's rejection of two price discrimination cases perhaps was overshadowed by the Greensboro, North Carolina, Robinson-Patman Act jury award of \$148.8 million in treble damages in *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.*<sup>111</sup> While staggering, the verdict was short lived, as the dis-

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102. 110 S. Ct. 2535.

103. *Id.* at 2530-40.

104. *Id.* at 2538.

105. *Id.* at 2539.

106. *Id.* at 2539-40.

107. *Id.* at 2540.

108. *Id.* at 2550-51.

109. *Id.* at 2545.

110. *Id.* at 2546.

111. No. C-84-617-D (M.D.N.C. Mar. 2, 1990).

strict court subsequently entered a judgment notwithstanding the verdict.<sup>112</sup>

In *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*,<sup>113</sup> plaintiff commercial photographers contended that the payments of profits by the contracting school photographer to the school in exchange for its status as official school photographer constituted "commercial bribery" in violation of section 2(c) of the Robinson-Patman Act.<sup>114</sup> In this case of first impression in the Fourth Circuit, the court recognized that the 1936 Robinson-Patman Act amendments to the Clayton Act<sup>115</sup> were enacted "to prohibit tactics used by large buyers or sellers to circumvent the discriminatory price provisions of the Clayton Act,"<sup>116</sup> such as commercial bribery and the use of "dummy brokerages" to whom discriminatory payments are made. Analyzing commercial bribery cases from four circuits and the legislative history of the amendments,<sup>117</sup> the Fourth Circuit recognized that only when the "seller-buyer line has been passed"<sup>118</sup> should courts impose section 2(c) liability.<sup>119</sup> Plaintiffs suggested that the seller-buyer line was crossed in this case because the schools acted for the students in contracting for yearbook photographs. Nevertheless, the court framed the issue as whether the schools acted as an intermediary for the student buyers for purposes of school portrait sales.<sup>120</sup> Finding that the schools had no authority to bind the students regarding portrait sales and that, as a result, no agency or employment relationship existed between the students and the school regarding such sales, the court found that the payments from the contracting official photographers to the schools did not cross the seller-buyer line, and did not

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112. *Id.* (Aug. 27, 1990), published at 59 Antitrust & Trade Reg. Rep. (BNA) 360 (Aug. 30, 1990).

113. 903 F.2d 988 (4th Cir. 1990).

114. 15 U.S.C. § 13(c) (1988).

115. 15 U.S.C. § 12.

116. *Stephen Jay Photography*, 903 F.2d at 992.

117. See *Environmental Tectonics v. W. S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1066 (3d Cir. 1988); *aff'd on other grounds*, 110 S. Ct. 701 (1990); *Grace v. E. J. Kozin Co.*, 538 F.2d 170 (7th Cir. 1976), *abrogation on other grounds recognized*, *Federal Paper Bd. Co. v. Amata*, 693 F. Supp. 1376 (D. Conn. 1988); *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966); *Fitch v. Kentucky-Tennessee Light & Power*, 136 F.2d 12 (6th Cir. 1943). *But see Seaboard Supply Co. v. Congoleum Corp.*, 770 F.2d 367, 371-72 (3d Cir. 1985) (questioning the proposition that Congress intended to include commercial bribery within the ambit of § 2(c)).

118. *Seaboard Supply Co.*, 770 F.2d at 372.

119. *Stephen Jay Photography*, 903 F.2d at 993.

120. *Id.*

result in liability under section 2(c).<sup>121</sup>

The Fourth Circuit also addressed the question of whether a tobacco wholesaler's revocation of a distributor's credit violated the Robinson-Patman Act. In *Thomas J. Kline, Inc. v. Lorillard, Inc.*,<sup>122</sup> the tobacco wholesaler, Lorillard, appealed from a jury verdict awarding plaintiff monetary and injunctive relief based on a breach of contract and a violation of the Robinson-Patman Act. The Fourth Circuit reversed, ruling that the suspension of credit may constitute a Robinson-Patman violation only in an extreme situation "of such magnitude or nature as to constitute a violation."<sup>123</sup> The Fourth Circuit held that except in such extreme circumstances, decisions involving the extension of credit, as a matter of law, do not constitute a Robinson-Patman violation because credit decisions involve a myriad of factors unique to each borrower<sup>124</sup> and

by their very nature, require constant discrimination between those who are a good credit risk and those who are not. To avoid Robinson-Patman problems in the extension of credit, a manufacturer must use the same standard of credit worthiness in dealing with all applicants for credit who are in competition with one another.<sup>125</sup>

Dissenting from Judge Chapman's panel opinion, Judge Sprouse reasoned that in light of the Supreme Court's decision in *Catalano, Inc. v. Target Sales, Inc.*,<sup>126</sup> the credit restrictions imposed by the cigarette supplier on its wholesalers must be viewed as being equivalent to a price increase.<sup>127</sup>

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121. *Id.* The court further rejected the contention that § 11-41(6) of the Code of Virginia compels the conclusion that the schools act as "purchasing agent" for the students because the portrait purchase is optional. The court also expressly disagreed with two opinions of the Virginia Attorney General interpreting a Virginia Antitrust Act provision similar to § 2(c) of the Robinson-Patman Act that the schools act as representatives of the students in connection with school portrait sales. *Id.*

122. 878 F.2d 791 (4th Cir. 1989).

123. *Id.* at 798 (quoting *Craig v. Sun Oil Company of Pennsylvania*, 515 F.2d 221, 224 (10th Cir. 1975), *cert. denied*, 429 U.S. 839 (1976)).

124. *Id.* at 797.

125. *Id.* at 799. Employing this standard, the court noted that the Robinson-Patman Act was not intended to result in the jury reviewing the reasonableness of a credit decision. "We are not concerned with the reasonableness of such decisions, but we are concerned with whether there was unjustified discrimination in extending or withholding credit to competing purchasers." *Id.*

126. 446 U.S. 643, 648 (1980).

127. *Lorillard*, 878 F.2d at 800-01 (Sprouse J., dissenting). The panel's opinion distin-

### E. Group Boycotts

The most important group boycott case this past year was the decision of the United States Supreme Court in *FTC v. Superior Court Trial Lawyers Association* ("SCTLA").<sup>128</sup> There the Court addressed whether a group of lawyers who refused to represent indigent criminal defendants in order to force an increase in their compensation violated section 5 of the Federal Trade Commission Act. One hundred District of Columbia public defenders in the SCTLA agreed to refuse new appointments under the District's Criminal Justice Act until they received a "substantial" increase in the hourly rate paid them by the city.<sup>129</sup> Through their group boycott, they were successful in forcing City Council to pass a bill increasing their rates between five dollars to fifteen dollars per hour.<sup>130</sup> The FTC subsequently filed a complaint against them alleging unfair methods of competition and eventually entered a cease-and-desist order.<sup>131</sup>

The Court of Appeals for the District of Columbia vacated the FTC order and remanded for a determination of whether the SCTLA possessed "significant market power."<sup>132</sup> While acknowledging that the boycott represented a classic restraint of trade in violation of section 1 of the Sherman Act, it concluded that the boycott contained an element of expression warranting first amendment protection.<sup>133</sup> Since the lawyers intended to convey a political message, the court of appeals required the FTC, under *United States v. O'Brien*,<sup>134</sup> to prove, rather than merely presume under the *per se* rule, that the SCTLA had market power.<sup>135</sup> The court stated that the antitrust laws should be applied "prudently and with sensitivity," with a special solicitude for the lawyers' first amendment rights.<sup>136</sup>

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guished *Catalano*, in which beer distributors agreed to eliminate short-term trade credit to retailers, as a horizontal price fixing conspiracy, unrelated to the unilateral conduct undertaken by Lorillard. *Id.* at 795-97.

128. 1990-1 Trade Cas. (CCH) ¶ 68,895 (U.S. Jan. 22, 1990).

129. *Id.* at 62,808.

130. *Id.* at 62,809.

131. *Id.* 62,809-10.

132. *Id.* 62,810.

133. *Id.*

134. 391 U.S. 367 (1968) (holding that restrictions on political expression are only justified when they are no greater than is essential to an important government interest).

135. *SCTLA*, 1990-1 Trade Cas. (CCH) ¶ 68,895 at 62,810.

136. *Id.* at 62,813.

The Supreme Court accepted the case in light of the court of appeals' novel holding. The Supreme Court began its analysis by noting that it was not its task "to pass upon the social utility or political wisdom of price-fixing agreements."<sup>137</sup> As in *National Society of Professional Engineers v. United States*,<sup>138</sup> where the Court had condemned a boycott despite the fact that it sought a "reasonable" price, the SCTLA's "naked restraint" on price and output was no less unlawful in light of the social justifications proffered by it.<sup>139</sup>

The Court then disposed of a series of the SCTLA's arguments. First, it held that the doctrine set out in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,<sup>140</sup> did not apply to the case.<sup>141</sup> Under that doctrine certain concerted efforts genuinely intended to influence governmental action are exempt from the antitrust laws.<sup>142</sup> The Court distinguished *Noerr* from the instant case on the grounds that, in *Noerr*, the alleged restraint was the intended consequence of the action whereas in this case the boycott was the means by which the SCTLA sought to obtain favorable legislation.<sup>143</sup>

The lawyers association's next argument was that if its conduct was otherwise prohibited by the antitrust laws it was entitled to protection by the first amendment as recognized in *NAACP v. Claiborne Hardware Co.*<sup>144</sup> The Court was unpersuaded, noting that the boycott involved in *Claiborne Hardware* was asserted by the participants to gain no special advantage for themselves except equal application of their constitutional rights, whereas the immediate objective of the lawyers' boycott was to gain an economic advantage, however altruistic their motives.<sup>145</sup>

Finally, the Court rejected the holding of the court of appeals that *per se* antitrust analysis is inapplicable to boycotts having an

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137. *Id.* at 62,810.

138. 435 U.S. 679 (1978).

139. SCTLA, 1990-1 Trade Cas. (CCH) ¶ 68,895 at 62,810.

140. 365 U.S. 127 (1961). For a discussion of the *Noerr* doctrine, see *infra* note 200 and accompanying text.

141. SCTLA, 1990-1 Trade Cas. (CCH) ¶ 68,895 at 62811-12.

142. *Id.* at 62,812.

143. *Id.*

144. 458 U.S. 886 (1982). In *Claiborne Hardware*, the Court found that politically motivated black citizens were entitled to vindicate their constitutional rights by non-violently boycotting white merchants without fear of the antitrust laws.

145. SCTLA, 1990-1 Trade Cas. (CCH) ¶ 68,895, at 62,812.

expressive component.<sup>146</sup> The underlying premise of the holding was flawed in that every boycott has an expressive component, and the antitrust laws require condemnation of price fixing and boycotts without proof of market power.<sup>147</sup>

Justices Marshall, Brennan and Blackmun dissented to the Court's holding that the *per se* rule was applicable to this boycott.<sup>148</sup> They noted that the success of this expressive boycott was more likely due to political persuasion than economic coercion, especially in light of the fact that the lawyers could have been forced to work for free as officers of the court.<sup>149</sup> The dissenters believed that the rule of reason should have been applied to the boycott given the expressive component involved.<sup>150</sup>

Two district court decisions rejected group boycott claims. In *Zavaletta v. American Bar Association*,<sup>151</sup> the United States District Court in the Eastern District of Virginia granted summary judgment for the American Bar Association ("ABA"), rejecting the claims of law students at CBN University Law School that the ABA's failure to accredit their school constituted an unlawful group boycott. The court found that the ABA's accreditation merely constituted an expression of the ABA's educational opinion about the quality of the school's program and such opinion placed no restrictions on hiring, referrals or otherwise dealing with graduates of unaccredited schools.<sup>152</sup>

In *Official Airline Guides, Inc. v. American Society of Travel Agents, Inc.*,<sup>153</sup> the Eastern District of Virginia orally rejected plaintiff's contention that the exclusion of its advertisement from the video monitors at a travel agents' association annual meeting constituted a group boycott violating section 1 of the Sherman Act. Implicit in the court's ruling was a rejection of plaintiff's inconsistent allegations that the trade association was a dominant competitor denying access to a unique annual event akin to an essential facility<sup>154</sup> and at the same time, a group of independent economic

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146. *Id.*

147. *Id.* at 62,813.

148. *Id.* at 62, 816 (Marshall, J., Brennan, J., and Blackmun, J. dissenting).

149. *Id.* at 62,816-18.

150. *Id.* at 62,816.

151. 1989-2 Trade Cas. (CCH) ¶ 68,671 (E.D. Va. 1989).

152. *Id.* at 61,538.

153. No. 89-1114-A (E.D. Va. Sept. 8, 1989).

154. "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

entities capable of conspiring with one another.<sup>155</sup>

### F. *Tying Arrangements*

The difficulty of prevailing on a tying claim is emphasized by the ease with which the federal courts dispose of them. The Fourth Circuit affirmed the rejection of two tying claims in *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*<sup>156</sup> and *Zeremski v. Keystone Title Association, Inc.*<sup>157</sup> In *Stephen Jay Photography*, the court ruled that even assuming that yearbook photographs and school portraits are separate products and that the official school photographer possessed market power in the tying product market by virtue of its exclusive contract with the school,<sup>158</sup> no coercion existed to force the unlawful purchase of the tied portrait product.<sup>159</sup> In *Zeremski*, the Fourth Circuit held that plaintiffs simply failed to establish that the sale of one product was conditioned upon the purchase of another, specifically, in this case, that the sale of houses in a particular development was conditioned upon the use of certain settlement attorneys.<sup>160</sup> In similar fashion, Judge Turk disposed of tying allegations in *Tempkin v. Lewis-Gale Hospital, Inc.*,<sup>161</sup> holding that "[p]laintiffs fail to allege a sale by defendants to Dr. Tempkin of two different, tied products."<sup>162</sup>

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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).

155. *Official Airline Guides*, No. 89-1114-A, slip op. at 4.

156. 903 F.2d 988.

157. No. 88-2569 (4th Cir. Aug. 30, 1989).

158. *Stephen Jay Photography*, 903 F.2d at 991.

159. Citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984), and *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 605 (1953), for the coercion requirement, the court ruled "Here, unlike the typical tying arrangement, appellees did not condition the taking of yearbook photographs on the purchase of portraits. It was abundantly clear from the solicitation letters that the parents and students were under no obligation to purchase portraits. Because the students had the option to purchase portraits and their decision whether to purchase had no effect on their yearbook photographs, the relationship here did not constitute a tying arrangement." *Stephen Jay Photography*, 903 F.2d at 991.

160. *Zeremski*, No. 88-2569, slip op. at 5.

161. 1989-2 Trade Cas. (CCH) ¶ 68,865 (W.D. Va. 1989).

162. *Id.* at 62,551-52 (citing *Drs. Steuer and Latham v. Nat'l Medical Enter., Inc.*, 672 F. Supp. 1489 (D. S.C. 1987), *aff'd*, No. 87-3753 (4th Cir. May 10, 1988) (in opposition to Dr. Tempkin's suggestion that all hospital exclusive contracts are necessarily tying arrangements). *Nat'l Medical Enter., Inc.* is discussed in Urbanski, *supra* note 44, at 475-76.

On the other hand, in *Faulkner Advertising Association, Inc. v. Nissan Motor Corp.*,<sup>163</sup> the Fourth Circuit found allegations of a coerced use of a Nissan advertising program tied to the sale of Nissan automobiles sufficient to state a tying claim. Judge Hall dissented, reasoning that only one product, automobiles, was sold. Citing *Jefferson Parish Hospital District No. 2 v. Hyde*,<sup>164</sup> Judge Hall also found the new advertising program to be pro rather than anticompetitive, thus not stating a Sherman Act claim.

### G. Market Definition Issues

A significant element of proof in any Sherman Act claim is the relevant market allegedly restrained or monopolized.<sup>165</sup> Over the past year, several such claims have been rejected by courts in the Fourth Circuit because of plaintiffs' failure to adequately demonstrate this element. For example, in *Official Airline Guides, Inc. v. American Society of Travel Agents, Inc.*,<sup>166</sup> Judge Bryan rejected as implausible plaintiff's contention that the annual meeting of defendant trade association could constitute a relevant market.<sup>167</sup> Judge Bryan's analysis is consistent with the leading Fourth Circuit case on market definition, *Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Virginia, Inc.*,<sup>168</sup> where the Fourth Circuit held that pay television services to apartment dwellers did not constitute an appropriate product market.

The Fourth Circuit similarly rejected the furniture retailers' attempt to craft a narrow market in *Murrow Furniture Gallery, Inc. v. Thomasville Furniture Industries, Inc.*<sup>169</sup> In this case, the retailers argued for a product market consisting of "better branded furniture" and argued that quality, price, and reputation of such furniture controlled the market definition.<sup>170</sup> The Fourth Circuit

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163. 905 F.2d 769 (4th Cir. 1990).

164. 466 U.S. 2, 21 (1984).

165. *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 Associated Resources v. Continental Cablevision of Virginia*, 714 F.2d 351, 357 (4th Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984).

166. No. 89-1114-A. (E.D. Va. Sept. 8, 1989).

167. *Id.*, slip op. at 19. Plaintiffs did not assert an essential facilities argument as one might expect, perhaps because of the reality that it could get its advertising message across to the trade association membership in other manners. *Id.* at 10-11.

168. 714 F.2d 351, 355-56 (4th Cir. 1983).

169. 889 F.2d 524 (4th Cir. 1989).

170. *Id.* at 528.

rejected this assertion, holding that these considerations are "economically meaningless."<sup>171</sup> The court articulated that the plaintiffs did not meet their burden of showing that their market of "better branded furniture" is not reasonably interchangeable with other furniture lines.<sup>172</sup> The court also rejected plaintiffs' argument that standard metropolitan statistical areas used by defendant furniture manufacturer for market research should be regarded as individual geographic markets.<sup>173</sup> Instead, the court accepted defendant's argument for a national market in which defendant sold less than three percent of all wooden furniture and less than one percent of all upholstered furniture.<sup>174</sup>

In *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*,<sup>175</sup> defendant Columbia Outdoor Advertising ("COA") argued on appeal that the district court's jury instruction identifying the outdoor advertising industry as the relevant product market constituted an inappropriate directed verdict on that issue. The Fourth Circuit affirmed, applying the reasonable interchangeability and cross-elasticity of demand test set forth in *United States v. E.I. duPont de Nemours & Co.*<sup>176</sup> Assessing the evidence, the Fourth Circuit found that defendant COA "offered no evidence concerning substantiability, cross-elasticity, or other facts which might be relevant to product market determination other than the bald statements concerning general competition."<sup>177</sup> The court relied upon *NCAA v. Board of Regents*<sup>178</sup> for the Supreme Court's analysis in determining that intercollegiate football telecasts constitute a discrete product market, and upon *Times-Picayune Pub-*

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171. *Id.*

172. *Id.*

173. *Id.* at 528-29.

174. *Id.*

175. 891 F.2d 1127 (4th Cir. 1989).

176. 353 U.S. 586 (1956). While applying the *duPont* test, Judge Sprouse, writing for the panel, expressed that the result would have been the same under the "submarket concept," enunciated in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). *Omni*, 891 F.2d at 1140 n.6. *Cf. Satellite Television*, 714 F.2d at 355 n.5 (4th Cir. 1983). In *Satellite Television*, the Fourth Circuit rejected the use of submarkets, reasoning that:

[t]he use of the term "submarket" is to be avoided; it adds only confusion to an already imprecise and complex endeavor. For antitrust purposes a product group or geographic area either meets the listed criteria, in which case it is a relevant market; or it does not, in which case it is irrelevant for purposes of analysis. No fiddling with nomenclature will change the analysis or result.

*Id.*

177. *Omni*, 891 F.2d at 1141.

178. 468 U.S. 85, 111-12 (1984).

lishing Co. v. United States<sup>179</sup> for the Supreme Court's recognition that newspapers, as opposed to other mass media, may constitute a separate product market.<sup>180</sup> The Fourth Circuit then approved the district court's outdoor advertising product market instruction because the only evidence in the record indicated that billboards in Columbia are not substitutable with other media and that there is little, if any, cross-elasticity of demand between billboards and other media.<sup>181</sup>

In *United States v. Carilion Health System*,<sup>182</sup> the Fourth Circuit upheld the district court's findings of fact, reached after an extensive trial on the merits, regarding the relevant product and geographic markets implicated in the Antitrust Division's challenge to the proposed affiliation of two Roanoke hospitals.<sup>183</sup> As to the relevant product market for merger purposes, the Fourth Circuit recognized at the outset that "[t]he hospitals consist of a cluster of product markets, each with a different degree of substitutability between inpatient and outpatient services."<sup>184</sup> The court then stated that to assess whether outpatient services should be included in the relevant product market, an analysis of each particular service at issue must be undertaken. "Given that the district court was evaluating the reasonableness of the merger as a whole, and not just for a single type of service, the court had to determine whether the number of services subject to competition from outpatient facilities was significant relative to the entire hospital."<sup>185</sup> Finding that the district court engaged in this analysis, albeit in shorthand fashion, the court of appeals found the district

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179. 345 U.S. 594 (1953).

180. *Id.* at 611-12.

181. *Omni*, 891 F.2d at 1141. It is arguable that the Fourth Circuit's product market determination in *Omni* is inconsistent with its earlier opinion in *Satellite Television* in that while *Satellite Television* appropriately places the burden of proving a product market on the antitrust plaintiff, *Omni* calls for rebuttal market evidence from the antitrust defendant. The cases may be rationalized procedurally, however, because *Satellite Television* was a summary judgment case and *Omni* was an appeal of the grant of a motion for judgment notwithstanding the verdict.

182. 1989-2 Trade Cas. (CCH) ¶ 68,859 (4th Cir. 1989).

183. Rejecting the relevant markets advocated by the Antitrust Division, the district court found that the relevant product market included both inpatient and certain outpatient hospital services and that the relevant geographic market was not limited to the Roanoke Valley but encompassed a wide expanse of southwestern Virginia from which one of the affiliating hospitals drew at least 100 patients per year. *Id.*; see Urbanski, *supra* note 44, at 468-69 (1989).

184. *Carilion*, 1989-2 Trade Cas. (CCH) ¶ 68,859 at 62,515.

185. *Id.*

court's factual determination as to the product market not clearly erroneous.<sup>186</sup>

As to the relevant geographic market, the court noted that the "geographic market should include all locations to which a customer would travel to obtain the product if the seller were to raise the price."<sup>187</sup> The government objected to the district court's geographic market because it argued that patients from outlying areas would not switch from the Roanoke Valley hospitals to those closer to home because of patients' perceptions that the Roanoke hospitals are higher quality facilities.<sup>188</sup> The Fourth Circuit demurred, ruling that "[w]hile the government's argument has some force, the record does contain evidence that the hospitals compete within the area defined by the district court, and we cannot say this finding is clearly erroneous."<sup>189</sup>

#### H. Antitrust Immunity Issues

The United States Supreme Court issued one opinion this past year related to the antitrust immunity field. In *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp. International*,<sup>190</sup> the Court

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186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 62,516. In contrast, the Seventh Circuit in *United States v. Rockford Memorial Corp.*, 898 F.2d 1278 (7th Cir. 1990), upheld a much narrower product and geographic market. The court in *Rockford* excluded services rendered by non-hospital providers, reasoning that the existence of substitutes for certain services places no check on the prices of services for which the acute care hospital has no competitors. As regards the geographic market, the court focused exclusively on where Rockford residents turn for hospital services, considering such services local.

People want to be hospitalized near their families and homes, in hospitals in which their own—local—doctors have hospital privileges. There are good hospitals in Rockford, and they succeed in attracting most of the hospital patients not only from Rockford itself but from the surrounding area delineated by the district judge.

*Rockford*, 898 F.2d 1278, 1285 (7th Cir. 1990). The Seventh Circuit rejected the geographic market advanced by the hospitals consisting of the service area from which the hospitals draw patients, considering it "ridiculous . . . that Rockford residents, or third-party payors, will be searching out small, obscure hospitals in remote rural areas if the prices charged by the hospitals in Rockford are above competitive levels." *Id.* While not on all fours with the Rockford district court's geographic market analysis, the Seventh Circuit accepted it under the deferential clearly erroneous standard. While the circuit court opinions in the Roanoke and Rockford affiliations appear at odds, one must consider the deferential nature of each appellate court's review of the findings of facts facing it and the evidence tendered at the trial of each case. See Poff, *Nonprofit Hospital Mergers: A Study of the Roanoke and Rockford Decisions*, 6(9) Hosp. L. Newsl. 1 (1989).

190. 110 S. Ct. 701 (1990).

ruled that the act of state doctrine is not applicable where the cause of action merely requires imputing foreign officials an unlawful motivation in performance of an official sovereign act. The doctrine is only applicable where the cause of action questions the validity of such an act.<sup>191</sup> The case arose because Kirkpatrick obtained a contract from the Republic of Nigeria by bribing certain Nigerian public officials.<sup>192</sup> Environmental Tectonics, an unsuccessful bidder, learned of the bribes and brought this action under, *inter alia*, the Robinson-Patman Act.<sup>193</sup> Kirkpatrick moved to dismiss on the grounds that the action was barred by the act of state doctrine.<sup>194</sup>

Affirming the Third Circuit, the Court found the factual predicate for application of the doctrine non-existent.<sup>195</sup> In all previous cases applying the doctrine, "the relief sought or the defense interposed would have required a [U.S.] court . . . to declare invalid the official act of a foreign sovereign performed within its own territory."<sup>196</sup> The Court concluded that "[t]he act of state doctrine does not establish an exception for cases . . . that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid."<sup>197</sup> Since bribery of public officials is illegal in Nigeria, the validity of no foreign act was at issue in this case, so the doctrine was therefore held inapplicable.

Continuing a recurring theme of Fourth Circuit antitrust jurisprudence, Virginia state and federal courts addressed antitrust immunity issues under the state action doctrine,<sup>198</sup> the Local Govern-

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191. *Id.* at 707.

192. *Id.* at 703.

193. *Id.*

194. *Id.*

195. *Id.* at 706.

196. *Id.* at 704.

197. *Id.* at 707.

198. The doctrine of state action immunity was first enunciated by the Supreme Court in *Parker v. Brown*, 317 U.S. 341, 351 (1943), 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 Court's reasoning extends to suits against private parties." *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 (1985). The circumstances under which the state action doctrine immunizes private conduct were refined in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). 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;' second, the policy must be 'actively supervised' by the state itself." *Id.* at 105 (citing

ment Antitrust Act<sup>199</sup> and the *Noerr-Pennington* doctrine.<sup>200</sup>

After reciting that "[t]o avail itself of the *Parker* exemption then, a municipality must show only that it is adhering to a state

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*City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978)). See also *Southern Motor Carriers*, 471 U.S. 48 (1985); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). The Court in *Southern Motor Carriers* 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.

*Southern Motor Carriers*, 471 U.S. at 64 (citation omitted).

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.

199. The Local Government Antitrust Act of 1984 ("LGAA"), 15 U.S.C. §§ 34-36 (Supp. 1984), was enacted to clarify antitrust immunity of local governments. 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 (1984), 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, cost or attorney's fees may be recovered under Section 4, 4A of FCV 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 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 State possesses 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 *Midcal*, 445 U.S. at 105.

200. The *Noerr-Pennington* doctrine exempts efforts to petition the government from antitrust liability. 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). 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." *Pennington*, 381 U.S. at 670. *Noerr-Pennington* immunity has been expanded beyond efforts to influence legislation to include activity directed at courts and administrative agencies.

policy to replace competition with regulation,"<sup>201</sup> the Fourth Circuit in *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*<sup>202</sup> determined that the South Carolina legislature envisioned the local regulation of billboards under general zoning statutes,<sup>203</sup> and noting its prior "lenient" treatment of the question of legislative contemplation of an anticompetitive effort,<sup>204</sup> held that the authority to regulate billboards makes an anticompetitive effort of regulation substantially foreseeable.<sup>205</sup> The court nevertheless refused to apply state action immunity, holding that the jury verdict against the city compels the application of the conspiracy exception to *Parker v. Brown*.<sup>206</sup> Citing *Westborough Mall, Inc. v. City of Cape Girardeau*<sup>207</sup> and *Whitworth v. Perkins*,<sup>208</sup> the Fourth Circuit held that *Parker* immunity was not available in cases where the conduct "relates not to the purpose of attaining governmental action but solely to forcing competitors from a particular market."<sup>209</sup> As the jury returned a verdict against the city, the appellate court assumed economic improprieties.<sup>210</sup>

201. *Omni*, 891 F.2d at 1131.

202. 891 F.2d 1127 (4th Cir. 1989).

203. *Id.* at 1132. *Cf.* *Pendleton Constr. Corp. v. Rockbridge County*, 652 F. Supp. 312 (W.D. Va. 1987), *aff'd on its reasoning*, 837 F.2d 178 (4th Cir. 1988); *Racetrac Petroleum, Inc. v. Prince George's County*, 601 F. Supp. 892, 906-10 (D. Md. 1985), *aff'd*, 786 F.2d 202, 318 (4th Cir. 1986).

204. *Omni*, 891 F.2d at 1132 (citing *Coastal Neuro-Psychiatric Ass'n v. Onslow Memorial Hosp.*, 795 F.2d 340 (4th Cir. 1986)). In *dicta*, the Fourth Circuit in *Omni* opined that local restrictions on hospital staff privileges pursuant to state statute satisfy the *Midcal* "clearly articulated and affirmatively expressed as state policy" test. *Id.*

205. *Id.* at 1132. The *Omni* court applied *Hallie* to its facts in a two-step manner, first requiring the existence of a "clearly articulated and affirmatively expressed state policy" to displace competition with regulation and the second that said policy "clearly contemplates" that the municipality may effect anticompetitive conduct. *Id.* As the Fourth Circuit noted in *Coastal*, 795 F.2d at 342, "*Town of Hallie* requires that local anticompetitive conduct be 'a foreseeable result' of the state enactment for antitrust exemption to apply."

206. In *Parker*, the Court held that "[w]e have no questions [in this case] of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade." 317 U.S. at 351-52.

207. 693 F.2d 733 (8th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983).

208. 559 F.2d 378 (5th Cir. 1977), *vacated*, 435 U.S. 992, *aff'd on rehearing*, 576 F.2d 697 (1978).

209. *Omni*, 891 F.2d at 1134.

210. The Fourth Circuit explained:

In view of the overriding economic thrust of Sherman Act concerns, it is tempting to consider all political activity as beyond the Act's purpose or reach. Certainly, Congress did not contemplate imposing economic oversight of political abuses *per se*. Yet the language of the Sherman Act is broad enough to include the proscription of actions where politicians or political entities are involved as conspirators. Moreover, we are constrained by established interpretation from excluding from Sherman Act consideration all conspiracies which have some political coloration. If it were otherwise,

Judge Wilkins dissented, stating that the district court's conspiracy instruction was too general, leaving the jury to conclude that lobbying alone was a sufficient basis upon which to find a conspiracy.<sup>211</sup> Judge Wilkins also disagreed with the majority's rejection of *Parker* immunity based upon principles of federalism and a concern over a potential chilling effect on public service.<sup>212</sup>

In summary fashion, the Fourth Circuit also addressed *Town of Hallie v. City of Eau Claire*<sup>213</sup> municipality immunity in *Pinehurst Enterprises, Inc. v. Town of Southern Pines*.<sup>214</sup> In *Pinehurst*, the North Carolina district court held that *Hallie* immunized a municipality's use of its statutorily prescribed zoning authority to regulate sewage services.<sup>215</sup> There public utility companies sought the right to service a golf club development located within the defendant municipality.<sup>216</sup> The court held that *Hallie* immunized the municipality's action in excluding the public utilities from rendering their competitive services.<sup>217</sup> In its opinion, the district court rec-

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the Supreme Court in post-*Parker* decisions would have given municipalities the same blanket protection it had awarded states in *Parker*. Even so, we must be very careful in these cases to assure that any political abuse has so completely metamorphosed into an economic abuse that it properly can be regulated by application of Sherman Act legal-economic procedures. In view of the jury verdict, we think that is what is involved here.

*Id.*

211. Judge Wilkins also deemed a remand inappropriate, finding that even if a more definite charge had been given, the record evidence was insufficient to support a conspiracy verdict against the city.

At no time did COA employees threaten anyone or use otherwise coercive tactics. No one engaged in deception or misrepresentation to secure passage of the billboard ordinances. There was no evidence of any illegal conduct such as bribery, coercion, violence, kickbacks, or the like. Neither the Mayor nor the City Council members stood to gain any personal financial advantage by passing the billboard ordinances nor was there any evidence of any other selfish or otherwise corrupt motive. Without some evidence of activity such as this, I would affirm the district court and hold that antitrust immunity attached.

*Id.* at 1146 (Wilkins, J., dissenting).

212. Judge Wilkins cautioned:

I fear that the holding of the majority may invite heretofore unauthorized federal antitrust lawsuits against municipalities. Losers in political battles will be able to achieve all or some of their objectives by threatening antitrust litigation and, in the process, discourage public officials from performing their public duties while they contend with antitrust allegations.

*Id.* at 1150.

213. 471 U.S. 34 (1985).

214. 1989-2 Trade Cas. (CCH) ¶ 68,784 (4th Cir. 1989), *aff'g* 1988-2 Trade Cas. (CCH) ¶ 68,206 (M.D.N.C. 1988).

215. 1988-2 Trade Cas. at (CCH) 59,355.

216. *Id.*

217. *Id.*

ognized that the Fourth Circuit has applied state action immunity broadly to exercise of zoning power by local governments.<sup>218</sup>

In similar fashion, the United States District Court for the Eastern District of Virginia, in *Airport Properties Ltd. Partnership v. Capital Region Airport Commission*,<sup>219</sup> in which the plaintiffs claimed a wrongful denial of an easement to allow easier access to the Richmond airport, granted defendant airport commission's motion for summary judgement on state action grounds, reasoning that the state legislation met *Hallie's* clear articulation test. The court also dismissed claims brought under the Virginia Antitrust Act<sup>220</sup> based on state action, citing *Reasor v. City of Norfolk*,<sup>221</sup> and the statutory immunity contained in the Act.<sup>222</sup>

The Fourth Circuit in *Omni* also invoked the "sham exception" to deny *Noerr-Pennington* immunity to the city.<sup>223</sup> Citing *Hospital*

218. *Id.* (citing *Pendleton Constr. Corp. v. Rockbridge County*, 837 F.2d 178 (4th cir. 1988), *aff'g per curiam* 652 F. Supp. 312 (W.D. Va. 1987)).

219. No. 89-00393-R (E.D. Va. Dec. 18, 1989).

220. VA. CODE ANN. §§ 59.1-9.1 to -9.18 (Rep. Vol. 1987 & Cum. Supp. 1990).

221. 606 F. Supp. 788, 796 (E.D. Va. 1984) (*Parker* immunity foreclosed liability under the state act).

222. The Virginia Antitrust Act by its terms immunizes certain anticompetitive conduct: Nothing contained in this chapter shall make unlawful conduct that is authorized, regulated, or approved (1) by a statute of this Commonwealth or (2) by an administrative or constitutionally established agency of this Commonwealth or of the United States having jurisdiction of the subject matter and having authority to consider the anticompetitive effect, if any, of such conduct.

VA. CODE ANN. § 59.1-9.4(b) (Repl. Vol. 1987).

223. *Omni*, 891 F.2d at 1138-39. 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." *Noerr*, 365 U.S. 127, at 144.

In *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1971), 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. But, 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.

*Building Co. v. Trustees of Rex Hospital*<sup>224</sup> for the proposition that "[a]ctions taken to discourage and actually prevent competitors from meaningful access to the processes of administrative agencies fall within the sham exception,"<sup>225</sup> the Fourth Circuit found that the record supported the jury's conclusion that COA's interaction with city officials constitute nothing more than "an attempt to 'harass and deter Omni.'"<sup>226</sup> Again, Judge Wilkins dissented, reasoning that *Rex II* is distinguishable from the facts in *Omni* because it involved "baseless appeals of the administrative process 'with the intent to delay . . . entrance into the . . . market.'"<sup>227</sup> Instead, Judge Wilkins suggested that the sham exception test was appropriately set forth in *Rex III*<sup>228</sup> and required that the efforts to influence the government, rather than the governmental decision itself, inflict the antitrust injury and that the petitioner has no reasonable expectation of obtaining a favorable decision.<sup>229</sup> Judge Wilkins concluded that:

The lobbying efforts of COA do not meet the definition of a sham as explained in *HBC III* [*Rex III*]. COA genuinely lobbied for ordinances which, if passed, would substantially foreclose Omni from the Columbia market. Not only did COA expect favorable results from its lobbying efforts, it was in fact successful in obtaining the billboard ordinances it sought. Nor was the injury to Omni inflicted directly by the COA lobbying efforts. Rather, any injury inflicted was by governmental action—the enactment of the billboard ordinances.<sup>230</sup>

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224. *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, (*Rex II*), 691 F.2d 678 (4th Cir. 1982).

225. *Id.* at 687; see also *Pendleton Constr. Corp. v. Rockbridge County*, 652 F. Supp. 312, 319 (W.D. VA 1987), *aff'd*, 837 F.2d 178 (4th Cir. 1988).

226. *Omni*, 891 F.2d at 1139.

227. *Id.* at 1147 (quoting *Rex II* 691 F.2d at 687) (Wilkins, J., dissenting).

228. *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, (*Rex III*) 791 F.2d 288 (4th Cir. 1986).

229. In *Rex III*, the court held:

[T]he basic concept [of the same exception], as employed by the Supreme Court, is that the defendant's activity was intended to injure the plaintiff directly *rather than through a governmental decision*. When the antitrust defendant had not truly sought to influence a governmental decision, his invocation of governmental machinery is a sham. To be sure, he would always be pleased to obtain a governmental decision against his rival. But *where he had no reasonable expectation of obtaining the favorable ruling*, his effort to do so was a sham.

*Id.* at 292 (quoting P. AREEDA, ANTITRUST LAW § 203.1A (Supp. 1982) (emphasis added)). Judge Wilkins also suggested that *Rex II* was not inconsistent when its facts are considered in context. *Omni*, 891 F.2d at 1148.

230. *Omni*, 891 F.2d at 1148.

While not addressed by the majority, Judge Wilkins also rejected the co-conspirator exception to *Noerr-Pennington* immunity,<sup>231</sup> expressing concern that this exception may emasculate the immunity doctrine.<sup>232</sup> Finding no evidence of illegal conduct or corrupt motive on behalf of the city officials, Judge Wilkins found the exception inapplicable.

In *General Medical Corp. v. Wyngarden*,<sup>233</sup> the Circuit Court for the City of Richmond rejected a crossbill that alleged that the filing of the motion for judgment was within the sham exception to the *Noerr-Pennington* doctrine.

In *Zavaletta v. American Bar Association*,<sup>234</sup> the district court commented briefly on the ABA's right to communicate its opinion to governmental bodies.<sup>235</sup>

### I. Antitrust Injury

Private antitrust plaintiffs must meet the threshold requirement of showing antitrust injury, derived from section 4 of the Clayton Act,<sup>236</sup> which provides treble damages to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."<sup>237</sup> In *Brunswick Corp. v. Pueblo Bowl-O-Mat*,<sup>238</sup> the court pronounced, "[P]laintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful."<sup>239</sup>

The concept of antitrust injury formed the basis for the indirect purchaser rule announced over a decade ago in *Illinois Brick Co. v. Illinois*.<sup>240</sup> The United States Supreme Court recently reaffirmed

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231. See *Duke & Co. v. Foerster*, 521 F.2d 1277, 1282 (3d Cir. 1975) (where the conduct surpasses the realm of 'official persuasion' encompassing a scheme to restrain trade).

232. *Omni*, 891 F.2d at 1148.

233. No. HA-98-3 (City of Richmond Cir. Ct. Apr. 20, 1990).

234. 1989-2 Trade Cas. (CCH) ¶ 68,671 (E.D. Va. 1989).

235. *Id.* at 61,538.

236. 15 U.S.C. § 15 (1988).

237. *Id.*

238. 429 U.S. 477 (1977).

239. *Id.* at 489 (emphasis in original).

240. 431 U.S. 720 (1977). The indirect purchaser rule bars indirect purchasers from suing an overcharging supplier. The rule derives from the Court's holding in *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968), which rejected the pass on defense. In that case, an overcharging supplier attempted to avoid liability by alleging that its purchaser suffered no injury because it passed on the overcharges to its customers. The Court reasoned

that rule in the context of regulated public utilities. In *Kansas and Missouri v. Utilicorp. United, Inc.*,<sup>241</sup> the Court held that the customers of a public utility to which its supplier's natural gas overcharges were passed on did not suffer antitrust injury for purposes of section 4 of the Clayton Act. Only the public utility, the direct purchaser, could assert a section 4 claim against the natural gas supplier who overcharged it in violation of the antitrust laws.<sup>242</sup>

The Court refused to carve out an exception to the indirect purchaser rule where regulated public utilities are involved because it found the difficulties of apportioning the overcharges<sup>243</sup> to be as great with regulated industries as with unregulated ones. In fact, the Court suggested that the justifications for an exception to the indirect purchaser rule were less compelling in the regulated context because state regulators often require compensated utilities to pass on to their customers at least some of their recovery obtained in section 4 suits.<sup>244</sup> In defending its decision, the Court observed that application of the indirect purchaser rule to regulated industries would not adversely affect private enforcement because utilities do not lack incentives to sue overcharging suppliers.<sup>245</sup>

Furthermore, while affirming its observations in *Illinois Brick* that an exception to the rule may be justified when cost-plus contracts are involved, the Court rejected the argument that regulations and tariffs requiring the utility to pass on its costs to consumers placed this case in the cost-plus contract exception.<sup>246</sup> The Court also dismissed petitioners argument that under section 4(c) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, they as state attorneys general could bring a *parens patriae* action on behalf of the utility customers notwithstanding the customers'

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that establishing the amount of the overcharge shifted to indirect purchasers "would normally prove insurmountable," *Id.* at 493, and the pass on defense would reduce the effectiveness of section 4 actions by reducing the recovery available to any potential plaintiff. *Id.* at 494. The Court's decision that overcharging suppliers could not use the pass on defense against direct purchasers was followed by its adoption of the indirect purchaser rule in *Illinois Brick*. The indirect purchaser rule was a logical corollary to the rejection of the pass-on defense, since overcharging suppliers may risk multiple liability if suits by indirect purchasers were allowed. *Illinois Brick*, 431 U.S. at 730-31.

241. 110 S. Ct. 2807 (1990)

242. *Id.* at 2812.

243. *Id.* at 2814.

244. *Id.*

245. *Id.*

246. *Id.* at 2814-15.

status as indirect purchasers.<sup>247</sup> This provision could not support a *parens patriae* action because the utility customers simply had not suffered antitrust injury, the Court reasoned.<sup>248</sup>

In a decision which may mark a shift in the Court's thinking as to the application of the *per se* rule to vertical, maximum price fixing schemes, the Supreme Court held in *Atlantic Richfield Co. v. USA Petroleum Co.*<sup>249</sup> that a firm which loses sales to a competitor charging nonpredatory prices pursuant to such a scheme does not suffer "antitrust injury" as required by section 4 of the Clayton Act. USA, an independent discount retail marketer of gasoline, alleged that Atlantic Richfield Company ("ARCO") had engaged in a vertical, maximum price fixing scheme with its dealers in violation of section 1 of the Sherman Act.<sup>250</sup> ARCO, to compete more effectively with independent discounters such as USA, had implemented a new marketing strategy to encourage its dealers to match retail gasoline prices of independents.<sup>251</sup> It made short-term discounts available to its dealers and it reduced its dealers' costs by, for instance, eliminating credit card sales.<sup>252</sup>

The district court granted summary judgment holding that even if USA could establish that ARCO had engaged in a vertical resale price maintenance conspiracy with its dealers to maintain low prices, it could not satisfy the "antitrust injury" requirement of section 4 without showing such prices to be predatory.<sup>253</sup> Such a showing was impossible because ARCO did not possess market power.<sup>254</sup>

A divided Ninth Circuit reversed, holding that USA's claimed injuries were a direct result of a disruption in the market caused by a *per se* antitrust violation.<sup>255</sup> Accordingly, USA had suffered antitrust injury.<sup>256</sup>

Reversing the Ninth Circuit, Justice Brennan, writing for the majority, began his analysis by noting that in *Albrecht v. Her-*

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247. *Id.* at 2815.

248. *Id.*

249. 110 S. Ct. 1884 (1990).

250. *ARCO*, 110 S. Ct. at 1887.

251. *Id.* at 1888.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at 1889.

*ald*,<sup>257</sup> where the court had declared vertical, maximum price fixing arrangements *per se* unlawful, the concern was with the potential effect on dealers and consumers, not on competitors.<sup>258</sup> In the instant case, USA was a competitor who was more likely benefitted than harmed by ARCO's pricing policies.<sup>259</sup> Thus, the Court held that USA had not suffered "antitrust injury" because its losses did not result from the anticompetitive effects of vertical, maximum price fixing which render it illegal.<sup>260</sup>

The Court further held that USA could not claim as antitrust injury losses resulting from the low prices produced by the pricing scheme when the prices were nonpredatory.<sup>261</sup> "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury."<sup>262</sup>

The Court rejected the notion that antitrust injury need not be shown where a *per se* violation is involved. It held these rules are distinct and must be shown independently:<sup>263</sup>

The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior. The need for this showing is at least as great under the *per se* rule as under the rule of reason. Indeed, insofar as the *per se* rule permits the prohibition of efficient practices in the name of simplicity, the need for the antitrust injury requirement is underscored.<sup>264</sup>

The Court concluded that it was unnecessary to relax the antitrust injury requirement in cases such as this since a competitor would

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257. 390 U.S. 145 (1968). In *Albrecht*, the Court found a vertical, maximum price fixing arrangement unlawful *per se* under section 1 of the Sherman Act. The case involved a newspaper publisher which disciplined a distributor for selling newspapers at a price higher than the suggested retail price. The Court reasoned that such an arrangement threatened to inhibit vigorous competition among dealers bound by it and would tend to become a minimum price fixing scheme.

258. *ARCO*, 110 S. Ct. at 1889.

259. *Id.* USA would be benefitted if ARCO's pricing policies resulted in fewer, larger ARCO distributors or prevented ARCO's dealers from engaging in non-price competition such as offering services desired by consumers such as credit card sales. *Id.*

260. *Id.* at 1892.

261. *Id.* at 1890.

262. *Id.* at 1892.

263. *Id.* at 1894 (quoting P. AREEDA & H. HOVENKAMP, Antitrust Law ¶ 334.2c (Supp. 1989)).

264. *ARCO*, 110 S. Ct. at 1894. (emphasis in original).

"be injured and hence motivated to sue only when a vertical, maximum price fixing arrangement has a *procompetitive* impact on the market."<sup>265</sup>

Dissenting Justices Stevens and White decried the majority's opinion, asserting that it "undermines the enforceability of a substantive price-fixing violation with a flawed construction of section 4, erroneously assuming that the level of a price fixed by a section 1 conspiracy is relevant to legality and that all vertical arrangements conform to a single model."<sup>266</sup>

The Fourth Circuit found antitrust injury present in *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*,<sup>267</sup> holding that Omni's evidence indicated that the city's final ordinance prohibited any future billboard construction, thus foreclosing any competition to Columbia Outdoor Advertising, not just from Omni but any other potential competitors.<sup>268</sup> In *Tempkin v. Lewis-Gale Hospital, Inc.*,<sup>269</sup> Judge Turk dismissed plaintiffs' allegations of loss of personal employment as insufficient to constitute antitrust injury.<sup>270</sup> He similarly dismissed Sherman Act claims in *Spire Corp. v. International Telephone & Telegraph Corp.*,<sup>271</sup> in part for failure to allege antitrust injury.<sup>272</sup>

## J. Procedure, Evidence and Remedies

### 1. Procedure

The United States District Court for the Eastern District of Virginia certified an antitrust class action alleging price-fixing against soft drink bottlers in Richmond and Norfolk,<sup>273</sup> distinguishing its prior opinions denying class certification, which arose out of the same alleged conspiracy.<sup>274</sup> In *Meredith v. Mid-Atlantic Coca-Cola*

265. *Id.* at 1895 (emphasis in original).

266. *Id.* at 1895-96 (White, J. and Stevens, J. dissenting).

267. 891 F.2d 1127, 1143 (4th Cir. 1989).

268. *Id.* (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 n.14 (1977); *Ratino v. Medical Serv.*, 718 F.2d 1260, 1272 (4th Cir. 1983)).

269. 1989-2 Trade Cas. (CCH) ¶ 68,683 (W.D. Va. 1989).

270. *Id.* at 62,551.

271. No. 88-0271-R (W.D. Va. Oct. 3 1989) (mem. op.).

272. *Id.* at 4.

273. *Meredith v. Mid-Atlantic Coca Cola Bottling Co.*, 129 F.R.D. 130, 134 (E.D. Va. 1989).

274. *Butt v. Allegheny Pepsi-Cola Bottling Co.*, 116 F.R.D. (E.D. Va. 1987); *Mom's, Inc. v. Allegheny Pepsi-Cola Bottling Co.*, No. 87-219-N (E.D. Va. 1987).

*Bottling Co.*,<sup>275</sup> two operators of small food markets sought class certification of their price-fixing claims. Defendant bottlers opposed certification, grounding their argument on Rule 23 of the Federal Rules of Civil Procedure.<sup>276</sup> Defendants argued that plaintiffs "are not typical of the class, that they will not adequately represent the class, that issues of fact or law common to the class do not predominate, and that class certification is an inferior method of adjudicating the class' claims."<sup>277</sup> Judge Merhige had little difficulty finding that the plaintiffs had met the numerosity and commonality requirements of Rule 23(a)<sup>278</sup> and found typicality even though some variations existed as to the size of the class members' operations and the prices they paid.<sup>279</sup> Citing *Surowitz v. Hilton*

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275. 129 F.R.D. 130 (E.D. Va. 1989).

276. Rule 23 provides, in pertinent part:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and the (4) representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating on the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23.

277. *Meredith*, 129 F.R.D. at 132.

278. *Id.* at 132-133.

279. *Id.* at 133. Judge Merhige ruled that plaintiffs need not be identical and reasoned that "[t]ypicality exists so long as the claims are based on the same legal or remedial theory and no conflict of interest exists between the named plaintiff and the class members." *Id.*

*Hotels Corp.*,<sup>280</sup> for the proposition that insufficient knowledge of the claim on behalf of the named plaintiff is not an appropriate basis for denying class certification, Judge Merhige discounted plaintiffs' misunderstanding of the nature of the suit and determined them to be adequate representatives.<sup>281</sup> As to the requirement of Rule 23(b), Judge Merhige found that while each class member may have a different amount of damages, common questions of law and fact as to the existence of the conspiracy, the effect and extent of the conspiracy, and a class-wide measure of damages existed.<sup>282</sup> Finally, finding no conflict between class members, Judge Merhige found the class action to be superior to other forms of adjudication.<sup>283</sup>

In certifying the class, Judge Merhige distinguished the 1987 Norfolk division opinions in *Butt v. Allegheny Pepsi-Cola Bottling Co.*<sup>284</sup> and *Mom's, Inc. v. Allegheny Pepsi-Cola Bottling Co.*,<sup>285</sup> where Judge MacKenzie denied class certification. Judge MacKenzie ruled that (1) the injury to each class member varied by customer, transaction and products purchased,<sup>286</sup> (2) plaintiff would be "unable to establish damages by common proof on a class-wide basis,"<sup>287</sup> (3) because the putative class included a number of high volume customers having sufficient economic interests to pursue their own suits, the class action was not a superior legal procedure, and finally, (5) that pursuant to *Windham v. American Brands, Inc.*,<sup>288</sup> the class was unmanageable.<sup>289</sup> Regardless of Judge Merhige's distinction of *Butt*, his opinion did not address the concerns raised by Judge MacKenzie as to the injury sustained by customers

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280. 383 U.S. 363 (1966).

281. *Meredith*, 129 F.R.D. at 133.

282. *Id.* at 134.

283. *Id.*

284. 116 F.R.D. 486 (E.D. Va. 1987).

285. No. 87-219-N (E.D. Va. 1987).

286. *Butt v. Alleghany Pepsi Cola Bottling Co.*, 116 F.R.D. at 491. In *Butt*, the court noted that the primary evidence of pricing fixing presented at the criminal trial, *United States v. Gravely*, Crim. No. 86-102-N (E.D. Va. 1987), involved promotional letter pricing. Judge MacKenzie was unconvinced that a price-fixing conspiracy regarding promotional letter pricing affected other purchases and concluded, therefore, that proof of injury must involve a customer-by-customer inquiry as to promotional letter purchases. Judge MacKenzie also noted that the possibility that the alleged conspirators cheated on the agreement "introduced enormous additional complications to determining whether individual members of the proposed class were in fact injured." *Butt*, 116 F.R.D. at 491.

287. *Butt*, 116 F.R.D. at 492.

288. 68 F.R.D. 641, 658 (D. S.C. 1975), *rev'd*, 539 F.2d 1016 (4th Cir. 1976), *rev'd en banc*, 565 F.2d 59 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).

289. *Butt*, 116 F.R.D. at 493.

receiving promotional letter pricing and those that did not.<sup>290</sup> Also, Judge Merhige accepted, where Judge MacKenzie did not, the conclusion that all soft drink prices were affected by the alleged conspiracy, thus allowing a simplified percentage increase in average price to constitute a class-wide measure of damages. Moreover, as the two cases each concerned Norfolk and Richmond soft drink sales, Judge Merhige's disregard for Judge MacKenzie's finding that a test case brought by large volume purchasers would be a superior legal vehicle to a class action is mystifying.

In *Vincent v. Reynolds Memorial Hospital, Inc.*,<sup>291</sup> a plaintiff physician, who alleged an antitrust conspiracy in the hospital staff privileges context, appealed from the district court's decision to dismiss his Sherman Act claims on the basis of the statute of limitations and the *res judicata* effect of prior state court litigation. The Fourth Circuit held that while Vincent alleged that the conspiracy commenced in 1969, the four-year statute of limitations<sup>292</sup> only barred acts occurring before 1977, four years before suit was filed. As to *res judicata*, the court held that as "each act of a defendant which injures a plaintiff during the course of a conspiracy to violate the antitrust laws constitutes a separate cause of action for which the plaintiff may recover damages,"<sup>293</sup> the federal allegations Vincent did not raise in the prior state proceeding were not barred by *res judicata*.<sup>294</sup>

## 2. Evidence

In reversing the Robinson-Patman Act judgment against Lorillard in *Thomas J. Kline, Inc. v. Lorillard, Inc.*,<sup>295</sup> the Fourth Circuit determined that the district court committed error in admitting the testimony of plaintiff's sole expert witness on the issue of whether Lorillard's shift in credit practice was unjustified credit discrimination.<sup>296</sup> Assessing the plaintiff's expert under Rule 702 of the Federal Rules of Evidence,<sup>297</sup> the court noted that the putative

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290. See *Mom's Inc.*, No. 87-219-N.

291. 1989-2 Trade Cas. (CCH) ¶ 68,681 (4th Cir. 1989).

292. 15 U.S.C. § 15b (1988).

293. *Vincent*, 1989-2 Trade Cas. (CCH) ¶ 68,681 at 61,595.

294. *Id.*

295. 878 F.2d 791, 800 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 1120 (1990).

296. *Id.* at 799.

297. FED. R. EVID. 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of the fact to understand the evidence or to determine a fact in issue, a witness qualified as an

expert witness, while she had attained an M.B.A., was not an economist.<sup>298</sup> Moreover, she had published only one article, which was unrelated to credit or antitrust, had no personal experience in making credit decisions, and worked for an employer primarily engaged in the business of providing expert testimony in litigation.<sup>299</sup> The court held:

Certainly no single one of these facts disqualifies [the expert] from giving opinions about the legitimacy of the justifications for Lorillard's credit decisions. In combination, however, they lead us to the conclusion that this witness cannot satisfy even the minimal requirements of Fed. R. Evid. 702. There was no indication, for example, that [the expert's] general business education included *any* training in the area of antitrust or credit. Similarly, [the expert] admitted that she lacked *any* other experience in such matters. Although it would be incorrect to conclude that [the expert's] occupation as a professional expert alone requires exclusion of her testimony, it would be absurd to conclude the one can become an expert simply by accumulating experience in testifying.<sup>300</sup>

Plaintiff's expert admitted that she had no experience in making credit decisions, and her testimony confirms that she totally lacked the "knowledge, skill, experience, training, or education" that Rule 702 requires of an expert witness.<sup>301</sup>

### 3. Remedies

The United States Supreme Court, resolving a conflict among the circuits, has decided that in merger cases divestiture is a remedy available to private plaintiffs under section 16 of the Clayton Act. In *California v. American Stores Co.*,<sup>302</sup> California sued after two of its largest retail grocery chains merged, claiming violations of federal and state antitrust laws. The state obtained a preliminary injunction from the district court preventing further integration of the operations of the two companies.<sup>303</sup> The Ninth Circuit,

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expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

298. *Lorillard*, 878 F.2d at 799.

299. *Id.*

300. *Id.*

301. *Id.* at 800.

302. 1990-1 Trade Cases (CCH) ¶ 69,003 (U.S. April 30, 1990)

303. *Id.* at 63,487.

reversed, holding that "injunctive relief," as contemplated by section 16, did not encompass divestiture and that therefore the district court did not have the authority to order the "indirect divestiture."<sup>304</sup>

The Supreme Court, unpersuaded by American's textual and legislative history arguments, disagreed with the Ninth Circuit and found that the plain text of section 16 authorizes private enforcement actions for divestiture to remedy section 7 violations.<sup>305</sup> While the Government enjoys the right to obtain divestiture under section 15, the Court noted that private plaintiffs must demonstrate standing to obtain such equitable relief.<sup>306</sup> It was also quick to point out that, while not at issue in this case, equitable defenses such as laches and unclean hands "may protect consummated transactions from belated attacks by private parties when it would not be too late for the Government to vindicate the public interest."<sup>307</sup>

In two antitrust opinions, *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Industries, Inc.*,<sup>308</sup> and *Wells American Corp. v. Ziff-Davis Publ. Co.*,<sup>309</sup> the Fourth Circuit affirmed the denial of preliminary injunctions, simply ruling in each case that plaintiff failed the *Blackwelder*<sup>310</sup> test.<sup>311</sup>

In *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*,<sup>312</sup> the Fourth Circuit applied a lenient standard of proof for antitrust damages<sup>313</sup> and held that once this relaxed evidentiary burden had been met, the burden shifted to the defendant to produce evidence "which was primarily in its possession"<sup>314</sup> that plaintiff's losses were caused by reasons other than defend-

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304. *Id.*

305. *Id.* at 63,494.

306. *Id.*

307. *Id.*

308. 889 F.2d 524 (4th Cir. 1989).

309. 1990-1 Trade Cas. (CCH) ¶ 68,960 (4th Cir. 1990).

310. *Blackwelder Furn. Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977).

311. *Murrow*, 889 F.2d at 526-29; *Wells American*, 1990-1 Trade Cas. (CCH) ¶ 68,960 at 63,512.

312. 891 F.2d 1127 (4th Cir. 1989).

313. *Id.* at 1143-44 (citing *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123-25 (1969); *Metrix Warehouse v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033 (4th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988); *Barber & Ross Co. v. Lifetime Doors*, 810 F.2d 1276, 1281 (4th Cir.), *cert. denied*, 484 U.S. 823 (1987)).

314. *Omni*, 891 F.2d at 1144.

ant's anticompetitive activities.<sup>315</sup> The Fourth Circuit also rejected arguments that insufficient evidence existed to support the damage award and that awards on both sections 1 and 2 counts were inconsistent and duplicative.<sup>316</sup>

The Supreme Court, in the context of a multimillion dollar treble antitrust judgment, clarified application of 28 U.S.C. § 1961 which governs the award of postjudgment interest. In *Kaiser Aluminum & Chemical Corp. v. Bonjorno*,<sup>317</sup> the Court noted that, although there was a conflict among the circuits, 28 U.S.C. § 1961's language is clear that postjudgment interest runs from the date the court enters judgment, not from the typically earlier time when the jury renders the verdict.<sup>318</sup> Furthermore, the Court held that interest should be calculated from the date damages are "ascertained."<sup>319</sup> Thus, the Court rejected the argument that interest should run from a much earlier date on which judgment was entered on liability but found legally insufficient as to damages.<sup>320</sup> The correct date governing accumulation of interest was the date of judgment governing damages.<sup>321</sup>

Finally, the Supreme Court had occasion in an antitrust context to clarify the application of Rule 11 of the Federal Rules of Civil Procedure in *Cooter & Gell v. Hartmarx Corp.*<sup>322</sup> In *Cooter*, the Court ruled that a party which files court papers with no basis in fact may not avoid Rule 11 sanctions by voluntarily dismissing the suit.<sup>323</sup>

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315. The court was quick to point out however that "[t]his is of course not so when the 'other causes' include factors that are internal to plaintiff or general in the market." *Id.* (citing *Eastern Auto Distrib. v. Peugeot Motors*, 795 F.2d 329, 338 (4th Cir. 1986)).

316. *Omni*, 891 F.2d at 1144-45 n.8.

317. 1990-1 Trade Cases (CCH) ¶ 68,992 (U.S. April 17, 1990). *See also* the companion case *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 1990-1 Trade Cases (CCH) ¶ 68,992 (U.S. April 17, 1990).

318. The parties' dispute concerned two days of interest. While seemingly insignificant, a multimillion dollar antitrust award may amass thousands of dollars of interest a day. *Kaiser*, 1990-1 Trade Cas. (CCH) ¶ 68,992 at 63,432.

319. *Id.*

320. *Id.*

321. *Id.* at 63,444.

322. 58 U.S.L.W. 4763 (U.S. June 11, 1990). The Court also ruled that an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a District Court's Rule 11 determination. Finally, the Court held that a party is not subject, under Rule 11, to pay the other party's expenses incurred in defending a Rule 11 award on appeal. Rather, the Court held that Rule 38 of the Federal Rules of Appellate Procedure governs this issue. *Id.*

323. *Id.* at 4767.

### III. VIRGINIA ATTORNEY GENERAL CIVIL ENFORCEMENT ACTIVITIES

The Antitrust and Consumer Litigation Section of the Attorney General's Office concluded two antitrust matters over the last year.

#### A. *Consumer Electronics Settlement Approved*

This past year, the Virginia Attorney General's Office, along with the Attorneys General of forty-eight other states and the District of Columbia, entered into a settlement agreement with the Panasonic Company, a division of Matsushita Electric Corporation of America, resulting from an investigation of resale price maintenance violations.

Panasonic traditionally issued with its list of wholesale prices a suggested range of retail sales prices. According to allegations contained in the complaint accompanying the settlement agreement, in early 1988, Panasonic initiated a new policy whereby it began to issue another suggested retail list price that it referred to as the "Go price," which was that price below which no retailer was expected to sell. The "Go price" did not appear on any of Panasonic's price sheets and was given to retailers verbally. "Go pricing" was a major effort by Panasonic to maintain prices on various Panasonic and Technics brand items while Panasonic was also attempting to introduce a uniform price to dealers. The stated policy of Panasonic in initiating the new "Go price" was to reduce the confusion over their pricing schedule and to increase the profitability of both Panasonic and its retailers.

The investigation centered on sixteen specified Panasonic and/or Technics products during that time period, including VCR's, camcorders, telephones, answering machines and stereo equipment. The settlement terms, which were filed in the United States District Court for the Southern District of New York and approved on February 5, 1990, called for consumer refunds to purchasers of the sixteen products between March 1 and August 31, 1988. The amount of refund per customer ranged from seventeen dollars to forty-five dollars depending on the product and model purchased. Nationwide figures revealed that 665,121 consumers were affected by the settlement, with consumers in Virginia alone totaling between 15,000 and 20,000.

## B. *Business Review Procedure*

The Engineers and Surveyors Institute ("ESI") obtained, pursuant to the Virginia Antitrust Act Business Review Procedure, a statement that the Attorney General had no current enforcement intentions with respect to proposed conduct involving certain lobbying and petitioning activity. The ESI's goal was the implementation of a peer review program operated and organized by ESI, a nonprofit Virginia corporation formed by professional engineers and surveyors in 1987 to improve and represent the development engineering and surveying professions in the Northern Virginia area.

## IV. STATE LEGISLATIVE ACTIVITIES

The Virginia General Assembly amended and reenacted sections of title 38.2 of the Code of Virginia, which address anticompetitive activity by liability insurers, and added provisions for Attorney General civil investigations of suspected violations, and injunctive and restitutionary relief for both the Commonwealth and victims of violations.<sup>324</sup> The Virginia Gas and Coal Act placed pooling of interests by the owners of gas or oil wells beyond statutory or common law restrictions on "monopolies or acts, arrangements, contracts, combinations, or conspiracies in restraint of trade or commerce."<sup>325</sup> The legislature also expanded the negative consequences of an antitrust conviction by requiring waste management facilities to include antitrust convictions of key personnel in disclosure statements to the Department of Waste Management<sup>326</sup> and amended the provisions defining advertising practices forbidden to motor vehicle dealers.<sup>327</sup>

## V. FEDERAL REGULATORY AND ENFORCEMENT EFFORTS

### A. *Civil Enforcement*

#### 1. *Litigation*

In addition to the *Carilion* merger litigation, the Antitrust Division issued civil investigative demands to a number of Virginia pri-

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324. See VA. CODE ANN. § 38.2-1916.1, -1916.2 (Repl. Vol. 1990).

325. See *id.* § 45.1-361.18(B) (Cum. Supp. 1990).

326. See *id.* § 10.1-1400(5) (Cum. Supp. 1990).

327. See *id.* § 46.2-1581 (Cum. Supp. 1990).

vate colleges and universities as part of a national investigation into tuition, fees, and salary practices.<sup>328</sup>

## 2. Depart of Justice Business Review Procedure

Under this procedure, an entity may submit a proposed business activity to the Antitrust Division of the Department of Justice for its review and receive a determination of whether the Antitrust Division would challenge the proposed activity as an antitrust violation.<sup>329</sup>

The Antitrust Division issued a Business Review letter to Hampton Roads Examination Warehouse, Inc. ("HREW") regarding a proposed joint venture between five Hampton Roads warehouse companies to establish and operate an off-terminal central examination station for United States Customs Service review of cargo entering the United States.<sup>330</sup> The joint venture proposal resulted from a Customs Service decision to change its practice of conducting cargo inspections at four terminals and conduct those inspections only at one terminal location and an additional off-terminal site. The Antitrust Division raised three competitive concerns regarding the joint venture. First, it noted that the joint venturers could obtain benefits, in the nature of preferential cargo handling, over non-owner warehouse companies which could constitute a competitive disadvantage to the non-owner warehouses and ultimately may result in market power for the owners. Recognizing, however, that the Customs Service requires non-discriminatory cargo treatment, this concern was minimized. The Division's second concern, regarding the disclosure of confidential information, such as customer lists, to the non-owner, was eliminated by HREW's representation that no information exchange between joint ventures would transpire. The Division's final concern of collusion between the joint venturers on related services was obviated by the limited scope of the joint venture.

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328. "Investigation Into Tuition Fixing Spreads; 55 Institutions Now Say They Are Targets," *The Chronicle of Higher Education*, October 4, 1989.

329. 28 C.F.R. § 50.6 (1990).

330. Letter from James F. Rill, Assistant Attorney General of the United States to HREW (Nov. 20, 1989) (Westlaw, FABR-BRL database).

### 3. Federal Trade Commission Activities

The FTC was also active in Virginia during the past year. In *Matter of Metro MLS, Inc.*,<sup>331</sup> the FTC obtained a consent order against a large real estate multiple listing service in Tidewater which had prohibited publication of exclusive agency listings. An exclusive agency listing is a brokerage service contract where the property owner agrees to pay a commission if the property is sold through a broker, but only a reduced commission or no commission at all if the owner locates the purchaser.<sup>332</sup> The FTC complaint, charging a violation of section 5 of the Federal Trade Commission Act,<sup>333</sup> alleged that the policy unreasonably restrained competition:

(a) by restraining competition among brokerage firms based on willingness to offer or accept different contract terms that may be attractive and beneficial to consumers; (b) by limiting the ability of consumers to negotiate brokerage contract terms that may be more advantageous to them than an exclusive right to sell listing; and (c) by limiting the ability of property sellers to compete against real estate brokers in locating purchasers.<sup>334</sup>

The proposed consent order prevents the listing service from refusing publications of any exclusive agency listing.<sup>335</sup>

In *In re Hensley Group*,<sup>336</sup> the FTC obtained a consent order, pursuant to section 5 of the FTC Act, against an Alexandria, Virginia timeshare property promoter prohibiting it from representing to consumers that they had won prizes when in fact they had not won such a prize, or that free prizes would be given when, in fact, such prizes bore charges. The FTC had earlier obtained a preliminary injunction against the Hensley Group and another timeshare resort operator, the Defuscos.<sup>337</sup>

The FTC also commented on proposed Virginia legislation and regulations, counseling in each instance that the proposals may in-

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331. No. 881-0044 (October 12, 1989) (Westlaw, FABR-FTC database).

332. *Id.*

333. 15 U.S.C. § 45 (1988). Section 5 of the FTC Act provides that "[u]nfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." *Id.*

334. *Metro*, No. 881-0044, Westlaw at 9-10.

335. *Id.*

336. 1990-1 Trade Cas. (CCH) ¶ 22,716 (E.D. Va. Aug. 7, 1989).

337. *FTC v. Defusco*, No. 89-1046 (E.D. Va. filed August 4, 1989).

hibit competition.<sup>338</sup> Responding to a proposed Virginia Board of Pharmacy regulation authorizing physicians to dispense and sell prescription drugs, the FTC Bureau of Competition opined that dispensing of prescription drugs by practitioners "provides service and price competition among physicians and between physicians and pharmacists, which are likely to benefit consumers." The FTC expressed concern over a requirement in the regulation that the dispensing physician personally perform the "selection, compounding, preparation, packaging and labeling of a prescription drug," opining that this requirement would unnecessarily restrict physicians' dispensing, thus reducing competition and consumer choice. In so opining, the FTC noted that existing Virginia pharmacy regulations do not require such comprehensive personal involvement by pharmacists. The FTC also commented negatively on a Virginia legislative proposal placing restrictions on gasoline suppliers vis-a-vis gasoline dealers, suggesting that such restraints may lessen competition among dealers and cause an increase in prices.

### B. *Criminal Enforcement*

The Antitrust Division of the Department of Justice was again active in its enforcement efforts in Virginia this year.

In *United States v. Franzen*,<sup>339</sup> the Fourth Circuit upheld the conviction of an executive of a chain link fence manufacturer despite the arguments raised on appeal that the executive had no knowledge of and had not participated in the conspiracy.<sup>340</sup> In reviewing the jury verdict, the Fourth Circuit applied the substantial evidence standard, framing the issue as whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."<sup>341</sup> As to the knowledge requirement,

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338. Letter from Kevin J. Arquit, Director, FTC Bureau of Competition to Virginia Board of Pharmacy (Nov. 27, 1989) (Westlaw, FABR-FTC database); Letter from Kevin J. Arquit, Director, FTC Bureau of Competition to Virginia General Assembly (Mar. 2, 1990) (Westlaw, FABR-FTC database).

339. 1989-2 Trade Cas. (CCH) ¶ 68,693 (4th Cir. 1989).

340. In a criminal conspiracy action, the government must prove, by either direct or circumstantial evidence, that the alleged conspirator "knew the purpose of the conspiracy and that he participated in it as evidenced by the taking of some action in furtherance of the object of the conspiracy." *Id.* at 61,640 (citing *United States v. Loughman*, 618 F.2d 1067, 1075 (4th Cir.), cert. denied, 447 U.S. 925 (1980)).

341. *Franzen*, 1989-2 Trade Cas. (CCH) ¶ 68,693 at 61,640 (quoting *Loughman*, 618 F.2d at 1075).

while Franzen contended that the government proved only that he was aware of meetings held between his subordinate and admitted conspirator, Bruce J. Patrick, and not that the meetings were to fix prices, the court cited testimony that Franzen knew the meetings were to discuss prices and had expressed pleasure that the meetings had gone well and documentary evidence of ending the previous practice of stealing other manufacturers accounts with low prices as evidence supporting the jury verdict.<sup>342</sup> Franzen also argued against upholding his conviction because he never met with competitors to fix prices.<sup>343</sup> The court held such a meeting not to be necessary to sustain a conviction, however, noting that authorizing, ordering or helping perpetuate the crime is sufficient to make one a participant in a price fixing conspiracy.<sup>344</sup> Determining that the record established that "in numerous instances Franzen authorized actions necessary to the carrying out of the conspiracy,"<sup>345</sup> the court affirmed the conviction.

The Antitrust Division also prosecuted a soft drink bottling firm and two former executives for conspiracy to defraud the government.<sup>346</sup> That case, which arose out of a grand jury investigation of price fixing among soft drink bottlers, was tried in the Eastern District of Virginia and resulted in a \$1.8 million fine against the bottler.

The Antitrust Division also conducted an extensive grand jury investigation into the advertising practices of Roanoke and Lynchburg television stations, which did not result in indictment.<sup>347</sup> Finally, Attorney General Mary Sue Terry has requested the Antitrust Division to mount an investigation into the bidding practices of Virginia dairies regarding school milk pricing, following similar

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342. *Franzen* 1989-2 Trade Cas. (CCH) ¶ 68, 693 at 61,640-41.

343. *Id.*

344. *Id.* at 61,641 (citing *United States v. Wise*, 370 U.S. 405, 416 (1962)). The *Franzen* court noted that "[a] single act will suffice to show participation if the circumstances permit the inference that the act was intended to advance the ends of the conspiracy." *Franzen*, 1989-2 Trade Cas. at 61,641 (citing *United States v. Vega*, 860 F.2d 779, 795 (7th Cir. 1988)).

345. *Franzen*, 1989-2 Trade Cas. at 61,641. The government's evidence of authorization consisted of Franzen's approval of Patrick's meetings with competitors, to discuss "the annual price increase . . . the two tier price system . . . charging freight, and . . . stopping the price war . . .," Franzen's authorization of Patrick's successful efforts to get a competitor to stop price cutting; and the issuance of a price increase that had been the subject of prior conspiratorial meetings of which Franzen was aware. *Id.* at 61,641.

346. *United States v. Mid-Atlantic Coca-Cola Bottling Co., Inc.*, No. 90-27-N (E.D. Va. 1990).

347. *TV Investigation Halted*, Roanoke Times & World News, April 27, 1990.

government investigations in Florida and Georgia.<sup>348</sup>

## VI. CONCLUSION

Antitrust claims remain difficult to prosecute and prove. Within the past year, the courts have consistently demanded substantial, factual allegations supporting the major elements of an antitrust claim. In considering the merits of a claim, they have carefully scrutinized both the evidence offered to establish the existence of an alleged conspiracy and the market definition proposed by the plaintiff. In cases involving price discrimination, tying, and monopolization, and in evaluating plaintiffs' requests for preliminary injunctions, the courts have shown little tendency to stretch their substantive definitions or their evidentiary requirements. One case suggests that plaintiffs may find it easier to escape state action or *Noerr-Pennington* immunity by characterizing local government actions as conspiracies or shams, respectively; however, other cases suggest no changes in the prevailing analysis. The apparent adoption of the market screen analysis by the Fourth Circuit suggests that yet another threshold burden will plague plaintiffs bringing antitrust claims. The United States Supreme Court, while making it clear that the remedy of divestiture is available to successful private plaintiffs, has also increased the burden on private plaintiffs by extending the indirect purchaser rule to cases involving regulated industries and by requiring plaintiffs to show antitrust injury even when a *per se* vertical, maximum price fixing violation has occurred.

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348. The Washington Post, April 28, 1990, at B1, col.6.