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Annual Survey of Virginia Law: Antitrust and Trade Regulation

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I. Introduction

Virginia federal courts have shown a reluctance this past year to summarily dismiss plaintiffs' antitrust claims on Rule 12(b)(6) motions where there is no factual record. However, once a sufficient record has been established, the courts have continued their rigorous scrutiny of antitrust claims. While this year's decisions contain few victories for antitrust plaintiffs on the merits, surprisingly, their holdings are mixed and cannot be categorized as decidedly pro-plaintiff or defendant. This past year, the Fourth Circuit has limited plaintiffs' actions by broadening the sweep of the intracorporate conspiracy doctrine established in Copperweld Corp. v. Independence Tube Corp. to include sister subsidiaries of the same parent, and by refusing to expand the independent stake exception to the Copperweld doctrine. However, the same court has also broken new ground by implying that allegations of monopoly leveraging state a separate Section 2 claim. In addition, it has failed to...
put a damper on the proliferation of health care antitrust actions by refusing to apply the Copperweld doctrine in the context of peer review activities. Similarly, while the Supreme Court eviscerated the interstate commerce defense to medical staff privileges cases, it expanded antitrust immunity doctrines by rejecting and narrowly construing the "conspiracy" and "sham" exceptions, respectively. This article discusses these developments and the impact they may have on Virginia law.

II. FEDERAL CIVIL ACTIONS

A. Sherman Act Section 1 Issues

1. Status of the Per Se Rule

While uniformly alleged, the per se rule is seldom invoked, as courts increasingly employ the antitrust rhetoric that its scope should be narrowly construed and its application confined to certain select offenses. Once safely within the confines of the Rule of Reason, antitrust defendants usually fare well, highlighting the difficult burden of proof facing an antitrust plaintiff in a Rule of Reason case. Perhaps no recent case more aptly demonstrates this dichotomy than the recent Supreme Court summary ruling in Palmer v. BRG of Georgia, Inc. The facts of that case, when viewed from the perspective of the Rule of Reason at the district and appellate court levels, resulted in summary judgment for the

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2. Because application of the per se rule eliminates the balancing of pro and anti-competitive effects, the courts have shown reluctance to broaden its ambit. In Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979), the Supreme Court held that "[i]t is only after considerable experience with certain business relationships that courts classify them as per se violations." Id. at 9 (quoting United States v. Topco Associates, 405 U.S. 596, 607-8, (1972)). "The Supreme Court has applied the per se prohibition to four types of conduct: 1) price-fixing, 2) certain concerted refusals to deal, 3) horizontal market division, and 4) tying arrangements." Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1186, 1190 (W.D.N.C. 1988) (citations omitted).

3. The parameters of the Rule of Reason were delineated by Justice Brandeis in Board of Trade v. United States, 246 U.S. 231 (1918):

   The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

   Id. at 238.

defendants. Once the Supreme Court characterized the facts slightly differently and invoked the per se rule, however, summary adjudication for the plaintiff resulted.

The Supreme Court, in what must be viewed as an extraordinary event, summarily reversed and remanded the opinion of the Eleventh Circuit in Palmer on a petition for writ of certiorari. Palmer involved an alleged price fixing and market allocation agreement between competing bar review course providers BRG and HBJ. Plaintiff alleged that in 1980 the two bar review courses agreed to an exclusive license agreement covering the state of Georgia. In that agreement, BRG and HBJ agreed that only the BRG course would be taught in Georgia and that BRG would not compete with HBJ outside of Georgia. In addition, the agreement provided that HBJ would obtain a flat fee for each BRG course sold in Georgia as well as a percentage of the course fees collected by BRG in Georgia over a certain amount. Perhaps implicitly recognizing that antitrust law typically is not taught in bar review courses, the Supreme Court had little difficulty in recognizing the agreement as a per se price fixing and market allocation scheme violative of Section 1 of the Sherman Act. Citing United States v. Socony-Vacuum Oil Co., the Court held that:

The revenue-sharing formula in the 1980 agreement between BRG and HBJ, coupled with the price increase that took place immediately after the parties agreed to cease competing with each other in 1980, indicates that this agreement was “formed for the purpose and with the effect of raising” the price of the bar review course. It was, therefore, plainly incorrect for the District Court to enter summary judgment in respondents’ favor. Moreover, it is equally clear that the District Court and the Court of Appeals erred when they assumed that an allocation of markets or submarkets by competitors is not unlawful unless the market in which the two previously competed is divided between them.

5. Id. at 402.
6. Section 1 of the Sherman Act provides as follows:
   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 hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony.
7. 310 U.S. 150 (1940).
While Justice Marshall dissented, his dissent was not substantive and was limited to the procedure employed by the Court in summarily dismissing the petition and reversing the case without providing the parties with an opportunity to be heard on the merits.9

What is remarkable about this case is not the Supreme Court's opinion, but rather the analysis employed by the Eleventh Circuit in affirming the district court's grant of summary judgment in favor of the defendants. The Eleventh Circuit rejected plaintiff's argument that the agreement was a per se unlawful price fixing agreement because it was not the "classic form of price fixing" and because the agreement did not "explicitly address the factor of price."10 Moreover, the Eleventh Circuit affirmed the district court's opinion denying horizontal market allocation essentially because the agreements did not divide the state of Georgia between BRG and HBJ, and because the two bar review courses historically had only competed inside Georgia.11 In the words of the Eleventh Circuit's split opinion:

The district court found that neither agreement between BRG and HBJ constituted the kind of market or customer allocation agreement which has been recognized as a basis for *per se* liability. . . . The district court found that this was not a situation where competitors divided up a market in which both were doing business, each taking a portion of the market. The district court also found that BRG had never done business outside the state of Georgia, that nothing in the record suggested that it ever intended to do so, and that HBJ did business nationwide, but withdrew from the Georgia market following the 1980 agreement between BRG and HBJ. Thus, the district court found the only market ever claimed by both defendants was the state of Georgia, which was not divided up under either the 1980 or 1982 agreements.12

Having determined that no per se violation existed, the lower court dismissed both the Section 1 and 2 claims because of plaintiff's

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9. Justice Marshall stated that
   (a) Although I agree that the limited information before us appeared to indicate that the Court of Appeals erred in its decision below, I continue to believe that summary dispositions deprive litigants of a fair opportunity to be heard on the merits and significantly increase the risk of an erroneous decision.

*Id.* at 403 (citations omitted).

10. 874 F.2d 1417, 1423 (11th Cir. 1989).

11. *Id.*

12. *Id.* (citing United States v. Topco Assocs., 405 U.S. 596 (1972)).
failure to adduce evidence sufficient to define "relevant product and geographic markets." Interestingly, while the Eleventh Circuit's opinion contained a lengthy dissent by Judge Clark, that court declined plaintiff's petition for rehearing en banc.14

While the historic competition between the bar review courses in BRG resulted in the application of the per se rule against horizontal market allocation, the absence of such competition between Coca-Cola bottlers operating in separate exclusive territories resulted in the Fourth Circuit's application of the Rule of Reason in Sewell Plastics, Inc. v. Coca-Cola Co.15 In Sewell, the Fourth Circuit affirmed, per curiam, the exhaustive analysis of the Western District of North Carolina and rejected the plaintiff's antitrust claims arising from the creation by its former customers, a group of Coca-Cola bottlers operating in the Southeast, of a captive plastic bottle manufacturer.16

At the district court level, Sewell Plastics alleged that as a result of an illegal group boycott and Section 1 conspiracy, it was foreclosed from competing for sales to defendant Coca-Cola bottlers, which comprised a substantial portion of the market for sale of plastic beverage bottles to the southeastern United States. The defendant bottlers contended that they established the plastic bottle manufacturer to combat high bottle prices.17

The district court first declined to find that plaintiff's group boycott claim constituted a per se violation. In particular, Sewell Plastics alleged the existence of a group boycott consisting of the bottlers' collective agreement to enter into individual supply contracts with the captive plastic bottle manufacturer. The terms of this agreement required the bottlers to purchase 80% of their annual requirements of plastic soft drink bottles for five years. The district court rejected the group boycott claim because of evidence

13. Id. at 1428.
14. 893 F.2d 293 (11th Cir. 1990).
15. 912 F.2d 465 (unpublished decision), 1990-2 Trade Cas. (CCH) ¶ 69,165 (4th Cir. Sept. 4, 1990), aff'd, 720 F. Supp. 1186 (W.D.N.C. 1990). All references to this case will be cited to 1990-2 Trade Cas. (CCH) ¶ 69,165.
16. Sewell Plastics, Id. at ¶ 64,937.
that "the bottlers purchased 17% of their aggregate requirements from Sewell during the contract period, and . . . that some bottlers purchased in excess of 20%" from Sewell Plastics.\textsuperscript{18} Following Northwest Wholesale Stationers, Inc. \textit{v.} Pacific Stationery & Printing Co.,\textsuperscript{19} the district court held that the level of these purchases from plaintiff sufficiently distinguished this case from the group boycott cases which it characterized as involving a "denial of access."\textsuperscript{20} The court concluded that the plaintiff had adduced no evidence from which a rational trier of fact could find a denial "necessary to enable plaintiff to compete"\textsuperscript{21} in that the denial alleged did not approach the level of denial of access present in \textit{Silver v. New York Stock Exchange},\textsuperscript{22} Radiant Burners, Inc. \textit{v.} Peoples Gas & Co.,\textsuperscript{23} Klors, Inc. \textit{v.} Broadway-Hale Stores, Inc.,\textsuperscript{24} and \textit{Associated Press v. United States}.\textsuperscript{25}

Moreover, the district court declined to expand the application of the per se rule beyond cases in which the alleged boycotting parties were competitors "for all other [non-boycott related] purposes."\textsuperscript{26} While the plaintiff contended that the defendant bottlers competed on the supply side for the purchase of bottles, the court distinguished the group boycott cases in which the boycotting entities otherwise engaged in full competition from this case because

\begin{footnotesize}
\begin{enumerate}
\item[18.] Id. at 1191.
\item[19.] 472 U.S. 284 (1985).
\item[20.] 720 F. Supp. at 1191 (citation omitted). The district court reasoned as follows:
First, plaintiff has had continuing, though limited, access to the customers allegedly participating in the boycott. Second, there is insufficient evidence in the record from which a rational trier of fact could find that the bottlers' business was necessary to enable plaintiff to compete in the southeast area market. There are other plastic bottle customers in that market (i.e., Pepsi bottlers). Plaintiff has pointed to no evidence in the record describing the respective market shares of the soft drink bottlers. Such evidence might allow a fact finder to determine whether the bottlers' 80% requirements contracts denied plaintiff access to "a market."

\item[21.] Id. at 1192 (emphasis in original).
\item[22.] 373 U.S. 341 (1963) (New York Stock Exchange's removal of over-the-counter worker's direct-wire telephone connections constituted a group boycott and per se violation of Sherman Act § 1).
\item[23.] 364 U.S. 656 (1961) (lower court erred in dismissing Sherman Act § 1 complaint by gas heater manufacturer against trade association for improperly refusing to approve its burners).
\item[24.] 359 U.S. 207 (1959) (agreement between appliance manufacturers and department stores not to sell to small businessmen, or to sell only at discriminatory prices, constitutes a group boycott).
\item[25.] 326 U.S. 1 (1945) (contract between Associated Press and Canadian Press Association to furnish news exclusively to each other constituted restraint of trade).
\item[26.] 720 F. Supp. at 1192 (emphasis in original).
\end{enumerate}
\end{footnotesize}
the defendant Coca-Cola bottlers operated in exclusive geographic territories and thus, by and large, did not compete.\textsuperscript{27}

The district court rejected plaintiff's attempt to characterize the bottle contracts as a per se price fixing agreement because, while a rational fact-finder could find that the bottlers agreed on uniform prices and other terms affecting price, the bottlers were not "engaged in a purely competitive relationship outside the confines of their combination."\textsuperscript{28} Thus, largely as a result of the lack of competition between the defendant Coca-Cola licensees operating in exclusive geographic territories, the district court declined to expand the coverage of the per se rule.

Plaintiff was no more successful in Sewell Plastics under the Rule of Reason. The district court also rejected plaintiff's Section 1 allegations because it failed to prove that Southeastern or the bott-

\textsuperscript{27} The court held:

The lack of competition between bottlers due to their exclusive geographic sales territories, along with the presence of competition between bottlers of different brands within the same territories, substantially reduces the antitrust risks of the bottlers' joint venture combination. . . . The bottlers' ability as a group to do any of these things is limited by competition between Coke products and other soft-drink manufacturers' products.

\textit{Id.} (emphasis in original) (citations omitted).

\textsuperscript{28} \textit{Id.} at 1194. The court reasoned:

Several features of the defendants' enterprise make the anti-competitive effect of these restraints less than obvious. First, the defendants are setting a price for inputs to their production charged by a joint venture which they own. In this situation, defendants have no obvious incentive to raise prices or restrict output, because they would be raising the cost of their own products. That price is subject to competitive pressure from the prices charged by the distributors of other brands of soft drinks.

This feature of defendants' conduct distinguishes the per se price-fixing cases on which plaintiff relies. In no case cited by plaintiff did a court hold a price-fixing agreement \textit{per se} illegal where the price-fixing companies were setting a price charged to them by a source of supply owned by them.

Second, the price restraints could well be found to be plausibly related to the success of the joint venture. The price restraints could plausibly guarantee that each bottlers stockholder will receive a comparably-priced supply, and that bottlers located near the plant will not have a comparative advantage due to their proximity. This device had plausible utility for attracting investors in the enterprise, increasing the volume, and lowering Southeastern's marginal cost of production. This in turn could enable Southeastern to lower its prices, enabling the bottlers to compete more effectively with bottlers of other soft drink brands.

The "price competition" clause plausibly enabled Southeastern to avoid losing demand for its production due to heavy discounting by an established supplier. There is no evidence that the price competition clause enabled Southeastern to maintain prices at a higher than market level. Indeed, one of plaintiff's arguments is that Southeastern's assured volume allowed it to offer prices at an "artificially low" level.

\textit{Id.} at 1194-95 (emphasis in original).
tlers possessed market power. Rejecting the notion that market power can be determined by market share alone, the court held that “[i]n this case, there is no evidence that Southeastern has raised or could raise market prices above the competitive level or, conversely, that the bottlers could depress market prices below the competitive level. Without evidence of market power, there is no basis for finding ‘undue’ foreclosure of the relevant market.” The Fourth Circuit affirmed, in summary fashion, holding that “the district court accurately and comprehensively analyzed the summary judgment record and properly applied controlling substantive and procedural principles in granting the defendants’ motion for summary judgment.”

2. Intracorporate Conspiracy Doctrine

In four recent cases, federal courts logically extended the scope of the intracorporate conspiracy doctrine to include wholly-owned sister subsidiaries, while rendering seemingly inconsistent opinions regarding the independent personal stake exception.

First, in Advanced Health-Care Services v. Radford Community Hospital, the Fourth Circuit, considering the issue for the first time and following prior holdings of the Fifth and Sixth Circuits, extended the intracorporate conspiracy doctrine announced in Copperweld Corp. v. Independence Tube Corp., to sister subsidiaries of the same parent corporation.

Three federal court cases considered the independent personal stake exception to the intracorporate conspiracy doctrine. In Ge-

31. 910 F.2d 139 (4th Cir. 1990).
32. Id. at 146.
33. 467 U.S. 752 (1984). In Copperweld, the Supreme Court held that “the coordinated activity of a parent and its wholly-owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act.” Id. at 771.
34. 910 F.2d at 145-47. The court stated “that two subsidiaries wholly owned by the same parent corporation are legally incapable of conspiring with one another for purposes of § 1 of the Sherman Act.” Id. at 146.
35. The independent personal stake exception to the intracorporate conspiracy doctrine holds that a corporation and other individuals or entities with which it is associated may be capable of “conspiring” with each other where there exists sufficient independent personal interests and activities between them to make it economically sensible to treat them as separate actors. See Bolt v. Halifax Hosp. Medical Center, 891 F.2d 810, 819 (11th Cir. 1990) (a
oplex Corp. v. Caci, Incorporated-Federal,38 the Fourth Circuit, in an unpublished opinion, declined to reverse the district court's finding that plaintiff's proof as to the independent personal stake exception was insufficient.37 Plaintiff sued a corporation and several of its officers and directors. Faced with Copperweld, plaintiff argued that the named individual defendants had an independent, albeit non-economic, interest sufficient to distinguish Copperweld. As framed by the district court, "[t]he issue here is whether the allegations concerning the interest that these officers may have had in avoiding criminal liability would be sufficient to take them out of the Copperweld rule and permit them to be conspirators with the company."38 Finding no case squarely on point, the district court held that while it was not prepared to rule that non-economic interests would never create an exception to Copperweld, the facts of this case did not warrant departing from the rule against intracorporate conspiracies.39

In Hampton Audio Electronics, Inc. v. Contel Cellular, Inc.,40 the district court was not as willing to dismiss the case because no discovery had been made. The defendants moved to dismiss on the basis of Copperweld, arguing that plaintiffs had made no allegation of an independent personal stake sufficient to invoke the exception. Finding that the complaint in Greenville Publishing Co. v.

hospital was capable of conspiring with its staff member physicians, where the physicians maintained their separate private practices in addition to their hospital employment. The Fourth Circuit first adopted the independent personal stake exception in Greenville Publishing Co., Inc. v. Daily Reflector, Inc., 496 F.2d 391, 399-400 (4th Cir. 1974).

36. 911 F.2d 722 (unpublished decision), 1990-2 Trade Cas. (CCH) ¶ 69,128, at 64,190 (4th Cir. Aug. 1, 1990) All references to this case will be cited to Geoplex, 1990-2 Trade Cas. (CCH) ¶ 69,128.

37. Id. Interestingly, in affirming, the Fourth Circuit ignored the Third's Circuit's admonition in Tunis Bros. v. Ford Motor Co., 763 F.2d 1482, 1496 (3d Cir. 1985), that the "independent personal stake" exception concerns questions of motive and intent which are particularly inappropriate for summary adjudication.

38. Record at 60, Geoplex (No. 89-610-A).

39. Id. at 62. The court reasoned as follows:

The reason that the noneconomic interest cases don't apply -- if that were generally the rule, then clearly, Copperweld would have an exception and swallow the rule. And as I indicated during oral argument, it is quite clear that any unilateral action that might fall prey to under Section 1 analysis as an antitrust violation would become a conspiracy under Section 1, because these corporations can only act though the decisions made by its officers, and you would always have a conspiracy then if you didn't have a Copperweld rule. By the same token, you need an exception to the Copperweld rule for the reasons pointed out in such cases as Tunis, but that exception, the Court ultimately concludes, does not apply here.

Id. at 62-63.

Daily Reflector, Inc.\textsuperscript{41} did not allege an independent personal stake and that it was reasonable to infer that discovery might reveal one, Judge Spencer declined to dismiss the action on the pleadings.\textsuperscript{42}

In Oksanen \textit{v. Page Memorial Hospital},\textsuperscript{43} the Fourth Circuit reversed the district court’s grant of summary judgment in a hospital staff privileges case. The court rejected the defendant’s contention that, in the context of peer review activities, the medical staff of the hospital is, by virtue of \textit{Copperweld}, legally incapable of conspiring with themselves or with the hospital for Sherman Act Section 1 purposes.\textsuperscript{44} Following the opinions of the Eleventh and Ninth Circuits in \textit{Bolt v. Halifax Hospital Medical Center},\textsuperscript{46} and \textit{Oltz \textit{v. St. Peter’s Community Hospital}},\textsuperscript{46} the Fourth Circuit found that

\begin{quote}
the physicians on the Page Memorial medical staff operated not as agents of Page Memorial during the peer review process but instead as independent sole practitioners, pursuing in many instances personal economic interests. Consequently, we hold that the peer review decisions of a hospital and its medical staff members may be subject to the penalties of Section 1 of the Sherman Act.\textsuperscript{47}
\end{quote}

Given the breadth of \textit{Copperweld}, it appears that the \textit{Greenville Publishing} exception will continue to be a fertile area for litigation.

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\item \textsuperscript{41} 496 F.2d 391 (4th Cir. 1974) (where the Fourth Circuit for the first time adopted the independent personal stake exception).
\item \textsuperscript{42} \textit{Hampton}, No. 89-00604-R, slip op. at 17. Judge Spencer, in \textit{Hampton}, reasoned:
\begin{quote}
The Fourth Circuit first applied \textit{[the independent personal stake exception]} in \textit{Greenville Publishing} to reverse an order of summary judgment when depositions made it ‘reasonable to infer’ that an individual defendant could personally benefit from the object of the alleged conspiracy. It does not appear that the complaint in \textit{Greenville Publishing} made any allegations to this effect. Here, discovery could make it ‘reasonable to infer’ that Daniel or Susan King were to personally benefit from having Hampton Audio sign the Proposed Agreement or go out of business.
\end{quote}
\textit{Id.} (citations omitted).
\item \textsuperscript{43} 912 F.2d 73 (4th Cir. 1990).
\item \textsuperscript{44} \textit{Id.} at 76-77.
\item \textsuperscript{45} 891 F.2d 810 (11th Cir.), \textit{cert. denied}, 110 S. Ct. 1960 (1990).
\item \textsuperscript{46} 861 F.2d 1440 (9th Cir. 1988).
\item \textsuperscript{47} 912 F.2d at 77.
\end{itemize}
3. Application of the Monsanto/Matsushita Conspiracy Standard

The Fourth Circuit continued its strict adherence to the Monsanto/Matsushita conspiracy standard in Laurel Sand & Gravel, Inc. v. CSX Transportation, Inc. In Laurel Sand, the court held that historic and ongoing business transactions between alleged co-conspirators, along with what plaintiff considered to be excessive shipment rates for the transportation of gravel and sand, did not rise to the level of a conscious commitment to a common scheme to achieve an unlawful objective, nor did it tend to exclude the possibility of independent action. In that case, Laurel Sand, a sand and gravel supplier, and Maryland Midland Railway ("MMR"), a short line railroad, alleged that CSX conspired with Millville Quarry to keep Laurel Sand out of the Washington, D.C./Baltimore market for aggregate material. Specifically, the plaintiffs alleged that CSX's denial of tracking rights to MMR, combined with its quotation of high rates for shipment on its line of Laurel Sand's aggregate, constituted an antitrust violation. Reviewing the conspiracy evidence which consisted wholly of historic and ongoing business relations between defendants CSX and Millville Quarry, the Fourth Circuit stated that

48. In Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984), the Supreme Court held that:

[2]there must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. As Judge Aldisert has written, the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Id. at 764. Two years later, in Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574-78 (1986), the Court further stated:

[1]it follows from these settled principles that if the factual context renders respondents' claim implausible — if the claim is one that simply makes no economic sense — respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary. . . . To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. . . . Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents.

Id. at 587-88 (citations omitted).

49. 924 F.2d 539 (4th Cir. 1991).

50. Id. at 543.

51. Id. at 541.

52. Laurel Sand's facility was located on the MMR short-line. It alleged that it could not get access to the Baltimore or Washington, D.C. market without its aggregate either being shipped by MMR over the CSX lines or by CSX over its lines. Id. at 540.
Trade F.2d petition complete determining verse with hospital defendant's year, recently, sales 4.

While rejection of Laurel Sand's conspiracy allegations is typical of recent antitrust cases, the Fourth Circuit remains loathe to affirm an antitrust dismissal on what it considers to be an incomplete record. Indeed, the Fourth Circuit's experience with health care antitrust cases during this past year seems to send a signal to antitrust defendants that only in the exceptional case will summary adjudication be permitted to stand.

4. Cases in the Health Care Context

While the Fourth Circuit has rather routinely affirmed dismissals of medical staff and other health care antitrust cases recently, it has reversed dismissals in two appeals decided this year, thereby discouraging future antitrust litigants from taking procedural shortcuts and requiring full discovery.

In Oksanen v. Page Memorial Hospital, the court rejected the defendant's Copperweld argument that the medical staff of the hospital was legally incapable of conspiring with themselves or with the hospital for Section 1 purposes. The court went on to reverse the district court's dismissal of plaintiff's Section 1 claims, determining that the plaintiff did not have an opportunity to complete discovery. Subsequently, the full court granted appellee's petition for rehearing en banc, which has been argued and is pres-

53. Id. at 543.
55. 912 F.2d 73, 77 (4th Cir. 1990). Oksanen's intracorporate conspiracy issues are discussed, supra, notes 43-47 and accompanying text.
56. 912 F.2d at 79. "[W]ithout commenting on whether Dr. Oksanen will be able to survive pre-trial motions and get to trial, or prevail ultimately if this case goes to trial, we conclude that he must be permitted further to depose defendants and receive answers to interrogatories." Id.
ently awaiting a ruling.\textsuperscript{57}

The Fourth Circuit reiterated the philosophy in \textit{Advanced Health-Care Services v. Radford Community Hospital},\textsuperscript{58} that "[i]n antitrust cases in particular, the Supreme Court has stated that ‘dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.'"\textsuperscript{59} Advanced Health Care, a supplier of durable medical equipment ("DME"),\textsuperscript{60} alleged antitrust violations arising from its alleged exclusion from access to defendant hospitals' patients as a result of the execution of exclusive contracts between the hospitals and competing DME suppliers.\textsuperscript{61} The district court dismissed the conspiracy allegations, ruling that the actions of the hospitals and DME companies in referring patients to the other defendant DME company were not predatory and "constitute[d] normal, reasonable competitive activity."\textsuperscript{62} The Fourth Circuit declined, however, to affirm the dismissal of the Section 1 allegations, finding that “[u]ntil some discovery is completed, there is no record upon which to assess the reasonableness of the restraints alleged by the plaintiff, so summary dismissal of the plaintiff’s [Section] 1 Sherman Act claims against Twin County and Giles was inappropriate."\textsuperscript{63} In its discussion, the court went out of its way to note that, despite the remand, it was expressing no opinion as to the ultimate merits of plaintiff's antitrust claim.\textsuperscript{64} Indeed, in his concurring opinion, Judge Hall wrote that

although [plaintiff’s claims] are tenuous at best and most likely meritless, they are sufficient to survive a motion to dismiss. . . . Simply put, a plaintiff must be given a chance to prove his colorable factual allegations, even if it appears unlikely that he can do so. Here, the district court slighted [plaintiff] of this chance and jumped the gun in dismissing these claims under Rule 12(b)(6). Thus, even in the face of the tenuity of these claims, reversal is appropriate.\textsuperscript{65}

Given these two opinions, the Fourth Circuit’s opinion in

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\item \textsuperscript{57} \textit{Id.} at 80.
\item \textsuperscript{58} 910 F.2d 139, 144 (4th Cir. 1990).
\item \textsuperscript{59} \textit{Id.} (quoting \textit{Hospital Bldg. Co. v. Trustees of Rex Hosp.}, 425 U.S. 738, 747 (1976)).
\item \textsuperscript{60} DME consists of medical equipment such as crutches and wheelchairs. \textit{Id.} at 142 n.2.
\item \textsuperscript{61} \textit{Id.} at 143.
\item \textsuperscript{62} \textit{Id.} at 145.
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} \textit{Id.} at 145 n.8.
\item \textsuperscript{65} \textit{Id.} at 154 (Hall, J., concurring).
\end{itemize}
\end{footnotesize}
Tempkin v. Lewis-Gale Hospital, Inc.66 is remarkable in that the court had little difficulty summarily disposing of the appeal from a Rule 12(b)(6) dismissal of a physician's antitrust suit against a hospital and multispecialty clinic.67 In a per curiam opinion, the Fourth Circuit affirmed the district court's dismissal on lack of subject matter jurisdiction, lack of standing, and failure to state a claim under Sherman Act Sections 1 and 2.68 Perhaps the apparent divergence in the Fourth Circuit opinions can be explained by the tortured procedural history of the Tempkin case in the district court, during which, despite repeated attempts and opportunities to amend their pleadings, plaintiffs simply failed to allege an actionable antitrust claim.69

66. 930 F.2d 913 (unpublished decision), 1991-1 Trade Cas. (CCH) ¶ 69,401, at 65,615 (4th Cir. April 19, 1991). All references to this case will be cited to tempkin, 1991-1 Trade Cas. (CCH). ¶ 69,401.
68. Tempkin, 1991-1 Trade Cas. (CCH) ¶ 69,401, at 65,616.
69. The twenty-one month history of this case in the district court evidences the opportunities the plaintiffs had available to develop evidence consistent with their allegations. Thus, although the court granted defendants' 12(b)(6) motion, as evidenced below, the procedural posture of this case was different from most cases involving judgments on the pleadings.

On April 5, 1988, the Tempkins filed their original complaint, which defendants moved to dismiss. After a hearing on August 8, 1988, the Tempkins' original counsel was given leave to withdraw. The court stayed the matter for sixty days to enable the Tempkins to retain substitute counsel. After plaintiffs' new counsel filed discovery in March, 1989, defendants sought a brief stay of discovery until the district court had considered the original motions to dismiss and the Tempkins' anticipated motion to amend. After a hearing on April 4, 1989, the district court stayed discovery on the original complaint, granted the Tempkins leave to amend and permitted the Tempkins to commence discovery immediately with the filing of their amended complaint.

On May 1, 1989, the Tempkins filed their First Amended Complaint, alleging federal antitrust violations and various state law claims. Defendants again moved to dismiss for lack of subject matter jurisdiction and failure to state a claim. Meanwhile, for seven months, from May 1, 1989 until the district court dismissed this action on November 22, 1989, the parties engaged in discovery.

The district court heard defendants' motions to dismiss on October 17, 1989. At the hearing, the district court invited the parties to request further argument, if needed, and to file any additional papers by November 9, 1989. The Tempkins filed two untimely memoranda which the district court accepted. After considering the Tempkins' additional submissions, the district court entered a Final Order, granting defendants' motions to dismiss on the grounds that (i) subject matter jurisdiction was lacking; (ii) the Tempkins had no standing to assert an antitrust violation in the alleged market; and, (iii) the Tempkins had not alleged sufficient facts to state a claim under §§ 1 or 2 of the Sherman Act.

On December 1, 1989, the Tempkins moved the district court to reconsider its decision and sought to leave to file a second amended complaint. The Tempkins, however, never filed a proposed amended complaint. After lengthy oral argument, the court denied both motions, giving rise to the appeal. See 1989-2 Trade Cas. (CCH) ¶ 68,865, at 62,543 (W.D. Va.)
Similarly, in *Advanced Health-Care Services, Inc. v. Radford Community Hospital*, 76 the Fourth Circuit reversed the district court’s dismissal of plaintiff’s Section 2 claims largely because the district court had not allowed the plaintiff to develop a factual record. 77 The district court had dismissed the Section 2 claims, finding that plaintiff’s allegations were devoid of any predatory conduct required to violate the Sherman Act. 78 Following *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 79 the Fourth Circuit announced that “[t]he key to distinguishing legal exclusion from improper, or predatory, exclusion is whether the exclusion was based on superior efficiency.” 80

While hinting that it might theoretically accept defendants’ contention that *Aspen Skiing* should be limited to its facts and should

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76. 910 F.2d 139 (4th Cir. 1990).
77. Id. at 149.
78. Id. at 147.
80. 910 F.2d at 147. The Fourth Circuit dismissed the district court’s contrary analysis as follows:

In finding that the plaintiff had not alleged predation in the cases before us, the district court found that the defendants “have not sacrificed the attractiveness of their hospital services but rather have made a business deal . . . that appears to have produced immediate benefits.” . . . This finding is premature and shows a misunderstanding of the plaintiff’s complaints. In essence, the plaintiff is alleging that the hospitals have linked the purchase of DME to the provision of their hospital services. Thus, for example, if the plaintiff can prove that the DME now provided to patients in the relevant areas is inferior in quality and/or more expensive than AHCS’s, it will have shown harm to competitors, short-term sacrifices by the hospitals, and adverse effects on merits competition that injure DME consumers, all as a result of the hospitals’ entry into the DME markets. From this, a finder of fact may be able to infer that their motives were anti-competitive (i.e., that these were predatory acts stemming from an illegal specific intent to monopolize).

The appellees argue that the district court was correct in its statement that antitrust law does not impose a duty on them to refer patients to or advertise on behalf of the plaintiff. Again, this reading miscasts the plaintiff’s argument.

If a refusal to deal with an individual competitor can give rise to antitrust liability in an appropriate case, it stands to reason that an agreement to exclude such a competitor could create liability as well. Therefore, the question in this case is not whether the defendants have a duty to advertise on behalf of or refer patients to the plaintiff; rather, it is whether the purposeful exclusion of this competitor from gaining access to the hospital’s patients constitutes the type of circumstances that can give rise to antitrust liability. . . . Like the plaintiffs in *Aspen Skiing*, AHCS deserves an opportunity to develop a factual record that “supports an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival.”

*Id.* at 148–49.
Finally, the Fourth Circuit, in *Vincent v. Reynolds Memorial Hospital, Inc.*, 70 affirmed, the district court's entry of a directed verdict against the plaintiff doctor who alleged a "conspiracy to restrain trade and to monopolize in violation of" Sherman Act Sections 1 and 2. The Fourth Circuit found that the evidence amply supported the district court's Rule of Reason analysis because defendant's conduct showed pro-competitive effect and did not demonstrate an adverse effect on competition. 71 It further found that the evidence also failed "to show a conscious commitment to a common scheme designed to achieve an unlawful objective by the defendant." 72

B. *Sherman Act Section 2 Issues*

As with Section 1 claims where discovery was not allowed to proceed, the Fourth Circuit demonstrated little patience with what it viewed as premature disposition of antitrust claims in the Section 2 area. 73 Indeed, while expressing skepticism as to the merits of plaintiff's antitrust allegations in two cases, the court nevertheless reversed and remanded the district court's early dismissals, calling into question the viability of Rule 12(b)(6) defenses to antitrust claims in this circuit. In those Section 2 cases in which the Fourth Circuit reviewed grants of summary judgment following complete discovery, the court had little difficulty upholding the district court's judgment.

1. Premature Dispositions by 12(b)(6) Motions

In *Oksanen v. Page Memorial Hospital*, 74 the Fourth Circuit, while expressing doubt about the ultimate viability of plaintiff's claims, reversed the district court's finding of no Section 2 liability because discovery had not been completed in the case. 75

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70. 930 F.2d 913 (unpublished decision), 1991-1 Trade Cas. (CCH) ¶ 69,402, at 65,616 (4th Cir. Apr. 19, 1991). All references to this case will be cited to *Vincent*, 1991-1 Trade Cas. (CCH) ¶ 69,402.
71. *Id.*
72. *Id.*
73. Section 2 of the Sherman Act provides as follows: "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. . . ." 15 U.S.C. § 2 (1988).
75. *Id.* at 79.
not impose duties on competitors to engage in cooperative behavior with the competition, the court declined to adopt this approach in this case, reasoning that "[e]ven if Aspen Skiing is so limited, it cannot be determined from the allegations of the plaintiff's complaints that such circumstances were not present in these cases."  

The court went further, however, and broke new ground in the Fourth Circuit by assuming, without deciding, that monopoly leveraging states a Section 2 claim separate from monopolization and attempted monopolization. The court outlined the elements of such a claim, which would require a plaintiff to prove "that the defendant possessed monopoly power, that it used that power to gain an unwarranted competitive advantage in a second distinct market, and that there was causal antitrust injury to the leveraged market." Employing this analytical framework, the court determined that the plaintiff's pleadings stated a claim, as follows:

The plaintiff here alleges that the hospitals have monopoly power in the market for short-term, acute care hospital services and that they have used that power, with the specific intent of foreclosing competition, to gain an unfair competitive advantage in the relevant DME markets. AHCS further alleges that the acts outlined above constitute exclusionary and predatory conduct that has artificially foreclosed it from a dominant share of those markets. These allegations could, if proven, support a finding of liability for monopoly leveraging under [Section] 2 of the Sherman Act in each of these cases. The district court's dismissals of the plaintiff's monopoly leveraging claims are, therefore, reversed.

The Fourth Circuit went on to reverse the district court's dismissal of plaintiff's essential facilities claim, in which the plaintiff

81. Id. at 148-49 n.16.
82. Id. at 149 n.17.
84. Id. at 149-50.
85. "The 'essential facilities' doctrine imposes on the owner of a facility that cannot reasonably be duplicated and which is essential to competition in a given market a duty to make that facility available to its competitors on a nondiscriminatory basis." Ferguson v. Greater Pocatello Chamber of Commerce, Inc., 848 F.2d 976, 983 (9th Cir. 1988); see also Fishman v. Estate of Wirtz, 807 F.2d 520, 539-41 (7th Cir. 1986); Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1519-21 (10th Cir. 1984), aff'd on other grounds, 472 U.S. 585 (1985); Hecht v. Pro-Football, Inc., 570 F.2d 982, 992-93 (D.C. Cir. 1977), cert.
DME company alleged that denial of access to the hospital's patients violated Section 2. Plaintiff argued that it had been able to compete before the hospitals had entered into exclusive contracts with defendant DME companies, and that following the establishment of the exclusive relationships, it was effectively cut out of the market. The district court ruled that the essential facilities doctrine was inapplicable, holding that there was no allegation that the hospitals, which controlled access to their patients, competed with plaintiff DME supplier. Finding that this issue was a factual one, the Fourth Circuit reversed the district court on the basis that the allegation of a financial stake by the hospitals in the DME companies warranted development of the facts. “Whether this connection alone is enough to make the hospitals competitors of AHCS and whether access to hospital patients is actually an essential facility to entry into the relevant market are factual issues that cannot be resolved on a motion to dismiss.”

2. Disposition on the Merits After Discovery

Conversely, Laurel Sand & Gravel Inc. v. CSX Transportation, Inc., a case in which discovery had been complete, the Fourth Circuit easily rejected plaintiff Maryland Midland Railway, Inc.’s (“MMR”) Section 2 essential facilities claim. MMR, a short line railroad, claimed that the only economically practical means of moving material between two Maryland points connected by CSX rail lines was CSX’s grant of trackage rights to MMR. The Fourth Circuit avoided reaching any conclusion on whether CSX, in fact, controlled an “essential facility” by finding that MMR failed to meet the last three prongs of the essential facilities test established in MCI Communications v. American Telephone & Telegraph Co. In MCI, the Seventh Circuit outlined the four elements necessary for an essential facilities claim: (1) control by the monopolist of the essential facility; (2) the inability of the competitor seeking access to practically or reasonably duplicate the facility; (3) the denial of the facility to the competitor, and (4) the feasibility of

86. Ferguson, 848 F.2d at 151.
87. Id. at 150.
88. Id. at 151.
89. 910 F.2d at 151 (citations omitted).
90. 924 F.2d 539 (4th Cir. 1991).
the monopolist to provide the facility.\(^2\)

The Fourth Circuit first found that MMR failed to show that no alternatives existed for the essential facility because CSX had offered to provide rail service to MMR for one cent over its variable cost. While MMR contended that this rate would not have allowed Laurel Sand to compete with Millville Quarry, the court, nevertheless, found the CSX rate to be reasonable, in large measure because it was less than what Millville paid CSX.\(^3\) Second, the court found that access had not been denied because, while the rate was greater than MMR and Laurel Sand could afford, "the reasonable standard of the access factor can not be read to mean the assurance of a profit for [Laurel Sand], and [Laurel Sand's] business for MMR."\(^4\) Finally, the court found that MMR had not met the final prong of the MCI test because, given the nature of its business, CSX could not feasibly rent its track to MMR because CSX relies for its business of providing transportation services on "feeder" railroads such as MMR.\(^5\)

In similar fashion, the court in Abcor Corp. v. AM International, Inc.,\(^6\) had little trouble affirming the district court's dismissal of an attempted monopolization case involving the alleged market for the servicing of printing equipment. Plaintiff Abcor serviced defendant AMI's printing equipment in the Washington area, and after negotiations for Abcor's acquisition by AMI broke off, Abcor contended that AMI engaged in a series of anti-competitive measures designed to drive Abcor out of business. The district court dismissed the Section 2 action because plaintiff failed to prove either the existence of a specific intent to monopolize or the existence of predatory acts or any antitrust injury.\(^7\)

Abcor first contended that a specific intent to monopolize was established by statements made by AMI managers that AMI did not need to buy Abcor because it could obtain the business through competition. The Fourth Circuit rejected this argument, finding that the evidence "show[ed] only that AMI planned to increase its competitive activity in the Washington area."\(^8\)

\(^2\) Id. at 1132-33.
\(^3\) Laurel Sand, 924 F.2d at 544-45.
\(^4\) Id. at 545.
\(^5\) Id.
\(^6\) 916 F.2d 924 (4th Cir. 1990).
\(^7\) Id. at 925.
\(^8\) Id. at 927.
court also rejected plaintiff Abcor’s suggestion that anti-competitive intent may be inferred from a series of anti-competitive acts, finding that “none of the actions relied on by the plaintiffs rise to the level of illegal competition. Even viewing the acts as a whole, the record reveals no more than vigorous competition which could not rise to the level of an antitrust violation.”

Similarly, the district court in Sewell Plastics, Inc. v. Coca-Cola Co. had little difficulty disposing with plaintiff bottle manufacturer’s monopolization claims, holding that its ruling on the Section 1 claim, that there was no actual or probable adverse effect on competition, precluded the Section 2 claim. Employing a Rule of Reason analysis, the court specifically found that “[s]ince the formation of Southeastern [the bottle manufacturer formed by defendant Coca-Cola bottlers] through 1986, plastic bottle prices have decreased, output of plastic bottles has increased, the number of competitors has remained the same, the market concentration has decreased, and production processes have become more efficient.” Given this evidence, the court easily found no detriment to competition as a result of the allegations.

The district court also rejected Sewell Plastics claim of predatory pricing. While the court recognized that the Supreme Court had not yet reached a consensus on the proper definition of preda-

99. Id. at 927-28. Specifically, the actions challenged by the plaintiff and found not to be evidence of the specific intent to monopolize were: (1) irrational, but not predatory, price discounts; (2) use of Abcor’s customer list and financial information obtained during acquisition negotiations; (3) refusal by AMI to grant Abcor access to AMI’s over-the-counter parts depot in Washington and requiring Abcor to purchase replacement parts only in writing; (4) two instances of misinformation by AMI personnel that Abcor was going out of business entirely, rather than Abcor’s mere withdrawal from the graphic supplies business; and (5) AMI’s hiring of two Abcor employees. Id. at 928-31.

The court declined to equate these sporadic acts with an antitrust violation so as to create a federal law of unfair competition. With respect to the acts set forth in (3) above, the court distinguished those refusal to deal cases, such as General Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795 (8th Cir. 1987), in which the supplier severed all ties with the antitrust plaintiff, from this case because Abcor had access to AMI’s replacement parts but was required to bear its own inventory costs. The court ruled that elimination of this “free ride” did not amount to an antitrust violation. 916 F.2d at 930.

Of interest, the issue of whether a violation of § 2 or a tying arrangement violative of § 1 occurs where a manufacturer changes its policy and refuses to sell replacement parts to competing independent service organizations, has been accepted for argument before the Supreme Court in next year’s term. Eastman Kodak Co. v. Image Technical Servs., 111 S. Ct. 2823 (1991).


101. Id.
tory pricing,"^{102} it appeared to apply the average variable cost standard in finding that plaintiff did not develop evidence "that Southeastern's sales of three-liter bottles in 1985 were below its marginal or average variable costs."^{103} Nevertheless, the court went on to reject plaintiff's argument that, using an average total cost test, Southeastern's sales of three-liter bottles was predatory, finding that

[B]ecause competitors in the Southeast area sell a full line of plastic beverage bottles, the court holds that three-liter bottles alone cannot be considered a relevant product for purposes of predatory pricing analysis. The relevant product must be defined with reference to the danger of predatory pricing. The danger of predatory pricing is that rivals will be driven out of the market. In this case, '[t]he pricing of one size at a predatory level would not necessarily drive out rivals who were selling a full line . . . unless this placed the overall price of the line at the predatory level.'^{104}

The Fourth Circuit affirmed the rulings of the district court per curiam.^{105}

3. Summary Disposition by the Supreme Court

The Supreme Court, in the only Section 2 case it considered during the 1990 term, dismissed in brutal summary fashion, a $4.76 million judgment arising from a natural gas supplier's refusal to deal with a competitor. In *City Gas Co. of Florida v. Consolidated Gas of Florida*,^{106} the Court rested its one paragraph per curiam opinion on a 1950 non-antitrust decision which dismissed as res judicata the damages portion of a government price regulation action because of the prior dismissal of the injunction portion of the suit for mootness after the product had been deregulated. The *City Gas* case had worked its way through the courts for eight years. Exhaustive opinions by the lower courts on the merits^{107} did not

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104. *Id.* (citing Janich Bros. v. American Distilling Co., 570 F.2d 848, 856 (9th Cir. 1977), cert. denied, 439 U.S. 829 (1978)); Bayou Bottling, Inc. v. Dr. Pepper Co., 725 F.2d 300, 305 (5th Cir.), cert. denied, 469 U.S. 833 (1984)).
107. Consolidated Gas of Fla. v. City Gas of Fla., 1990-2 Trade Cas. (CCH) ¶ 69,186, at 64,512 (11th Cir. Sept. 19, 1990), *aff'g* panel op. 880 F.2d 297 (11th Cir. 1989), *aff'g* 665 F. Supp. 1493 (S.D. Fla. 1987). All references to this case will be cited to *Consol. Gas*, 1990-2
even discuss the *res judicata* issue. Although it is far from clear, the Court apparently based its ruling on a state court injunction action brought by Consolidated concerning the exclusive use of City Gas natural gas lines, which was settled and dismissed before this action was brought.\(^{108}\)

C. **Exclusive Dealing**

In *Advanced Health-Care Service v. Radford Community Hospital*,\(^ {109}\) the Fourth Circuit strained to reverse Judge Turk's dismissal of plaintiff DME supplier's Clayton Act Section 3 claims by liberally construing "ambiguous" pleadings and determining that, while at first glance no Clayton Act Section 3 claim was apparent, a generous interpretation of plaintiff's pleading somehow indicated that a "more sophisticated exclusive dealing arrangement" may exist.\(^ {110}\) As with its other holdings in *Advanced Health Care Service*, the court reversed the Rule 12(b)(6) dismissal because the record was not "fully developed."\(^ {111}\) While doing so, the court extended the Supreme Court's analysis in *Copperweld* and rejected any exclusive dealing arrangement between the Radford Hospital and its sister DME company.

For two reasons, the court declined to accept plaintiff's suggestion that the purchasers of plaintiff's DME were the hospital discharge personnel rather than the patients using the DME. First, the court declined to apply the analysis contained in a number of medical antitrust cases that the de facto economic decision makers are hospital discharge personnel, because those cases focused on definition of the relevant market rather than the issue of "purchaser identity."\(^ {112}\) In addition, the court found that employees of the DME company or the DME/hospital joint venture could be the purchasers because "[b]y definition, there cannot be an exclusive dealing arrangement between an employer and its employees."\(^ {113}\)

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\(^{108}\) The Supreme Court's summary reversal, on a petition for writ of certiorari, of the *Palmer v. BRG* case is discussed supra notes 4-14 and accompanying text.

\(^{109}\) 910 F.2d 139 (4th Cir. 1990).

\(^{110}\) *Id.* at 152.

\(^{111}\) *Id.* at 153.

\(^{112}\) *Id.* at 152 n.23. The medical antitrust cases that the court distinguishes are *Dos Santos v. Columbus-Cuneo-Cabrini Medical Center*, 684 F.2d 1346 (7th Cir. 1982) and *United States v. American Soc'y of Anesthesiologists*, 473 F. Supp. 147 (S.D.N.Y. 1979). *Id.* at 152 n.23.

\(^{113}\) *Id.* F.2d at 153.
Nevertheless, the court reversed the district court’s dismissal of the Section 3 claim as to those hospitals which were not sister subsidiaries with their joint venture DME companies, finding that plaintiff’s allegations that “this arrangement is anticompetitive because of the allegedly monopolistic power that the buyers enjoy and because of the financial benefit they directly reap from Medserv’s profits”\textsuperscript{114} stated a claim.

In \textit{Sewell Plastics}, the only other case raising Clayton Act Section 3 allegations, the Fourth Circuit affirmed the district court holding that, even assuming that the plastic bottle supply contracts were exclusive dealing arrangements, they did not violate the Rule of Reason because of the absence of market power or anti-competitive effect evident from its analysis of the Sherman Act Section 1 claim.\textsuperscript{115}

D. \textit{Interstate Commerce}

Perhaps raising more questions than it answered, the Supreme Court in a 5-4 opinion in \textit{Summit Health, Ltd. v. Pinhas}\textsuperscript{116} held that an ophthalmologist’s antitrust claim stated a sufficient nexus with interstate commerce to support federal jurisdiction.\textsuperscript{117} In reviewing dismissal of a complaint that alleged nothing more than the defendants were “engaged in interstate commerce,” Justice Stevens put an end to the interstate commerce defense in medical staff cases\textsuperscript{118} by expanding the jurisdictional test. Instead of determining whether the defendant’s “activities which allegedly have been infected by a price-fixing conspiracy . . . have a not insubstantial effect on the interstate commerce involved,”\textsuperscript{119} the new test requires a “general evaluation of the impact of the restraint on other participants and potential participants in the market from

\textsuperscript{114} Id.
\textsuperscript{115} \textit{Sewell Plastics}, 1991-92 Trade Cas. (CCH) ¶ 69,615.
\textsuperscript{117} Id. at 1848-49.
\textsuperscript{118} An effective use of the defense in the medical staff privileges context can be found in \textit{Sarin v. Samaritan Health Center}, 813 F.2d 755 (6th Cir. 1987). There the issue was whether the challenged conduct of terminating a physician's staff privileges at a hospital met the “effects” jurisdictional test. Because the plaintiff focused on his own termination, the Sixth Circuit found that, at most, only a de minimis impact on interstate commerce had been shown.
which he has been excluded.”

Because Congress has the power to regulate the peer-review process controlling access to the market for ophthalmological surgery in Los Angeles, and because the alleged peer review conspiracy denied Pinhas access to the market, the Court found a sufficient nexus with interstate commerce to support federal jurisdiction.

In his dissent however, Justice Scalia wrote that while he agreed that Congress had the power constitutionally to regulate the alleged activity, Congress had not exercised it. Tracing the history of the interstate commerce requirement, Justice Scalia noted that before 1980 there was little confusion regarding this requirement since the test was whether the alleged restraint, if successful, would have a substantial effect on interstate commerce. As Justice Scalia noted, the 1980 McLaIn v. Real Estate Board, Inc. opinion muddled the waters by broadening the requirement to include the defendant’s activities which have been infected by the price fixing conspiracy. Over the last decade, a debate has been waged in the circuits as to whether this required an effect on interstate commerce merely from the general business activities of the defendant or whether such effect must flow from the conspiratorial acts. Since 1980, the majority of circuits faced with this question dismissed staff privilege cases as lacking the required nexus. Justice Scalia suggests that the Court’s opinion embraces neither interpretations of earlier case law and actually makes matters worse:

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120. 111 S. Ct. at 1848.
121. Id.
122. Id.
123. Id.
125. Summit, 111 S. Ct. at 1849-50.
126. Id. at 1850.
Today the Court could have cleared up the confusion created by *McLain*, refocused the inquiry along the lines marked out by our previous cases (and still adhered to by most circuits), and reversed the judgment below. Instead, it compounds the confusion by rejecting the two competing interpretations of *McLain* and adding yet a third candidate to the field, one that no court or commentator has ever suggested, let alone endorsed. To determine Sherman Act jurisdiction it looks *neither* to the effect on commerce of the restraint, *nor* to the effect on commerce of the defendants' infected activity, but rather, it seems, to the effect on commerce of the activity from which the plaintiff has been excluded. As I understand the Court's opinion, the test of Sherman Act jurisdiction is whether the entire line of commerce from which Dr. Pinhas has been excluded affects interstate commerce. Since excluding him from eye surgery at Midway Hospital effectively excluded him from the entire Los Angeles market for eye surgery (because no other Los Angeles hospital would accord him practice privileges after Midway rejected him), the jurisdictional question is simply whether that market affects interstate commerce, which of course it does. This analysis tells us nothing about the substantiality of the impact on interstate commerce generated by the particular conduct at issue here.¹²⁸

Moreover, Justice Scalia considered the Pinhas complaint to be devoid of any facts alleging an effect on interstate commerce and referred to the majority's reference to out-of-state patients, as being "undocumented."¹²⁹ Finally, Justice Scalia lamented the Court's transformation of a business tort into a federal cause of action.¹³⁰

Called into question by this recent Supreme Court ruling are a number of medical staff antitrust cases dismissed over the past few years for failure to allege a sufficient nexus with interstate commerce. For example, last year, in *Jeffress v. Titius*,¹³¹ the District Court for the Western District of Virginia, following its decision in *Thompson v. Wise General Hospital*,¹³² required the plaintiff to plead that "the alleged actions by the defendants, even if they in fact injured the nursing home, affected interstate commerce in any

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¹²⁸ 111 S. Ct. at 1850 (dissenting opinion).
¹²⁹ 111 S. Ct. at 1853.
¹³⁰ 111 S. Ct. at 1854.
way." Judge Turk, as Judge Williams had done previously in Thompson, embraced the majority interpretation of McLain, which merely required antitrust plaintiffs to prove that the substantial effect on interstate commerce flows from the antitrust violation, rather than from the general business activities of the alleged antitrust violators, and found plaintiff's allegations lacking. Of course, following Pinhas, the interstate commerce defense in medical staff privileges cases is no longer viable. As it had done in Patrick v. Burget, the Supreme Court declined the opportunity to keep medical staff privileges cases from clogging the federal courts, a consequence surely not contemplated by Senator Sherman one hundred years ago.

E. Antitrust Immunity Issues

In a reversal of roles from the Court's Pinhas opinion, Justice Scalia wrote the majority opinion for the Court in City of Columbia v. Omni Outdoor Advertising, Inc., whereas Justice Stevens authored the dissent. In each case, however, Justices Scalia, O'Connor, Kennedy and Souter found no antitrust violation. In Omni, the Court was faced with the Fourth Circuit's reversal of a South Carolina district court's judgment notwithstanding the verdict. The Fourth Circuit reinstated the jury verdict for the antitrust plaintiff, ruling that the district court failed to apply the conspiracy exception to the Parker v. Brown state action and

133. 756 F. Supp. at 257.
135. 756 F. Supp. at 256-57.
137. At the time of the enactment of the Sherman Act, Congress' constitutional authority to legislate in this area was debated. This debate was ultimately resolved by reference to Congress' power to regulate interstate commerce. In any event, Senator Sherman surely would be surprised by the Court's Pinhas decision because at the time of the enactment of the statute that bears his name, he did not contemplate that corporations from the same state would fall within the ambit of the Act. 21 CONG. REC. 2569 (1890).
138. 111 S. Ct. 1344 (1991). The difference in composition of the majority and dissent in Pinhas and Omni is that Justices Rehnquist and Blackmun joined the Court's four newest members in the Omni majority.
139. 317 U.S. 341 (1943). The doctrine of state action immunity was first enunciated by the Supreme Court in Parker v. Brown. 317 U.S. at 351. Here the Court held that the Sherman Act was not intended to prohibit states from imposing restraints on competition. The Court later explained that "[a]lthough Parker v. Brown 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).
Noerr-Pennington antitrust immunity doctrines. The Supreme Court overturned the ruling of the Fourth Circuit, holding that the so-called "conspiracy" exception was not supported by the language of Parker and further that any such exception would tend to eviscerate the immunity. Further, the Court declined to adopt the Fourth Circuit's theories for application of the "sham" exception to the Noerr-Pennington doctrine. The Court distin-

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 (quoting 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 Clair, 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 reliability on Goldfarb v. Virginia State Bar, 421 U.S. 778, reh'g denied, 423 U.S. 366 (1975), for the establishment of a compulsion requirement, the Southern Motor Carriers 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.


The Hallie Court on the other hand 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.

140. 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 Conference 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.


142. Omni, 111 S. Ct. at 1356.

143. 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, 144. In California Motor Trans. 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
guished situations in which persons use the process of government as an anti-competitive weapon, from those which use the outcome of the governmental process, ruling that whereas the "sham" exception encompasses the former, it does not involve the latter.\footnote{144 The Court next rejected the proposed creation of a conspiracy exception to the \textit{Noerr-Pennington} doctrine. Justice Scalia declined to accept this proposal for the same reasons he chose to reject such an exception to the state action doctrine.\footnote{146}}

\begin{quote}
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."
\end{quote}

\textit{Id.} \footnote{144. \textit{Omni}, 111 S. Ct. at 1355. The Court reasoned as follows: Neither of the Court of Appeals' theories for application of the "sham" exception to the facts of the present case is sound. The court reasoned, first, that the jury could have concluded that COA's interaction with city officials "was 'actually nothing more than an attempt to interfere directly with the business relations [sic] of a competitor.'" This analysis relies upon language from \textit{Noerr}, but ignores the import of the critical word "directly." Although COA indisputably set out to disrupt Omni's business relationships, it sought to do so not through the very process of lobbying, or of causing the city council to consider zoning measures, but rather through the ultimate \textit{product} of that lobbying and consideration, viz., the zoning ordinances. The Court of Appeals' second theory was that the jury could have found "that COA's purposes were to delay Omni's entry into the market and even to deny it a meaningful access to the appropriate city administrative and legislative fora." But the purpose of delaying a competitor's entry into the market does not render lobbying activity a "sham," unless (as no evidence suggested was true here) the delay is sought to be achieved only by the lobbying process itself, and not by the governmental action that the lobbying seeks. \textit{Id.} at 1354 (citations omitted).}

\textit{Id.} at 1355. Justice Scalia wrote: \footnote{145. \textit{Id.} at 1355. The same factors which, as we have described above, make it impracticable or beyond the purpose of the antitrust laws to identify and invalidate lawmaking that has been infected by selfishly motivated agreement with private interests likewise make it impracticable or beyond that scope to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials. "It would be unlikely that any effort to influence legislative action could succeed unless one or more members of the legislative body became . . . 'co-conspirators'" in some sense with the private party urging such action. And if the invalidating "conspiracy" is limited to one that involves some element of unlawfulness (beyond mere anticompetitive motivation), the invalidation would have nothing to do with the policies of the antitrust laws. In \textit{Noerr} itself, where the private party "deliberately deceived the public and public officials" in its successful lobbying campaign, we said that "deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned."}
In his dissent, Justice Stevens first opined that the City of Columbia's economic regulation of the billboard market was not exempt from antitrust scrutiny because the regulation was pursuant to a generalized grant of zoning power. Justice Stevens also disagreed with the majority opinion that the judicial process would not be able to recognize "the difference between independent municipal action and action taken for the sole purpose of carrying out an anticompetitive agreement for the private party." Furthermore, he saw no difference between the proof problems of ascertaining whether the actions of municipal officials are motivated by an illegal agreement and those involved in any antitrust case. Justice Stevens concluded that the resolution lies in the creation of appropriate evidentiary standards, rather than an expansion of antitrust immunity.147

While agreeing with the majority's opinion as to the inapplicability of the "sham" exception to the Noerr-Pennington doctrine, Justice Stevens argued that "the evidence in the record is sufficient to support the jury's finding that a conspiracy existed between the private party and the municipal officials in this case so as to remove the private petitioner's conduct from the scope of Noerr-Pennington antitrust immunity."148 Because of the existence of that conspiracy evidence, Justice Stevens would have reinstated the jury verdict.

In Airport Properties Ltd. Partnership v. Capital Region Airport Commission,149 the Fourth Circuit held that the Richmond airport's decision not to allow a competing private airport parking company to use an access road to the airport was a foreseeable consequence of the Commonwealth's grant of power to the airport

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Id. at 1355-56 (citations omitted).

146. Id. at 1362.

147. Justice Stephens remarked:

Unfortunately, the Court's decision today converts what should be nothing more than an anticompetitive agreement undertaken by a municipality that enjoys no special status in our federalism system into a lawful exercise of public decision-making. Although the Court correctly applies principles of federalism in refusing to find a "conspiracy exception" to the Parker state action doctrine when a State acts in a nonproprietary capacity, it errs in extending the state action exemption to municipalities that enter into private anticompetitive agreements under the guise of acting pursuant to a general state grant of authority to regulate health, safety and welfare.

Id. at 1363 (dissenting opinion).

148. Id.

149. 929 F.2d 691 (unpublished decision), 1991-1 Trade Cas. (CCH) ¶ 69,388, at 65,565 (4th Cir. Apr. 3, 1991). All references to this case will be cited to Airport Properties, 1991-1 Trade Cas. (CCH) ¶ 69,338.
commission and was thus immune from Sherman Act liability under the Parker state action doctrine. Because the General Assembly had granted the airport commission the power to grant airport parking concessions and further provided that such concessions “shall be exclusive or limited when it is necessary to further the public safety, improve the quality of service, avoid duplication of service, or conserve airport property and the airport's resources,” the court held that the statute clearly contemplates anti-competitive conduct in parking services, bringing the case within the purview of the theory of immunity expressed in Town of Hallie v. City of Eau Clair. The court also held that the immunity provision of the Virginia Antitrust Act immunized the state antitrust claims because the alleged anti-competitive conduct was authorized by the Capitol Region Airport Commission Act. Given the specificity of the empowering Virginia statute, it is likely that both the Omni majority and dissent would agree with the Fourth Circuit’s opinion in Airport Properties.

The Fourth Circuit also immunized the filing of a breach of contract action under the Noerr-Pennington doctrine in Eden Hannon & Co. v. Sumitomo Trust & Banking Co. In Eden, the court held that the filing of a successful breach of contract suit cannot constitute a “sham” actionable under that exception to the Noerr-Pennington doctrine. Furthermore, the court rejected the appellant’s argument that, regardless of merit, a suit “can be a sham if it was brought for the purpose of being a sham.” The Fourth Circuit declined to subjectively broaden the scope of the sham exception and, citing Hospital Building Co. v. Trustees of Rex Hospital, held that “[i]ntent only becomes relevant once the invalidity of the legal claims is established.”

152. 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.

154. 914 F.2d 556 (4th Cir. 1990).
155. Id. at 564-65.
156. Id. at 565 (emphasis in original).
158. Eden, 914 F.2d at 565.
F. Standing

Attacking the plaintiff's antitrust standing remains a viable defense to claims brought by persons not within the contemplation of Section 4 of the Clayton Act. In Jeffress v. Titius, Judge Turk dismissed a Sherman Act Section 1 claim brought by an individual on behalf of two unincorporated associations. On its own motion, the court dismissed the action for lack of standing because there was no indication that plaintiff was either an officer or trustee of either association or that the associations had authorized him to act for them.

The Fourth Circuit in Laurel Sand & Gravel Inc. v. CSX Transportation, Inc. invoked the indirect purchaser doctrine to deny standing to Laurel Park on its Section 1 conspiracy claim. In that case, Laurel Park alleged a conspiracy between CSX, a national rail carrier, and a competing aggregate supplier, Midland Quarry. Because Laurel Sand only purchased transportation services through Millville, the court deemed it to be an indirect purchaser and denied antitrust standing.

161. Id. at 257.
162. This doctrine, enunciated by the Supreme Court in Hanover Shoe, Inc. v. United Shoe Mach. Corp., Inc., 392 U.S. 481, 487, reh'g denied, 393 U.S. 901 (1968); and again in Illinois Brick Co. v. Illinois, 431 U.S. 720, reh'g denied, 434 U.S. 881 (1977), denies antitrust standing to indirect purchasers. In Illinois Brick, the Court explained that "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." Illinois Brick, 431 U.S. at 735.
163. 924 F.2d 539, 543-44 (4th Cir. 1991).
164. Id. The court distinguished this opinion from the Supreme Court's prior antitrust standing opinion in Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982), as follows:

In Blue Shield, the Court allowed standing for a patient denied reimbursement from a health plan for the use of the services of a psychologist. The Court held that while the conspiracy was directed at psychologists for the benefit of competing psychiatrists, it was the denial of the subscriber's reimbursement that was the means Blue Shield used to effect its conspiracy. Like the subscriber in Blue Shield, LSG would seem to suffer from the alleged conspiracy to inhibit competition in the Baltimore/Washington aggregate market. Moreover, both the refusal of the health plan and that of CSX were the alleged means of the conspiracies. The similarities, however, end here; the dissimilarities between Blue Shield and the instant case make the former inapposite. Unlike the subscriber, LSG would have been the focus of the alleged conspiracy. Moreover, the results of the conspiracies were different. While the subscribers suffered direct and readily discernible economic harm from the health
G. Antitrust Injury

The requirement of showing a legitimate antitrust injury, derived from the Supreme Court’s opinion in Brunswick Corp. v. Pueblo Bowl-O-Mat,165 remains a fertile area for defense efforts. For example, in Sewell Plastics, Inc. v. Coca-Cola Co., the defendants succeeded in the district court with a defense based on these grounds.166 Citing Brunswick and Cargill v. Montfort of Colorado, Inc.,167 the court concluded that, even assuming that an antitrust violation could be proven, plaintiff had adduced no evidence demonstrating that its losses resulted from the conduct which made the formation of Southeastern unlawful.168

As the court in Brunswick explained:

Assuming plaintiff could prove that defendants’ conduct violates one of the substantive provisions of the Sherman Act or the Clayton Act, plaintiff’s lost sales to the Bottlers would be causally linked to the “illegal” formation and operation of Southeastern. However, it does not follow that Sewell’s lost sales would have occurred by reason of that which made Southeastern’s formation and operation illegal.169

Moreover, despite repeated opportunities to do so, Sewell Plastics did not present evidence sufficient to demonstrate an injury to competition rather than to individual competitors.170 In fact, the

plan’s refusal to reimburse them for psychological care, LSG’s harm from the refusal of trackage rights is discernible but indirect. The subscriber lost money spent for a psychologist’s care; LSG only lost potential savings on transportation costs through direct purchaser MMR, and possible profits from trackage rights. Under the Hanover Shoe—Illinois Brick standard, LSG as an indirect purchaser has no standing.

924 F.2d at 543-44 (citation omitted).

165. 429 U.S. 477 (1977). The Court explained:

Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be ‘the type of loss that the claimed violations . . . would be likely to cause.

Id. at 489.


168. 720 F. Supp. at 1221-22 (citation omitted).

169. Id. at 1222.

170. Id. at 1219. The Supreme Court held that “[t]he antitrust laws . . . were enacted for ‘the protection of competition, not competitors.’” Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320
court allowed the plaintiff an additional opportunity to present evidence on this issue even after it had announced its ruling granting defendants' renewed motion for summary judgment. In short, the court found that the uncontradicted evidence established that competition increased after the bottlers formed Southeastern. Among other procompetitive effects, the court found that plastic bottle prices decreased; output of plastic bottles increased; market concentration decreased; retail soft drink prices decreased and production costs decreased. Analyzing the evidence under the Rule of Reason, the court concluded that plaintiff simply "failed to prove that defendants' actions have harmed or will harm the competitive process."

In Abcor, the Fourth Circuit affirmed the district court's finding of no antitrust injury, recognizing that "Abcor had not lost a single customer or contract or any loss of market share, and nothing indicated any loss stemming from illegal, anti-competitive activity." The court rejected plaintiff's suggestion that Abcor's reduced profit margin indicated antitrust injury, reasoning as follows:

While Abcor's profit margin may have declined, the plaintiffs have failed to show a causal link to anti-competitive activity. More aggressive competition on the merits from AMI may also have reduced Abcor's profit margin as it struggled to respond. For example, having to warehouse its own supply of parts rather than relying on AMI may have increased Abcor's costs. Plaintiffs' expert, who was unfamiliar with the term "antitrust injury" prior to his deposition, did not identify the source of the reduced profit margin.

While the Sewell Plastics and Abcor courts engaged in sophisticated analyses of the antitrust injury requirement, the court in Advanced Health-Care required, for pleading purposes, no more than "a reasonably probable causal link between the antitrust violation and a business loss of the sort the antitrust laws were designed to prevent." Thus, once again highlighting the appellate court's tendency not to approve antitrust dismissals on the pleadings.

(1962)).
171. 730 F. Supp. at 1203-05.
172. Id. at 1218.
173. 916 F.2d 924, 931 (4th Cir. 1990).
174. Id.
175. 910 F.2d 139, 149 (4th Cir. 1990).
H. Market Definition Issues

In *Sewell Plastics, Inc. v. Coca-Cola Co.*,\(^\text{176}\) the district court, for purposes of predatory pricing analysis, refused to limit the relevant product market to the market for three-liter plastic bottles. The court concluded that the market could not be that narrow because other competitors in the area sell a full line of plastic beverage bottles.\(^\text{177}\)

I. Procedure and Evidence

1. Procedure

The Fourth Circuit affirmed a district court’s grant of a motion to quash a subpoena directed to the Justice Department seeking recovery of tapes turned over to the United States Attorney for investigation of a bid rigging scheme.\(^\text{178}\) When the Justice Department declined to prosecute, the individual who had cooperated with the government and provided the tapes filed a civil suit against the alleged bid riggers and subpoenaed the tapes. The Fourth Circuit affirmed the district court’s grant of the government’s motion to quash on the basis that disclosure of the tapes would interfere with enforcement proceedings or reveal investigative techniques.\(^\text{179}\) In doing so, the court suggested to the movant that he try to seek to obtain the tapes from the government pursuant to 28 C.F.R. section 16.26(c) which authorizes disclosure “if the administration of justice requires disclosure.”\(^\text{180}\)

In *Sun Dun Inc. of Washington v. United States*,\(^\text{181}\) Judge Doumas denied Sun Dun’s request for grand jury testimony. He ruled that the request failed to show a particularized need because it did not demonstrate that the information sought was otherwise unavailable. Sun Dun, a vending machine servicing firm, brought a price-fixing suit against soft drink distributors Mid-Atlantic Coca-

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\(^{177}\) Id. at 1218.


\(^{179}\) Id. at 65,071; see 28 C.F.R. § 16.26(b)(5) (1990).

\(^{180}\) *Automated Mailing*, 1991-1 Trade Cas. (CCH) ¶ 69,292 at 65,071 (quoting 28 C.F.R. § 16.26(c) (1990)).

Cola Bottling Co., Inc., and General Cinema Beverages of Washington, D.C., Inc. ("GCB"). Both defendants had earlier pleaded guilty to price-fixing charges. Sun Dun sought the grand jury testimony of certain witnesses believing that the testimony would contain evidence that Mid-Atlantic and GCB had agreed to charge prices published on a third-party price list.\(^{182}\)

Judge Doumas refused Sun Dun's request, viewing it as an attempt to shortcut discovery. He noted that Sun Dun had not even attempted to depose some of the witnesses, which is the bare minimum required to show particularized need. He also held that the proposed use of the testimony for cross examination purposes was not a particularized need. Judge Doumas concluded with the concern that some witnesses had testified under a grant of immunity and to release their testimony would possibly subject them to civil penalties substantially greater than the criminal penalties they sought to avoid.\(^{183}\)

2. Evidence

In *Sewell Plastics Inc. v. Coca-Cola Co.*, plaintiff bottle manufacturer attempted to introduce evidence of a separate, unrelated price fixing agreement involving two of the thirty-five bottler defendants, which resulted in guilty pleas on behalf of those defendants.\(^{184}\) The Fourth Circuit affirmed the exclusion of this evidence, ruling that

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\text{[n]ot only would introduction of this evidence have worked to prejudice the other thirty-three defendants who were not involved in these conspiracies, this evidence was properly excluded for Sewell's failure to carry its "burden of demonstrating that the conduct underlying those prior judgments had a direct, logical relationship to the conduct at issue in this case."} \(^{185}\)
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182. *Id.* at 466.
183. *Id.* at 469.
185. *Id.* (citing *International Shoe Mach. Corp. v. United States*, 315 F.2d 449, 459 (1st Cir. 1963)).
III. Civil Enforcement Activities of the Attorney General of Virginia

The Antitrust and Consumer Litigation Section of the Attorney General's Office brought four new antitrust complaints this past year and settled three of them. Consistent with the publicized focus of the National Association of Attorneys General, two of these matters involved vertical restraints.

A. Sandoz Drug Tying Arrangement

This past year the Virginia Attorney General's Office, along with the Attorneys General of twenty-three other states, culminated an eight month investigation by filing suit in the Southern District of New York against Sandoz Pharmaceuticals Corporation and Caremark, Inc., alleging that the company's distribution of the drug Clozaril violated federal and state antitrust laws.186

The suit alleges that Sandoz, which holds the exclusive right in the United States to market Clozaril, a drug for the treatment of schizophrenia, has illegally tied the sale of the drug to the purchase of non-drug medical services in violation of Sections 1 and 2 of the Sherman Act and the Virginia Antitrust Act. Purportedly in response to the threat of agranulocytosis, a potentially fatal side effect of the drug, Sandoz distributes the drug exclusively through the Clozaril Patient Management System, administered by Caremark, which is an elaborate and costly system by which patient's blood is monitored.187 The cases have been consolidated for discovery under multi-district litigation rules and are pending in the Northern District of Illinois.

B. Deceptive Charitable Solicitations

The Attorney General's Office has also brought suit against and entered into a consent decree with The Watson & Hughey Company arising from its charitable solicitation practices.188 The complaint alleged that The Watson & Hughey Company deceptively solicited charitable contributions for its client charities through a

187. Id.
cash sweepstakes contest which led consumers to believe they had won. In one example, the company advised potential donors that they were “winners” in a “$5,000 sweepstakes” and would request a voluntary $5.00 donation to receive the prize. In fact, there was no top prize of $5,000, that being the total value of all prizes. The consent decree provided for a $2.1 million settlement, with Virginia’s portion of $100,000 going to a Virginia charity. The consent decree also put certain conditions and restrictions on future charitable solicitations by The Watson & Hughey Company.\textsuperscript{189}

C. \textit{Nintendo RPM Scheme}

The Virginia Attorney General’s Office has also joined other state attorneys general in bringing an action for injunctive relief and treble damages against Nintendo under Section 1 of the Sherman Act and the Virginia Antitrust Act.\textsuperscript{190} The complaint alleged that Nintendo engaged in a resale price maintenance (“RPM”) scheme with RPM retailers involving its Nintendo Entertainment System 8-bit video game consoles.\textsuperscript{191}

The parties subsequently entered into a settlement agreement in which Nintendo agreed to cease and desist engaging in any RPM scheme; advise dealers they may set their own resale prices; pay $1.75 million to fund a State Administration Account which will be paid to the states to reimburse costs related to the litigation; pay $3 million to the states in compensatory damages; and reimburse its dealers up to $25 million through the redemption of consumer coupons to qualified purchasers.

D. \textit{Mitsubishi Electronics RPM Schedule}

Finally, the Virginia Attorney General’s Office brought a complaint against Mitsubishi Electronics America, Inc., alleging that it engaged in a resale price maintenance scheme during 1988 which fixed the retail prices of Mitsubishi television and other consumer electronic products.\textsuperscript{192} This case was settled with Mitsubishi paying $1 million into an administration account and $5 million into a

\textsuperscript{189} \textit{Id.}

\textsuperscript{190} \textit{Id.}

\textsuperscript{191} \textit{Id.} at 6-7.

settlement account to be refunded directly to consumers.

IV. STATE LEGISLATIVE ACTIVITIES

The General Assembly of Virginia amended and reenacted section 38.2-1904 of the Code of Virginia ("Code"), which regulates insurance rate standards. The purpose of this section is to protect consumers against excessive rates by encouraging price competition and preventing monopolies. The amendment authorizes an insurer to file an expense reduction plan with the State Corporation Commission. The plan permits the insurer to reduce his sales commission, resulting in an appropriate reduction in premiums, as a sales inducement. The insurer may also reduce noncommission expenses for the same purposes.

The Virginia Petroleum Products Franchise Act, which addresses the relationship between petroleum producers and distributors was amended to include a provision allowing dealers to recover treble damages against refiners that charge fees in excess of actual cost for the privilege of honoring the refiner’s credit card. Franchise regulation was also affected by amendments to the Retail Franchising Act, which increased the penalty for violation of the Act from $5,000 to $25,000 and granted the State Corporation Commission authority to summarily suspend a franchise registration when a revocation proceeding is pending.

The legislature also added Chapter 33 to Title 59.1 of the Code, which regulates information disclosure of “900” number and pay-per-call advertising and solicitation. Violations invoke the enforcement provision and remedies of the Consumer Protection Act which was amended to also include the newly created Vehicle Manufacturers’ Warranty Adjustment Act.

194. Id. § 38.2-1900.
195. Id. § 38.2-1904E.
196. Id.
197. Id.
200. Id. § 59.1-21.11(7).
201. Id. § 13.1-570.
203. Id. § 59.1-429 to -434.
204. Id. § 59.1-434.
205. Id. § 59.1-200(25).
Violators of the new amendments to the Weights and Measures Act, which requires retail merchants using a point of sale system to clearly indicate the price of items, are also subject to the provisions of the Consumer Protection Act.

V. FEDERAL LEGISLATIVE ACTIVITIES

A. Antitrust Amendments Act of 1990

The Antitrust Amendments Act of 1990 was the only pure antitrust bill sent to President Bush by the 101st Congress, and was signed into law November 16, 1990. The antitrust measure: (1) raises the threshold for corporations covered by Clayton Act Section 8 from $1 million to $10 million, and indexes the threshold for inflation; (2) expands Clayton Act Section 8 coverage to include senior officers as well as directors; and (3) creates de minimis exceptions to interlocking directorate restrictions where the competitive sales of either corporation are less than $100 million for either company, 2% of either company’s sales, or less than 4% of the sales of both companies. The Act also repeals Clayton Act Section and increases the maximum fine for Sherman Act violations to $10 million for corporations and $350,000 for individuals. It also allows the federal government to recover treble damages in price fixing cases.

B. Resale Price Maintenance Legislation

The Senate also passed the Consumer Protection Against Price-Fixing Act of 1991 on May 9, 1991. The Act would amend Sherman Act Sections 1 and 3 regarding retail competition by setting forth evidentiary standards for terminated discounters to get resale price maintenance claims to a jury. The standard would require the claimant to present evidence that a competitor gave an express or reasonably implied request or demand to the supplier to curtail or eliminate price competition. The request or demand must also

206. Id. § 3.1-919 to -966.2.
207. Id. § 59.1-290(26).
210. Id. § 20.
211. Id.
be shown to have been the major cause of the supplier’s refusal to continue to supply the seller. Opponents argue that the bill would modify Business Electronics Corp. v. Sharp Electronics Corp. and Monsanto Co. v. Spray-Rite Service Corp. and allow cases with insufficient evidence to reach the trier of fact and subject distributors to damages in dealer termination instances.

In the House, the House Judiciary Committee’s Economic and Commercial Law Subcommittee passed the Price Fixing Prevention Act of 1991 which would codify the per se illegality rule for vertical price fixing, other than for maximum prices, and modify the Monsanto and Sharp decision.

VI. FEDERAL REGULATORY AND ENFORCEMENT EFFORTS

A. Federal Trade Commission Activities

In Matter of Olin Corp. the FTC upheld an ALJ decision requiring Olin Corporation, a Virginia company, to completely divest the assets of FMC Corporation. Both companies produce swimming pool chemicals, and the market for these products was highly concentrated. Consequently, the merger between the two companies would further increase market concentration and lessen competition, in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. Divestiture was held to be the “necessary and appropriate remedy” in this situation to restore the level of competition that existed before the unlawful acquisition.

213. Id. at 652:1-652:2.
214. 485 U.S. 717 (1988) (a vertical restraint on trade is not per se illegal unless it includes an agreement on price levels).
215. 465 U.S. 752 (1984) (a conspiracy is not established by proof that a manufacturer terminated a distributor following, or even in response to, complaints by other distributors of the manufacturer).
219. Id.

220. Section 7 of the Clayton Act 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 to substantially lessen competition, or tend to create a monopoly. 15 U.S.C. § 18 (1988).

221. Section 5 of the FTC Act provides, in pertinent part, that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.” 15 U.S.C. § 45 (1988).

The FTC has also approved the divestiture by General Cinema Corporation ("GCC") of its exclusive soft drink distribution licenses in Staunton, Virginia to Halmor Corporation of Charlottesville. A consent order in 1989 settled charges that PepsiCo's acquisition of bottling facilities in Staunton and Broward County, Florida would lessen competition in the soft drink market. This order required FTC approval for any further transfer of operations in either geographic area. The manufacturers of Dr. Pepper and other GCC brands agreed to the transfer, acknowledging that it would allow for the continued distribution of the soft drink brands in the Staunton area through a vigorous new distributor. 223

B. Criminal Enforcement

The Antitrust Division of the Department of Justice has continued its active enforcement efforts in Virginia during the past year. For example, as part of a growing investigation into the bidding practices of dairies throughout the Southeast, including Virginia, Douglas H. Stamper, vice president and Virginia region manager of Land-O-Sun Dairies, Inc. of Johnson City, Tennessee, and a former manager at Pet, Inc., was charged in a felony information, filed in the United States District Court for the Eastern District of Virginia, for conspiring to rig bids to supply dairy products to schools in violation of Section 1 of the Sherman Act. 224 The information charged that Stamper and certain unnamed co-conspirators rigged bids among themselves during the period of 1984 through 1987. Stamper has entered into a plea agreement pleading guilty to a one-count criminal information charging him with bid rigging in violation of Section 1.

VII. Conclusion

This past year of antitrust jurisprudence in Virginia's federal courts has brought little change to the law. However, while the courts appear more lenient on procedural dismissals, they are as demanding as ever when scrutinizing claims on the merits. As seems the case every year, though, the Supreme Court has issued several significant opinions. The Court will now allow medical staff privileges cases without giving serious consideration to the effect

on interstate commerce. Nevertheless, it has closed the door on the fertile fields of litigation involving the "conspiracy" exception to the *Parker v. Brown* state action immunity and the *Noerr-Pennington* antitrust immunity doctrines. The Court has also strictly construed the *Noerr* "sham" exception. In short, while one door has been opened, the other door has been closed. What remains certain throughout is that antitrust plaintiffs will continue to carry a heavy burden in prosecuting their claims.