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ANTITRUST AND TRADE REGULATION*

Michael F. Urbanski**

I. INTRODUCTION

Continuing in a groove well worn by decisions rendered over the last several years, Virginia's federal courts have, over the past year, continued to demonstrate a measure of hostility toward antitrust conspiracy claims by regularly disposing of fully-discovered conspiracy claims through summary adjudication. Plaintiffs' conspiracy claims in the health care context have fared especially poorly.

While the Fourth Circuit and Virginia's federal district courts continued to display a similar hostility toward tying and monopolization claims, the United States Supreme Court's recent decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*¹ could stem, if not reverse, the trend in those substantive areas.

On the federal regulatory and enforcement fronts, the Department of Justice has been roundly criticized in a General Accounting Office report for, among other things, its focus on criminal actions of a purely local character. Nevertheless, the Department of Justice has plowed ahead in its continuing investigation of Virginia's dairy industry.² The Federal Trade Commission and the Department of Justice also have issued the first unified set of guidelines for analyzing the potential effects of horizontal mergers

* This article addresses federal and state legislative developments and enforcement activities, and antitrust decisions of the United States Supreme Court, the Fourth Circuit Court of Appeals, and state and federal courts of Virginia from June, 1991 to June, 1992.

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1. 60 U.S.L.W. 4465 (U.S. June 8, 1992).

2. See, e.g., Associated Press, *Federal Probe of School Milk Bid Rigging Widens*, RICHMOND NEWS LEADER, Aug. 5, 1991, at B5.

on competition.³ In addition, on November 1, 1991, new amendments to the Federal Sentencing Guidelines went into effect which will govern the sentencing of organizations for violations of federal antitrust law.⁴

Finally, at the state level, the Antitrust and Consumer Litigation Section of the Attorney General's Office spent the past year successfully investigating and prosecuting conspiracies in Virginia's dairy industry involving rigged bids for school milk contracts.⁵

II. FEDERAL CIVIL ACTIONS

A. *Sherman Act Section 1 Conspiracy Issues*

Since the 1986 Supreme Court summary judgment trilogy was handed down,⁶ antitrust plaintiffs opposing summary judgment motions on their conspiracy claims have fared poorly in Virginia courts. This is largely due to the burden imposed on them by *Matsushita Electric Industrial Co. v. Zenith Radio*.⁷ *Matsushita* requires the plaintiff to develop evidence of a conscious commitment by conspirators to a common scheme to achieve an unlawful objective. This rigorous standard requires proof which tends to exclude the possibility of independent action by the alleged conspirators.⁸

1. Cases in the Health Care Context

Perhaps reflecting the increasingly competitive nature of the health care industry, health care providers have lodged allegations of antitrust conspiracies with seeming abandon throughout the last decade.⁹ With rare exception,¹⁰ however, Virginia federal and state courts have demonstrated little patience with antitrust health care

3. See *infra* notes 53-59 and accompanying text.

4. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL 205-08 (1992 ed. 1991).

5. See Frank Green, *Attorney General's Office Suing Four Milk Firms*, RICHMOND TIMES DISPATCH, Aug. 17, 1991, at B3.

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

7. 475 U.S. 574.

8. *Matsushita*, 475 U.S. at 587-88 (developing the strict conspiracy standard enunciated in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) into a hurdle which antitrust plaintiffs must overcome to defeat a motion for summary judgment or for a directed verdict).

9. Since 1980, the Fourth Circuit has encountered some fifty antitrust cases involving claims alleged by individuals or groups of health care providers against larger health care institutions. See cases cited *infra* notes 10-11.

claims.¹¹ Cases decided during the past year are indicative of this trend.

While the Supreme Court last year in *Summit Health, Ltd. v. Pinhas*¹² declined to administer euthanasia to hospital staff privilege cases by expansively interpreting Sherman Act jurisdiction over such claims,¹³ the Fourth Circuit's 1991 en banc decision in *Oksanen v. Page Memorial Hospital*¹⁴ effectively signaled the death of such claims in the Fourth Circuit. The determining factor in *Oksanen* was the plaintiff's failure to demonstrate the existence of a plurality of actors required under section 1 of the Sherman Act. The underlying problem for this and similar claims, however, is the absence of proof of market power necessary to establish the existence of an unreasonable restraint of trade.

In *Oksanen*, the Fourth Circuit declined to adopt the panel's earlier decision¹⁵ and affirmed the district court's grant of sum-

10. See *Mahendra Shah v. Memorial Hosp.*, 1988-2 Trade Cas. (CCH) ¶ 68,199 (W.D. Va. 1988) (allowing plaintiff's antitrust staff privileges claims despite prior Fourth Circuit precedent for dismissal). See also *Oksanen v. Page Memorial Hosp.*, 912 F.2d 73 (4th Cir. 1990) (reversing the district court's dismissal of plaintiff's § 1 claims because plaintiff did not have an opportunity to complete discovery); *Advanced Health-Care Servs. v. Radford Community Hosp.*, 910 F.2d 139 (4th Cir. 1990) (discouraging dismissals of plaintiff's claims without ample opportunity for discovery).

11. For cases filed in the Fourth Circuit, see, e.g., *Tempkin v. Lewis-Gale Hosp.*, 1989-2 Trade Cas. (CCH) ¶ 68,865 (W.D. Va. 1989), *aff'd*, 1991-1 Trade Cas. (CCH) ¶ 69,401 (4th Cir. Apr. 19, 1991); *Oksanen v. Page Memorial Hosp.*, 912 F.2d 73 (4th Cir. 1990); *Advanced Health-Care Servs. v. Radford Community Hosp.*, 910 F.2d 139 (4th Cir. 1990); *Purnima Shah v. Memorial Hosp.*, 1988-2 Trade Cas. (CCH) ¶ 68,198 (W.D. Va. 1988), *aff'd per curiam*, 875 F.2d 316 (unpublished decision), 1989-2 Trade Cas. (CCH) ¶ 68,653 (4th Cir. May 22, 1989); *Thompson v. Wise General Hosp.*, 707 F. Supp. 849 (W.D. Va. 1989), *aff'd*, 896 F.2d 547 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 132 (1990); *Sandcrest Outpatient Servs. v. Cumberland County Hosp. Sys.*, 853 F.2d 1139 (4th Cir. 1988); *Steuer & Latham, P.A. v. National Medical Enters., Inc.*, 672 F. Supp. 1489 (D.S.C. 1987), *aff'd*, 846 F.2d 70 (4th Cir. 1988); *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98 (4th Cir. 1987); *Coastal Neuro-Psychiatric Assocs. v. Onslow Memorial Hosp.*, 795 F.2d 340 (4th Cir. 1986); *Cooper v. Forsyth County Hosp. Auth., Inc.*, 789 F.2d 278 (4th Cir.), *cert. denied*, 479 U.S. 972 (1986); *Virginia Academy of Clinical Psychologists v. Blue Shield of Va.*, 624 F.2d 476 (4th Cir. 1980); see also Michael F. Urbanski, *Antitrust & Trade Regulation Law: Annual Survey of Virginia Law*, 25 U. RICH. L. REV. 565, 588 n.127 (1991) (acknowledging the plethora of health care cases brought in federal courts in other circuits over the past decade).

12. 111 S. Ct. 1842 (1991).

13. 111 S. Ct. at 1848-49 (expanding the jurisdictional evaluation to consideration of the general impact of the restraint on other participants in the relevant market).

14. 945 F.2d 696 (4th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 973 (1992).

15. *Oksanen*, 945 F.2d at 699. The Fourth Circuit, on its first hearing of *Oksanen*'s appeal, had reversed the district court's grant of summary judgment, ruling that *Oksanen* had not been given adequate time for discovery. See *Oksanen v. Page Memorial Hosp.*, 912 F.2d 73 (4th Cir. 1990).

mary judgment on the physician plaintiff's claim of an anticompetitive revocation of his staff privileges.

As is typical in the plethora of staff privilege cases which have recently plagued federal courts, Dr. Oksanen alleged that during the peer review process the medical staff at Page Memorial Hospital conspired both with the hospital and among themselves to exclude him from practicing at the hospital. Basing its holding upon the principle of intracorporate immunity,¹⁶ the Fourth Circuit held that the hospital "and its medical staff lacked the capacity to conspire during the peer review process."¹⁷ The Fourth Circuit also found a unity of interest (quality patient care) between the hospi-

16. This principle was announced in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769-71 (1984) (establishing that because a parent and its subsidiary, or even a single entity and its officers or agents, possess an overall unity of interest rather than separate economic interest, their unilateral actions cannot be considered the joining of economic power previously targeted at divergent goals).

17. *Oksanen*, 945 F.2d at 706.

Consistent with this holding, the Fourth Circuit also held in *Cohn v. Bond and Mann v. Princeton Comm. Hosp. Ass'n* that members of the medical staff at Wilkes Hospital were, in making peer review decisions, acting as agents of the hospital. The court held that they were entitled to immunity for Sherman Act purposes due to this unitary status with the hospital. *Cohn*, 953 F.2d 154 (4th Cir. 1991), cert. denied, 120 L. Ed. 2d 922 (1992); *Mann*, 956 F.2d 1162 (unpublished decision), 1992-1 Trade Cas. (CCH) ¶ 69,738 (4th Cir. Mar. 3, 1992). For a full discussion of *Cohn* and *Mann*, see *infra* section II.D.

In addition, consistent with its earlier opinions in *Sandcrest Outpatient Servs. v. Cumberland Co. Hosp. Sys.*, 853 F.2d 1139, 1148 (4th Cir. 1988), and *Coastal Neuro-Psychiatric v. Onslow Memorial Hosp.*, 795 F.2d 340, 341 (4th Cir. 1986), the Fourth Circuit in *Cohn* applied The Local Government Antitrust Act of 1984 (LGAA), 15 U.S.C. §§ 34-36 (1988). The legislative history of the LGAA noted concern over an "increasing number of antitrust suits, and threatened suits, that could undermine a local government's ability to govern in the public interest." H.R. REP. No. 965, 98th Cong., 2d Sess. 2 (1984), reprinted in 1984 U.S.C.C.A.N. 4602, 4603. 15 U.S.C. § 35(a) provides that "[n]o damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A or 4C of the Clayton Act (15 U.S.C. §§ 15, 15a or 15c) from any local government, or official or employee thereof acting in an official capacity." This statute was apparently a reaction to the Supreme Court's opinion in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982). See H.R. REP. No. 965 at 2, reprinted in 1984 U.S.C.C.A.N. at 4603.

In *Boulder*, the Court refused to exempt a Colorado city's actions regarding its regulation of cable television. The Court was unpersuaded by the city's argument that the Colorado Constitution delegated regulation of cable television to municipalities by means of its "home rule" amendment, reasoning:

The *Parker* [v. Brown, 317 U.S. 341 (1943)] state-action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution. But this principle contains its own limitation: Ours is a "dual system of government," *Parker*, 317 U.S. at 351 (emphasis added), which has no place for sovereign cities.

Boulder, 455 U.S. at 53.

Because Colorado had taken no position on the regulation of cable television, the Court held that the city's conduct did not meet the *Parker* "clearly articulated and affirmatively

tal and its medical staff.¹⁸ Because of this common interest, the hospital and its medical staff were legally indistinct and inseparable entities.¹⁹ The court held that threatening the peer review process with potential antitrust liability would stifle the incentives and benefits flowing to the hospital with respect to the maintenance of high quality professional health care service. Congress' intent to provide incentives and protection for physicians engaging in effective professional peer review also would be harmed.²⁰

The Fourth Circuit declined to extend the scope of the *Greenville Publishing Co. v. Daily Reflector, Inc.*²¹ independent personal stake exception²² to the umbrella of immunity created in *Copperweld Corp. v. Independence Tube Corp.*²³ The court found that there was no evidence of a direct economic interest and, further, that the medical staff did not exercise ultimate control over peer review decisions.²⁴ The court also noted that Dr. Oksanen failed to prove "a conscious commitment to a common scheme designed to achieve an unlawful objective."²⁵ Mere allegations in disciplinary actions adverse to Dr. Oksanen during the course of the peer review process were insufficient to establish an inference of an antitrust conspiracy.²⁶

expressed [as] state policy" test as refined by *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). See *Boulder*, 455 U.S. at 54-56.

18. *Oksanen*, 945 F.2d at 703.

19. *Id.*

20. *Id.* at 704 & n.2.

21. 496 F.2d 391 (4th Cir. 1974).

22. *Id.* at 399-400.

23. 467 U.S. 752 (1984).

24. *Oksanen*, 945 F.2d at 705-06. The Fourth Circuit expressed concern about expanding the *Greenville* independent personal stake exception for fear that it would "swallow the rule." *Id.* at 705. The court explained:

Given the force of these criticisms, we decline to extend the personal stake exception beyond the rationale underlying the *Greenville* decision. There it was held that the president of the defendant company could conspire with it where he had a financial interest in another firm that competed with the plaintiff and would directly benefit if the plaintiff was eliminated as a competitor. . . . Thus, it is unclear whether any decision to eliminate Oksanen from the market would directly benefit the members of the medical staff. . . . We doubt, however, that these indirect economic interests justify a personal stake exception

. . .

Because the challenged decision was subject to review by the hospital and because decisionmaking authority in Dr. Oksanen's case was dispersed among a number of individuals, the personal stake exception is inapplicable.

Id. at 705-06.

25. *Id.* at 706.

26. *Id.*

Because Dr. Oksanen's only proffered evidence of independent decisions made by the medical staff outside of the peer review process stemmed from individual choices made in reaction to his own actions, the court concluded that Dr. Oksanen failed to meet his summary judgment burden of establishing an inference of a conspiracy subject to Sherman Act section 1 sanctions.²⁷ The Fourth Circuit further held that Oksanen failed to establish that the defendants either possessed the market power necessary to significantly restrain trade, or that the defendants' conduct had any anticompetitive effects, both of which must be shown to bring a section 1 claim.²⁸

The Fourth Circuit curtly rejected Oksanen's Virginia Antitrust Act claim as well,²⁹ holding that it necessarily failed because the Act specifically provides that it is to be interpreted and implied consistently with federal antitrust law.³⁰ Finally, *Oksanen* is noteworthy because of the limited period of discovery allowed by the district court before consideration of summary judgment.³¹

From a discovery standpoint, *Becker v. Blue Shield of Southwestern Virginia*³² was the polar opposite of *Oksanen*, yet the Western District of Virginia also found summary judgment appropriate in that case. *Becker* was dismissed after more than ten years of discovery because plaintiffs had developed no evidence of an antitrust conspiracy.

In *Becker*, plaintiff chiropractors alleged that Blue Shield of Southwestern Virginia and its physician board members conspired to deny insurance coverage for chiropractic services. The court found no evidence in the record to support the plaintiffs' claim, noting that the plaintiffs had admitted in deposition that they had no knowledge of any conspiracy. Instead, the chiropractors were relying "upon a loosely woven theory of suggestion and innuendo

27. *Id.* at 707-08.

28. *Id.* at 708-09. This failure to adduce any evidence of market power likewise doomed Dr. Oksanen's Sherman Act § 2 claim. *Id.* at 710.

29. *Id.*

30. *Id.* (citing VA. CODE ANN. § 59.1-9.17 (Repl. Vol. 1990)).

31. *See id.* at 712 (dissenting opinion).

32. No. 81-0320-R (W.D. Va. June 5, 1992) (mem.).

to support their claim."³³ Following *Matsushita*, Judge Turk found such a thread too weak to support an antitrust claim.³⁴

In *Shafi v. St. Francis Hospital of Charleston, West Virginia*,³⁵ the Fourth Circuit, in an unpublished per curiam opinion, upheld the summary rejection of tying and exclusive dealing claims. An anesthesiologist had filed suit against a Charleston, West Virginia hospital and the anesthesiology group with which it had contracted to provide anesthesia services.

Dr. Shafi alleged that a contract between Professional Anesthesia Services, Inc. (PAS) and St. Francis Hospital constituted illegal tying of the group's anesthesia services to the purchase of hospital services. Relying on *Jefferson Parish Hospital District v. Hyde*,³⁶ the court "easily rejected" the plaintiff's tying claim, holding that St. Francis' eleven percent share of the local hospital services market was insufficient to establish the market power necessary to restrain trade in the tied anesthesia market.³⁷ The Fourth Circuit minced few words in dismissing Shafi's exclusive dealing claim; it relied heavily on its earlier opinion, *Steuer & Latham, P.A. v. National Medical Enterprises, Inc.*,³⁸ for the proposition that replacement of one exclusive contractor with another does not constitute a violation of the antitrust laws.³⁹ Because Dr. Shafi had previously been the exclusive anesthesiologist at St. Francis, he could not now complain that someone else enjoyed a similar position.⁴⁰

The Fourth Circuit's remand of Dr. Shafi's group boycott claim in light of *Summit Health, Ltd. v. Pinhas*⁴¹ is difficult to square with its en banc opinion in *Oksanen*.⁴² The district court in *Shafi* had rejected the conspiracy allegations on the grounds that Shafi failed to provide evidence of an adverse effect on competition or on the market allegedly restrained.⁴³ While the Fourth Circuit based

33. *Id.* at 3.

34. *Id.* The court issued its memorandum opinion within three days of hearing oral argument on the motion, perhaps indicative of its unwillingness to burden the court system any further with meritless antitrust claims.

35. 937 F.2d 603 (unpublished decision), 1991-1 Trade Cas. (CCH) ¶ 69,500 (4th Cir. July 16, 1991) (per curiam).

36. 466 U.S. 2 (1984).

37. *Shafi*, 1991-1 Trade Cas. (CCH) ¶ 69,500 at 66,134.

38. 672 F. Supp. 1489 (D.S.C. 1987), *aff'd*, 846 F.2d 70 (4th Cir. 1988).

39. *Shafi*, 1991-1 Trade Cas. (CCH) ¶ 69,500 at 66,135.

40. *Id.*

41. *See id.*

42. *See Oksanen*, 945 F.2d 696, *supra* at notes 14-31 and accompanying text.

43. *Shafi*, 1991-1 Trade Cas. (CCH) ¶ 69,500 at 66,135.

its dismissal in *Oksanen* partially on these grounds, in *Shafi*, the Fourth Circuit panel⁴⁴ concluded that *Pinhas* placed the district court's reasoning in doubt, and remanded the case for further consideration on the conspiracy/group boycott claim.⁴⁵

Finally, in an aberrant opinion, *Tempkin v. Lewis-Gale Clinic, Inc.*,⁴⁶ the Circuit Court for the City of Salem allowed antitrust claims deemed meritless by the Western District of Virginia and the Fourth Circuit to survive demurrer, ruling that discovery should proceed. Dr. Tempkin, a physiatrist, and his wife, a nurse practitioner, brought suit under the Virginia Antitrust Act for conspiracy, monopolization and various state tort and contract claims. Dr. Tempkin's claims arose from his alleged dismissal as medical director of the physical rehabilitation unit at Lewis-Gale Hospital as well as from a dispute over patient referrals. Mrs. Tempkin's claims were based on Lewis-Gale Hospital's alleged delay in granting her privileges, as well as its alleged refusal to allow her to practice under her husband's supervision.⁴⁷

With respect to the antitrust issues, the *Tempkin* defendants filed special pleas in bar to the bill of complaint on grounds of res judicata, estoppel, and stare decisis, as well as demurrers to the merits of the antitrust claims themselves. Plaintiffs had previously filed an action based upon the same facts in federal court in the Western District of Virginia.⁴⁸ In the federal court action, Judge Turk had dismissed the section 1 claim on the ground that plaintiffs failed to make any allegations regarding the hospital's market power or injury to competition sufficient to state an antitrust claim.⁴⁹ The Sherman Act section 2 claims were dismissed on these as well as jurisdictional grounds, since the plaintiffs' amended complaint lacked allegations of a substantial effect on interstate commerce.⁵⁰ In a per curiam opinion, the Fourth Circuit affirmed the district court's dismissal.⁵¹

44. In *Shafi* the Fourth Circuit panel consisted of Judges Hall, Butner, and Boyle.

45. *Shafi*, 1991-1 Trade Cas. (CCH) ¶ 69,500 at 66,135.

46. 27 Va. Cir. ___, Chancery No. 89-209 (Salem Cir. Ct. Mar. 16, 1992) (letter opinion).

47. *Id.* at ___, letter opinion at 1-2.

48. *Tempkin v. Lewis-Gale Hosp., Inc.*, 1989-2 Trade Cas. (CCH) ¶ 68,865 (W.D. Va. 1989), *aff'd*, 1991-1 Trade Cas. (CCH) ¶ 69,401 (4th Cir. Apr. 19, 1991).

49. *Tempkin*, 1989-2 Trade Cas. (CCH) ¶ 68,865 at 62,552.

50. *Id.*

51. *Tempkins v. Lewis-Gale Hosp., Inc.*, 930 F.2d 913 (unpublished decision) (per curiam) 1991-1 Trade Cas. (CCH) ¶ 69,401 at 65,616 (4th Cir. Apr. 19, 1991).

Despite the fact that two federal courts had previously addressed and dismissed plaintiffs' antitrust claims, the Salem Circuit Court ruled that plaintiffs' claims were not barred by res judicata, estoppel, or stare decisis because "the primary ground" for dismissal of the federal court action was lack of subject matter jurisdiction. The court reasoned that those portions of the district court and Fourth Circuit opinions addressing the merits of plaintiff's claims were dicta; therefore, they were not binding upon the circuit court.⁵² Without addressing the merits of defendant's antitrust demurrer in any detail, the court concluded that discovery in the case should begin. It is difficult, if not impossible, to reconcile the *Tempkin* opinion with other opinions which have consistently held that the Sherman and Virginia Antitrust Acts are to be interpreted in the same manner.⁵³

2. Other Conspiracy Cases

Virginia federal courts also have rejected Sherman Act section 1 conspiracy allegations outside of the health care context, finding insufficient evidence to establish the plaintiff's case in each instance. In two cases, *Precision Piping & Instruments, Inc. v. E.I. du Pont de Nemours & Co.*,⁵⁴ and *Virginia v. Embassy Dairy, Inc.*,⁵⁵ Virginia federal courts, applying *Matsushita*,⁵⁶ found plaintiff's evidence insufficient to dispel the possibility that defendants acted independently.⁵⁷

Moreover, during its last term, the Supreme Court declined to review the Fourth Circuit's recent decisions in *Laurel Sand & Gravel, Inc. v. CSX Transportation, Inc.*,⁵⁸ *Sewell Plastics, Inc. v. Coca-Cola Co.*,⁵⁹ and *Oksanen*,⁶⁰ confirming the prevalence of summary adjudication of antitrust conspiracy claims. The court's de-

52. 27 Va. Cir. at ___, letter opinion at 3-4.

53. Indeed, despite the state circuit court's holding in *Tempkin*, the Virginia Code requires the Virginia Antitrust Act to be construed in harmony with federal cases decided under the Sherman Act. VA. CODE ANN. § 59.1-9.17 (Repl. Vol. 1992).

54. 951 F.2d 613 (4th Cir. 1991).

55. No. 91-510-N (E.D. Va. Mar. 26, 1992).

56. 475 U.S. 574 (1986).

57. See detailed discussion *infra* section II.E.2.

58. 924 F.2d 539 (4th Cir.), *cert. denied*, 112 S. Ct. 64 (1991).

59. 912 F.2d 463 (unpublished decision), 1990-2 Trade Cas. (CCH) ¶ 69,165 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1019 (1991).

60. 945 F.2d 696 (4th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 973 (1992).

nial of review also affirmed the necessity of offering proof of market power in section 1 cases.

B. *Sherman Act Section 2 Monopolization Issues*

1. Tying Claims

a. The *Kodak* opinion

In an opinion which will send shock waves through much of corporate America, the United States Supreme Court on June 8, 1992, handed down its long awaited decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*⁶¹ *Kodak* will certainly be heralded by consumer groups and the plaintiffs' bar as a significant blow to the exploitative exercise of single-brand market power. It is equally obvious, however, that the decision will be lamented by those (including the *Kodak* dissenters and revisers of antitrust compliance programs) who view *Kodak* as an unfortunate perversion of antitrust law motivated by a misguided, though laudable, concern for consumer welfare.⁶²

Justice Blackmun, writing for the majority,⁶³ characterized the Court's opinion in *Kodak* as "yet another case that concerns the standard for summary judgment in an antitrust controversy."⁶⁴ He framed the principal issue to be decided in this way: "whether a defendant's lack of market power in the primary equipment market precludes, as a matter of law, the possibility of market power in derivative aftermarkets."⁶⁵

Petitioner Eastman Kodak (*Kodak*) manufactures and sells high-volume photocopy and micrographic equipment to businesses. *Kodak's* machines are unique in that parts from machines manu-

61. 60 U.S.L.W. 4465 (U.S. June 8, 1992).

62. *See id.* at 4468-73.

63. The *Kodak* majority included Chief Justice Rehnquist and Justices Blackmun, White, Stevens, Kennedy, and Souter. Justice Scalia wrote the *Kodak* dissent, in which Justices O'Connor and Thomas joined.

64. 60 U.S.L.W. at 4466.

65. *Id.* In his dissenting opinion, Justice Scalia characterized the issue much differently: [T]he case presents a very narrow — but extremely important — question of substantive antitrust law: Whether, for purposes of applying our *per se* rule condemning "ties," and for purposes of applying our exacting rules governing the behavior of would-be monopolists, a manufacturer's conceded lack of power in the interbrand market for its equipment is somehow consistent with its possession of "market," or even "monopoly," power in wholly derivative aftermarkets for that equipment.

Id. at 4475 (Scalia, J., dissenting).

factured by other companies are not interchangeable with Kodak parts.⁶⁶ Kodak provides parts and service to owners of Kodak equipment at an additional cost, which varies from customer to customer based on negotiations and bidding.⁶⁷ Replacement parts for Kodak equipment are either produced by Kodak or are made to order for Kodak by original-equipment manufacturers (OEMs).⁶⁸ Kodak provides eighty to ninety-five percent of the service for its machines.⁶⁹

The respondents in *Kodak* were eighteen independent service organizations (ISOs) that formed a niche in the early 1980s servicing Kodak equipment and selling new and reconditioned Kodak parts.⁷⁰ According to their customers, ISOs provided better service than Kodak at a lower price.⁷¹ ISOs generally maintained a stock of Kodak parts, purchased either directly from Kodak or from OEMs, for use in servicing their customers' Kodak machines. However, some customers purchased their own parts and looked to ISOs only for service.⁷²

In 1985 and 1986, Kodak implemented several new policies in order to limit the availability of Kodak parts to ISOs and to reduce competition from ISOs in the servicing of Kodak equipment.⁷³ Specifically, Kodak determined to sell Kodak parts only to owners of Kodak equipment who rely on Kodak for service or who service their Kodak equipment themselves.⁷⁴ In addition, Kodak sought to further limit the availability of Kodak parts to the ISOs by entering into agreements with OEMs restricting OEMs' sale of Kodak replacement parts to Kodak alone.⁷⁵

Kodak's efforts to reduce the competitive threat posed by the ISOs were ruthlessly successful. As a result of Kodak's policies, ISOs were unable to obtain Kodak parts in any reliable fashion and, therefore, either lost substantial revenues or went out of busi-

66. *Id.* at 4466-67.

67. *Id.* at 4467.

68. *Id.*

69. *Id.*

70. *Id.* at 4466-67.

71. *Id.* at 4467.

72. *Id.*

73. *Id.* at 4466-67.

74. *Id.* at 4467.

75. *Id.* "Kodak also pressured Kodak equipment owners and independent parts distributors not to sell Kodak parts to ISO's" (sic) and "took steps to restrict the availability of used [Kodak] machines". *Id.*

ness.⁷⁶ Not surprisingly, the ISOs sued, alleging (i) an unlawful tying of service for Kodak equipment to the purchase of Kodak replacement parts in violation of section 1 of the Sherman Act⁷⁷ and (ii) monopolization and attempted monopolization of the market for the servicing of Kodak equipment in violation of section 2.⁷⁸

Kodak filed a motion for summary judgment, and after limited discovery⁷⁹ and without a hearing, the district court granted summary judgment in favor of Kodak, finding that the ISOs had no evidence of an arrangement tying Kodak equipment to Kodak parts or service.⁸⁰ As the Supreme Court noted, however, the district court did not actually address the section 1 claim that the ISOs were making: “[The ISOs] allege a tying arrangement not between Kodak *equipment* and service, but between Kodak *parts* and service.”⁸¹

The Ninth Circuit Court of Appeals reversed the district court’s holding with respect to the ISOs’ section 1 claim. The court found that disputed issues of fact existed as to whether parts and service were distinct markets and whether there was an illegal tying arrangement.⁸² On the basis of this decision, the Ninth Circuit considered the next issue, “agree[ing] with Kodak that competition in the equipment market might prevent Kodak from possessing power in the parts market, but refus[ing] to uphold the District Court’s grant of summary judgment ‘on this theoretical basis’ because ‘market imperfections can keep economic theories about how consumers will act from mirroring reality.’”⁸³ Regarding the ISOs’ section 2 claim, the Ninth Circuit held that the ISOs had sufficient evidence to create factual issues about Kodak’s proffered business justifications and to support a finding that Kodak’s conduct was

76. *Id.*

77. Section 1 of the Sherman Act outlaws “[e]very 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.” 15 U.S.C. § 1 (1988).

78. 60 U.S.L.W. at 4467. Sherman Act § 2 makes it a crime to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade among the several States, or with foreign nations.” 15 U.S.C. § 2.

79. The ISOs were allowed to file one set of interrogatories and requests for production of documents and were allowed to take six depositions. 60 U.S.L.W. at 4467.

80. *Id.*

81. *Id.* As to the ISOs’ § 2 claim, the district court concluded that although Kodak had a “natural monopoly over the market for parts it sells under its name,” a unilateral refusal to sell such parts to the ISOs did not violate § 2. *Id.*

82. *Id.*

83. *Id.* (citing *Eastman Kodak Co. v. Image Technical Serv., Inc.*, 903 F.2d 612, 617 (9th 1990)).

“anticompetitive” and “exclusionary” and was born of “a specific intent to monopolize.”⁸⁴

Because Kodak did not dispute that its policy affected a significant amount of interstate commerce, the Supreme Court restricted its analysis of the ISOs’ section 1 tying claim to two issues: (1) whether Kodak’s policies constituted a tying arrangement and (2) whether Kodak had “appreciable economic power” in the market for Kodak parts.⁸⁵ The Court reasoned that for the ISOs’ tying arrangement claim to survive Kodak’s motion for summary judgment, “a reasonable trier of fact must be able to find, first, that service and parts are two distinct products, and, second, that Kodak has tied the sale of the two products.”⁸⁶

To be considered distinct products, parts and service must each be the object of sufficient consumer demand that a firm could efficiently provide either one without also providing the other.⁸⁷ On this point, the Court found sufficient evidence of such a demand because Kodak had regularly sold parts to customers who serviced their own machines. The very existence and growth of the high-technology service industry was additional proof of such a demand.⁸⁸ Furthermore, the Court summarily rejected Kodak’s argument that two distinct products were not involved because there is allegedly no demand for parts separate from the demand for service. In so doing, the majority in *Kodak* noted that “[b]y that logic, there can never be separate markets, for example, for cameras and film, computers and software, or automobiles and tires.”⁸⁹

Finally, on the issue of the existence of a tying arrangement, the Court found that the ISOs had met their burden of establishing a *prima facie* case. The record contained evidence that Kodak would

84. *Id.* at 4468.

85. *Id.* The Court defined a tying arrangement in the following manner:

A tying arrangement is “an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.” *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958). Such an arrangement violates § 1 of the Sherman Act if the seller has “appreciable market power” in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market. *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 503 (1969).

86. 60 U.S.L.W. at 4468.

87. *Id.* (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 21-22 (1984)).

88. 60 U.S.L.W. at 4468.

89. *Id.*

only sell parts to customers who agreed not to purchase service from the ISOs.⁹⁰

Having found a tying arrangement, the *Kodak* Court reached the most significant aspect of its analysis: the question of whether Kodak had appreciable power in the tying market.⁹¹ The ISOs argued that Kodak was able to force unwanted sales of service upon its equipment customers by the use of its power in the parts market. The plaintiffs pointed to sufficient evidence of this fact to convince the *Kodak* majority of the existence of a triable issue on Kodak's power in the tying market.⁹²

Kodak argued, however, that even if it conceded a monopoly share of the relevant parts market, Kodak could not actually *exercise* the necessary market power for a tying violation. Kodak asserted that competition in the market for copier equipment is so fierce that if Kodak raised its service prices above a competitive level, consumers would simply buy office equipment with a lower service cost from a different manufacturer.⁹³ Kodak essentially asserted that the ISOs' theory made no economic sense.⁹⁴

But the majority was not swayed by Kodak's intuitively attractive argument. Before considering Kodak's argument, the Court observed that *Matsushita*⁹⁵ demands only that antitrust plaintiffs'

90. *Id.*

91. *Id.* The tying market in this case was the market for Kodak parts. The Court defined market power as "the power 'to force a purchaser to do something that he would not do in a competitive market.'" *Id.* (citing *Jefferson Parish*, 466 U.S. 2, 14 (1984)). The Court also endorsed the definitions of market power contained in *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969) and *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956). These cases held that market power is "the ability of a single seller to raise price and restrict output." *Fortner*, 394 U.S. at 503; *E.I. du Pont*, 351 U.S. at 391. Finally, the Court cited, inter alia, *Jefferson Parish*, 466 U.S. at 17, for the proposition that the possession of market power "ordinarily is inferred from the seller's possession of a predominant share of the market." 60 U.S.L.W. at 4469.

92. 60 U.S.L.W. at 4469. The ISOs pointed to the following evidence in the record to support their contention that Kodak wielded sufficient power in the parts market to force the unwanted purchase of service: (1) some of the parts that fit Kodak equipment are available only from Kodak; (2) Kodak controls the availability of parts that it does not manufacture; (3) Kodak has prohibited other manufacturers from selling parts to ISOs; (4) Kodak has discouraged independent parts distributors from selling to the ISOs; (5) Kodak has sought to limit the availability of used machines; (6) consumers have been forced to use Kodak service rather than the lower-priced, higher-quality ISO service that they prefer; and (7) ISOs have been forced out of business. *Id.*

93. *Id.* at 4469.

94. *Id.* Kodak cited *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 594-95 (1986), in support of its "economic sense" argument.

95. 475 U.S. 574 (1986).

inferences be reasonable in order reach a jury. Kodak, therefore, bore a "substantial burden" to make the required showing "that despite evidence of increased prices and excluded competition, an inference of market power is unreasonable."⁹⁶ The Court began its analysis of the assumptions underlying Kodak's theory by observing that the extent to which one market prevents exploitation of another depends on the cross-elasticity of demand between those markets, i.e., the extent to which an increase in the price of one product will cause an increase in consumption in the other.⁹⁷

The Court noted that even if Kodak could not raise service prices without losing equipment customers, it could still have and use market power in the parts and service markets.⁹⁸ This is true because "[t]he sales of even a monopolist are reduced when it sells goods at a monopoly price, but the higher price more than compensates for the loss in sales."⁹⁹ In other words, "there could easily be a middle, optimum price at which the increased revenues from the higher-priced sales of service and parts would more than compensate for the lower revenues from lost equipment sales."¹⁰⁰

Leaving the realm of the theoretical, the *Kodak* majority considered the two fatal shortcomings of Kodak's theory that higher service prices would lead to serious losses in the sales of Kodak equipment, namely, that "significant information [costs] and switching costs . . . could create a less responsive connection between parts prices and equipment sales."¹⁰¹ The Court's exhaustive discussion of the potential hidden costs to Kodak's customers indicates that the term "information costs" means the costs of accurately determining comparative life-cycle costs of complex office equipment.¹⁰² "Switching costs" were defined as "the cost to current owners of switching to a different product."¹⁰³ The Court noted that "[i]f the cost of switching is high, consumers who already have purchased the equipment, and are thus 'locked in,' will tolerate some level of

96. 60 U.S.L.W. at 4469.

97. *Id.* at 4470 (citing *E.I. du Pont*, 351 U.S. at 400; PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS ¶ 342(c) (4th ed. 1988) (characterizing this inquiry as "the degree to which the [defendant's] sales fall . . . as its prices rise.")).

98. 60 U.S.L.W. at 4470.

99. *Id.*

100. *Id.*

101. *Id.* at 4471.

102. *Id.* at 4471-72.

103. *Id.* at 4472.

service-price increases before changing equipment brands.”¹⁰⁴ Because the ISOs had adduced evidence that both switching and information costs were high for the types of equipment and consumers involved, the Court concluded that Kodak “failed to demonstrate that [the ISOs’] inference of market power in the service and parts market [was] unreasonable. . . .”¹⁰⁵ In affirming the Ninth Circuit’s denial of Kodak’s motion for summary judgment on the ISOs’ section 1 tying claim, the *Kodak* Court made this final characterization of the balance it had struck:

We need not decide whether Kodak’s behavior has any procompetitive effects and, if so, whether they outweigh the anticompetitive effects. We note only that Kodak’s service and parts policy is simply not one that appears always or almost always to enhance competition, and therefore to warrant a legal presumption without any evidence of its actual economic impact. In this case, when we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior go unpunished, the balance tips against summary judgment.¹⁰⁶

With disconcerting ease,¹⁰⁷ the Court also affirmed the Ninth Circuit’s denial of Kodak’s summary judgment motion on the ISOs’ section 2 monopolization and attempted monopolization claims.¹⁰⁸ With respect to the first element of the offense of monopolization, possession of monopoly power in the relevant market, the Supreme Court noted that the ISOs had presented sufficient evidence to withstand summary judgment. This decision was supported by Kodak’s control of eighty to ninety-five percent of the service market and almost one-hundred percent of the parts market.¹⁰⁹ The majority also flatly rejected Kodak’s argument on the monopoly power issue, and stated: “as a matter of law, a single brand of a product or service can never be a relevant market under the Sherman Act.”¹¹⁰ The Court, citing *Jefferson Parish Hospital District v. Hyde*,¹¹¹ stressed that “[t]he relevant market for anti-

104. *Id.*

105. *Id.*

106. *Id.* at 4473.

107. See Justice Scalia’s dissent, discussed *infra* at notes 117-18 and accompanying text.

108. 60 U.S.L.W. at 4474.

109. *Id.* at 4473.

110. *Id.*

111. 466 U.S. 2 (1984).

trust purposes is determined by the choices available to Kodak equipment owners."¹¹²

Regarding the second element of the ISOs' monopolization claim, "the use of monopoly power 'to foreclose competition, to gain competitive advantage, or to destroy a competitor,'" the Court noted that the record was replete with evidence indicating Kodak had taken "exclusionary action to maintain its parts monopoly and used its control over parts to strengthen its monopoly share of the Kodak service market."¹¹³ In light of this conclusion, the next question was whether any "valid business reasons" existed that could explain Kodak's actions.¹¹⁴ Kodak offered three business justifications in support of its actions,¹¹⁵ but based upon the ISOs' evidence that consumers preferred ISO service,¹¹⁶ the Court found them unconvincing.

Justice Scalia, in a vigorous dissent joined by Justices O'Connor and Thomas, argued that the absence of market power in inter-brand markets *should* preclude a finding of market power in wholly derivative aftermarkets.¹¹⁷ Justice Scalia reasoned:

The Court today finds in the typical manufacturer's inherent power over its own brand of equipment . . . the sort of "monopoly power" sufficient to bring the sledgehammer of § 2 into play. And, not surprisingly in light of that insight, it readily labels single-brand power over aftermarket products "market power" sufficient to permit an antitrust plaintiff to invoke the per se rule against tying. In my opinion, this makes no economic sense. The holding that market power can be found on the present record causes [the] venerable rules of selective proscription to extend well beyond the point where the reasoning that supports them leaves off. Moreover, because the sort of power condemned by the Court today is possessed by every manufacturer of durable goods with distinctive parts, the Court's

112. 60 U.S.L.W. at 4473. The Court also stated: "This Court's prior cases support the proposition that in some instances one brand of a product can constitute a separate market." *Id.* (citing *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 101-02, 111-12 (1984)).

113. 60 U.S.L.W. at 4474.

114. *Id.*

115. The three business justifications offered by Kodak were that the company had undertaken its actions: "(1) to promote interbrand equipment competition by allowing Kodak to stress the quality of its service; (2) to improve asset management by reducing Kodak's inventory costs; and (3) to prevent ISOs from free riding on Kodak's capital investment in equipment, parts and service." *Id.* (quoting Brief for Petitioner at 6).

116. 60 U.S.L.W. at 4474.

117. *Id.* at 4475.

opinion threatens to release a torrent of litigation and a flood of commercial intimidation that will do much more harm than good to enforcement of the antitrust laws and to genuine competition.¹¹⁸

Whether one agrees or disagrees with the majority's use of anti-trust doctrine to rescue consumers from manufacturers' exercise of this sort of situational economic power, the significance of the *Kodak* decision for businesses and antitrust practitioners is undeniable.

b. Fourth Circuit Tying Cases

This year's most interesting section 2 opinions from lower federal courts are a cluster of tying cases. In these cases, the Fourth Circuit's approach is inconsistent with both emerging Supreme Court jurisprudence and with its own decisions.

In contrast with the Supreme Court's decision in *Kodak* is the earlier Fourth Circuit decision in *Service & Training, Inc. v. Data General Corp.*¹¹⁹ Because this Fourth Circuit opinion expressly disagreed with the Ninth Circuit's opinion in *Kodak*, it is now of questionable precedential value.

In this tying case, the District Court of Maryland found that plaintiff Service & Training, Inc. (STI) had not demonstrated the existence of two separate products as required to establish an unlawful tying arrangement under Sherman Act section 1.¹²⁰ Defendant Data General refused to sell or license a diagnostic software program (MV/ADEX) unless the plaintiff also purchased computer maintenance services. Although the Fourth Circuit disagreed with the district court's conclusion that the plaintiff had not produced sufficient evidence of two separate products, it affirmed the lower court's grant of summary judgment, finding the plaintiff had failed to develop evidence of an agreement conditioning the purchase of the tied product to the purchase of the tying product.¹²¹ The

118. *Id.* at 4475-76.

119. 963 F.2d 680 (4th Cir. 1992).

120. Under the Sherman Act, the other three elements of a tying claim are: "(2) an agreement conditioning purchase of the tying product upon purchase of the tied product (or at least upon an agreement not to purchase the tied product from another party), (3) the seller's possession of sufficient economic power in the tying product market to restrain competition in the tied product market, and (4) a not insubstantial impact on interstate commerce." *Id.* at 683 (footnotes omitted) (outlining elements of tying claims).

121. *Id.* at 685.

Fourth Circuit held that Data General's actions in selling either the software alone to its cooperative maintenance customers or the software along with repair services to its other customers were equally consistent with permissible competitive behavior and an illegal conspiracy.¹²²

According to the court, Data General's arrangement with its cooperative maintenance customers at most showed that the defendant sold repair services which incidentally included the use of the MV/ADEX software by the company's field engineers. "It is entirely consistent with a conclusion that Data General lawfully extolled the superiority of its repair services due to its use of MV/ADEX and that customers independently concluded that they preferred Data General Services using MV/ADEX over [third-party maintenance] services that do not use MV/ADEX."¹²³ The defendant's attractive package, combining the MV/ADEX software with repair services which utilized the software, did not constitute an impermissible tying arrangement. Consequently, STI did not prove all of the elements necessary to support a section 1 violation.

Significantly, in *Service & Training* the Fourth Circuit expressly rejected the Ninth Circuit's reasoning in *Image Technical Services, Inc. v. Eastman Kodak Co.*¹²⁴ The Ninth Circuit had decided that a manufacturer's agreement with its equipment owners to sell parts only to owners who serviced their own equipment could constitute an illegal tying arrangement. The Fourth Circuit opined, however, that "[i]t simply does not follow from the fact that a seller agrees to sell Product A only to a certain class of customers that it has necessarily conditioned the sale of product A on an agreement not to purchase product B from another seller, especially where, as here, the particular class of customers to whom product A is sold have no need to purchase product B."¹²⁵

Faulkner Advertising Associates, Inc. v. Nissan Motor Corp.,¹²⁶ is also indicative of the unsettled state of the law regarding tying claims. In *Faulkner*, the plaintiff advertising agency alleged that a Nissan advertising policy conditioned the sale of Nissan automobiles on participation in a comprehensive national advertising program. This program required Nissan dealers to buy local

122. *Id.*

123. *Id.* at 687.

124. 903 F.2d 612 (9th Cir. 1990), *aff'd*, 60 U.S.L.W. 4465 (U.S. June 8, 1992).

125. *Service & Training*, 963 F.2d at 686 n.12.

126. 945 F.2d 694 (4th Cir. 1991).

advertising from Nissan and its advertising agency, rather than utilizing local advertising agencies. The Fourth Circuit, sitting en banc, divided equally on whether to affirm the United States District Court for the District of Maryland's grant of summary judgment.

Judge Hall, author of the earlier panel's dissent, rejected the plaintiff's claim based on the fact that only one product, automobiles, was involved. The judge also concluded: "Faulkner alleges only that Nissan has purchased more advertising in markets where it hopes to increase sales of its only product, and that buyers of the product must pay a higher price because of Nissan's expanded efforts. These allegations are insufficient to state a "tying" claim under the Sherman Act."¹²⁷

Judge Ervin, joined by Judges Phillips, Murnaghan, Sprouse and Butzner, disagreed and took issue with the court's willingness to engage in fact finding.¹²⁸ Judge Ervin wrote that such fact finding deprived Faulkner of the benefit of the maxim "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."¹²⁹ Of course, the equally divided en banc opinion had the result of affirming the district court's rejection of the tying claim.

2. Recognition of Monopoly Leveraging

In a remarkable opinion where the Fourth Circuit, for the first time, appeared to embrace a monopoly leveraging theory, the Fourth Circuit Court of Appeals reversed the district court's grant of summary judgment in a hospital downstream integration case.¹³⁰ Plaintiff M & M Medical Supplies, a durable medical equipment (DME) dealer, brought suit against Pleasant Valley Hospital, Inc. (the Hospital) and its wholly owned subsidiary, Pleasant Valley Home Medical Equipment Company, for monopoly leveraging in violation of Sherman Act section 2.¹³¹ The hospital arranged for

127. *Id.* at 695.

128. The other Fourth Circuit judges determined that Faulkner was not purchasing advertising from Nissan and that the plaintiff's increased costs merely reflected the increase in Nissan's overhead. *Id.* at 695-96.

129. *Id.* at 696 (citing *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957)).

130. *M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 1991-2 Trade Cas. (CCH) ¶ 69,618 (4th Cir. Oct. 22, 1991).

131. *Id.* at 66,761.

patients to purchase DME exclusively from the Hospital's DME company, without allowing patients to choose DME supplied by its competitors.¹³² As it had in *Advanced Health-Care Services v. Radford Community Hospital*,¹³³ the Fourth Circuit reversed the district court's dismissal of plaintiff's monopolization, attempted monopolization, and monopoly leveraging claims.¹³⁴

Continuing its emphasis on the plaintiff's initial requirement of establishing the defendant's market power in order to succeed on a monopolization claim,¹³⁵ the Fourth Circuit held that the plaintiff DME company's evidence supported a finding of both (1) the existence of a specifically defined geographic market, and (2) the exercise of monopoly power by defendants.¹³⁶ The plaintiff submitted the affidavit of an expert economist regarding the definition of geographic market and the exercise of monopoly power. Although the district court discounted the affidavit as being conclusory and devoid of supporting facts, Judge Boyle held that the affidavit satisfied the summary judgment standard enunciated in *Celotex Corp. v. Catrett*.¹³⁷

The Fourth Circuit also stressed the importance of plaintiff's evidence demonstrating that: (1) the Hospital was the only hospital in the county; (2) the majority of all DME consumers in the county experience their initial need for DME as a result of inpatient or outpatient hospital care; and (3) the majority of county residents used the Hospital for their medical needs.¹³⁸ The court also cited evidence that Hospital employees were encouraged to purchase the defendant DME company's products as supporting the plaintiff's economist's expert opinion.¹³⁹ Given these facts, the Fourth Circuit rejected the defendants' argument that the economist's opinion

132. *Id.*

133. 910 F.2d 139 (4th Cir. 1990).

134. 1991-2 Trade Cas. (CCH) ¶ 69,618 at 66,765. The Fourth Circuit granted rehearing en banc of the *M & M* opinion and argument was heard on April 6, 1992.

135. *Id.* at 66,762 ("To prove exercise of market power against a defendant, a plaintiff must show that the defendant has monopoly power over a product in some relevant geographic market." (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966))).

136. *M & M*, 1991-2 Trade Cas. (CCH) ¶ 66,618 at 66,762 (citing *Satellite Television & Assoc'd Resources, Inc. v. Continental Cablevision of Virginia, Inc.*, 714 F.2d 351 (4th Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984)).

137. 477 U.S. 317 (1986) (requiring a party resisting summary judgment to set forth specific facts that raise a material issue of fact with respect to each element of the moving party's claim).

138. 1991-2 Trade Cas. (CCH) ¶ 69,618 at 66,763.

139. *Id.*

was unsupported; instead, the court found that the affidavit was sufficient to raise a question of fact.

The Fourth Circuit also disagreed with the district court's finding that there had been an intent to monopolize, reasoning that "the key to distinguishing legal competitive acts from predatory ones is whether the acts were based on superior efficiency."¹⁴⁰ Following *Advanced Health-Care Services v. Radford Community Hospital*¹⁴¹ and the Eleventh Circuit's opinion in *Key Enterprises of Delaware, Inc. v. Venice Hospital*,¹⁴² the court concluded that "the linking of DME to hospital services constitutes anticompetitive activity which may support an inference of intent to monopolize."¹⁴³

Significantly, in *M & M Medical Supplies* the Fourth Circuit also addressed the district court's finding that the plaintiff DME company's monopoly leveraging claim did not state an antitrust claim separate and distinct from attempted monopolization.¹⁴⁴ Judge Boyle cited Second and Sixth Circuit opinions which recognize monopoly leveraging as a distinct antitrust theory,¹⁴⁵ while simultaneously acknowledging the Fourth Circuit's reservation of judgment on the issue until an appropriate case presents itself.¹⁴⁶

Again, it is difficult to square the Fourth Circuit's opinion in *Oksanen* with the *M & M Medical Supplies* case. Judge Wilkinson dismissed Dr. Oksanen's section 2 claims, finding that plaintiff failed to produce evidence of market definition, market power and monopolistic intent, reasoning as follows:

Although some dispute about the relevant market exists among the parties, Oksanen has offered little or no evidence to support his proposed definition of Page County as the relevant market. It is difficult to understand how Oksanen can maintain his proposed market

140. *Id.* at 66,764 (citing *Advanced Health-Care Servs. v. Radford Community Hosp.*, 910 F.2d 139, 147 (4th Cir. 1990) (citing *Aspen Skiing Corp. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602-03 (1985))).

141. 910 F.2d 139 (4th Cir. 1990).

142. 919 F.2d 1550 (11th Cir. 1990).

143. 1991-2 Trade Cas. (CCH) ¶ 69,618 at 66,764.

144. *Id.* at 66,764.

145. *Id.* at 66,674 (citing *Kerasotes Michigan Theatres, Inc. v. Nat'l Amusements, Inc.*, 854 F.2d 135, 136-37 (6th Cir. 1988), *cert. dismissed sub nom.*, *G.K.C. Michigan Theatres, Inc. v. Nat'l Amusements, Inc.*, 490 U.S. 1087 (1989); *Grand Light & Supply Co. v. Honeywell, Inc.*, 771 F.2d 672, 681 (2d Cir. 1985)).

146. 1991-2 Trade Cas. (CCH) ¶ 69,618 at 66,765 (citing *Advanced Health-Care Servs.*, 910 F.2d 139, 149 n.17 (4th Cir. 1990)).

definition since he himself sent a significant number of patients to hospitals outside of Page County. As our prior discussion has indicated, we doubt whether Page Memorial exercised market or monopoly power in a market defined to account for commercial reality.¹⁴⁷

3. Fourth Circuit's Rigid Essential Facilities Test Survives Certiorari Petition

Last term, the United States Supreme Court declined to review the Fourth Circuit's holding in *Laurel Sand & Gravel, Inc. v. CSX Transportation, Inc.*,¹⁴⁸ thereby leaving intact the Fourth Circuit's rigid application of the *MCI Communications Corp. v. AT&T Co.* essential facilities test.¹⁴⁹ The Supreme Court's refusal to review the standards articulated by the Fourth Circuit in *Laurel Sand* has ensured their continuing survival as a tool for the Fourth Circuit's demonstrated willingness to dispose of meritless claims in summary fashion after discovery has been completed.¹⁵⁰

147. *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 710 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 973 (1992).

148. 924 F.2d 539 (4th Cir.), *cert. denied*, 112 S. Ct. 64 (1991).

149. In *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983), the Seventh Circuit outlined the four elements necessary for an essential facilities claim: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." *Id.* at 1132-33.

150. In *Laurel Sand*, the Fourth Circuit easily rejected plaintiff Maryland Midland Railway, Inc.'s ("MMR") § 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 had failed to meet the last three prongs of the essential facilities test established in *MCI Communications*. 924 F.2d at 544-45.

The Fourth Circuit first found that MMR failed to show no alternatives existed for the essential facility because CSX had offered to provide rail service to MMR for one cent over its variable costs. *Id.* at 544. 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. 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." *Id.* at 545. 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 part of CSX's business is providing transportation services to "feeder" railroads such as MMR. *Id.* at 545.

4. State Courts Differ Over Section 2 Demurrers

In two rare state court antitrust opinions, the Fairfax County and Salem City Circuit Courts disagreed as to whether plaintiffs' monopolization claims were sufficient to survive demurrer. In *Tempkin v. Lewis-Gale Clinic, Inc.*,¹⁵¹ the Salem Circuit Court, without analysis, overruled defendant's demurrers and allowed discovery to proceed, whereas in *Trashbusters, Inc. v. AAA Disposal Services, Inc.*, the Fairfax County Circuit Court¹⁵² sustained defendants' demurrer to plaintiff's monopolization and attempted monopolization claims but allowed discovery on conspiracy to monopolize and "conspiracy to harm a business" claims.¹⁵³

Trashbusters, Inc. (Trashbusters) brought suit against Rainbow Industries, Inc. (Rainbow) and AAA Disposal Service, Inc. (AAA), alleging, among other things, monopolization by AAA, attempted monopolization by AAA, and conspiracy between AAA and Rainbow "to monopolize, divide markets and injure competition."¹⁵⁴ Judge McWeeny of the Fairfax County Circuit Court sustained in part and overruled in part the demurrers of defendants Rainbow and AAA.¹⁵⁵

Judge McWeeny ruled first that Trashbusters had not adequately plead a monopolization claim against AAA because Trashbusters had not alleged a specific market share control by AAA of at least fifty percent, or special circumstances which might support a monopolization claim absent a fifty percent market share.¹⁵⁶ Second, Judge McWeeny noted that "[t]here must be either some indication of market share or other particular market factors alleged, given the admission of the existence of at least one other competitor [, the other defendant,] alleged to be or attempting to be a monopolist."¹⁵⁷ Because these factors were not plead, the court then granted defendants' demurrers to the attempted monopolization claims.¹⁵⁸

151. 27 Va. Cir. —, Chancery No. 89-209 (Salem Cir. Ct. Mar. 16, 1992) (letter opinion).

152. No. 107091, 1992 WL 132552 (Fairfax Co. Cir. Feb. 28, 1992) (letter opinion).

153. *Id.*

154. *Id.* at *1-2.

155. *Id.* at *1.

156. *Id.* at *1-2.

157. *Id.* at *2.

158. *Id.*

Judge McWeeny, however, overruled the demurrers to the plaintiff's claim of conspiracy to monopolize. He reasoned that the plaintiff's failure to allege a specific market share was not fatal to plaintiff's conspiracy claims because, while market share may contribute to a finding of an antitrust violation, "other anti-competitive conduct" may also contribute to a finding of a conspiracy.¹⁵⁹

Judge McWeeny further rejected the defendants' contention that Trashbusters lacked standing because the market division complained of could not injure a rival firm such as Trashbusters. The court noted that the effect of the alleged conspiracy would be to "foreclose competition by eliminating plaintiff and other small firms, providing an injury both to plaintiff and competition."¹⁶⁰ The court in *Trashbusters* repeatedly emphasized that plaintiffs do not have to *prove* antitrust injury at the demurrer stage; rather, they have only to *allege* that such injury occurred.¹⁶¹

While the past year has seen few victories for antitrust plaintiffs, the *Tempkin* and *Trashbusters* decisions perhaps reflect the Virginia state court perspective that antitrust claims should not be disposed of before there has been an adequate opportunity to develop a factual record. Of course, such a perspective, coupled with the inability to use depositions as a tool to obtain summary judgment in state court and the prevalence of successful Rule 56 motions in federal antitrust cases, may lead more antitrust practitioners to file claims under the Virginia Antitrust Act¹⁶² in the first instance.¹⁶³

C. Price Discrimination

In *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.*,¹⁶⁴ the Fourth Circuit Court of Appeals rejected plaintiff Liggett's predatory pricing claim under the Robinson-Patman Act¹⁶⁵ because it made no rational economic sense. Liggett brought suit against Brown & Williamson, a competing cigarette manufacturer,

159. *Id.*

160. *Id.*

161. *Id.* at *3.

162. VA. CODE ANN. §§ 59.1-9.1 to -9.18 (Repl. Vol. 1992).

163. Of course, the fact that treble damages are available under the Virginia Antitrust Act only for flagrant violations serves as a sufficient incentive for plaintiffs to remain in federal court. *Id.* § 59.1-9.12.

164. 964 F.2d 335 (4th Cir. 1992).

165. 15 U.S.C. §§ 13-13b, 21a (1988).

alleging that it had engaged in a "primary-line predatory pricing scheme¹⁶⁶ in the sale of generic cigarettes . . . in violation of Section 2(a) of the Robinson-Patman Act."¹⁶⁷ Specifically, Liggett contended that Brown & Williamson priced its generic cigarettes below its average variable cost — "to force Liggett either to raise the prices of its generic cigarettes or to cease selling them" — with the expectation of maintaining higher profits in the oligopolistic branded cigarette market.¹⁶⁸ While the jury returned a \$49.6 million verdict for Liggett which was trebled to \$149 million, the district court granted Brown & Williamson a judgment, notwithstanding the verdict and Liggett appealed.¹⁶⁹

Liggett based its theory on the premise that Brown & Williamson could recoup the losses sustained during the predatory pricing period, as well as earn additional profits, based upon the predicted behavior of the other manufacturer/competitors in the cigarette market. This anticipated behavior envisioned that the other four competing cigarette manufacturers would fail to sell generic cigarettes and would simply stand by and watch as Brown & Williamson drove Liggett out of the market and then raised prices. Liggett's theory necessarily implied, therefore, that the other four cigarette manufacturers would behave uncompetitively in the face of a competitive move by Brown & Williamson.¹⁷⁰

166. Primary-line predatory pricing occurs when a market participant with a very large share of the market attempts to drive out a competitor by selling its product at artificially low prices. The predator incurs losses on each sale below its average variable cost until the competitor is driven out of the market. Once this happens, the predator gains profits which more than compensate for the losses incurred during the period when the product was sold at the artificially low price.

167. *Id.* at 336. As the court stated,

Section 2(a) of the Robinson-Patman Act [15 U.S.C. § 13(a)] makes it unlawful for a person engaged in commerce "to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition . . . or to injure, destroy, or prevent competition" with the person charging the discriminatory prices. The requirement to show that the effect of pricing "may be substantially to lessen competition" may be satisfied by proof of predatory pricing.

Id. at 338-39 (quoting 15 U.S.C. § 13(a) (1988) (citation omitted)).

168. *Id.* at 336. While Liggett alleged that Brown & Williamson sold its generic cigarettes below its variable cost, Liggett conceded that "Brown & Williamson realized profits [during the relevant period] in the overall sale of cigarettes in the United States, the agreed upon relevant market." *Id.* at 338.

169. *Id.* at 336.

170. *Id.* at 340-41.

The Fourth Circuit rejected this premise. While noting that the definition of "predatory pricing" is still unclear,¹⁷¹ the court, citing *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,¹⁷² stated that in addition to some form of below-cost pricing, predatory pricing must also involve a "rational expectation of later realizing monopoly profits."¹⁷³ As this essential element was missing, the court affirmed judgment for Brown & Williamson. Liggett did not claim that a relatively small competitor like Brown & Williamson, which controlled only twelve percent of the agreed-upon market, could exercise monopoly power for a sufficient period to reap the gains of its alleged below-cost pricing in the absence of concerted action.¹⁷⁴ Also, the court was not convinced that other oligopolists in the market would simply stand by and refrain from selling generic brands while Brown & Williamson artificially raised prices of its generic cigarettes.¹⁷⁵ The court noted that it was "aware of no case in which the predicted economic behavior of an oligopoly was relied on to provide a rational means of recoupment of the losses sustained in a predatory pricing scheme, and economic logic as well as actual experience in this case belie such a holding."¹⁷⁶ Because "the pricing policies undertaken by Brown & Williamson . . . did not provide an economically rational basis 'to recoup . . . loses and to harvest some additional gain,'" they could not be classified as predatory.¹⁷⁷

On the other hand, in *Unlimited Screw Products, Inc. v. Malm*¹⁷⁸ the United States District Court for the Eastern District of Virginia refused to grant summary judgment on plaintiff's claim of commercial bribery under section 2(c) of the Robinson-Patman Act¹⁷⁹ in connection with the sale of shipbuilding fasteners. The court held that an alleged job offer resulting in actual employment was something of value within the meaning of that section.

Plaintiff Unlimited Screw, a shipbuilding fastener supplier, brought suit after it was terminated as a supplier by the Newport

171. *Id.* at 338 n.5, 339.

172. 475 U.S. 574, 597-98 (1986).

173. 964 F.2d at 339.

174. *Id.* at 340.

175. *Id.* at 341.

176. *Id.*

177. *Id.* at 342 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986)).

178. 781 F. Supp. 1121 (E.D. Va. 1991).

179. 15 U.S.C. § 13(c) (1988).

News Shipbuilding and Drydock Company (Newport News). Newport News acted upon the recommendation of its quality control inspector, Malm, after it instituted "stringent, on-site quality audits."¹⁸⁰ After Unlimited Screw's termination, Sales Systems, a competitor, experienced a substantial increase in sales to Newport News. Subsequently, Malm joined Sales Systems as a quality control manager. Unlimited Screw then sued Malm and Sales Systems claiming that they had "acted together to disqualify [Unlimited Screw] as a supplier and to qualify defendant Sales Systems."¹⁸¹

The court considered Unlimited Screw's Robinson-Patman and intentional interference claims together on summary judgment because they involved similar evidentiary support and a showing of intentional conduct by defendants.¹⁸² "Section 2(c) of the Robinson-Patman Act makes it unlawful in certain commercial contexts to pay or receive 'anything of value as a commission, brokerage, or other compensation, . . . except for services rendered in connection with the sale or purchase of goods, wares, or merchandise.'" ¹⁸³ Noting that the Fourth Circuit has implicitly recognized the applicability of section 2(c) in "certain commercial bribery contexts," the district court held that a job offer to Malm by Sales Systems which resulted in employment did "constitute something of value within the meaning of the [Robinson-Patman] Act."¹⁸⁴ Thus, the absence of direct evidence of payments between Sales Systems and Malm was not fatal to Unlimited Screw's claim. The court denied summary judgment, concluding that there was sufficient evidence from which a jury could infer a conspiracy and that Sales Systems bribed Malm with a job offer.¹⁸⁵

In another price discrimination case, the Fourth Circuit, interpreting a provision of the Maryland Antitrust Act substantially identical to section 2(e) of the Robinson-Patman Act,¹⁸⁶ held that

180. *Malm*, 781 F. Supp. at 1124.

181. *Id.*

182. *Id.* at 1129.

183. *Id.* (quoting 15 U.S.C. § 13(c) (1988)).

184. *Id.* at 1130.

185. *Id.*

186. The section of the Maryland Antitrust Act at issue, MD. COM. LAW II CODE ANN. II § 11-204(a)(5) (1990), makes it unlawful to

[d]iscriminate in favor of one purchaser against another purchaser of a commodity bought for resale, with or without processing, by contracting to furnish, furnishing, or contributing to the furnishing of any service or facility connected with the processing, handling, sale, or offering for sale of the commodity on terms not accorded to all purchasers on proportionally equal terms.

a real estate lease did not constitute a "service" under the Act. In *Hinkleman v. Shell Oil Co.*,¹⁸⁷ Hinkleman, who operated a service station franchise of Shell Oil Company, paid rent under the franchise agreement according to Shell's Variable Rent Program which was governed by the volume of the dealer's monthly gasoline purchases from Shell.¹⁸⁸ Hinkleman was terminated after Shell experienced a series of problems in collecting payments from him, and he brought suit alleging that Shell was guilty of price discrimination in connection with its lease of the service station premises to Hinkleman.¹⁸⁹

The Fourth Circuit affirmed the district court's dismissal of Hinkleman's price discrimination claim, holding that while the Act prohibits price discrimination through the discriminatory provision of services to purchasers in connection with the sale of a commodity, Hinkleman's real estate lease did not constitute a "service." After examining the case law interpreting section 2(e) of the Robinson-Patman Act, the court determined that the phrase "services and facilities" found in the Act is limited to advertising, promotional, or merchandising services.¹⁹⁰ The court chose to exclude real estate leases from the prohibition of § (2)(e) because they do not promote the commodity to the ultimate retail consumer.¹⁹¹ Moreover, the court was concerned with expanding the scope of behavior violative of section 2(e) because such behavior is deemed

Id.

Section 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e) (1988), reads:

It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Id.

187. 962 F.2d 372 (4th Cir. 1992).

188. *Id.*

189. Hinkleman also alleged that the franchise termination was in violation of § 102(b)(2)(C) of the Petroleum Marketing Practices Act (PMPA). The Fourth Circuit affirmed the district court's grant of summary judgment on this claim, holding that Hinkleman's payment failures constituted adequate grounds under the PMPA for termination. The court was not persuaded that Hinkleman's payment failures were exempt as "unimportant" failures under the Act. *Id.* at 376-77. Moreover, the court refused to scrutinize the reasonableness of the termination beyond the PMPA's language, finding that the statute listing payment failure as adequate grounds for termination is all that is required to resolve the issue. *Id.* at 377.

190. *Id.* at 379.

191. *Id.* at 380.

per se illegal under the Act, without any analysis of its procompetitive effects.¹⁹²

D. Antitrust Immunity Issues

In *Federal Trade Commission v. Ticor Title Insurance Co.*,¹⁹³ the Supreme Court narrowed the scope of state action immunity available to provide entities. In *Ticor Title*, the FTC challenged the practice of setting uniform rates for title search and related services by title insurance companies. The FTC charged a horizontal price fixing agreement and the companies defended on the basis of the state action doctrine,¹⁹⁴ contending that their conduct was undertaken pursuant to a clearly articulated state policy and was actively supervised by the states. The FTC conceded that the state policy prong of the *Midcal* test had been met and the Court's analysis focused on the active supervision requirement. As it had done recently in *Patrick v. Burget*,¹⁹⁵ the Court held that the mere availability of state supervision was insufficient to establish immunity, reasoning as follows:

192. *Id.* at 381.

193. 60 U.S.L.W. 4515 (U.S. June 12, 1992).

194. The doctrine of state action immunity was first enunciated by the United States Supreme Court in *Parker v. Brown*, 317 U.S. 341, 351 (1943), where the Court held that the Sherman Act was not intended to prohibit states from imposing restraints on competition. "Although *Parker* involved an action against a state official, the Court's reasoning extends to suits against private parties." *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 (1985). The circumstances under which the state action doctrine immunizes private conduct were refined in *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). The Court's opinion in *Midcal* establishes a two-pronged test for determining whether state regulation of private parties invokes state action immunity. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy;' second, the policy must be 'actively supervised' by the State itself." *Id.* at 105 (citing *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (opinion of Brennan, J.)). See also *Southern Motor Carriers*, 471 U.S. 48 (1985); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

The Court in *Southern Motor Carriers* took the *Midcal* analysis one step further and addressed whether state compulsion is required to immunize the actions of private parties. Discounting reliance on *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), for the establishment of a compulsion prerequisite to a finding of state action immunity:

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

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

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

195. 486 U.S. 94 (1988).

Where prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme. The mere potential for state supervision is not an adequate substitute for a decision by the State.¹⁹⁶

The Court was quick to add, however, that this stringent rule was limited to the horizontal price fixing activity before it and suggested a more lenient analysis for conduct which falls short of establishing uniform prices.¹⁹⁷

Further demonstrating the increasing difficulty experienced by physicians in maintaining antitrust staff privileges actions, in *Cohn v. Bond*¹⁹⁸ the Fourth Circuit dismissed a chiropractic staff privileges case brought against Wilkes General Hospital and members of its medical staff on the grounds that their actions were shielded by the state action doctrine, the Local Government Antitrust Act (LGAA),¹⁹⁹ and the intracorporate immunity doctrine.

The Fourth Circuit found that because the hospital was owned and operated by the City of Wilkesboro, both it and its medical staff were immune from suit for money damages under the LGAA. The court decided that the hospital's medical staff fell under the protection of the LGAA because its actions were " 'directed by' an official."²⁰⁰ The court noted, however, that the medical staff was also shielded by *Copperweld* immunity under its recent decision in *Oksanen v. Page Memorial Hospital*.²⁰¹ Thus, in *Cohn* the medical

196. *Ticor Title*, 60 U.S.L.W. at 4519.

197. The Court explained:

This case involved horizontal price fixing under a vague imprimatur in form and agency inaction in fact. No antitrust offense is more pernicious than price fixing. *FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411, 434 n.16 (1990). In this context, we decline to formulate a rule that would lead to a finding of active state supervision where in fact there was none. Our decision should be read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision. We do not imply that some particular form of state or local regulation is required to achieve ends other than the establishment of uniform prices. *Cf. Columbus v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991) (city billboard zoning ordinance entitled to state action immunity).

Ticor Title, 60 U.S.L.W. at 4520.

198. 953 F.2d 154 (4th Cir. 1991), *cert. denied*, 120 L.Ed.2d 922 (1992).

199. See *supra* note 17 for a discussion of the implications of the LGAA.

200. 1991-2 Trade Cas. (CCH) ¶ 69,663 at 67,003.

201. 945 F.2d 696 (4th Cir.), *cert. denied*, 112 S. Ct. 973 (1991). Finally, the court rejected plaintiff's argument that the medical staff exerted undue influence on the Board, thereby supplanting its decision. It noted that under *Oksanen*, the hospital and the medical staff

staff was entitled to the same immunity as the hospital from money damages under the LGAA.²⁰²

While LGAA immunity shielded defendants only from the imposition of money damage claims,²⁰³ the Fourth Circuit further immunized the peer review decision from attack by applying the state action doctrine.²⁰⁴ The court reasoned that the first prong of the *Parker v. Brown* state action doctrine,²⁰⁵ requiring action to be "clearly articulated and affirmatively expressed [as] state policy," was met because "North Carolina statutes authorizing municipalities to construct, operate and maintain hospitals . . . contemplate anticompetitive effects."²⁰⁶ The decision indicated the "active supervision" prong of *Parker* was inapplicable because the medical staff acted as agents of Wilkes in making recommendations whether to grant privileges.²⁰⁷

The Fourth Circuit rejected another staff privilege claim in *Mann v. Princeton Community Hospital Ass'n*.²⁰⁸ There after having been denied staff privileges as a pediatrician at Princeton Community Hospital, Mann sued the facility, its medical staff and five physicians alleging antitrust violations. The court summarily rejected Dr. Mann's section 1 claim on the basis that *Oksanen* had established medical staff immunity from antitrust challenges.²⁰⁹ The court also found insufficient evidence that two competing physicians, with the help of the hospital, conspired to monopolize the pediatric medicine market. Instead, the court found that those physicians were merely carrying out their duties to deny or to grant privileges under established hospital procedures.²¹⁰

were one entity which could not conspire with itself based upon the intracorporate immunity doctrine. The logical extension of the court's holding in *Oksanen* is that Wilkes and the medical staff, as a single entity, could not unduly influence itself. The plaintiff's undue influence argument, therefore, was irrelevant.

202. 953 at 155.

203. *Id.* at 158.

204. *Id.* at 158-59.

205. *See supra* note 17.

206. 953 F.2d at 158 (quoting *Coastal Neuro-Psychiatric Assocs. v. Onslow Memorial Hosp.*, 795 F.2d 340, 341 (4th Cir. 1986)).

207. *Id.* (citing *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985)).

208. 956 F.2d 1162 (unpublished decision), 1992-1 Trade Cas. (CCH) ¶ 69,738 (4th Cir. Mar. 3, 1992).

209. *Id.* at 67,353.

210. *Id.* at 67,354.

E. Procedure and Evidence

1. Procedure

Consistent with its treatment of antitrust claims over the past several years, the Fourth Circuit continues to have little difficulty affirming summary judgment when it deems that a plaintiff has had sufficient opportunity for discovery.

In *Mann v. Princeton Community Hospital Ass'n*,²¹¹ for example, the court dismissed Mann's contention that the district court prematurely granted summary judgment because discovery was incomplete. The Fourth Circuit found that Mann had a full opportunity for complete discovery, noting that during one full year of discovery he had taken only two depositions. In addition, Mann failed to respond to the defendant's motion for summary judgment in a timely manner. Instead, one day after Mann's response was due, he moved for an extension of time in which to respond, claiming that affidavits of certain lay witnesses were forthcoming. These affidavits were supposed to establish the existence of a genuine issue of material fact. However, no such affidavits were ever produced.²¹² Therefore, the court found meritless plaintiff's claim that summary judgment was premature.²¹³

Similarly, in *Cohn v. Bond*,²¹⁴ another staff privileges case, the Fourth Circuit found the hospital and medical staff immune under the LGAA, the state action doctrine, and the intracorporate immunity doctrine. In the court's opinion, there was no need for further discovery of closed-door sessions of the hospital board meetings in an attempt to develop evidence of conspiracy and undue influence, since such evidence was irrelevant. The decision noted that discovery should not become a "fishing expedition."²¹⁵

The lack of discovery allowed to the plaintiff in *Oksanen v. Page Memorial Hospital*²¹⁶ formed the basis for the en banc dissent to the Fourth Circuit's opinion. In that case, the fact that discovery had proceeded for only four months prior to being stayed by the

211. 1992-1 Trade Cas. (CCH) ¶ 69,738 (4th Cir. Mar. 3, 1992).

212. *Id.* at 67,353.

213. *Id.*

214. 953 F.2d 154 (4th Cir. 1991), *cert. denied*, 120 L.Ed. 2d 922 (1992).

215. *Id.* at 159. (citing *Sandcrest Outpatient Servs. v. Cumberland City*, 853 F.2d 1139, 1146 (4th Cir. 1988)).

216. 945 F.2d 696 (4th Cir.), *cert. denied*, 112 S. Ct. 973 (1991).

district court did not dissuade the majority of Fourth Circuit judges from granting summary judgment.²¹⁷

While the Fourth Circuit has decried discovery proceedings which are mere "fishing expeditions," the Circuit Court for the City of Salem has apparently allowed such a proceeding. In *Tempkin v. Lewis-Gale Clinic, Inc.*,²¹⁸ the circuit court refused to dismiss, on demurrer, antitrust claims previously deemed meritless by two separate federal courts.²¹⁹

2. Evidence

Consistent with the Supreme Court's pronouncements in *Montano v. Spray-Rite Corp.*²²⁰ and *Matsushita Electric Industrial Co. v. Zenith Radio*,²²¹ Virginia's federal courts have skeptically viewed alleged evidence of conspiracy. For example, in *Precision Piping and Instruments, Inc. v. E. I. du Pont de Nemours & Co.*,²²² the Fourth Circuit upheld the U.S. District Court for the Southern District of West Virginia's exclusion of alleged hearsay statements of co-conspirators. Precision Piping and Instruments (PPI), a West Virginia pipefitting contractor, was a member of PMCA, a trade association for unionized construction workers, which was negotiating a union contract pursuant to a collective bargaining agreement.²²³ When PPI communicated an interest in bargaining on its own, directors of PMCA and du Pont allegedly warned PPI that it would be "through in th[e] valley" if it did so.²²⁴

Despite these warnings, PPI was successful in reaching a separate agreement with the local union. PPI alleged that as a result of this contract, du Pont and Borg-Warner, with whom PPI did most

217. At the opposite end of the discovery spectrum, Judge Turk granted summary judgment in *Becker v. Blue Shield of Southwestern Virginia*, No. 81-0320-R (W.D. Va. June 5, 1992), after ten and one-half years of discovery, certainly an ample period under any standard.

218. ___ 27 Va. Cir. ___, Chancery No. 89-209 (Salem Cir. Ct., Mar. 16, 1992), discussed at *supra* Section II.A.

219. See *Tempkin v. Lewis-Gale Hosp., Inc.*, 1991-1 Trade Cas. (CCH) ¶ 69,401 at 65,615 (4th Cir. Apr. 19, 1991), *aff'g* 1989-2 Trade Cas. (CCH) ¶ 68,865 at 62,548 (W.D. Va. Nov. 22, 1989).

220. 465 U.S. 752 (1984).

221. 475 U.S. 574 (1986).

222. 951 F.2d 613 (4th Cir. 1991).

223. *Id.*

224. *Id.* at 616.

of its business,²²⁵ terminated all business relations.²²⁶ Applying *Matsushita*, Judge Sprouse upheld the district court's grant of a directed verdict for defendants was proper.²²⁷ The Fourth Circuit's decision was based on PPI's failure to dispel evidence suggesting the defendants' acts were independent, and PPI's inability to present evidence establishing that any individual defendant was influenced by the decisions and actions of any other defendant.

Judge Sprouse also reviewed the propriety of the district court's exclusion of statements offered by PPI as evidence of the existence of a conspiracy. During the trial, PPI sought to introduce the testimony of its president and superintendent regarding conversations these officers had with the defendants.²²⁸ The district court determined that such hearsay statements were not admissible under Federal Rules of Evidence 801(d)(2)(D)²²⁹ or 801(d)(2)(E)²³⁰ and excluded the statements.²³¹ The Fourth Circuit affirmed the district court's exclusion and held that the lower district court did not abuse its discretion in determining whether the statements were made within the scope of employment.²³² The district court's preliminary determination of whether a conspiracy existed, as required under Federal Rule of Evidence 801(d)(2)(E), also was not clearly erroneous.²³³

Similarly, in *Virginia v. Embassy Dairy, Inc.*²³⁴ Judge Doumar refused to infer a conspiracy in the absence of direct evidence. The only proof offered by the plaintiff was expert statistical testimony that the defendant's bidding patterns strongly suggested the existence of a bid-rigging scheme.

The case was brought by Virginia's Attorney General, on behalf of school boards in Tidewater and Central Virginia, against five dairies for their alleged participation in a conspiracy to allocate

225. *Id.* at 615-16.

226. *Id.*

227. *Id.* at 618.

228. *Id.* at 616.

229. FED. R. EVID. 801(d)(2)(D) provides that certain statements are admissible if the statement is offered against the party and is made by the party's agent concerning a matter within the scope of the agency or employment.

230. FED. R. EVID. 801(d)(2)(E) provides that statements made in the course of and in furtherance of a conspiracy are admissible.

231. 951 F.2d at 616.

232. *Id.* at 620.

233. *Id.* at 621.

234. No. 91-510-N, slip op. (E.D. Va. Mar. 25, 1992).

school milk contracts by prearranging bid offerings in violation of section 1 of the Sherman Act and section 59.1-9.5 of the Virginia Antitrust Act.²³⁵ Embassy Dairy moved for summary judgment on the grounds that the Commonwealth had not proffered evidence sufficiently proving either the existence of a conspiracy or Embassy's participation in such a conspiracy.²³⁶

The Attorney General offered no direct evidence of a conspiracy involving Embassy. Instead, the prosecution's argument relied upon a statistical model (the McClave Model) that was developed by an expert statistician. This model allegedly demonstrated bidding patterns which suggested the existence of a bid-rigging scheme.²³⁷ Although acknowledging that this form of circumstantial evidence is relevant to determining the existence of a conspiracy,²³⁸ the court found that the Commonwealth's statistical evidence did not sufficiently exclude the possibility that Embassy acted independently.²³⁹

Most importantly, the court found the prosecution's evidence wanting primarily because it assumed that Embassy was responsible for actions taken by the Southland Corporation. However, Embassy had merely purchased certain assets from Southland. Because Embassy could not be held liable for actions taken by Southland on this basis, the court decided it was "improper to accord substantial probative value" to the Commonwealth's statistical evidence.²⁴⁰ The court also sharply criticized the Commonwealth's expert's data and analysis, finding it substantially lacking and unsatisfactory regarding Embassy's relative costs and market share analyses.²⁴¹

Evidentiary issues also dominated the defendant moving company's appeal in *United States v. Allen's Moving & Storage, Inc.*²⁴² The defendants were convicted of fixing the price of discounted moving services to military bases. The Fourth Circuit determined that the government was properly permitted to call a military officer as a rebuttal witness where that action arguably vi-

235. *Id.* at 1-3.

236. *Id.* at 6-7.

237. *Id.* at 10.

238. *Id.* at 10 (citing *Theatre Enters. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954)).

239. *Id.* at 10-11.

240. *Id.* at 11.

241. *Id.* at 14.

242. No. 90-5824 (4th Cir. June 28, 1991) (unpublished) (text available in WESTLAW).

olated the pretrial stipulation of the parties and the Federal Rules of Evidence.²⁴³ The court also rejected defendants' arguments²⁴⁴ that the government withheld exculpatory evidence in violation of *Brady v. Maryland*,²⁴⁵ that the jury was improperly instructed that the defendants' challenged conduct was per se illegal,²⁴⁶ and that the jury instructions failed to require a finding that defendants had a specific intent to violate the law.²⁴⁷ The Fourth Circuit also concluded the indictment was sufficiently precise to avoid claims of double jeopardy.²⁴⁸

III. FEDERAL REGULATORY, ADMINISTRATIVE AND ENFORCEMENT EFFORTS

While the Department of Justice (DOJ) has been criticized this year for its weak enforcement efforts, including those involving purely local criminal actions, the DOJ has investigated Virginia dairies, dropped its inquiry regarding an alleged information exchange among Virginia colleges and, along with the Federal Trade Commission (FTC), issued new unified merger guidelines.

A. *Criminal Enforcement Efforts*

The General Accounting Office issued a report at the end of 1991 providing a glimpse of the Department of Justice's criminal enforcement efforts.²⁴⁹ The report revealed 198 complaints and leads uninvestigated by the DOJ and a decline in the total number of investigations and in Sherman Act investigations initiated by the Division between 1986 and 1990. The report has resulted in criticism of the DOJ's record keeping practices and use of its resources to investigate matters which are purely local, such as bid rigging in antique furniture auctions, among local roof contractors, and on milk sales to local school districts.²⁵⁰

243. *Id.* at *6.

244. *Id.* at *9.

245. 373 U.S. 83 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution").

246. No. 90-5824, at *10.

247. *Id.* at *12.

248. *Id.* at *13.

249. GENERAL ACCOUNTING OFFICE, Rep. No. B-241053 (1991).

250. See 62 Antitrust & Trade Reg. Rep. (BNA) 137 (Feb. 6, 1992).

Despite such criticism, the DOJ continued its investigation into the bidding practices of Virginia's milk industry. In the first Virginia school milk case, filed in the summer of 1991, Douglas Stamper, Vice President and Virginia Regional Manager of Land-O-Sun Dairies, pled guilty to conspiracy to rig school milk bids. Stamper was fined fifteen thousand dollars and was given a one-year suspended jail sentence in addition to three years probation.²⁵¹

In a related case, *United States v. Pet, Inc.*,²⁵² Pet pled guilty to school bid rigging charges and was fined six hundred and fifty thousand dollars. Pet also paid one hundred thousand dollars in civil penalties and damages to the United States as a result of these charges. On November 12, 1991, Marva Maid, a dairy cooperative, was convicted of one count of conspiracy to rig bids to Virginia schools and two counts of mail fraud. The dairy was fined over one million dollars. Count four of the Marva Maid indictment, however, charging a violation of 18 U.S.C. § 1001 (false statements), was dismissed.²⁵³ Finally, in April 1992, Joseph C. Hughes, general manager of Birtcherd Dairies, Inc. from 1973 to 1986, was acquitted after trial on charges of perjury and obstruction of justice in connection with the school milk investigation.²⁵⁴ This was the first perjury and obstruction of justice case brought involving the forty-five filed criminal milk conspiracy cases.²⁵⁵

On another front, because of a DOJ investigation into the pricing practices of tuition, financial aid, and faculty salaries at Ivy League schools, the United States entered into a consent decree with several schools.²⁵⁶ In the consent decree, the universities did not admit any wrongdoing, but agreed not to collude on tuition, financial aid, and salaries in the future.²⁵⁷ At the same time, the DOJ quietly closed its similar investigation regarding similar practices among certain Virginia colleges and universities.

251. *United States v. Stamper*, Crim. No. 91-73N (E.D. Va. May 9, 1991).

252. Crim. No. 91-138-N (E.D. Va. 1991).

253. *United States v. Maryland & Virginia Milk Producers Coop. Ass'n*, Crim. No. 91-120-N (E.D. Va., filed July 30, 1991).

254. *United States v. Hughes*, Crim. No. 92-25N (E.D. Va. Apr. 27, 1992) (acquittal entered).

255. Trade Reg. Rep. (CCH) ¶ 45,092, at 44,582 (June 9, 1992).

256. Gary Putka, *Ivy League Discussions on Finances Extended to Tuition and Salaries*, WALL ST. J., May 8, 1992, at A1.

257. *Id.*

B. *New DOJ/FTC Unified Merger Guidelines*

On April 2, 1992, the Department of Justice and the FTC issued their eagerly awaited first set of unified guidelines for analyzing horizontal mergers.²⁵⁸ The 1992 Horizontal Merger Guidelines (the 1992 Guidelines), replace the FTC's June 14, 1982 Statement Concerning Horizontal Mergers and DOJ's June 14, 1984 Merger Guidelines. The new guidelines represent the first regulatory scheme where the two agencies responsible for federal antitrust merger enforcement have arrived at a mutually agreeable and comprehensive approach to evaluating the antitrust implications of mergers.

According to remarks by Antitrust section head James F. Rill in his speech to the ABA Section of Antitrust Law at the Section's spring meeting,²⁵⁹ the framework of the 1992 Guidelines consists of five steps, each treated by a chapter which the government considers necessary. Taken together, the Guidelines are sufficient to determine whether a merger is likely to bolster the exercise of market power. The five basic chapters concern (1) market definition, measurement and concentration; (2) potential adverse competitive effects; (3) entry analysis; (4) efficiencies; and (5) failure of existing assets.²⁶⁰ By comparison, the 1984 Merger Guidelines contained chapters on purpose and underlying policy assumptions, market definition and measurement, horizontal mergers, horizontal effect from non-horizontal mergers, and defenses.²⁶¹

Treatment of market definition remains largely unchanged in the 1992 Guidelines, although the government will now focus solely on demand substitution factors.²⁶² The treatment of market measurement and market concentration, however, is somewhat revised. For example, the new guidelines take a broader view of who should be included as market participants in order to encompass all entities affecting competitive interaction surrounding mergers.²⁶³

258. *Justice Department, FTC Issue Unified Federal Guidelines on Horizontal Mergers*, Antitrust & Trade Reg. Rep. (BNA) No. 1559 (Special Supp., Apr. 2, 1992) [hereinafter *1992 Guidelines*]. These new guidelines update the Merger Guidelines released by the Department of Justice in 1984 [hereinafter *1984 Guidelines*].

259. *Speech by James F. Rill to ABA Section of Antitrust Law*, Antitrust & Trade Reg. Rep. (BNA) No. 1560 at 485 (April 9, 1992).

260. *Id.* (citing *1992 Guidelines* § 2).

261. Antitrust & Trade Reg. Rep. (BNA) No. 1559, at 404:1 (Apr. 2, 1992).

262. *Id.* at 404:2.

263. Antitrust & Trade Reg. Rep. (BNA) No. 1560, at 486 (citing *1992 Guidelines* § 1.3).

Among market participants, the 1992 Guidelines include all current producers or sellers of the relevant product, even vertically integrated firms producing only for their own internal consumption, as well as the producers or sellers of recycled or reconditioned goods and three forms of uncommitted entrants.²⁶⁴

The new guidelines retain the Herfindahl-Hirschman Index²⁶⁵ (the HHI) to assess market concentration. They abandon the "likely to sue" formulation, however, which the HHI has represented in the past. Rather, the 1992 Guidelines stress that market concentration will be taken into account along with other factors set forth in the guidelines.²⁶⁶

One significant change in the 1992 Guidelines is the chapter entitled "Potential Adverse Competitive Effects of Mergers,"²⁶⁷ which attempts to articulate more clearly the anticompetitive effects, involving both collusion and unilateral activity, that mergers may cause. As Mr. Rill noted, this reflects a recognition "that it is *conduct*, not structure, that causes anticompetitive effects, although structure can influence the likely effect of conduct."²⁶⁸

Another change is the expanded chapter on "Entry Analysis,"²⁶⁹ which establishes a three-part framework focusing on the timeliness, likelihood, and sufficiency of entry alternatives. This analysis helps assess the probability that a merger's potential anticompetitive effects will be offset by post-merger entry into the market.

The final two chapters on "Efficiencies"²⁷⁰ and "Failure of Existing Assets"²⁷¹ have been revised to indicate that the government has diminished hostility to these defenses. For example, efficiencies need no longer be proven by "clear and convincing evidence," a higher standard than other elements of the analysis. Additionally, the government ostensibly intends to take a more neutral approach on the failing company defense than the skeptical approach taken in past years.²⁷²

264. *Id.*

265. The HHI is an arithmetic measure of market concentration derived by summing the squares of the market shares of participants in the relevant market.

266. Antitrust & Trade Reg. Rep. (BNA) No. 1560, at 486 (citing 1992 Guidelines § 1.3).

267. 1992 Guidelines, *supra* note 253, at S-8.

268. Antitrust & Trade Reg. Rep. (BNA) No. 1560, at 487.

269. 1992 Guidelines, *supra* note 253, at S-11 to S-12.

270. *Id.* at S-13.

271. *Id.*

272. Antitrust & Trade Reg. Rep. (BNA) No. 1559, at 404:2.

C. *FTC Enforcement Activity*

The FTC was not as active in Virginia this year as it has been in the past. In the only reported action, *FTC v. Voices for Freedom*,²⁷³ the FTC entered into a consent judgment, approved by the United States District Court for the Eastern District of Virginia, permanently enjoining telemarketer William von Meister, former president of Phone Base Systems, Inc., from misrepresenting the nonprofit nature of any organization for which he conducts marketing and the percentage of proceeds of any such promotion that will ultimately reach any charity or non-profit organization.²⁷⁴ The agreement was reached with Mr. von Meister to settle charges arising out of an action filed by the FTC alleging deceptive telemarketing of "Desert Shield/Desert Storm" bracelets sold by an Alexandria-based company called Voices for Freedom. The FTC's charges against Voices for Freedom and its principals are still pending.

D. *Administrative Debarment Upheld*

In *Leitman v. McAusland*,²⁷⁵ the Fourth Circuit refused to overturn an administrative decision debaring the appellant from purchasing surplus and foreign excess personal property from the federal government for three years. The court found there was substantial evidence to support collusive bidding charges upon which the hearing officer's decision was based.

IV. CIVIL ENFORCEMENT ACTIVITIES OF THE ATTORNEY GENERAL OF VIRGINIA

This past year the Antitrust and Consumer Litigation Section of the Virginia Attorney General's Office followed up a Norfolk federal grand jury investigation by filing a civil suit on behalf of thirty-five school districts in Tidewater and central Virginia against five dairies. Settlements were reached with two dairies and suit was dismissed against a third.

The suit filed by the Attorney General is *Virginia v. Embassy Dairy, Inc.*²⁷⁶ It names as defendants Embassy Dairy, Inc., Land-

273. No. 91-1542-A (E.D. Va. Apr. 6, 1992).

274. Trade Reg. Rep. (CCH) ¶ 23,167, at 22,833 (Apr. 14, 1992).

275. 934 F.2d 46, 52 (4th Cir. 1991).

276. No. 91-510-N (E.D. Va. 1991).

O-Sun Dairies, Inc. t/a Pet Dairy, Maola Milk & Ice Cream Company, Inc., Maryland and Virginia Milk Producers Cooperative Association, Inc. t/a Marva Maid Dairy, and The Southland Corporation. The first amended complaint alleges that beginning as early as 1983 and through 1991, defendants conspired to rig school milk bids and allocate contracts in violation of Sherman Act section 1 and section 59.1-9.5 of the Virginia Antitrust Act. Recognizing potential problems with the applicable four year statute of limitations, the complaint also alleges that defendants engaged in fraudulent concealment of their allegedly illegal activities.²⁷⁷

In another enforcement proceeding, the settlement between Nintendo and the Virginia Attorney General's Office concerning an alleged resale price maintenance scheme involving Nintendo's Entertainment System eight-bit video game consoles, reported in last year's Antitrust Law Survey,²⁷⁸ received final approval from the District Court for the Southern District of New York. Approval was given despite the continued objection of some California plaintiffs to the content of the notices to be published nationwide advising consumers of the settlement.²⁷⁹

V. FEDERAL AND STATE LEGISLATIVE ACTIVITY

A. Federal Legislation

1. Status of Price Fixing Prevention Act of 1991

The only significant legislative development this past year in the federal antitrust area was the passage of the Price Fixing Prevention Act of 1991 (the Act),²⁸⁰ by the House of Representatives on October 10, 1991. The bill (1) would codify the per se illegality rule

277. Plaintiff's First Amended Complaint at 17, *Virginia v. Embassy Dairy, Inc.*, No. 91-510-N (E.D. Va. 1991). The suit has resulted in settlements with Maola and the Southland Corporation. As part of its settlement entered into on May 29, 1992, Southland has agreed to pay \$379,021.00 in damages for overcharging on milk, as well as \$100,000 in attorney's fees and costs. Litigation involving Land-O-Sun is stalled pending the resolution of bankruptcy proceedings in Florida, No. 91-617-3P-1 (Bankr. M.D. Fla. 1991), and Embassy Dairy has been dismissed from the case on summary judgment. See discussion *Virginia v. Embassy Dairy, Inc.*, No. 91-510-N, (E.D. Va. Mar. 25, 1992). Trial against the sole remaining defendant, Marva Maid, was scheduled to begin July 1, 1992.

278. See Michael F. Urbanski, *Antitrust and Trade Regulation Law: Annual Survey of Virginia Law*, 25 U. RICH. L. REV. 565, 601 (1991).

279. *Virginia v. Nintendo of Am., Inc.*, No. 91-CIV-3943 (S.D.N.Y. June 11, 1991) (settlement agreement approved).

280. H.R. 1470, 102d Cong., 1st Sess. (1991). See Antitrust & Trade Reg. Rep. (BNA) No. 1536, at 437 (Oct. 10, 1991) for the House Judiciary Committee Report on the Act.

for vertical price fixing, other than for maximum prices, (2) establish a market power defense to resale price maintenance claims, and (3) modify the Supreme Court's decisions in *Monsanto v. Spray-Rite Service Corp.*²⁸¹ and *Business Electronics Corp. v. Sharp Electronics Corp.*²⁸² Those decisions would be modified by allowing a terminated dealer to now reach the jury if he provides evidence of "substantial causation," as defined by the Act, which would raise an inference of illegal concerted action. The legislation has been sent to conference to be reconciled with the United States Senate's version contained in the Consumer Protection Against Price-Fixing Act of 1991,²⁸³ passed on May 9, 1991. President Bush is expected to veto the legislation.

2. Sentencing Guidelines Amended

On November 1, 1991, new amendments to the Federal Sentencing Guidelines mandated for use by United States district courts became effective. A new chapter was included in the guidelines addressing the topic of the sentencing of organizations. The guidelines contained in this chapter are based upon the notion that the culpability of an organization should be governed primarily by the steps taken by it, prior to the offense, to prevent and detect criminal conduct. Thus, the guidelines place a premium on effective, consistently maintained antitrust compliance programs.²⁸⁴

B. State Legislation

1. Consumer Protection Legislation

The Virginia General Assembly has modified current comparison price advertising criminal statutes and enacted the Comparison Price Advertising Act,²⁸⁵ which will be enforced under the Virginia Consumer Protection Act.²⁸⁶

281. 465 U.S. 752 (1984).

282. 485 U.S. 717 (1988).

283. S. 429, 102d Cong., 1st Sess. (1991); see *Antitrust & Trade Reg. Rep.* (BNA) No. 1515, at 652:1 (May 9, 1991).

284. 56 Fed. Reg. 22786-97 (May 16, 1991).

285. Act of Apr. 5, 1992, ch. 768, 1992 Va. Acts 1191 (codified at VA. CODE ANN. §§ 59.1-207.40 to -207.44)).

286. VA. CODE ANN. §§ 59.1-196 to -207 (Repl. Vol. 1992).

2. Franchise Legislation

The fees under the Virginia Retail Franchising Act²⁸⁷ have been increased from two-hundred and fifty to five hundred dollars for filing an application for registration of a franchise, from one hundred and fifty to two hundred and fifty dollars for filing an application for renewal, and from fifty to one hundred dollars for amending a registration. These increases take effect July 1, 1992.

VI. CONCLUSION

While most of the past year's antitrust jurisprudence in Virginia saw only fortification of well-defined doctrinal obstacles to plaintiffs' prosecution of antitrust claims, the United States Supreme Court's opinion in *Kodak*, as well as statutory and regulatory changes at the federal level, has signaled a potential shift of direction in several areas of antitrust law. It remains to be seen, however, how Virginia's federal and state courts will react to these developments — as foot-dragging followers or as groundbreaking leaders.

287. VA. CODE ANN. § 13.1-561(d) (Cum. Supp. 1992).