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

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# ARTICLES

## ANTITRUST AND TRADE REGULATION\*

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### I. INTRODUCTION

Group boycott and antitrust conspiracy claims met with little success in Virginia this year. Both federal and state courts are increasingly wary of allowing cases to proceed where the essential elements of antitrust claims are not established or where no impact on competition is proven. Moreover, procedural and evidentiary difficulties have plagued antitrust plaintiffs this

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\* This article addresses federal and state legislative developments and enforcement activities, and antitrust decisions of the United States Supreme Court, if any, the Court of Appeals for the Fourth Circuit, and state and federal courts of Virginia from June, 1994 to June, 1995.

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year. In short, the cases reflect judicial analysis that is both sophisticated and resistant to allowing meritless antitrust claims to get to a jury.

## II. CIVIL ANTITRUST ACTIONS

### A. *Statute of Limitations and the Fraudulent Concealment Doctrine*

Judge Jackson L. Kiser, Chief Judge of the Western District of Virginia, rendered a significant decision this past year in two related cases dealing with bid-rigging and price fixing when he ruled that an antitrust plaintiff must present acts of concealment "separate and apart" from the underlying conspiracy before it may invoke the equitable doctrine of fraudulent concealment<sup>1</sup> to toll the statute of limitations.<sup>2</sup> The cases, *Supermarket of Marlinton v. Meadow Gold Dairies*<sup>3</sup> and *West Virginia ex. rel. McGraw v. Meadow Gold Dairies*,<sup>4</sup> although not consolidated, arose generally out of the same factual background. Both cases were brought after Meadow Gold and Valley Rich Dairy pled guilty in 1992 to one count informations charging violations of the Sherman Act<sup>5</sup> for rigging bids to certain school districts in parts of southwestern Virginia and southeastern West Virginia in the mid-1980s.<sup>6</sup> While the companies pled guilty, three employees of Meadow Gold were indicted and individually prosecuted. The government's principal evidence against these three employees at trial was the testimony of Paul French, the former General Manager of Valley Rich, who

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1. To toll the statute of limitations on the basis of fraudulent concealment, a plaintiff must show that "(1) the party pleading the statute fraudulently concealed facts which are the basis of the claim, and that (2) the claimant failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 218 (4th Cir. 1987).

2. 15 U.S.C. § 15b (1994) provides that antitrust actions "shall be forever barred unless commenced within four years after the cause of action accrued."

3. 874 F. Supp. 721 (W.D. Va. 1994).

4. 875 F. Supp. 340 (W.D. Va. 1994).

5. 15 U.S.C. §§ 1-7 (1994).

6. The authors represented Valley Rich Dairy during the criminal investigation and defended Valley Rich in both the *Marlinton* and *McGraw* cases. Since Judge Kiser's decisions, the *McGraw* case has settled and *Marlinton* has been appealed to the Fourth Circuit.

testified under a grant of use immunity.<sup>7</sup> The trial, over which Judge Kiser presided, resulted in a hung jury, and the government subsequently abandoned its prosecution.<sup>8</sup>

Based on French's testimony, the State of West Virginia later filed suit on behalf of three West Virginia school districts to recover civil damages under the Sherman Act.<sup>9</sup> The Supermarket of Marlinton, purporting to represent a class of commercial customers, also filed suit against the dairies and their partners for fixing prices to commercial customers in Virginia and West Virginia.<sup>10</sup> Both suits were filed in 1993, well after the running of the four-year statute of limitations.<sup>11</sup>

Recognizing this, each plaintiff pled that the equitable doctrine of fraudulent concealment tolled the limitations period.<sup>12</sup> After discovery, the dairies moved for summary judgment on the statute of limitations. In response, the plaintiffs in both cases offered the criminal testimony of Paul French as their principal evidence of fraudulent concealment.<sup>13</sup> They also offered non-collusion affidavits submitted by the dairies to certain schools,<sup>14</sup> and the Supermarket of Marlinton offered the testimony of a former Meadow Gold employee.<sup>15</sup>

Judge Kiser was unimpressed, holding French's criminal testimony inadmissible hearsay and ruling that plaintiffs' remaining evidence was insufficient under the applicable fraudulent concealment standard.<sup>16</sup> The plaintiffs offered French's testimony under three exceptions to the hearsay rule.<sup>17</sup> They

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7. *Marlinton*, 874 F. Supp. at 723; *McGraw*, 875 F. Supp. at 343.

8. *Marlinton*, 874 F. Supp. at 723; *McGraw*, 875 F. Supp. at 343.

9. *McGraw*, 875 F. Supp. at 343.

10. *Marlinton*, 874 F. Supp. at 723.

11. *Marlinton*, 874 F. Supp. at 723; *McGraw*, 875 F. Supp. at 343.

12. *Marlinton*, 874 F. Supp. at 723; *McGraw*, 875 F. Supp. at 343.

13. *Marlinton*, 874 F. Supp. at 725; *McGraw*, 875 F. Supp. at 344. During discovery, Paul French's counsel indicated that he would assert his privilege against self-incrimination under the Fifth Amendment if he were asked to give a deposition. Both plaintiffs moved to have him declared unavailable for purposes of admitting his testimony under an exception to the hearsay rule. Without reaching the issue, Judge Kiser assumed French's unavailability for purposes of his decision. *Marlinton*, 874 F. Supp. at 725; *McGraw*, 875 F. Supp. at 344.

14. *Marlinton*, 874 F. Supp. at 725; *McGraw*, 875 F. Supp. at 344.

15. *Marlinton*, 874 F. Supp. at 723.

16. *Marlinton*, 874 F. Supp. at 730; *McGraw*, 875 F. Supp. at 349.

17. *Marlinton*, 874 F. Supp. at 725; *McGraw*, 875 F. Supp. at 344.

claimed that it was admissible as former testimony under Federal Rule of Evidence 804(b)(1),<sup>18</sup> as a statement against interest under Rule 804(b)(3), or under the residual exception found in Rule 804(b)(5).<sup>19</sup>

In considering the first exception, former testimony, and whether the parties had similar motives in cross-examination, Judge Kiser considered the fraudulent concealment doctrine and explained that the circuits have adopted three different standards. The most lenient standard, known as the self-concealing conspiracy doctrine, is set forth in the Second Circuit's opinion in *New York v. Hendrickson Bros.*<sup>20</sup> and does not require proof of affirmative acts of concealment. On the other hand, the Tenth Circuit requires proof of acts of concealment "separate and apart" from the acts constituting the conspiracy itself.<sup>21</sup> According to Judge Kiser, "[t]his standard requires 'affirmative steps in addition to the original wrongdoing to prevent the plaintiff from discovering the wrong.' Essentially, a post-fraud cover up is required."<sup>22</sup> Under a third (intermediate) standard, acts of concealment committed in furtherance of the underlying conspiracy are sufficient.<sup>23</sup>

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18. Federal Rule of Evidence 804(b)(1) provides for the admission of: testimony given as a witness at another hearing of the same or a different proceeding . . . if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

FED. R. EVID. 804(b)(1).

According to Judge Kiser, the focus of the inquiry under Rule 804(b)(1) is on the similarity of motives between the predecessor in interest and the one against whom the testimony is now offered. *Marlinton*, 874 F.Supp. at 725 (citing *Horne v. Owens-Corning Fiberglas Corp.*, 4 F.3d 276, 282 (4th Cir. 1993)). "If the motives are different, then the testimony is inadmissible." *Id.* "[T]he party against whom the testimony is now offered must point up factual and legal distinctions not evident in the earlier litigation that would preclude similar motives of witness examination." *Id.*

19. *Marlinton*, 874 F. Supp. at 725; *McGraw*, 875 F. Supp. at 344.

20. 840 F.2d 1065 (2nd Cir. 1987).

21. *Colorado v. Western Paving Constr. Co.*, 630 F. Supp. 206, 210 (D. Colo. 1986), *aff'd by equally divided en banc court*, 841 F.2d 1025 (10th Cir.) (withdrawing prior panel opinion), *cert. denied*, 488 U.S. 870 (1988).

22. *Marlinton*, 874 F. Supp. at 724; *McGraw*, 875 F. Supp. at 343 (quoting *Western Paving*, 630 F. Supp. at 210) (citations omitted).

23. *Texas v. Allan Constr. Co.*, 851 F.2d 1526 (5th Cir. 1988); *see also Pinney Dock & Trans. Corp. v. Penn Cent. Corp.*, 838 F.2d 1445, 1471-72 (6th Cir.), *cert. denied*, 480 U.S. 880 (1988).

The significance of this analysis for purposes of examining the former testimony hearsay exception, in Judge Kiser's view, was that if the self-concealing standard applied, the motives of the criminal defendants and the civil corporate defendants on cross-examination would be similar, i.e., proving no conspiracy existed.<sup>24</sup> But, if the Tenth Circuit standard applied, then the motives would be different, because there would be no reason for the prosecution and the defense to examine French on whether he engaged in additional acts to cover up the alleged conspiracy.<sup>25</sup>

Judge Kiser easily disposed of the self-concealing standard under the authority of *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.* in which the Fourth Circuit held that fraudulent concealment "implies conduct . . . affirmatively directed at deflecting litigation."<sup>26</sup> He explained:

*Pocahontas* must mean that the defendant's acts must amount to more than clandestine meetings between co-conspirators. . . . It would seem that the *Pocahontas* 'deflecting litigation' standard would refer to situations where the conspirators had some knowledge, or at least a suspicion, that their misdeeds were about to be discovered and took additional steps to cover up their activities. For example, if the defendant acts to deflect litigation by shredding documents or issuing misleading or false press releases, the equitable tolling doctrine comes into play.<sup>27</sup>

The court then considered whether acts "separate and apart" or acts "in furtherance" would suffice. Judge Kiser decided that the facts of *Pocahontas* compelled application of the "separate and apart" standard because there the Fourth Circuit chose not to examine the specific activities undertaken in the conspiracy or the "manipulative and deceptive practices" associated with the conspiracy alleged by the plaintiff.<sup>28</sup>

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24. In this regard, Judge Kiser noted that "[a]ny testimony regarding *secrecy* of the meetings between French and the defendants would be only incidental to the fact that meetings were held at all." *Marlinton*, 874 F. Supp. at 725; *McGraw*, 875 F. Supp. at 345.

25. *Marlinton*, 874 F. Supp. at 725; *McGraw*, 875 F. Supp. at 345.

26. 828 F.2d 211, 219 (4th Cir. 1987).

27. *Marlinton*, 874 F. Supp. at 726; *McGraw*, 875 F. Supp. at 345.

28. *Marlinton*, 874 F. Supp. at 726; *McGraw*, 875 F. Supp. at 346.

Judge Kiser held that the "separate and apart" standard was the better reasoned rule.<sup>29</sup> He explained that as conspiracies, by their very nature, involved acts of concealment, the "in furtherance" standard would make the fraudulent concealment doctrine "potentially applicable in every conspiracy case," contrary to Congress' intent and to the policy behind the four-year statute of limitations.<sup>30</sup>

Judge Kiser also criticized the "in furtherance" standard as difficult to apply and dismissed the *Allan Construction* court's criticism of the "separate and apart" standard as unworkable.<sup>31</sup> He noted that the *Allan Construction* court was not clear on what acts were sufficient to meet its standard or how to distinguish between acts that are part of a conspiracy and acts that are in furtherance of the conspiracy and are intended to conceal it.<sup>32</sup>

Because the court correctly held that fraudulent concealment requires acts separate and apart from the conspiracy, Judge Kiser held that the criminal and civil defendants did not have similar motives on cross-examination.<sup>33</sup> The criminal defendants were only interested in developing French's testimony concerning the conspiracy itself.<sup>34</sup> The defendants would have undercut their defense if they inquired how French may have concealed the conspiracy.<sup>35</sup> Moreover, in Judge Kiser's words, "[t]here was certainly no motive to inquire into the subtle distinction between those acts taken in furtherance of the conspiracy and those acts that were taken separate and apart from the conspiracy to cover it up."<sup>36</sup> The former testimony exception to the hearsay rule, therefore, was inapplicable.

Judge Kiser also held that French's testimony did not fall under the statement against interest or the residual hearsay exceptions.<sup>37</sup> Thus, French's testimony was inadmissible.

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29. *Marlinton*, 874 F. Supp. at 726; *McGraw*, 875 F. Supp. at 346.

30. *Marlinton*, 874 F. Supp. at 726; *McGraw*, 875 F. Supp. at 346.

31. *Marlinton*, 874 F. Supp. at 726; *McGraw*, 875 F. Supp. at 346.

32. *Marlinton*, 874 F. Supp. at 727; *McGraw*, 875 F. Supp. at 346.

33. *Marlinton*, 874 F. Supp. at 727; *McGraw*, 875 F. Supp. at 346.

34. *Marlinton*, 874 F. Supp. at 727; *McGraw*, 875 F. Supp. at 346.

35. *Marlinton*, 874 F. Supp. at 727; *McGraw*, 875 F. Supp. at 346.

36. *Marlinton*, 874 F. Supp. at 727; *McGraw*, 875 F. Supp. at 346.

37. *Marlinton*, 874 F. Supp. at 728; *McGraw*, 875 F. Supp. at 347-49; see *infra*

Without French's testimony, the plaintiffs' remaining evidence of fraudulent concealment was insufficient. In *Marlinton*, the plaintiff sought refuge in alleged anecdotes which consisted of nothing more than a request to shut an office door and an observation that certain meetings should be held one-on-one.<sup>38</sup> Judge Kiser found nothing unusual about wanting to keep a conversation private. He also held that shutting a door while allegedly discussing the conspiracy was not an act "separate and apart" from the conspiracy itself.<sup>39</sup> As for the one-on-one meetings comment, Judge Kiser considered it a mere observation.<sup>40</sup> Most importantly, though, the comment did not indicate a cover-up because the plaintiff's own evidence was that the person making the comment was *not* involved in the alleged conspiracy.<sup>41</sup>

The plaintiffs also offered non-collusion statements contained in the bids submitted by the defendants to schools.<sup>42</sup> Judge Kiser ruled that the non-collusion statements did not meet the separate and apart standard because they were "simply a failure to disclose wrongdoing and not an affirmative act of concealment."<sup>43</sup>

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

The Fourth Circuit issued one Sherman Act Section 1 opinion this year, in which it held that an exclusive relationship between cable television companies and independent sales agents ("traditional cable reps") did not constitute a horizontal conspiracy.<sup>44</sup> In the one unpublished opinion issued by the

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part II.F.2 (discussing this part of Judge Kiser's ruling).

38. *Marlinton*, 874 F. Supp. at 729.

39. *Id.*

40. *Id.*

41. *Id.* at 729-30.

42. *Id.* at 730; *McGraw*, 875 F. Supp. at 349.

43. *Marlinton*, 874 F. Supp. at 730; *McGraw*, 875 F. Supp. at 349 (both citing *Colorado v. Western Paving Constr. Co.*, 630 F. Supp. 206, 209-10 (D. Colo. 1986), *aff'd by equally divided en banc court*, 841 F.2d 1025 (10th Cir.), *cert. denied*, 488 U.S. 870 (1988)); *see also* *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 218-19 ("Fraudulent concealment implies conduct more affirmatively directed at deflecting litigation than [an alleged failure to own up to illegal conduct].").

44. *Thompson Everett, Inc. v. National Cable Advertising*, 57 F.3d 1317, 1324 (4th Cir. 1995).

Fourth Circuit this year, the court easily disposed of a plaintiff's claims under the intracorporate immunity doctrine.

The Eastern District of Virginia issued a published opinion granting summary judgment in a case complicated by underlying state court litigation. Finally, two separate courts, in rulings from the bench, found no merit to plaintiffs' claims of group boycott.

### 1. The Intracorporate Immunity Doctrine

In the unpublished Fourth Circuit opinion, *Seabury Management v. Professional Golfers' Ass'n of America*,<sup>45</sup> the Fourth Circuit affirmed the district court's judgment as a matter of law in favor of the defendants on plaintiff's Section 1 claims.<sup>46</sup> The plaintiff, Seabury Management, sued the Professional Golfers' Association (PGA) and the Middle Atlantic Section of the PGA (MAPGA) alleging restraint of trade under the Sherman Act<sup>47</sup> and the Maryland Antitrust Act,<sup>48</sup> as well as breach of contract and tortious interference.<sup>49</sup>

Seabury's claims arose from a five-year contract between it and MAPGA that allowed Seabury to produce and promote a golf trade show on the East Coast under MAPGA sponsorship.<sup>50</sup> For the first several exhibitions, Seabury was unable to lease sufficient exhibition space within MAPGA's boundaries, so it held the trade show in Atlantic City, New Jersey, within the boundaries of the Philadelphia Section of the PGA.<sup>51</sup> The PGA objected, ultimately refused to allow the trade shows to proceed, and ordered MAPGA to withdraw its sponsorship, even though

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45. No. 94-1814, 94-1688, 1995 WL 241379 (4th Cir. Apr. 26, 1995) (unpublished disposition).

46. *Id.* at \*3.

47. Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1994).

48. MD. CODE ANN., COM. LAW II § 11-204(a)(1990).

49. *Seabury*, 1995 WL 241379 at \*2.

50. *Id.* at \*1.

51. *Id.*

it realized this would be a breach of MAPGA's contract with Seabury.<sup>52</sup>

A jury returned a verdict for Seabury on all claims, awarding \$2.6 million in compensatory damages and \$4.8 million in punitive damages.<sup>53</sup> The district court, however, granted PGA and MAPGA judgment as a matter of law on all counts except the breach of contract claim.<sup>54</sup> The Fourth Circuit had little trouble affirming the dismissal of Seabury's Section 1 claims on the grounds that MAPGA and PGA were a single economic unit unable to conspire with itself<sup>55</sup> under the Supreme Court's teaching in *Copperweld Corp. v. Independence Tube Corp.*<sup>56</sup> and the Fourth Circuit's prior rulings in *Oksanen v. Page Memorial Hospital*<sup>57</sup> and *Advanced Health-Care Services v. Radford Community Hospital*.<sup>58</sup>

## 2. Concerted Action Held Lacking

In *Thompson Everett v. National Cable Advertising*,<sup>59</sup> the Fourth Circuit held that the action of independent cable reps in enforcing their exclusive contracts with cable companies did not amount to a horizontal antitrust conspiracy among the reps. The court noted that there was no proof that the traditional cable reps conspired to enter into the exclusive contracts and, without more, there was insufficient evidence to draw the inference that concerted activity was the cause for the contractual enforcement.<sup>60</sup> The court further rejected the notion that information disseminated by a cable television trade association that the independent cable reps believed that cable could best com-

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52. *Id.*

53. *Id.* at \*2.

54. *Id.*

55. *Id.* at \*3. The district court also granted judgment as a matter of law on both the compensatory and punitive damages awards. *Id.* at \*4-\*6.

56. 467 U.S. 752 (1984) (holding that a corporation and its wholly owned subsidiary are not capable of conspiring in violation of section 1 of the Sherman Act.)

57. 945 F.2d 696, 703-05 (4th Cir. 1991) (en banc) (holding that a hospital and its medical staff are incapable of conspiring during the peer review process), *cert. denied*, 502 U.S. 1074 (1992).

58. 910 F.2d 139, 146 (4th Cir. 1990) (holding two wholly owned subsidiaries of the same parent corporation legally incapable of conspiring).

59. 57 F.3d 1317 (4th Cir. 1995).

60. *Id.* at 1323-24.

pete with other media by means of the exclusive contracts was enough to establish concerted action, particularly when there was no evidence that the reps engaged in any further concerted activity following the circulation of this information.<sup>61</sup>

Judge Jackson, sitting on the District Court for the Eastern District of Virginia, granted summary judgment on the plaintiff's claims under Sherman Act Section 1 in *Levine v. McLeskey*.<sup>62</sup> Gail M. Levine and Marina Shores Ltd. brought suit against F. Wayne McLeskey, Jr. alleging violations of the Sherman and Virginia Antitrust Acts, and other state law causes of action.<sup>63</sup> McLeskey is the fifty percent owner of Cohn-Phillips, Ltd., which leased space at the Marina Shores marina for the operation of a restaurant, and the owner of Lynnhaven Dry Storage Marina, Inc., a competitor of Marina Shores in the dry storage market in Virginia Beach.<sup>64</sup>

This antitrust action followed a tangled web of underlying litigation which began on June 7, 1991, when Levine brought an action for unlawful detainer against Cohn-Phillips for failure to pay rent and, in response, Cohn-Phillips filed counterclaims for breach of the lease, tortious interference with business expectancy, and violations of the Virginia Business Conspiracy Act.<sup>65</sup> On April 1, 1992, a jury found in favor of Cohn-Phillips and awarded damages of approximately \$513,000.<sup>66</sup> To collect the judgment, Cohn-Phillips subsequently filed suit against the Levines personally, in order to pierce Marina Shores' corporate veil, and filed a *lis pendens* on the Marina Shores property.<sup>67</sup> Marina Shores followed that suit with a second unlawful detainer action for failure to pay rent for the months of June, July and August 1992.<sup>68</sup> On September 17, 1993, the Virginia Supreme Court overturned the trial court's verdict in the first unlawful detainer action and awarded Marina Shores judgment in its favor.<sup>69</sup>

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61. *Id.* at 1324.

62. 881 F. Supp. 1030 (E.D. Va. 1995).

63. *Id.* at 1035-36.

64. *Id.* at 1036-37.

65. *Id.* at 1037.

66. *Id.*

67. *Id.* at 1038.

68. *Id.*

69. *Id.* While the Supreme Court's decision in the first unlawful detainer action

In the antitrust action which followed, the plaintiffs claimed that McLeskey violated Sherman Act Section 1 and its Virginia Antitrust Act counterpart<sup>70</sup> by conspiring with Cohn-Phillips to unreasonably and unlawfully restrain Marina Shores' trade and business through its improper operation of the restaurant and sham litigation.<sup>71</sup> With regard to operation of the restaurant, the district court held that Marina Shores was collaterally estopped from relitigating this issue.<sup>72</sup>

The district court also held that McLeskey's lawsuits and counterclaims did not constitute sham litigation under *Professional Real Estate Investors v. Columbia Pictures Industries*.<sup>73</sup> Judge Jackson noted that in order for a lawsuit to be a sham, it must be objectively baseless, and even if it is, the defendant's subjective motivation in bringing the litigation must be to interfere directly with the business relationship of a competitor.<sup>74</sup> Because McLeskey won at the trial court level in the actions complained of, Judge Jackson concluded that the litigation was not objectively baseless.<sup>75</sup>

In light of the above rulings, Judge Jackson found that there was no basis for plaintiff's Sherman Act Section 1 and Virginia Antitrust Act<sup>76</sup> claims of concerted action, and granted

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was pending, Cohn-Phillips paid its rent monies into an escrow account which, at the time of the Supreme Court's decision, totalled approximately \$100,000. After the Supreme Court's decision, Marina Shoes demanded that Cohn-Phillips hand over the monies from the escrow account, and Cohn-Phillips refused. Marina Shoes then brought a detinue action against Cohn-Phillips which was dismissed on demurrer. Subsequently, in a declaratory judgment action filed by Cohn-Phillips, the Virginia Beach Circuit Court held that Marina Shoes was entitled to the escrowed funds. *Id.* at 1038-39.

70. VA. CODE ANN. §§ 59.1-9.1 to -9.16 (Repl. Vol. 1992).

71. *Levine*, 881 F. Supp. at 1041-42.

72. *Id.* at 1041. In the first unlawful detainer case, the jury was asked to determine whether Cohn-Phillips breached the lease through the negligent operation of its restaurant. The jury answered "no" to this instruction. Thus, the district court held that the issue of McLeskey's operation of the restaurant previously had been raised and decided. *Id.*

73. 113 S. Ct. 1920, 1926 (1993) (holding that "an objectively reasonable effort to litigate cannot be a sham regardless of subjective intent").

74. *Levine*, 881 F. Supp. at 1042.

75. *Id.* at 1042-44.

76. The court analyzed the Virginia Antitrust Act claims under federal case law as well as in light of the General Assembly's mandate that the state's antitrust laws "shall be applied and construed to effectuate [their] general purposes in harmony with judicial interpretation of comparable federal statutory provisions." *Id.*; VA. CODE ANN.

McLeskey summary judgment.<sup>77</sup> The court dismissed Marina Shores' Section 1 claims on this ground.<sup>78</sup> With respect to Levine's Section 2 claims, the court additionally held that they were deficient because Levine failed to provide any evidence of a relevant market as to her. Levine claimed she had been restrained in her efforts to develop real estate, but she neither defined this as a relevant market nor demonstrated that McLeskey wielded market power in any real estate market.<sup>79</sup> The report of Levine's expert only focused on the product and geographic markets for marina services.<sup>80</sup>

### 3. Group Boycott Claims Dismissed on Summary Judgment

In two alleged group boycott cases, courts in western Virginia granted summary judgment for the defendants in bench rulings issued after extensive discovery.

In *Worrell Enterprises v. Real Estate III*,<sup>81</sup> U.S. Magistrate Judge B. Waugh Crigler, sitting by consent of the parties, granted summary judgment to the defendant real estate brokerage firms in Charlottesville in a case brought by Worrell Enterprises, the publisher of *The Daily Progress* newspaper, alleging a group boycott of real estate advertising.

Worrell sued Real Estate III and several other real estate brokerage firms in Charlottesville claiming that they engaged in a conspiracy to boycott Worrell's newspaper, *The Daily Progress* (the *Progress*), in violation of Sherman Act Section 1.<sup>82</sup> Worrell also alleged violations of Virginia's business conspiracy statute and tortious interference with business expectancies.<sup>83</sup> Worrell brought suit after the real estate firms allegedly withdrew a substantial portion of their real estate advertising from the *Progress* and placed it in a new publication, *The Real Estate*

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§ 59.1-9.17 (Repl. Vol. 1992).

77. *Levine*, 881 F. Supp. at 1046.

78. *Id.*

79. *Id.* at 1046-47.

80. *Id.* at 1047.

81. No. 94-0001-C (W.D. Va. Dec. 13, 1994) (unpublished transcript, on file with the *University of Richmond Law Review*). The authors were counsel for one of the defendant real estate firms in this case.

82. *Id.* at 157.

83. *Id.*

*Weekly* (the *Weekly*), which had been formed by the Charlottesville Area Association of Realtors.<sup>84</sup> The defendants counterclaimed, alleging that Worrell had filed a sham suit in violation of Sherman Act Section 2 to monopolize and attempt to monopolize the print residential real estate advertising market.<sup>85</sup>

After extensive discovery, both sides filed cross motions for summary judgment.<sup>86</sup> Magistrate Judge Crigler, who presided over the case pursuant to Federal Rule of Civil Procedure 73 and 28 U.S.C. § 636, granted both motions from the bench.<sup>87</sup> With respect to Worrell's claims, Judge Crigler held as a threshold matter that since Worrell was neither a consumer nor competitor in the real estate brokerage market, which Worrell identified as the relevant market, Worrell had no standing to bring its claim.<sup>88</sup> Judge Crigler noted that Worrell had to identify an injury to the advertising market to have standing.<sup>89</sup>

Judge Crigler also agreed with the defendants' remaining arguments. He refused to adopt Worrell's assertion that the defendants' "boycott" was a per se violation, holding instead that the alleged conspiracy was to be analyzed under the rule of reason.<sup>90</sup> Judge Crigler drew this conclusion because the record contained substantial evidence that the challenged conduct fostered competition, increased efficiency, "filled a gap in real estate advertising that did not exist before the *Weekly*," and was supported by ample competitive justification.<sup>91</sup> For example, the evidence offered by experts for both sides showed that, after introduction of the *Weekly*, the amount of advertising in the market increased and advertising rates decreased.<sup>92</sup> The per se rule also was inapplicable because the defendants had not foreclosed plaintiff from competing in the advertising market.<sup>93</sup> Moreover, Judge Crigler held that Worrell's claim

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84. *Id.*

85. *Id.* at 159.

86. *Id.* at 157.

87. *Id.* at 156.

88. *Id.* at 168.

89. *Id.* at 169.

90. *Id.* at 176.

91. *Id.* at 174.

92. *Id.*

93. *Id.*

failed under either a "quick look" or full blown rule of reason analysis.<sup>94</sup>

On the issue of conspiracy, Judge Crigler also ruled that Worrell had not presented evidence showing a conscious commitment to a common scheme designed to achieve an unlawful objective.<sup>95</sup> The evidence of conspiracy on which Worrell relied was piecemeal and taken out of context. In any event, Worrell did not come forward with significant evidence tending to exclude the possibility of independent action as required by the Supreme Court in *Monsanto v. Spray-Rite Service Corp.*<sup>96</sup> and *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*<sup>97</sup> Judge Crigler noted that the defendants' legitimate business purposes were "legion," that Worrell had no evidence to rebut them, and that its evidence of "sinister purpose" was merely opinion, conclusion or argument, and not based upon facts.<sup>98</sup> Under such circumstances, no factfinder could find that the "conspiracy" was designed to achieve an *unlawful* objective.

Judge Crigler dismissed Worrell's state law conspiracy claim because Worrell could not show that the defendants' motive in leaving the *Progress* was inspired by hatred or ill will toward Worrell.<sup>99</sup> He also dismissed the tortious interference claim because Worrell could not demonstrate "improper means."<sup>100</sup>

Judge Crigler also granted Worrell's motion for summary judgment on the counterclaim.<sup>101</sup> He ruled as a matter of law that Worrell's suit was not a sham, because at the time it filed suit Worrell had probable cause in that it had a reasonable argument for extension of the law.<sup>102</sup> Judge Crigler also ruled that the defendants had not otherwise come forward with evidence of predatory conduct.<sup>103</sup>

In *Tempkin v. Lewis-Gale Clinic*,<sup>104</sup> a health care antitrust

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94. *Id.* at 183.

95. *Id.* at 185.

96. 465 U.S. 752 (1984).

97. 475 U.S. 574 (1986).

98. *Worrell Enterprises*, *supra* note 77, at 183.

99. *Id.* at 187.

100. *Id.* at 188.

101. *Id.* at 189.

102. *Id.*

103. *Id.* at 190.

104. No. 89-209 (Salem City July 6, 1995) (unpublished transcript, on file with the

case which previously had been dismissed by the United States District Court for the Western District of Virginia and the Fourth Circuit,<sup>105</sup> the Circuit Court for the City of Salem likewise granted summary judgment in a case brought under the Virginia Antitrust Act.<sup>106</sup> In *Tempkin*, the plaintiff physiatrist alleged a per se group boycott by members of the Lewis-Gale Clinic regarding new inpatient referrals for the Rehabilitation Unit at the Lewis-Gale Hospital. After extensive discovery, including many Rule 4:11 admissions by the plaintiff, Judge G.O. Clemens granted the defendants summary judgment, ruling that because the alleged boycott was not between competitors, it was not subject to the per se rule.<sup>107</sup> There being no dispute that the plaintiff retained privileges at Lewis-Gale Hospital, that other rehabilitation facilities were present in the market and that the alleged violations had no impact on price or quality, the court had little difficulty finding no antitrust violation under the rule of reason.<sup>108</sup> The court also rejected the claimed tying violation, drawing on the wealth of case law finding no antitrust violation in the hospital exclusive contract arena.<sup>109</sup> The court also rejected claims based on the Virginia business conspiracy statute and tortious interference with contract, ruling that once the antitrust claims were dismissed, there was no evidence of unlawful conduct or improper means sufficient to give rise to the state law claims.<sup>110</sup> Adopting the reasoning of the prior federal court opinions, Judge Clemens also dismissed the case for lack of antitrust injury and standing.<sup>111</sup> In sum, consistent with many prior health care antitrust cases decided in the federal courts of Virginia and the Fourth Circuit,<sup>112</sup> the court determined that the plaintiff could

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*University of Richmond Law Review*). The authors served as counsel for one of the co-defendants.

105. *Tempkin v. Lewis-Gale Hospital*, No. 88-0156-R (W.D. Va. Nov. 22, 1989), *aff'd*, No. 80-2504 (4th Cir. Apr. 19, 1991) (per curiam).

106. VA. CODE ANN. §§ 59.1-9.1 to -9.17 (1992).

107. *Tempkin*, *supra* note 104, at 9.

108. *Id.* at 9-10.

109. *Id.* at 10.

110. *Id.* at 10-11.

111. *Id.* at 11-12.

112. *See, e.g.*, *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696 (4th Cir. 1991), *cert. denied*, 502 U.S. 1074 (1992); *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98 (4th Cir. 1987); *Advanced Health-Care Serv. v. Giles Memorial Hosp.*, 846 F. Supp. 488 (W.D. Va. 1994); *Cogan v. Steuer and Latham v. National Medical Enter.*, 672 F.

not prove an antitrust violation and termed the case "an employment dispute."<sup>113</sup>

### C. *Sherman Act Section 2 Monopolization Issues*

After affirming the district court's finding of no concerted action, the Fourth Circuit in *Thomas Everett* also rejected plaintiff's claim that each individual exclusive representation contract illegally denied Thompson Everett the opportunity to compete.<sup>114</sup> Following *Continental T.V., Inc. v. GTE Sylvania Inc.*,<sup>115</sup> the court first held that the exclusive sales rep contracts, as non-price vertical restraints, did not go beyond the legitimate business purposes for which they were used. The court found that the exclusive sales contracts were typically of short duration, were competitively negotiated, and were advantageous to the cable companies in their efforts to compete with other media to attract advertising dollars. The court concluded that "[w]hile the exclusive nature of these cable rep contracts may temporarily preempt competition in providing representation services to a particular cable company, Thompson Everett has failed to establish that this relatively minor restriction outweighs the benefits of increased 'inter-media' competition in the larger market for advertising dollars."<sup>116</sup> The Fourth Circuit also rejected Thompson Everett's monopoly leveraging claim, reasoning that "the absence of any evidence of monopoly power, such as price control or monopoly profits, or threatened monopoly power"<sup>117</sup> in any market defined by the plaintiff was "[f]atal to Thompson Everett's monopolization claim."<sup>118</sup>

The Fourth Circuit in *Seabury Management v. Professional Golfers' Ass'n of America*<sup>119</sup> and the district court in *Levine v.*

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

113. *Tempkin*, *supra* note 104, at 7.

114. *Thompson Everett*, 57 F.3d at 1325-26.

115. 433 U.S. 36, 54-57 (1977).

116. *Thompson Everett*, 57 F.3d at 1326 (citing *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 3230, 333-35 (1961)); *Advanced Health-Care Servs. v. Radford Community Hosp.*, 910 F.2d 139, 151 (4th Cir. 1990).

117. *Thompson Everett*, 57 F.3d at 1326-27.

118. *Id.* at 1327.

119. *Seabury Management v. Professional Golfers' Ass'n of America*, Nos. 94-1814, 94-1688, 1995 WL 241379 (4th Cir. Apr. 20, 1995) (unpublished disposition).

*McLeskey*<sup>120</sup> also disposed of plaintiff's Sherman Act Section 2<sup>121</sup> claims. The Fourth Circuit also issued a short per curiam opinion in *Giben America, Inc. v. Schelling America, Inc.*,<sup>122</sup> affirming the district court's dismissal of the plaintiff's meritless Section 2 claim. Further, in the *Worrell*<sup>123</sup> and *Tempkin*<sup>124</sup> cases, the trial courts disposed of alleged monopolization claims in the context of sham litigation and tying, respectively.

In *Giben*, Giben America, a foreign corporation which designs and manufacturers high tech panel saws, brought a Section 2 claim of attempted monopolization<sup>125</sup> against Schelling America, a direct competitor of Giben in the North American market. Giben filed the suit after an employee of Schelling mistakenly advised a customer of Giben that Giben's panel saw violated Schelling's patent in the United States and that the matter was currently being litigated.<sup>126</sup> Even though the Schelling employee corrected the error after discovering his mistake, and the Giben customer purchased the saw as planned without any profit loss to Giben,<sup>127</sup> Giben sued alleging that Schelling's conduct had damaged its reputation and claiming that the customer no longer trusted Giben and was less likely to deal with it in the future.<sup>128</sup>

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120. 881 F. Supp. 1030 (E.D. Va. 1995).

121. Section 2 of the Sherman Act makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade of commerce among the several States, or with foreign nations." 15 U.S.C. § 2 (1988 & Supp. 1990).

122. No. 94-1939, 1995 U.S. App. LEXIS 4789, (4th Cir. Mar. 10, 1995) (per curiam) (unpublished disposition).

123. *Worrell Enterprises v. Real Estate III*, No. 94-0001-C (W.D. Va. Dec. 13, 1994) (unpublished transcript, on file with the *University of Richmond Law Review*).

124. *Tempkin v. Lewis-Gale Clinic*, No. 89-209 (Salem City, July 6, 1995) (unpublished transcript, on file with the *University of Richmond Law Review*).

125. It is generally required that to demonstrate the offense of attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. See 3 PHILIP AREEDA & DONALD TURNER, ANTITRUST LAW ¶ 820 (1978); see also *Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884, 890-91 (1993); *Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924, 926 (4th Cir. 1990); *Advanced Health-Care Servs. v. Radford Community Hosp.*, 910 F.2d 139, 147 (4th Cir. 1990).

126. *Giben America, Inc.*, 1995 U.S. App. LEXIS 4789, at \*1.

127. *Id.*

128. *Id.* at \*2.

The district court, however, was not impressed and dismissed all of Giben's claims, either on summary judgment or on a motion to dismiss.<sup>129</sup> The district court dismissed the attempted monopolization claim because Giben failed to allege a causal antitrust injury or a dangerous probability that Schelling's conduct would create a monopoly.<sup>130</sup> The Fourth Circuit affirmed on the reasoning of the district court.

In *Seabury Management v. Professional Golfers' Ass'n of America*,<sup>131</sup> the Fourth Circuit also found no merit in Seabury's monopolization claim, ruling that Seabury failed to define a relevant market.<sup>132</sup> While the court agreed that there was sufficient evidence to support Seabury's claim that the relevant market consisted of golf trade shows as a unique marketing technique, as opposed to other methods of marketing golf equipment and merchandise, the court held that Seabury failed to present evidence that the market was geographically limited to the East Coast.<sup>133</sup> Because nationally there were a "substantial" number of golf trade shows, and because the opinion of Seabury's expert that the market did not include smaller golf trade shows was not supported by the evidence, Seabury failed to prove the existence of a relevant market.<sup>134</sup> As "proof of a relevant market is a threshold requirement of any Section 2 claim,"<sup>135</sup> the Fourth Circuit affirmed the district court's grant of judgment as a matter of law.

The Eastern District was equally unpersuaded that the Section 2 claim brought by Marina Shores in *Levine v. McLeskey*<sup>136</sup> was supported by sufficient evidence to prove monopolization and attempted monopolization by McLeskey. Marina Shores argued that McLeskey monopolized or attempted to monopolize the market for dry storage slips in the Lynnhaven

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129. *Id.*

130. *Id.*

131. Nos. 94-1814, 94-1688, 1995 WL 241379 (4th Cir. Apr. 26, 1995) (unpublished disposition).

132. *Id.*

133. *Id.* at \*3.

134. *Id.* at \*4.

135. *Id.* (quoting *Consul, Ltd. v. Transco Energy Co.*, 805 F.2d 490, 493 (4th Cir. 1986), *cert. denied*, 481 U.S. 1050 (1987)).

136. 881 F. Supp. 1030 (E.D. Va. 1995).

Inlet market area.<sup>137</sup> Its market share evidence demonstrated that McLeskey's Lynnhaven Marina had 55.7 percent of the dry slip capacity in that market, but Marina Shores itself had 42.6 percent.<sup>138</sup> The parties enjoyed equally high market shares in other defined local markets as well.<sup>139</sup> Judge Jackson was not convinced that even a fifty-five percent market share was sufficient to demonstrate prima facie monopoly power.<sup>140</sup> Finding the facts akin to those in *Brager & Co., Inc. v. Leumi Securities Corp.*,<sup>141</sup> he held that Marina Shores' monopolization claim failed, given that Marina Shores controlled almost half of the relevant market itself.<sup>142</sup>

Marina Shores' attempted monopolization claim also failed, as it was based on McLeskey's negligent operation of the restaurant and sham litigation, which Judge Jackson had rejected under its Section 1 analysis.<sup>143</sup> Moreover, Judge Jackson held that because the parties almost evenly split the market, Marina Shores failed to show that McLeskey had a dangerous probability of achieving monopoly power. The court refused to speculate about the market if McLeskey someday purchases Marina Shores and its share of the market.<sup>144</sup>

#### D. Price Discrimination

In *Bristol Steel & Iron Works v. Bethlehem Steel Corp.*,<sup>145</sup> the Fourth Circuit affirmed a verdict which held that Bethlehem Steel's discounting of prices was justified under the Robinson-Patman Act's "meeting competition" affirmative defense.<sup>146</sup> Bristol, a steel fabricator, alleged that Bethlehem discriminated

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137. *Id.* at 1037-38.

138. *Id.* at 1047.

139. *Id.* For example, in the Lynnhaven/Rudee Inlet market area, Lynnhaven Marina had 55.7% of the dry slips and Marina Shores had 42.6%. In the Lynnhaven/Rudee Inlet/Little Creek market area, Lynnhaven Marina had 41.5% of the dry slips and Marina Shores had 31.8% of the dry slips. *Id.*

140. *Id.*

141. 429 F. Supp. 1341 (S.D.N.Y. 1977).

142. *Levine*, 881 F. Supp. at 1047.

143. *Id.*

144. *Id.*

145. 41 F.3d 182 (4th Cir. 1994). The authors were counsel for Bethlehem in this case before the trial court and on appeal.

146. *Id.*

in the price it charged Bristol for certain steel plates and shapes.<sup>147</sup> Bristol's claim centered on alleged price discounts and unjustified rebates given by Bethlehem to certain independent fabricators which were competitors of Bristol.<sup>148</sup>

The jury found for Bethlehem, and Bristol appealed.<sup>149</sup> On appeal, Bristol raised the following contentions: (1) Bethlehem failed to establish its affirmative defense by a preponderance of the evidence; and the district court erred in (2) permitting unidentified witnesses to testify; (3) in not submitting to the jury during its deliberations invoices which formed the basis for summary charts Bristol put into evidence; and (4) in instructing the jury on a special verdict form to proceed with deliberations concerning other issues on the form despite being deadlocked on one question.<sup>150</sup> The Fourth Circuit found no merit in Bristol's arguments and affirmed.

First, the court ruled that it was foreclosed from considering Bristol's sufficiency of the evidence claim, because Bristol had never moved the district court for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure at the end of Bethlehem's case.<sup>151</sup> "[A] party's complete failure to move for judgment as a matter of law, barring plain error, generally forecloses appellate review of the sufficiency of the evidence."<sup>152</sup> The Court also rejected Bristol's argument that a Rule 50 motion for judgment as a matter of law, as to an affirmative defense, was not available to a *plaintiff* until after the Rule was amended in 1993, noting that the Notes of the Advisory Committee suggested otherwise.<sup>153</sup>

In light of these rulings, the court determined that its scope of review was therefore "limited to whether there was any evidence to support the jury's verdict, irrespective of its sufficiency, or whether plain error was committed which . . . would result in a 'manifest miscarriage of justice.'"<sup>154</sup> The court

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147. *Id.* at 184.

148. *Id.*

149. *Id.*

150. *Id.* at 186.

151. *Id.*

152. *Id.* at 187.

153. *Id.*

154. *Id.*

found, though, that there was testimony that Bethlehem only deviated from its price list in a good faith effort to meet competition in the relevant market.<sup>155</sup> Thus, the court concluded that the jury's findings were clearly supported by the evidence.<sup>156</sup>

The court also was unpersuaded by Bristol's contention that the district court committed reversible error in allowing unidentified witnesses to testify for Bethlehem.<sup>157</sup> The court deferred to the district court's discretion in allowing the witnesses to testify because Bristol never sought a witness list by court order or discovery, and no Rule 16 pretrial order was ever entered in the case.<sup>158</sup> The court found Bristol's argument that the witnesses should have been excluded irrelevant because Bethlehem never mentioned them during voir dire, noting that voir dire does "not operat[e] as a discovery tool by opposing counsel."<sup>159</sup>

The Fourth Circuit also rejected Bristol's other claims. On the third claim, the admissibility of invoices forming the basis for summary charts, the Fourth Circuit held Bristol was not entitled to have the invoices shown to the jury under Federal Rule of Evidence 1006 because they were not in evidence.<sup>160</sup> On its final claim, Bristol complained that the district court "coerced" the jury's defense verdict when it instructed the jury during deliberations, after it indicated a deadlock, that it should consider other parts of the special verdict form, such as the affirmative defense question, because they may be dispositive of the case.<sup>161</sup> The court, noting that it is the trial judge's duty to be responsive to the jury's difficulties, found that the district court's instruction did not "coerce" the jury but indeed aided it.<sup>162</sup>

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155. *Id.*

156. *Id.*

157. *Id.* at 188.

158. *Id.*

159. *Id.* at 189.

160. *Id.* at 189-90. This issue is treated in more detail, *infra* notes 182-191 and accompanying text.

161. *Id.* at 190.

162. *Id.*

### E. *Antitrust Injury and Standing*

In *Thompson Everett*, the Fourth Circuit found that the only barriers to plaintiff's representation of cable companies were the enforceable provisions of the exclusion rep contracts and Thompson Everett's self-selected position in the market as a representative of advertisers, and concluded that "[s]ince neither of these barriers are created by anything illegal under the antitrust laws, Thompson Everett has no basis for asserting an antitrust claim."<sup>163</sup> The court further held that Thompson Everett had shown no damage to the competition process required by Section 4 of the Clayton Act,<sup>164</sup> reasoning, "Thompson Everett is not a would-be competitor with the cable reps and is not being denied access to the cable company sales service market by any act in violation of the antitrust laws. Rather, Thompson Everett is simply seeking to substitute its proposed method of serving cable companies for that selected by the cable companies without demonstrating that the substitution would advance the competitive process."<sup>165</sup>

Also, in both the *Worrell* and *Tempkin* bench rulings, the courts rejected the alleged group boycott claims, because of the absence of any antitrust injury and standing. In each case, the courts' rulings were squarely in accord with the Supreme Court's opinion in *Associated General Contractors v. California State Council of Carpenters*,<sup>166</sup> because neither plaintiff was a competitor or consumer in the relevant market, and neither could demonstrate any injury to competition.

Similarly, in *Levine*, because Levine was neither a competitor nor consumer in the market for marina services, and because she failed to meet the other factors set out in *Associated General Contractors*, the court held that she lacked standing to bring her claims.<sup>167</sup>

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163. *Thompson Everett v. Nat'l Cable Advertising*, 57 F.3d 1317, 1325 (4th Cir. 1995).

164. 15 U.S.C. § 15(a).

165. *Thompson Everett*, 57 F.3d at 1325 (citations omitted).

166. 459 U.S. 519, 539 (1983) (analyzing standing under six factors which examine the nature of the alleged antitrust activity and the nature of the injury allegedly sustained).

167. *Levine v. McLeskey*, 881 F. Supp. 1030, 1045-46 (E.D. Va. 1995).

## F. Procedure and Evidence

### 1. Procedure-Discovery and the Collateral Order Doctrine

In *MDK, Inc. v. Mike's Train House*,<sup>168</sup> the Fourth Circuit refused to apply the exception of the collateral order doctrine to a nonfinal discovery order in an antitrust case, but instead followed established precedent by declining jurisdiction to review a district court order compelling discovery of nonparties in the underlying litigation.<sup>169</sup>

In the underlying antitrust litigation, Mike's Train House alleged that Lionel Trains violated Sherman Act Section 2 by misusing its monopoly power in the market for O gauge model trains.<sup>170</sup> At issue was the relevant market definition for the sale of O gauge model trains.<sup>171</sup> To marshal evidence proving that Lionel monopolized that market, Mike's issued subpoenas to other model train manufacturers, including MDK, requesting business records detailing sales revenue and costs of goods sold.<sup>172</sup> MDK moved to quash the subpoena, arguing that the information sought constituted confidential commercial information and trade secrets.<sup>173</sup> The magistrate judge held that because Mike's had a critical need for the information to determine the relevant market and the presence of monopoly power, MDK must comply with the subpoena.<sup>174</sup> The district court upheld this ruling, and MDK appealed.<sup>175</sup>

The Fourth Circuit held that it had no jurisdiction to entertain MDK's appeal of a nonfinal order. In doing so, the court rejected MDK's contention that orders mandating discovery of trade secrets are appealable.<sup>176</sup> The court also rejected MDK's contention that the district court's order constituted a collateral order under the doctrine established in *Cohen v. Beneficial*

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168. 27 F.3d 116 (4th Cir.), cert. denied, 115 S. Ct. 510 (1994).

169. *Id.* at 121.

170. See *Mike's Train House v. Lionel Trains*, No. CA 93-60138 (E.D. Mich.).

171. *MDK, Inc.*, 27 F.3d at 118.

172. *Id.*

173. *Id.*

174. *Id.* at 119.

175. *Id.*

176. *Id.* at 120.

*Industrial Loan Corp.*<sup>177</sup> Under *Cohen*, a court has jurisdiction to review an appeal (1) if the party is unable to receive review in another forum or (2) if the appeal could be considered apart from the main issue being litigated.<sup>178</sup> The first exception did not apply because MDK had another forum for appealing the claim.<sup>179</sup> The second exception did not apply because the issue on appeal could not be considered apart from the course of the main litigation. Resolution of the issue, and any delay in doing so, would directly impact the litigation.<sup>180</sup> Thus, MDK could not invoke the collateral order doctrine.<sup>181</sup>

## 2. Evidence

Two evidentiary issues in antitrust cases were decided by the courts in the Fourth Circuit this past year. In *Bristol Steel & Iron Works v. Bethlehem Steel Corp.*,<sup>182</sup> the Fourth Circuit affirmed the district court's refusal to allow Bristol's evidence of invoices to be submitted to the jury.<sup>183</sup> Apparently pursuant to Rule 1006,<sup>184</sup> Bristol had prepared charts summarizing invoices and offered the charts in evidence to prove its price discrimination claims.<sup>185</sup> But Bristol did not offer the actual

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177. 337 U.S. 541 (1949). The collateral order doctrine allows for a limited group of "collateral" decisions to undergo review even where the decision does not have a direct part in concluding the litigation in question. Generally, appellate review is limited to decisions which have a bearing on concluding the litigation on the merits. *Id.* at 546.

178. *MDK, Inc.*, 27 F.3d at 120.

179. The Court noted that MDK's other option was to refuse to answer the order, be cited for contempt, then challenge the order at the same time MDK appeals the contempt citation. *Id.* at 121.

180. *Id.*

181. *Id.* at 122.

182. 41 F.3d 182 (4th Cir. 1994).

183. *Id.* at 189.

184. Federal Rule of Evidence 1006 provides that:

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

FED. R. EVID. 1006.

185. *Bristol Steel*, 41 F.3d at 184.

invoices.<sup>186</sup> During deliberations the jury sent the court a note stating: "We are deadlocked on [special verdict form interrogatory] #3. What is the proof required to establish a sale? [D]o we need two invoices?"<sup>187</sup> Bristol argued strenuously that the trial court should provide the actual invoices to the jury since the charts that were submitted as evidence were based on the contents of the invoices.<sup>188</sup> The district court, however, refused.<sup>189</sup>

The Fourth Circuit affirmed, noting that the jury never specifically asked for the invoices but only queried what proof was required to establish a sale.<sup>190</sup> In any event, the court held that because Bristol chose not to put the invoices in evidence even though they were available, Bristol was not entitled to have them shown to the jury under Rule 1006.<sup>191</sup>

Judge Kiser's interesting ruling that a witness' prior criminal testimony was inadmissible hearsay in a subsequent civil case came in *Supermarket of Marlinton v. Meadow Gold Dairies*<sup>192</sup> and its companion case, *State of West Virginia ex. rel McGraw v. Meadow Gold Dairies*.<sup>193</sup> In those cases, which are discussed in detail at the beginning of this article, the civil plaintiffs offered as evidence of fraudulent concealment the previous testimony given in a criminal bid-rigging trial of three Meadow Gold employees of a now unavailable witness, Paul French. The plaintiffs argued that the prior testimony should come in under one of the following exceptions to the hearsay rule: (1) former testimony under Rule 804(b)(1); (2) statement against interest under Rule 804(b)(3); or (3) Rule 804(b)(5)'s residual exception. Judge Kiser was unconvinced, holding all these exceptions inapplicable.

As explained above Judge Kiser held that the testimony was inadmissible under the former testimony exception because the criminal defendants did not have the same motives in cross-

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186. *Id.* at 184-85.

187. *Id.* at 185.

188. *Id.*

189. *Id.*

190. *Id.* at 189.

191. *Id.* at 190.

192. 874 F. Supp. 721 (W.D. Va. 1994).

193. 875 F. Supp. 340 (W.D. Va. 1994).

examining French on the fraudulent concealment issues as the subsequent civil defendants.<sup>194</sup> In drawing this conclusion, Judge Kiser held that a plaintiff must demonstrate acts of concealment "separate and apart" from the conspiracy itself.<sup>195</sup>

Judge Kiser also did not allow admission of the testimony under Rule 804(b)(3)<sup>196</sup> as a statement against interest because French had been immunized when he testified. In a common sense approach, Judge Kiser noted that "[a] reasonable person in French's position would have testified to avoid criminal prosecution because that testimony would *not* be 'so far contrary to [French's] pecuniary or proprietary interest . . . ,' because his 'testimony was *for* his interest, not against.'<sup>197</sup> It was not important to the court that French's testimony subjected him to a theoretical but unrealistic possibility of civil liability.<sup>198</sup>

French's testimony also was inadmissible under the residual exception found in Rule 804 (b)(5)<sup>199</sup> because it did not have "equivalent guarantees of trustworthiness" comparable to other enumerated hearsay exceptions. Judge Kiser compared the instant cases to that in *United States v. Clarke*,<sup>200</sup> where the

194. *Marlinton*, 874 F. Supp. at 727; *McGraw*, 875 F. Supp. at 346-47.

195. *Marlinton*, 874 F. Supp. at 727; *McGraw*, 875 F. Supp. at 346-47.

196. A statement falls under F.R.E. 804(b)(3)'s statement against interest exception when it is:

at the time of its making so far contrary to the declarant's pecuniary interest or proprietary interest, or so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

FED. R. EVID. 804.

197. *Marlinton*, 874 F. Supp. at 728; *McGraw*, 875 F. Supp. at 347 (both quoting FED. R. EVID. 804(b)(3)) (alteration in original).

198. *Id.*

199. Federal Rule of Evidence 804(b)(5) provides in pertinent part:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

FED. R. EVID 804.

200. 2 F.3d 81 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1194 (1994).

Fourth Circuit allowed the immunized suppression hearing testimony of the brother of the defendant charged in a drug conspiracy to be admitted at trial when the brother refused to testify.<sup>201</sup> The Fourth Circuit allowed the testimony in *Clarke* because of its "circumstantial guarantees of trustworthiness," and its "ring of reliability."<sup>202</sup>

While Judge Kiser found that *Clarke* held some comparisons to the instant cases, such as the testimony in both cases was immunized, under oath and subject to cross-examination, he found the differences to be more compelling, even suggesting that French had a motive to lie.<sup>203</sup> Unlike *Clarke* where the witness had no reason to implicate his brother, French had the obvious reason of self-preservation. He also had been fired by Meadow Gold, giving rise to the additional motive of revenge, and had made inconsistent statements to the government.<sup>204</sup> But most compelling, in Judge Kiser's view, was that the jury had refused to believe French and convict the criminal defendants on his testimony.<sup>205</sup> For these reasons, French's testimony did not possess the requisite "ring of reliability" for it to come in under the residual exception.<sup>206</sup>

### III. FEDERAL REGULATORY, ADMINISTRATIVE AND ENFORCEMENT EFFORTS

#### A. Antitrust Division Focuses on Civil Investigations

In February, 1995, the U.S. Department of Justice's Antitrust Division released its workload statistics from FY 1985 to FY 1994.<sup>207</sup> Those statistics reflect the Antitrust Division's stated interest in expanding its civil enforcement. Among the most notable developments were increases in the Division's issuance of civil investigative demands (CIDs),<sup>208</sup> increases in negotia-

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201. *Id.* at 83.

202. *Id.* at 84.

203. *Marlinton*, 874 F. Supp. at 729; *McGraw*, 875 F. Supp. at 349.

204. *Marlinton*, 874 F. Supp. at 729; *McGraw*, 875 F. Supp. at 349.

205. *Marlinton*, 874 F. Supp. at 729; *McGraw*, 875 F. Supp. at 349.

206. *Marlinton*, 874 F. Supp. at 729; *McGraw*, 875 F. Supp. at 349.

207. *Workload Statistics for Division Show Increase in CIDs, Advice to Foreign States*, Antitrust & Trade Reg. Rep. (BNA) No. 68, at 129 (Feb. 2, 1995).

208. *Id.*

tions with foreign entities, and a decrease in criminal enforcement activities.<sup>209</sup>

The total number of CIDs issued in FY 1994 was up 245 percent to 1,135, the highest number issued in one single year.<sup>210</sup> Compare that with fifty-seven criminal cases filed in FY 1994, the third lowest number since 1985.<sup>211</sup> The highest number of criminal cases occurred in 1987 when ninety-two cases were filed.<sup>212</sup> Under the Clinton Administration in FY 1994, the Department of Justice also participated in the highest number of representations and negotiations with international organizations and governments, reflecting a national interest in worldwide expansion of domestic products and services.<sup>213</sup> That fiscal year also included other significant high numbers, including the highest number of premerger notification cases filed,<sup>214</sup> the highest number of preliminary inquiries initiated by the Division,<sup>215</sup> and the highest number of civil cases filed in district courts.<sup>216</sup>

Regarding investigations initiated under the Sherman Act, the total number of actions taken under Section 1 for FY 1994 was 136, up from 109 in 1993.<sup>217</sup> The total number for Section 2 was twenty-two, the highest since 1985.<sup>218</sup> The total number of investigations initiated under Section 7 of the Clayton Act remained the same for FY 1993 and FY 1994 at 102 each year, which was up from eight-four in FY 1992.<sup>219</sup>

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209. *Id.*

210. *Id.*

211. *Id.* at 130.

212. *Id.*

213. *Id.*

214. In 1994, nine such cases were filed with the next highest being six filed in 1990 and 1988. *Id.* at 129.

215. This number was 254, compared to 185 in FY 1993. *Id.*

216. This number was 21, up from nine in FY 1993. *Id.*

217. The highest number of these investigations occurred in 1986 when 137 were initiated. *Id.*

218. *Id.* at 146.

219. The highest number of these investigations occurred in 1987 with 109. *Id.*

### B. *Antitrust Enforcement Guidelines for International Operations*

In April, 1995, the Justice Department and the Federal Trade Commission (FTC) issued the third version of the Antitrust Enforcement Guidelines for International Operations.<sup>220</sup> According to U.S. Deputy Assistant Attorney General Diane P. Wood, "international cooperation" is a key theme throughout the text<sup>221</sup> and constitutes one of the primary changes from the 1988 version. Wood also emphasizes the fact that these new Guidelines provide instruction on how to apply existing U.S. domestic law in a non-discriminatory manner to international transactions.<sup>222</sup>

Even though U.S. antitrust law has always been applied to international commerce, the 1995 Guidelines enumerate significant factors and related statutes for agencies to use when attempting to identify anticompetitive behavior.<sup>223</sup> Pertinent statutes include, among others, the Sherman Act, the Clayton Act, Title II of the Hart-Scott-Rodino Antitrust Improvements Act, and the National Cooperative Research and Production Act.<sup>224</sup> Operation of these statutes and other factors in certain situations is illustrated in the Guidelines through a series of hypotheticals that allow the agencies to analyze and check the procedure to use in different contexts.<sup>225</sup>

Other topics covered in the Guidelines include the Department of Justice's and the FTC's subject matter jurisdiction over actions occurring outside of the United States, issues of comity and other factors that provide authority for jurisdiction, and

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220. U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS, (Apr. 1995) [hereinafter AEGIO].

221. *Enforcement Guidelines for International Operations U.S. Deputy Assistant Attorney General's Views*, Trade Reg. Rep. (CCH) ¶ 50,144, at 49,093, 49,096 (Apr. 11, 1995).

222. *Id.* at ¶ 49,095.

223. *Justice and FTC Issue Final Guidelines on International Antitrust Enforcement*, Antitrust & Trade Reg. Rep. (BNA) No. 68, at 462 (Apr. 6, 1995) [hereinafter Justice and FTC].

224. AEGIO, *supra* note 220, §§ 2.1-2.5.

225. AEGIO, *supra* note 220.

"the effects of foreign governmental involvement on the anti-trust liability of private entities."<sup>226</sup>

The Guidelines also cite four major philosophical principles that the Department of Justice and FTC would like an agency to follow regarding enforcement of antitrust provisions:

1) Foreign commerce cases can involve almost any provision of the antitrust laws;

2) The enforcement agencies do not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties;

3) The agencies do not use their antitrust authority to further non-antitrust objectives; and

4) Once jurisdictional requirements, comity, and doctrines of foreign governmental involvement have been considered and satisfied, the substantive antitrust rules that apply to domestic operations apply with equal force to international operations.<sup>227</sup>

### C. *Intellectual Property Guidelines*

Concurrent with the release of the Antitrust Enforcement Guidelines for International Operations, the Department of Justice and the FTC also released the 1995 Antitrust Guidelines for the Licensing of Intellectual Property,<sup>228</sup> which replace the intellectual property portions of the 1988 Antitrust Enforcement Guidelines for International Operations.<sup>229</sup> The most significant feature of these Guidelines is the establishment of "safety zones" for licensing agreements that collectively total less than 21 percent of the relevant market affected by the restraint.<sup>230</sup> According to U.S. Deputy Assistant Attorney

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226. AEGIO, *supra* note 220, § 1.

227. Justice and FTC, *supra* note 223.

228. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY, (Apr. 1995).

229. *1995 Antitrust Guidelines for the Licensing of Intellectual Property: U.S. Deputy Assistant Attorney General's Views*, Trade Reg. Rep. (CCH) ¶ 50,145, at 49,099 (Apr. 11, 1995) [hereinafter *Deputy Assistant Attorney General's Views*].

230. *Antitrust Guidelines for the Licensing of Intellectual Property*, Antitrust & Trade Reg. Rep. (BNA) No. 1708, at 5-11 (Apr. 13, 1995).

General Richard J. Gilbert, there are two factors that will be considered to determine if an intellectual property arrangement falls within the "safety zone."<sup>231</sup>

The first factor is whether or not the restraint is facially anticompetitive.<sup>232</sup> Examples of facially anticompetitive behavior include such things as price fixing and market division.<sup>233</sup> The second factor is whether "the licensor and its licensees collectively account for no more than twenty percent of each relevant market significantly affected by the restraint."<sup>234</sup> If the agreement is deemed not to be facially anticompetitive and collectively accounts for less the twenty-one percent of the market, then it will probably fall within the established "safety zone."<sup>235</sup>

#### IV. CIVIL ENFORCEMENT ACTIVITIES OF THE ATTORNEY GENERAL OF VIRGINIA

The Antitrust and Consumer Litigation Section of the Virginia Attorney General's Office reported that this past year it settled a group boycott claim against a doctors' association in Danville, Virginia.

The settlement, set out in a Consent Final Judgment, came after the Virginia Attorney General's Office conducted a joint investigation with the Federal Trade Commission into the practices of Physicians Group, Inc. (PGI), an association of physicians located in Danville, Virginia.<sup>236</sup> In the Complaint, which the Commonwealth filed simultaneously with the settlement, the Commonwealth alleged that PGI and seven doctors who comprise the former and current members of its board of directors, organized and carried out a group boycott in Danville of Key Advantage, the state's managed health care plan for its

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231. *Deputy Assistant Attorney General's Views*, *supra* note 229.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Virginia v. Physicians Group*, Civil Action No. 95-0015-D (W.D. Va. filed Apr. 26, 1995). The authors represented Physicians Group and certain members of its board of directors in this matter.

employees and their dependents.<sup>237</sup> The Commonwealth alleged that because of the boycott, there were not enough physicians participating in the plan to adequately serve the medical needs of the almost 2000 state employees in the Danville area.<sup>238</sup> As a result, the Commonwealth alleged it had to implement an interim health insurance plan, which allowed these employees and their dependents to see non-participating physicians in the area without financial penalty.<sup>239</sup> The interim plan was in place from October 1, 1992, when Key Advantage was first implemented statewide, until July 1, 1994.<sup>240</sup>

Although individual doctors and medical group practices may independently decline to participate in insurance and managed care health plans, the Commonwealth alleged that the joint decision was a per se violation of Section 1 of the Sherman Act, and the Virginia Antitrust Act.<sup>241</sup> PGI and its board members denied any liability and the parties settled the matter by means of the Consent Final Judgment.

Additionally, an Agreement to Cease and Desist and Order between the FTC and PGI has obtained preliminary approval from the Commission, and has been published for public comment.<sup>242</sup> In settling the FTC's charges, PGI and its board members likewise denied any wrongdoing.<sup>243</sup>

## V. FEDERAL AND STATE LEGISLATIVE ACTIVITY

### A. *Federal Legislation*

In November, 1994, President Clinton signed a bill that enacted the International Antitrust Enforcement Assistance Act to help the Department of Justice in obtaining antitrust evidence located outside of the United States.<sup>244</sup> The new law provides

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237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. International Antitrust Enforcement Assistance Act of 1994, Pub. L. No. 103-438, 108 Stat. 4597 (codified at 15 U.S.C.A. §§ 6201-6212 (1995)).

the Attorney General and the Federal Trade Commission with a powerful new tool in obtaining evidence overseas for domestic prosecutions,<sup>245</sup> which may alleviate previous difficulties that U.S. enforcement authorities have encountered in this area.<sup>246</sup> The law also allows for investigations into possible violations of foreign antitrust laws and the reciprocal exchange of evidence and information with foreign antitrust authorities to determine if a violation of a federal antitrust law or a foreign antitrust law has occurred.<sup>247</sup>

According to Section 12 of the Act, a foreign antitrust authority is defined as a governmental body endorsed by a foreign state or "regional economic integration organization" to enforce the antitrust laws of that state or organization.<sup>248</sup> The Act allows for an exchange of information pursuant to an "antitrust mutual assistance agreement."<sup>249</sup> Such agreements are essentially a "written memorandum of understanding" between the United States and the foreign antitrust authority for the purposes of conducting an investigation into possible antitrust violations.<sup>250</sup> The requisite provisions of an antitrust mutual assistance agreement include the following:

- 1) An assurance that each side will provide assistance comparable in scope to that received by the other;<sup>251</sup>
- 2) An assurance that the foreign authority is subject to the laws and procedures as promulgated by the United States regarding the confidentiality of antitrust evidence;<sup>252</sup>
- 3) A description of U.S laws as well as the laws of the foreign authority governing the confidentiality of antitrust evi-

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245. *Id.*

246. *See, e.g.,* United States v. General Electric Co., 869 F. Supp. 1285 (S.D. Ohio 1994). Here, the court awarded G.E. a judgment of acquittal on charges that it violated § 1 of the Sherman Act by conspiring with DeBeers Centenary Co. to raise prices worldwide in the industrial diamond market. In this case, the Antitrust Division stated that it had some difficulty obtaining certain evidence from overseas. *Id.* at 1300.

247. International Antitrust Enforcement Assistance Act, § 3, 108 Stat. at 4597.

248. *Id.* § 12, 108 Stat. at 4603.

249. *Id.*

250. *Id.*

251. *Id.* § 8, 108 Stat. at 4601.

252. *Id.* § 12(2)(B), 108 Stat. at 4603.

dence as well as the enforcement mechanisms and penalties applicable to such laws;<sup>253</sup>

4) Citations to the specific federal and foreign antitrust laws to which the agreement applies;<sup>254</sup>

5) Terms and conditions that permit the disclosure of antitrust evidence gathered in the course of the investigation and any other factors pertaining to disclosure;<sup>255</sup>

6) An assurance that any material/evidence given to the foreign authority will be returned to the Attorney General or Federal Trade Commission;<sup>256</sup> and

7) Terms and conditions for terminating the agreement.<sup>257</sup>

Use of antitrust mutual assistance agreements are conditioned, however, on the determination by the Attorney General or the Federal Trade Commission that the foreign authority will in fact abide by the terms as outlined in the agreement and that such an agreement is "consistent with the public interest of the United States."<sup>258</sup> They must also conclude that providing evidence to the foreign authority will not violate any restrictions placed on the Attorney General or the Federal Trade Commission under Section 7A of the Clayton Act,<sup>259</sup> violate the interests of national defense or foreign policy, or fall within one of the enumerated areas of disclosure prevented by federal law.<sup>260</sup>

The Act also includes provisions for jurisdiction of U.S. district courts,<sup>261</sup> limitations on judicial review<sup>262</sup> and publication of antitrust mutual assistance agreements in the Federal Register.<sup>263</sup>

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253. *Id.* § 12(2)(C), 108 Stat. at 4603.

254. *Id.* § 12(2)(D), 108 Stat. at 4603.

255. *Id.* § 12(2)(E), 108 Stat. at 4603.

256. *Id.* § 12(2)(F), 108 Stat. at 4603.

257. *Id.* § 12(2)(G), 108 Stat. at 4603.

258. *Id.* §§ 8(a)(1)-(3), 108 Stat. at 4601.

259. 15 U.S.C. § 18a (1989); International Antitrust Enforcement Assistance Act § 5, 108 Stat. at 4600.

260. International Antitrust Enforcement Assistance Act § 5(2), 108 Stat. at 4600.

261. *Id.* § 4, 108 Stat. at 4599.

262. *Id.* § 9, 108 Stat. at 4602.

263. *Id.* § 7, 108 Stat. at 4600.

### B. *Virginia State Legislation*

The Virginia General Assembly did not pass any significant antitrust legislation this past year.

## VI. CONCLUSION

As the Virginia federal and state courts develop more experience in antitrust cases, they have become increasingly suspect of such claims and have demonstrated a heightened willingness to dispose of meritless claims as a matter of law. As with any case, adherence to the rules of procedure and evidence is essential to maintaining a viable claim and several antitrust cases decided this year make this point clear. Federal enforcement agencies issued the long-awaited International and Intellectual Property Guidelines and a new federal law was enacted to help obtain evidence of international antitrust violations.

