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

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# ARTICLES

## ANTITRUST AND TRADE REGULATION

*Michael F. Urbanski\**

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### I. INTRODUCTION

During the past year, Virginia's federal courts published surprisingly few antitrust opinions. These few opinions indicate fact-specific analysis and little significant development to the law. However, the decisions reflect the continued difficulties faced by private antitrust plaintiffs alleging conspiracy claims and criminal antitrust defendants prosecuted for conduct which is illegal per se. Antitrust plaintiffs, however, have enjoyed measured, if only temporary, success. For example, the United States Court of Appeals for the Fourth Circuit reversed a grant of summary judgment against a durable medical equipment company alleging monopoli-

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This article addresses federal and state legislative developments and enforcement activities, and antitrust decisions of the United State Supreme Court, the Court of Appeals for the Fourth Circuit, and state and federal courts of Virginia from June, 1992 to June, 1993. The authors gratefully acknowledge the assistance of Abigail L. Perkins, Associate, Woods, Rogers & Hazlegrove; B.S., 1989, James Madison University; J.D., 1992, The College of William and Mary; as well as Alicia Zatcoff, J.D. Candidate, December, 1993, University of Richmond, T. C. Williams School of Law, in the preparation of this article. The authors also acknowledge and appreciate the assistance of Frank Seales, Jr., Chief, and Milton A. Marquis, Assistant Attorney General, Antitrust and Consumer Litigation Section, Commonwealth of Virginia, Office of Attorney General, for information regarding Virginia state antitrust enforcement actions.

zation claims against a hospital and its affiliated medical equipment company.<sup>1</sup> In another antitrust case, a district court accepted the arguments of a steel fabricator alleging monopolization and price discrimination by a major steel manufacturer, finding that factual issues precluded a grant of summary judgment.<sup>2</sup> While these decisions prove beneficial to private antitrust plaintiffs, they have been tempered by decisions of the United States Supreme Court broadening application of the *Noerr-Pennington* antitrust immunity doctrine<sup>3</sup> and requiring inquiry in all instances into defendants' market power in attempted monopolization cases.

## II. FEDERAL CIVIL ACTIONS

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

There were no published opinions this past year addressing Sherman Act Section 1<sup>4</sup> conspiracy issues. The four unpublished opinions which did address Section 1 were decided in the dealer termination, tying arrangement and school milk price fixing contexts.

Not surprisingly, the antitrust claims of terminated dealers fared poorly. In *Holabird Sports Discounters v. Tennis Tutor, Inc.*,<sup>5</sup> the Fourth Circuit Court of Appeals held that in light of *Monsanto Co. v. Spray-Rite Serv. Corp.*,<sup>6</sup> a terminated dealer failed to produce sufficient evidence of a conspiracy between its competing dealers and suppliers. Holabird was a dealer of tennis ball practice machines manufactured by Tennis Tutor, Inc. (TTI). TTI's dealers were governed by its policy prohibiting advertising of the machine "in any general circulation regional or national publication for less than suggested retail price, including call for price advertisements."<sup>7</sup> The advertising restriction did not prevent dealers from selling the machine at whatever price they chose; it only prohibited advertising the machine for sale at less than the suggested retail

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1. *M & M Medical Supplies & Services, Inc. v. Pleasant Valley Hospital, Inc.*, 981 F.2d 160 (4th Cir. 1992) (en banc).

2. *Bristol Steel and Iron Works, Inc. v. Bethlehem Steel Corp.*, No. 88-0296-A (W.D. Va. Apr. 20, 1993) (memorandum opinion).

3. See *infra* note 101.

4. 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 (1988).

5. No. 92-2504, 1993 WL 147470 (4th Cir. May 7, 1993) (unpublished).

6. 465 U.S. 752 (1984).

7. 1993 WL 147470, at \*1.

price in regional and national publications.<sup>8</sup> The purpose of the restriction was “to maintain a healthy national distribution system through the prevention of free-riding by national mail order discount houses such as Holabird.”<sup>9</sup> TTI dealers who violated the policy were subject to termination.

TTI terminated Holabird’s dealership when it learned Holabird had violated the advertising restriction by placing an advertisement in a national magazine which requested readers to call for the price of TTI’s machine.<sup>10</sup> After Holabird’s termination, TTI also took unilateral action to prevent its machines from being diverted to Holabird through other dealers.<sup>11</sup> In response, Holabird sued TTI, alleging that its advertising restriction violated Section 1 of the Sherman Act. Citing the “thorough opinion” of the district court,<sup>12</sup> and noting that the application of *Monsanto in Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*<sup>13</sup> was controlling, the Fourth Circuit court of appeals affirmed the district court’s grant of summary judgment for TTI because Holabird “failed to produce sufficient evidence that TTI had entered into a contract, conspiracy, or combination with any of its dealers” and “failed to identify sufficient evidence tending to exclude the possibility that TTI and its dealers acted independently with regard to the advertising restriction. . . .”<sup>14</sup>

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8. *Id.*

9. *Id.* at \*2. The Court explained the free-riding issue as follows:

Free-riding occurs when a discounter takes advantage of customer services offered by local dealers. Since the Tennis Tutor is a complex, innovative machine, most prospective purchasers would not fully appreciate the benefits of the product unless dealers make the effort to explain the machine, set up demonstrations, and allow trial use. Without the advertising restriction, national mail order discounters that offer no such special services could exploit the efforts of full-service local dealers: Customers would go to their local dealer to gather information about the Tennis Tutor, but could then order the machine for a lower price from a discounter that could afford to charge less than the local dealer because it did not have to bear the expense of customer services. According to TTI, this result would cause disgruntlement among local dealers, who would respond by refusing to carry Tennis Tutors or by cutting back on their services, either outcome of which would be detrimental.

*Id.* at \*2, n.1.

10. *Id.* at \*2.

11. *Id.*

12. *Holabird Sports Discounter v. Tennis Tutor, Inc.*, No. 91-2208-WN (D. Md. Oct. 30, 1992).

13. 878 F.2d 801 (4th Cir. 1989).

14. 1993 WL 147470, at \*2.

The district court in *W. A. Stratton Construction Co. v. Butler Manufacturing Co.*,<sup>15</sup> also found insufficient evidence of conspiracy, dismissing a terminated dealer's Section 1 claims on summary judgment. Stratton and Coleman-Adams were dealers of Butler's manufactured building parts for prefabricated wood and steel frame buildings. Stratton sued Butler and Coleman-Adams after Stratton was terminated as a Butler dealer.<sup>16</sup> The suit centered on a meeting among Butler, Stratton, and Coleman-Adams where the dealers' marketing territory was discussed and it was agreed that Stratton would allow Coleman-Adams to service Lynchburg in exchange for Coleman-Adams surrendering Appomattox County to Stratton.<sup>17</sup> After the meeting, disagreements developed among the parties, resulting in Stratton's termination as Butler's dealer.<sup>18</sup>

Butler and Coleman-Adams moved for summary judgment on Stratton's Section 1 claim. Stratton argued that the territory marketing agreement constituted a horizontal restraint of trade, as it was a conspiracy to allocate markets between competitors, which is per se illegal under Section 1.<sup>19</sup> The trial court disagreed, holding the agreement to be nothing more than "a market division imposed by a supplier."<sup>20</sup> Finding that Stratton failed to introduce sufficient evidence of any horizontal restraint of trade, the court granted summary judgment in favor of Butler and Coleman-Adams.<sup>21</sup>

The Fourth Circuit was similarly unsympathetic to a plaintiff's Section 1 tying claims in *Montgomery County Ass'n of Realtors, Inc. v. Realty Photo Master Corp.*<sup>22</sup> Realty Photo sought an interlocutory appeal from the district court's denial of a preliminary injunction. Realty Photo sought to prevent Montgomery County Association of Realtors (MCAR) from upgrading its computer services database, thereby alleviating the need for some of Realty Photo's services.<sup>23</sup> MCAR used the computer database to disseminate real estate listing information to its member realtors. MCAR's computer, however, could not transmit photographs of the prop-

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15. No. 87-0041-C, 1992 WL 159107 (W.D. Va. June 23, 1992) (unpublished).

16. *Id.* at \*1.

17. *Id.* at \*3.

18. *Id.* at \*5.

19. *Id.*

20. *Id.* at \*7.

21. *Id.* at \*9.

22. 1993-1 Trade Cas. (CCH) ¶ 70,239 (4th Cir. May 20, 1993).

23. *Id.* at 70,179.

erty, so Realty Photo, without MCAR's permission, accessed MCAR's computer database and provided MCAR members with real estate photographs.<sup>24</sup> When MCAR decided to upgrade its photo enhancement capabilities to handle that aspect of its services, Realty Photo brought suit under the Sherman Act.<sup>25</sup>

Realty Photo contended that MCAR had illegally tied multiple listing information to pictures of the real estate and sought an injunction.<sup>26</sup> The district court disagreed, finding that the written descriptions and pictures of the real estate are simply components of only one product, the information about specific real estate properties.<sup>27</sup> The district court therefore rejected the tying claim, finding that Realty Photo had failed to identify two separate products necessary to maintain a tying claim.<sup>28</sup> Citing *Service & Training, Inc. v. Data General Corp.*,<sup>29</sup> the court found that the focus of the "separate products" inquiry turns not on the functional relation between the two allegedly separate products, but rather on the character of the demand for the two items. The court concluded that written and photographic real estate information traditionally constituted a single product without separate consumer demand.<sup>30</sup>

In the final unpublished Section 1 case, *United States v. Maryland and Milk Producers Cooperative Ass'n, Inc. Marva Maid Dairy*,<sup>31</sup> the United States Court of Appeals for the Fourth Circuit addressed the level of proof necessary to show criminal intent under Section 1 in the context of a per se violation such as price fixing. In the court below, Marva Maid was convicted of rigging bids on Tidewater school milk and argued on appeal that the government failed to prove that it had the necessary intent to violate the Sherman Act. The fourth circuit was unimpressed, however, noting that bid rigging itself is a per se violation of the Sherman

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24. *Id.* at 70,180.

25. *Id.*

26. *Id.* at 70,181. Three factors must be shown to prove an illegal tying arrangement: (1) two separate and distinct product markets must have been linked together; (2) the seller must be using its market power to force its customers to accept the tying arrangement; and (3) the tying arrangement must unreasonably restrain market competition in the tied product. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984); see also *Faulkner Advertising Ass'n, Inc. v. Nissan Motor Corp.*, 905 F.2d 769, 773 (4th Cir. 1990).

27. *Realty Photo*, 1993-1 Trade Cas. (CCH) ¶ 70,239 at 70,181.

28. *Id.*

29. 963 F.2d 680, 684 (4th Cir. 1992).

30. 1993-1 Trade Cas. (CCH) ¶ 70,239 at 70,181.

31. 1992-2 Trade Cas. (CCH) ¶ 69,959 (4th Cir. Sept. 15, 1992), (unpublished) (*cert. denied*, 113 S. Ct. 1580 (1993)).

Act. Quoting *United States v. United States Gypsum Co.*,<sup>32</sup> the court held that the government did not have to prove that Marva Maid's employee had a specific intent to restrain trade or violate the Sherman Act.<sup>33</sup> The government only needed to demonstrate that the employee "acted with knowledge of the anticipated consequences of his action."<sup>34</sup> If so, intent would be imputed to Marva Maid vicariously.<sup>35</sup> Under this standard, the court had little difficulty finding that the government had presented sufficient evidence of Marva Maid's intent.<sup>36</sup>

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

### 1. Attempted Monopolization and Monopolization

This past term, the Supreme Court finally addressed the conflict among between the circuits over the correct definition of the elements of the Sherman Act Section 2<sup>37</sup> offense of attempted monopolization.<sup>38</sup> The Court in *Spectrum Sports, Inc. v. McQuillan*,<sup>39</sup> considered whether proving an attempt to monopolize requires proof of a dangerous probability of monopolization of a relevant market. The Court took the opportunity to reprove the errant Ninth Circuit court of appeals which in *Lessig v. Tidewater Oil Co.*,<sup>40</sup> in conflict with every other circuit,<sup>41</sup> ruled that both the spe-

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32. 438 U.S. 422, 446 (1978).

33. 1992-2 Trade Cas. (CCH) ¶ 69,959, at 68,631 (citing *United States v. Foley*, 598 F.2d 1323 (4th Cir. 1979) and quoting *United States v. United States Gypsum Co.* 438 U.S. 422, 446 (1978)); see also *United States v. Smith Grading and Paving, Inc.* 760 F.2d 527, 533 (4th Cir. 1985) (holding the government does not need to show specific intent of defendant in *per se* Sherman Act violation).

34. *Id.*

35. 1992-2 Trade Cas. (CCH) ¶ 69,959, at 68,632.

36. *Id.* The Fourth Circuit also affirmed Marva Maid's convictions for mail fraud, finding that Marva Maid had engaged in a scheme to defraud the schools of money or property and used the mails in furtherance thereof. The court noted that the government need not prove that the scheme to defraud was successful, but instead, only that Marva Maid intended to design a bid rigging scheme for that purpose. *Id.*

37. 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 among the several States, or with foreign nations." 15 U.S.C. § 2 (1988).

38. It is generally required that in order to demonstrate 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 *Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924, 926 (4th Cir. 1990); *Advanced Health-Care Serv., Inc. v. Radford Community Hosp.*, 910 F.2d 139, 147 (4th Cir. 1990).

39. 113 S. Ct. 884 (1993).

40. 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).

cific intent and dangerous probability elements may be inferred from sufficient evidence of unfair or predatory conduct. *Lessig* required proof of the relevant market or defendant's market power<sup>42</sup> only when the evidence of unfair or predatory conduct is insufficient.

The plaintiff in *Spectrum Sports*, a terminated regional distributor of sorbothane (a patented elastic polymer with shock absorbing characteristics), sued the manufacturer and distributors of the product, alleging violations of Sherman Act Section 2. Not surprisingly after having been instructed on the *Lessig* standard,<sup>43</sup> the jury returned a verdict for the plaintiff, and the defendants appealed.

The Supreme Court rejected *Lessig's* interpretation of Section 2, holding that the "notion that proof of unfair or predatory conduct alone is sufficient to make out the offense of attempted monopolization [was] contrary to the purpose and policy of the Sherman Act."<sup>44</sup> Reversing the Ninth Circuit, the Court went on to hold that although "unfair" or "predatory" tactics may be sufficient to prove the necessary intent to monopolize, a plaintiff must also demonstrate a dangerous probability of monopolization through "inquiry into the relevant product and geographic market and defendant's economic power in that market."<sup>45</sup>

The Court's decision in *Spectrum Sports* appears to place in question the Fourth Circuit's en banc holding in *M & M Medical*

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41. See *Spectrum Sports*, 113 S. Ct. at 889, citing *Abbot Lab. v. Brennan*, 952 F.2d 1346, 1354 (Fed. Cir. 1991), *cert. denied*, 112 S. Ct. 2993; *Key Enter. of Del., Inc. v. Venice Hosp.*, 919 F.2d 1550, 1565 (11th Cir. 1990); *Arthur S. Langenderfer, Inc. v. S. E. Johnson Co.*, 917 F.2d 1413, 1431-32 (6th Cir. 1990); *Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924, 926, 931 (4th Cir. 1990); *Twin Lab. Inc. v. Weider Health & Fitness*, 900 F.2d 566, 570 (2nd Cir. 1990); *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of Am.*, 885 F.2d 683, 693 (10th Cir. 1989), *cert. denied*, 498 U.S. 972 (1990); *C.A.T. Indus. Disposal, Inc. v. Browning-Ferris Indus., Inc.*, 884 F.2d 209, 210 (5th Cir. 1989); *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1413-16 (7th Cir. 1989); *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 804 (8th Cir. 1987); *Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 428-29 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 851 (1986); *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 851 (1st Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068, 1079 (3d Cir. 1978).

42. 113 S. Ct. at 892.

43. The jury was instructed that "[i]f the Plaintiff has shown that the Defendant engaged in predatory conduct, you may infer from that evidence the specific intent and the dangerous probability element of the offense without any proof of the relevant market or the Defendant's marketing [sic] power." *Spectrum*, 113 S. Ct. at 889 n.4.

44. *Id.* at 891.

45. *Id.* at 892.



*Supplies & Services Inc. v. Pleasant Valley Hospital, Inc.*,<sup>46</sup> which was rendered a month and a half earlier. In *M & M Medical Supplies*, a sharply divided court, reaching the same result as the panel,<sup>47</sup> vacated and remanded to the United States District Court for the Southern District of West Virginia that court's grant of summary judgment in favor of defendants, on plaintiff's attempted monopolization and monopolization claims.

In *M & M Medical Supplies*, plaintiff M & M Medical Supplies and Service, Inc., a durable medical equipment supplier (DME), brought suit against Pleasant Valley Hospital and its subsidiary DME company, alleging that the Hospital had used its control of access to patients to exclude M & M from the market. The defendants prevailed on their summary judgment motion. On appeal, M & M challenged the district court's finding that M & M had failed to adduce sufficient proof of the elements of monopolization and attempted monopolization to withstand summary judgment. M & M also challenged the district court's dismissal of M & M's monopoly leveraging claim on the ground that such a claim is not contemplated by the Sherman Act.<sup>48</sup>

First, the Fourth Circuit held en banc that the district court had erred in dismissing M & M's monopoly claim on the grounds that the affidavit of M & M's expert economist was inadequate.<sup>49</sup> Regarding M & M's attempted monopolization claim on which the district court had granted summary judgment for want of evidence that Hospital patients were forced to purchase DME from the Hospital's company, the court of appeals held that the district court applied the wrong standard in assessing proof of specific intent to monopolize.<sup>50</sup> Citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,<sup>51</sup> the court reasoned that specific intent to monopolize can be inferred from predatory acts, which are established by showing that a firm attempted to exclude competitors on a basis other than efficiency.<sup>52</sup> Finding sufficient evidence of exclusionary conduct in the record to support an inference that the Hospital was not motivated by efficiency or quality concerns such as the cir-

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46. 981 F.2d 160 (4th Cir. 1992) (en banc).

47. The en banc opinion was decided 7-6. The three-judge panel, with one dissenter, also vacated the district court's summary dismissal. See 946 F.2d 886 (4th Cir. 1991).

48. *M & M Medical Supplies*, 981 F.2d at 162.

49. *Id.* at 165. See discussion *infra* notes 153-59.

50. *M & M Medical Supplies*, 981 F.2d at 166.

51. 472 U.S. 585, 605 (1985).

52. *M & M Medical Supplies*, 981 F.2d at 167.

culuation by the Hospital of a memo suggesting that all doctors practicing at the Hospital refer their patients to the Hospital's DME company and the charging of less than competitive prices, the court held that M & M was entitled at the summary judgment stage to an inference of predatory conduct and of a specific intent to monopolize.<sup>53</sup>

The court's analysis of the third element of M & M's attempted monopolization claim, dangerous probability of success, may be in conflict with *Spectrum Sports*. The court described a new, highly flexible, approach to evaluating the sufficiency of plaintiffs' evidence on the three elements of an attempt claim on summary judgment. While acknowledging that market share is relevant in showing a dangerous probability of success, the Fourth Circuit held that its relevance is tempered by the strength of evidence of intent or anticompetitive conduct.<sup>54</sup> "Compelling evidence of an intent to monopolize or of anticompetitive conduct reduces the level of market share that need be shown."<sup>55</sup>

Significantly, the court adopted the following framework, borrowed from *Areeda & Turner*,<sup>56</sup> in evaluating market share in attempt cases:

(1) claims of less than 30% market shares should presumptively be rejected; (2) claims involving between 30% and 50% shares should usually be rejected, except when conduct is very likely to achieve monopoly or when conduct is invidious, but not so much so as to make the defendant per se liable; and (3) claims involving greater than 50% share should be treated as attempts at monopolization when the other elements for attempted monopolization are also satisfied.<sup>57</sup>

Surprisingly, immediately after setting out the above framework of percentages of market shares and without discussing the market share of the Hospital's DME company, the court concluded that: "patients' descriptions of exclusionary anticompetitive conduct, the affidavits of a doctor and of a former employee recounting pressures applied by the Hospital, M & M's substantial decrease in

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53. *Id.* at 167-68.

54. *Id.* at 168.

55. *Id.*

56. 3 PHILIP AREEDA & DONALD TURNER, ANTITRUST LAW ¶ 835 (1978).

57. *M & M Medical Supplies*, 981 F.2d at 168.

revenue, and Dr. Blair's affidavit adequately address the three elements of attempted monopolization."<sup>58</sup> The quoted portions of Dr. Blair's affidavit, however, stated only that the Hospital's DME company exercised monopoly power in the relevant market. The affidavit did not address actual market share.<sup>59</sup> Moreover, the Court's opinion did not address the economic power of the Hospital itself. Thus, it may be that the court's decision regarding the Hospital conflicts with the Supreme Court's admonition in *Spectrum Sports* that in order for a plaintiff to survive summary judgment on its attempt claim and meet the element of dangerous probability of success, it must offer evidence of the defendant's economic power in the relevant product and geographic markets.<sup>60</sup> Nevertheless, the Supreme Court recently denied the hospital's petition for a writ of certiorari.<sup>61</sup>

Finally, in *M & M Medical Supplies*, the Fourth Circuit as it had in its earlier unpublished panel decision, directed the district court on remand to assume the viability of plaintiff's monopoly leveraging claim as a distinct violation of Section 2, but expressed no opinion. The court noted that "[t]here will be time enough to evaluate the validity of this assumption after the parties have developed a factual record."<sup>62</sup>

In two separate dissenting opinions, the six dissenters took issue with the majority's treatment of: (1) the level of factual detail in the expert economist's affidavit; (2) M & M's failure to establish the relevant market for the sale of DME as opposed to the market for hospital services; (3) M & M's evidence of the maintenance or acquisition of monopoly power; and, (4) M & M's evidence of a specific attempt to monopolize.<sup>63</sup> Noting that there had been no evidence that the Hospital DME company had priced its equipment below cost when it entered the DME market, Judge Luttig (Judges Russell and Wilkinson concurring) lamented the majority's holding: "The obvious effect of this novel holding, for which the majority offers no support, is that an antitrust plaintiff can avoid summary judgment on an attempted monopolization claim merely

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58. *Id.*

59. *Id.* at 164.

60. 327 F.2d 459 (9th Cir. 1964).

61. No. 92-1685, 1993 U.S. LEXIS 4071 (June 14, 1993).

62. *M & M Medical Supplies*, 981 F.2d at 169.

63. *Id.* at 169-75.

by proffering evidence that the defendant set its prices below those of its competitors."<sup>64</sup>

In the only other Virginia Sherman Act Section 2 decision rendered this past year, the United States District Court for the Eastern Division of Virginia refused to grant summary judgment to a steel manufacturer, finding issues of material fact. In *Bristol Steel and Iron Works, Inc. v. Bethlehem Steel Corp.*,<sup>65</sup> Bristol, a steel fabricator,<sup>66</sup> alleged that its steel supplier, Bethlehem, monopolized or attempted to monopolize the market for the sale of certain steel products. Bethlehem moved for summary judgment on Bristol's Section 2 claim on the grounds that Bristol had no evidence that Bethlehem exercised market power in an appropriately defined market, and that Bethlehem's alleged pricing activity made no economic sense and could not have facilitated the acquisition or maintenance of monopoly power by Bethlehem.<sup>67</sup>

In the mid-1980s Bristol purchased a majority of its steel products, including rolled structural shapes and steel plate, from Bethlehem. Bristol alleged that Bethlehem monopolized or attempted to monopolize the market for raw steel products in the geographic region in which it competed by offering discriminatorily low price quotes to Bristol's competing fabricators. This activity allowed Bethlehem to effectively choose which fabricator would be the successful low bidder on a specific project.<sup>68</sup>

Judge Richard L. Williams denied Bethlehem's motion for summary judgment, finding that factual issues existed for trial. In analyzing Bristol's attempt claim, the court referred to the sliding scale set out in *M & M Medical Supplies*,<sup>69</sup> and found there to be a genuine issue of fact as to Bethlehem's market share because of perceived conflicts in the evidence.<sup>70</sup>

Surprisingly, the court also rejected Bethlehem's argument that Bristol's claim must fail because Bethlehem was not a competitor in the fabrication market in which the alleged anticompetitive con-

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64. *Id.* at 173.

65. No. 88-0296-A (W.D. Va. Apr. 20, 1993) (memorandum opinion).

66. The process by which raw steel products, such as rolled structural shapes and steel plate, are prepared for erection in the construction of buildings and bridges through cutting and welding is known as "fabrication." *Id.* at 2.

67. *Id.* at 6.

68. *Id.*

69. 981 F.2d 160 (4th Cir. 1992) (en banc).

70. *Bristol Steel* at 30.

duct occurred. While conceding that Bethlehem and Bristol did compete in distinct product markets, the court found that fact to be "irrelevant" to Bristol's Section 2 claims.<sup>71</sup> Distinguishing *White v. Rockingham Radiologists, Ltd.*<sup>72</sup> and *Drs. Steur and Latham, P.A. v. National Medical Enter., Inc.*<sup>73</sup> on the grounds that those were Section 1 conspiracy cases, the Court held that Section 2, which only addressed conduct by a single firm, did not require a plaintiff purchaser to "compete" in the same market as the alleged monopolist or attempted monopolist manufacturer.<sup>74</sup>

## 2. Market Definition

In analyzing the market to determine if Bristol's Section 2 claims could survive summary judgment, the court agreed with the narrow product and geographic market definitions advanced by Bristol.<sup>75</sup> For example, the court rejected Bethlehem's contention that reinforced concrete directly competes with "plain material steel sections, plates and shapes" for use in the construction of bridges and buildings.<sup>76</sup> The court reasoned that concrete only competes in the market for *fabricated* steel, not unfabricated steel which was the market Bristol alleged Bethlehem monopolized, because "concrete structural members are *not* functionally interchangeable and share no cross-elasticity of demand with plain, unfabricated steel shapes and plates."<sup>77</sup>

With respect to the relevant geographic market, Bristol asserted that it consisted of the mid-Atlantic region where it bid on projects. Conversely, Bethlehem submitted evidence that the market was international in scope because of international suppliers Bristol could turn to for steel. While seemingly accepting that the relevant geographic market is that "area in which the defendant operates and the plaintiff can reasonably turn to for products or services,"<sup>78</sup> the court nevertheless rejected Bethlehem's pretrial argument, accepted the possibility that the relevant geographic market may be that area where Bristol sold fabricated steel, and con-

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71. *Id.* at 34.

72. 820 F.2d 98 (4th Cir. 1987).

73. 672 F. Supp. 1489 (D.S.C. 1987), *aff'd*, 846 F.2d 70 (4th Cir. 1988).

74. *Bristol Steel* at 34-35.

75. *Id.* at 34.

76. *Id.* at 25-26.

77. *Id.* at 26-27.

78. *Id.* at 27.

cluded that an issue of fact existed.<sup>79</sup> Perhaps recognizing its difficult burden of proof on the issue, Bristol eventually dropped its Section 2 claims prior to trial.

### C. Price Discrimination

*Bristol Steel and Iron Works, Inc. v. Bethlehem Steel Corp.*<sup>80</sup> was also the only price discrimination case of the past year. The district court rejected the parties' cross motions for summary judgment, finding that there were triable issues of fact.<sup>81</sup> Bristol alleged that Bethlehem discriminated against it and in favor of other steel fabricators by selling steel of like grade and quality to favored Bristol competitors at a contemporaneous time, for discriminatorily low prices in violation of section 2(a) of the Robinson-Patman Act.<sup>82</sup> In support of its claim, Bristol pointed to Bethlehem's internal price deviation reports (PDRs) which it said reflected completed sales.<sup>83</sup> Bethlehem moved for summary judgment on the grounds that Bristol had no evidence of two different contemporaneous completed sales of like grade and quality, and that Bethlehem's price quotes were in response to "meeting competition."<sup>84</sup>

The court first held that the issue of two actual contemporaneous sales presented genuine issues of fact not appropriate for summary judgment. In this regard, it noted that there was conflicting evidence as to whether the PDRs, upon which Bristol relied, reflected actual sales or only price quotes.<sup>85</sup> It also held that while the issue of contemporaneousness is "primarily a question of

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79. *Id.* at 27-29.

80. No. 80-0296-A (W.D. Va. Apr. 20, 1993) (memorandum opinion).

81. *Id.*

82. 15 U.S.C. § 13(a) (1988). The relevant portion of Section 2(a) states:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce. . . .

*Id.*

For a recent case applying section 2(a) of the Robinson-Patman Act in a primary line context, see *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.*, 964 F.2d 335 (4th Cir. 1992).

83. *Bristol Steel*, mem. op. at 5.

84. *Id.*

85. *Id.* at 10-12.

fact,"<sup>86</sup> sales occurring within a three month period were sufficiently contemporaneous to survive summary judgment.<sup>87</sup>

On the issue of "like grade and quality," Bethlehem argued that Bristol was comparing apples and oranges because it was comparing projects involving different grades, shapes, and sizes of steel.<sup>88</sup> The court noted that "if meaningful functional and physical differences as perceived by the trade are demonstrated to exist," transactions involving the goods are not comparable.<sup>89</sup> Applying this test of "functional interchangeability," the court found Bethlehem's argument "compelling" but declined to grant summary judgment because Bethlehem's own pricing scheme, providing the same discount for all steel within a given grade, suggested that despite the size of the steel, Bethlehem considered it of "like grade and quality."<sup>90</sup>

Bethlehem's argument that sales in the bidding context were not "in competition" also failed. Bethlehem argued that as steel is only purchased after a contract is awarded by only one fabricator for any given project, competition ceases as soon as the bid is awarded. Consequently, any subsequent sales are not made in competition. While citing *M. C. Mfg. Co. v. Texas Foundries, Inc.*<sup>91</sup> for the proposition that it is irrelevant that a successful bidder was ultimately able to obtain prices below those offered to its competitors when bidding on a singular contract, the court found this case to be more "akin to *Bruce's Juices, Inc. v. American Can Co.*,"<sup>92</sup> where competitors in the same market were simultaneously engaged in competitive purchasing and selling,<sup>93</sup> and therefore inappropriate for summary judgment. The court therefore denied both parties summary judgment on Bristol's price discrimination claim.

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86. *Id.* at 12.

87. *Id.* at 13.

88. The court explained:

By way of example, Bethlehem notes that one piece of A36 steel may be configured as a four inch beam, suitable for spanning short spans and carrying light loads while a second piece of A36 steel could be a massive thirty-six inch beam weighing hundreds of pounds per foot and designed to support great weight.

*Id.* at 17-18.

89. *Id.* at 18.

90. *Id.*

91. 517 F.2d 1059, 1066 (5th Cir. 1975).

92. 87 F. Supp. 985, 987 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919, 924 (5th Cir.), *cert. denied*, 342 U.S. 875 (1951).

93. *Bristol Steel* at 14.

The case subsequently was tried solely on Bristol's price discrimination claim. During trial, Judge Williams denied Bethlehem's motion for judgment as a matter of law. The case went to the jury which found for Bethlehem on its "meeting competition" defense. Following the verdict, Judge Williams denied Bristol's motion for a new trial, and entered judgment for Bethlehem.

#### D. *Antitrust Injury*

The requirement of showing "antitrust injury,"<sup>94</sup> that is, injury to competition, rather than to individual competitors, which the antitrust laws were designed to prevent, rather than to individual competitors, is just one more hurdle for private antitrust plaintiffs. The plaintiff in *Bristol Steel and Iron Works, Inc. v. Bethlehem Steel Corp.*, however, met this requirement to avoid summary judgment. The district court in *Bristol Steel* was not persuaded by Bethlehem's argument that Bristol's alleged losses were wholly attributable to a weakened demand for steel, finding there to be at least a question of fact as to whether Bristol suffered antitrust injury as a result of Bethlehem's allegedly discriminatory pricing scheme.<sup>95</sup> While noting that Bristol may not assess damages based solely on the fact that it did not also receive a discriminatory price, the court found no fault with a damage calculation based only in part on the discriminatory pricing.<sup>96</sup> The court found that Bristol had adequately presented such a calculation and that in any event, in a secondary line price discrimination case such as this one, under *Federal Trade Commission v. Morton Salt Co.*,<sup>97</sup> a "competitive injury" may be *prima facie* established by proof of a "substantial price discrimination between competing purchasers over time."<sup>98</sup>

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94. The threshold requirement that private antitrust plaintiffs must demonstrate "antitrust injury" is derived from Section 4 of the Clayton Act, which provides treble damages to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15 (1988). The Supreme Court in *Brunswick Corp. v. Pueblo Bowl-A-Mat*, 429 U.S. 477 (1977), pronounced, "[P]laintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." *Id.* at 489 (emphasis in original).

95. *Bristol Steel*, mem. op. at 35-38.

96. *Id.* at 36 (citing *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1043-44 (9th Cir. 1987), *aff'd*, 496 U.S. 543 (1990)(court did not discuss or disagree with the lower court's approval of a damage calculation based on plaintiff's receiving a lower price)).

97. 334 U.S. 37, 50 (1948).

98. *Bristol Steel*, mem. op. at 37.



### E. Antitrust Immunity Issues

In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*,<sup>99</sup> the Supreme Court took the opportunity to elaborate on its holding in *City of Columbia v. Omni Outdoor Advertising, Inc.*<sup>100</sup> regarding proper application of the "sham" litigation exception to the *Noerr-Pennington* antitrust immunity doctrine.<sup>101</sup> In so doing, the Court continued its trend in recent years of expanding antitrust immunity.

In *Professional Real Estate Investors*, the operators of a resort hotel installed videodisc players in the resort's hotel rooms and rented videodiscs to guests for in-room viewing.<sup>102</sup> The operators also planned to sell videodisc players to other hotels which designed to offer offering in-room viewing of videodiscs.<sup>103</sup> Columbia Pictures, one of eight major motion picture studios holding copyrights to the motion pictures recorded on the videodiscs which the operators purchased, also licensed the transmission of copyrighted motion pictures to hotel rooms through a wired cable system.<sup>104</sup> Consequently, Columbia and the resort operators were competitors in the market for in-room entertainment services in hotels. Columbia sued the operators for alleged copyright infringement and the operators counterclaimed under the Sherman Act, alleging that Columbia's copyright suit was "sham" litigation that cloaked underlying acts of monopolization and conspiracy to restrain trade and was therefore not entitled to *Noerr-Pennington* immunity.<sup>105</sup>

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99. 113 S. Ct. 1920 (1993).

100. 111 S. Ct. 1344 (1991).

101. The *Noerr-Pennington* doctrine exempts from antitrust liability efforts to petition the government. See *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Under this doctrine, joint lobbying and other "efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." *Pennington*, 381 U.S. at 670. *Noerr-Pennington* immunity has been expanded beyond efforts to influence legislation to include activity directed at courts and administrative agencies. In *City of Columbia v. Omni Outdoor Advertising, Inc.*, the Court distinguished situations in which persons use the *process* of government as an anti-competitive weapon, from those which use the *outcome* of the governmental process, ruling that whereas the "sham" exception encompasses the former, it does not apply to the latter. 111 S. Ct. at 1355.

102. *Professional Real Estate Investor*, 113 S. Ct. at 1923.

103. *Id.*

104. *Id.*

105. *Id.* at 1924.

The Court ruled "that an objectively reasonable effort to litigate cannot constitute a sham, regardless of subjective intent."<sup>106</sup> The Court established a two-part test for determining whether litigation is a sham and thereby not entitled to immunity under the *Noerr-Pennington* doctrine:

(1) The lawsuit must be objectively baseless in that no reasonable litigant could realistically expect success on the merits; and,

(2) If the litigation is objectively meritless, it must conceal an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process, as opposed to the outcome of that process, as an anticompetitive weapon.<sup>107</sup>

The Court went on to hold that, even though Columbia's infringement suit was dismissed, the action was "objectively plausible" due to the unsettled nature of the law regarding in-room viewing of copyrighted motion pictures.<sup>108</sup> Therefore, Columbia was entitled to summary judgment on the operators' antitrust claims because it was immunized under *Noerr-Pennington*.<sup>109</sup>

Of the three concurring justices, Justice Stevens and Justice O'Connor most strongly attacked the majority's "unnecessarily broad dicta."<sup>110</sup> Stevens indicated his uneasiness with the majority's use of this "easy case" as a vehicle to unnecessarily announce a more broad-reaching rule.<sup>111</sup> While agreeing with the majority that the lawsuit was not "objectively baseless," and that an improper subjective motive did not make a lawsuit a "sham," Justice Stevens would avoid equating "objectively baseless" with the question of whether any reasonable litigant could realistically expect success on the merits.<sup>112</sup> Justice Stevens noted that while there may be lawsuits which fit in the latter definition, that same suit may still be "objectively unreasonable," and therefore a sham,<sup>113</sup> a possibility which the majority's broad dicta did not recognize.

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106. *Id.* at 1926.

107. *Id.* at 1928.

108. *Id.* at 1930-31.

109. *Id.* at 1931.

110. *Id.* at 1932 (Stevens, J. concurring).

111. *Id.*

112. *Id.*

113. *Id.*

## F. *Statute of Limitations*

A panel of the Fourth Circuit made clear its view of the proper application of the Sherman Act's five-year criminal statute of limitations in its unpublished opinion in *United States v. Maryland and Milk Producers Cooperative Ass'n, Inc., d/b/a Marva Maid Dairy*.<sup>114</sup> In that case, Marva Maid argued that the government failed to prove that the alleged Section 1 conspiracy continued into the five year statute of limitations period.<sup>115</sup> Marva Maid's indictment was returned on July 30, 1991.<sup>116</sup> At trial, the government offered evidence that the conspiracy started as early as 1984 and continued through the 1986-1987 school year. While the evidence was that the last conspiratorial meeting occurred in the spring of 1986, the government offered proof that Marva Maid accepted money from rigged school milk bids as late as March 1987.<sup>117</sup>

Following the Supreme Court's lead in *United States v. Kissel*<sup>118</sup> and *Grunewald v. United States*,<sup>119</sup> the court noted that the duration of a conspiracy is defined by the nature and scope of the conspiratorial agreement, which in this case included supplying milk and receiving payments for the rigged price.<sup>120</sup> The court therefore had no difficulty holding that each receipt of school milk payments by Marva Maid constituted an overt act in furtherance of the conspiracy.<sup>121</sup> As payments were made within five years of the indictment, the action against Marva Maid was not time barred.

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114. 1992-2 Trade Cas. (CCH) ¶ 69,959 (4th Cir. Sept. 15, 1992).

115. The statute of limitations for noncapital federal criminal offenses, such as criminal violations of the Sherman Act's prohibition against conspiracies in restraint of trade, is five years. 18 U.S.C. § 3282 (1988). The limitations period dates back from the time an indictment is found or information is instituted. *Id.* In the case of criminal conspiracy the cause of action accrues and the statute begins to run from the time of the last overt act which furthers the conspiracy causing injury or damage is committed. *Grunewald v. United States*, 353 U.S. 391, 396-97 (1957); *see also* *United States v. A-A-A Electrical Co.*, 788 F.2d 242, 245 (4th Cir. 1986) ("[t]he statute of limitations begins to run, not from the date of the legally cognizable harm, but from the date of the last overt act.").

116. *Marva Maid*, 1992-2 Trade Cas. (CCH) ¶ 69,959, at 68,630.

117. *Id.*

118. 218 U.S. 601 (1910).

119. 353 U.S. 391, 397 (1957).

120. *Marva Maid* 1992-2 Trade Cas. (CCH) ¶ 69,959, at 68,631.

121. *Id.* at 68,631. In this regard, the Fourth Circuit stated: "Courts have uniformly held that the limitations period extends until either final payments are received under the illegal contracts or the illicit gains are finally distributed among co-conspirators." *Id.* at 68, 631 n.9 (citations omitted); *see also* *United States v. Nazzaro*, 889 F.2d 1158 (1st Cir. 1989); *United States v. Modern Elec. Co.*, 788 F.2d 232, 233 (4th Cir. 1986); *United States v. Girard*, 744

## G. Procedure, Evidence, Discovery and Remedies

### 1. Procedure

Putting an end to lengthy litigation, the Court of Appeals for the Fourth Circuit refused to consider antitrust claims on remand from the Supreme Court which were not raised and properly preserved in the initial appeal. The court also refused to allow the plaintiffs to amend on appeal to add federal racketeering and state law claims. The case, *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*,<sup>122</sup> which involved the City of Columbia and two competing billboard advertising companies, had been appealed to the Supreme Court which found that there was no conspiracy exception to the *Parker v. Brown*<sup>123</sup> state action immunity doctrine, and that the city was entitled to *Noerr-Pennington* im-

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F.2d 1170, 1172-74 (5th Cir. 1984); *United States v. Mennuti*, 679 F.2d 1032, 1035-36 (2nd Cir. 1982).

It may be, however, that unilateral activity by a conspirator in accepting payment on a rigged bid is not enough to delay the start of the statute of limitations. In *United States v. Doherty*, 867 F.2d 47 (1st Cir. 1989), *cert. denied*, 492 U.S. 918 (1989), the First Circuit was faced with whether a police officer's receipt of salary payments in connection with a position he fraudulently obtained forestalled the running of the statute of limitations. The court held:

[W]here receiving the payoff merely consists of a lengthy, indefinite series of ordinary, typically noncriminal, unilateral actions, such as receiving salary payments, and there is no evidence that any concerted activity posing the special societal dangers of conspiracy is still taking place, we do not see how one can reasonably say that the conspiracy continues.

*Id.* at 61 (emphasis in original). The court went on to note that "in these latter circumstances, one would ordinarily view the receipt of payments merely as the "result" of the conspiracy." *Id.*

The *Doherty* court distinguished the decisions of the other circuits by suggesting that most of those cases involved more than unilateral activity, because the payoff required cooperation among conspirators. The court concluded by noting that:

We cannot read these cases as extending the conspiracy statute of limitations indefinitely beyond the period when the unique threats to society posed by a conspiracy are present. To do so "would for all practical purposes wipe out the statute of limitations in [this kind of] conspiracy case[]." *Id.*

*Id.* at 62 (quoting *Gunnwald v. United States*, 253 U.S. 391, 402 (1957)).

The Fourth Circuit addressed the *Doherty* holding squarely in *United States v. Barsanti*, 943 F.2d 428, 436 (4th Cir. 1991), holding that there was sufficient evidence of continued concerted activity to bring the case within the rule announced in *Doherty*.

122. 974 F.2d 502 (4th Cir. 1992).

123. 317 U.S. 341 (1943). In *Parker*, the Supreme Court first enunciated the state action doctrine holding 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." *Id.* at 356.

munity.<sup>124</sup> The Supreme Court remanded the case to the Fourth Circuit to consider whether Omni was entitled to a new trial on the grounds that defendant advertising company, Columbia Outdoor Advertising (COA), had engaged in several private, anticompetitive actions. The Fourth Circuit held that plaintiff Omni had waived its monopolization and attempted monopolization claims against COA because they were not raised in the initial appeal.<sup>125</sup> The court also refused to allow Omni to amend its complaint under Rule 15(a) to include RICO and state conspiracy and tortious interference claims, noting that the latter cause of action simply was not available to Omni, and that it would not permit amendments on the two former causes of action because Omni was not entitled "to engage in the litigation of cases one theory at a time."<sup>126</sup>

In *The Baltimore Luggage Co. v. Samsonite Corp.*,<sup>127</sup> the Fourth Circuit affirmed the district court's decision that Baltimore's claims for attorney's fees under the Lanham Act<sup>128</sup> were barred by the doctrine of collateral estoppel and that its antitrust and unfair competition claims were barred by the doctrine of res judicata.<sup>129</sup> This procedurally complicated suit originated from Samsonite's claim that Baltimore's introduction of a new luggage line impinged upon Samsonite's trademark rights. While the case was pending in the district court, Samsonite brought a parallel action before the International Trade Commission (ITC) against Baltimore and seven other respondents.<sup>130</sup> Baltimore raised twenty-one affirmative defenses, but did not appeal the administrative law judge's adverse findings on the unclean hands and bad faith defenses.<sup>131</sup>

After the ITC hearing, Samsonite moved for summary judgment in the district court on Baltimore's antitrust and unfair competition claims, on the grounds that they were barred by res judicata and collateral estoppel by the ITC ruling.<sup>132</sup> The district court granted Samsonite summary judgment and denied Baltimore at-

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124. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991). For a discussion of this case, see Michael F. Urbanski, *Annual Survey of Virginia Law: Antitrust and Trade Regulation Law*, 25 U. RICH. L. REV. 560, 590-93 (1991).

125. 974 F.2d at 505.

126. *Id.* at 506.

127. *Baltimore Luggage*, 1992-2 Trade Cas. (CCH) ¶69,998 (4th Cir. Oct. 16, 1992).

128. Under the Lanham Act, a prevailing party may recover attorney's fees in "exceptional cases." 15 U.S.C. § 1117 (1988).

129. *Baltimore Luggage* 1992-2 Trade Cas. (CCH) ¶ 69,998 at 68,839.

130. *Id.*

131. *Id.*

132. *Id.*

torneys' fees under the Lanham Act on collateral estoppel grounds.<sup>133</sup>

On appeal, the Court of Appeals for the Fourth Circuit affirmed stating that the ITC's determinations were "entitled to res judicata [claim preclusion] effect."<sup>134</sup> Furthermore, the court found that as Baltimore had been provided a "full and fair opportunity" to argue its affirmative defenses in front of the ITC, there was no reason to allow a relitigation by the district court.<sup>135</sup> With regard to the award of attorney's fees, the court ruled that the ITC's finding of no bad faith by Samsonite was properly interpreted by the district court to collaterally estop Baltimore from relitigating the issue.<sup>136</sup>

The Fourth Circuit also addressed whether a pre-indictment delay had prejudiced a defendant, requiring reversal of a conviction for bid rigging. This was one of the many defenses asserted by Marva Maid on appeal in *United States v. Maryland and Milk Producers Cooperative Ass'n, Inc. d/b/a Marva Maid Dairy*.<sup>137</sup> The United States Department of Justice initiated its investigation into the dairy industry in 1986, due to a suspicion that dairies were rigging the bids for military milk contracts.<sup>138</sup> During the investigation, Marva Maid's documents were subpoenaed by a federal grand jury and Charles Elliott, a Marva Maid division manager, was questioned extensively.<sup>139</sup> At that time, Elliott denied any bid rigging on milk contracts, so in 1988, due to lack of evidence, the government closed its investigation and returned the subpoenaed documents.<sup>140</sup> In April 1990, after gaining more information on bid rigging, the government reopened its investigation, focusing specifically on school milk contracts.<sup>141</sup> When the government again subpoenaed Marva Maid's documents, Marva Maid could not produce twenty-five percent of them because it discarded them after the

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133. *Id.*

134. *Id.* at 68,840.

135. *Id.*

136. The district court had ruled that the ITC's finding of no bad faith was not essential to its judgment. Usually this serves to bar the claim from serving as grounds for collateral estoppel. The Fourth Circuit, however, found an exception to this rule where the party nevertheless received a "fair and full opportunity" to litigate. In such a case, collateral estoppel would be allowed. *Id.* at 68,841 (citing *Ritter v. Mount St. Mary's College*, 814 F.2d 986, 993-94 (4th Cir. 1987)).

137. 1992-2 Trade Cas. (CCH) ¶ 69,959 (4th Cir. Sept. 15, 1992) (unpublished).

138. *Id.* at 68,624.

139. *Id.*

140. *Id.* at 68,624-25.

141. *Id.* at 68,625.

government closed its initial investigation.<sup>142</sup> Elliott was again extensively interviewed by the government.<sup>143</sup>

On appeal from its subsequent conviction, Marva Maid argued that its due process rights were violated. Marva Maid contended that it was prejudiced by the government's delay in prosecuting after the 1986 investigation, as it was not able to interview Elliott and had innocently discarded some of the bid documents.<sup>144</sup> The court analyzed Marva Maid's pre-indictment due process claim under a two pronged inquiry.<sup>145</sup> It held that Marva Maid must show: (1) actual prejudice was suffered, and (2) the delay, balanced against the reasons for the delay, offends "fundamental conceptions of justice" or "the community's sense of fair play and decency."<sup>146</sup> Applying this test, the court determined that the slight prejudice to Marva Maid did not rise to a constitutional dimension because Marva Maid had the opportunity to question Elliott at trial and had other means available to piece together the bid work-ups.<sup>147</sup> The court determined that the delay in prosecution was justifiably due to the government's lack of information to support probable cause, rather than an attempt to gain a tactical advantage, and therefore Marva Maid was not denied its due process rights.<sup>148</sup>

In an interesting opinion by the Circuit Court for the City of Richmond, the court rejected the Virginia Attorney General's attempt to disqualify an attorney who represented both a dairy company and its employee under investigation for violations of state antitrust laws.<sup>149</sup> The dairy company, Meadow Gold Dairies, Inc., had previously plead guilty to federal antitrust violations in a simi-

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142. *Id.*

143. *Id.*

144. *Id.* at 68,626.

145. *Id.* (citing *United States v. Automated Medical Lab. Inc.*, 770 F.2d 399, 403 (4th Cir. 1985)).

146. *Id.* (citing *United States v. Automated Medical Lab. Inc.*, 770 F.2d 399, 403 (4th Cir. 1985) (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977))).

147. *Marva Maid*, 1992-2 Trade Cas. (CCH) ¶ 69,959 at 68,626.

148. *Id.* at 68,626-27. In this regard, the court noted that other circuits have also not found due process violations without a showing of prejudice and evidence of the government's intentional delay in order to gain a tactical advantage. See *United States v. Sims*, 779 F.2d 16, 17 (8th Cir. 1985) (holding a defendant must prove that the "government intentionally delayed seeking an indictment to gain tactical advantage and that the delay substantially prejudiced his defense"); see also *United States v. Benson*, 846 F.2d 1338 (11th Cir. 1988).

149. *In re Civil Investigative Demand*, No. 0057-92 (Rich. Cir. Ct. Oct. 15, 1992) (letter opinion).

lar criminal investigation. The Meadow Gold employee, James Rhoads, had given testimony under subpoena to the federal grand jury.<sup>150</sup>

The Attorney General argued that Rhoads' attorney, who had represented both Rhoads and Meadow Gold in the federal investigation, should be barred from representing Rhoads in the state proceeding because of a conflict of interest.<sup>151</sup> The court disagreed and allowed the attorney to represent Rhoads, finding no present conflict existed and that there had been full disclosure to both Meadow Gold and Rhoads of the possibility of a conflict arising in the future.<sup>152</sup>

## 2. Evidence

In *M & M Medical Supplies and Service Inc. v. Pleasant Valley Hospital, Inc.*,<sup>153</sup> the Fourth Circuit clarified the standard to be applied to an expert's affidavit submitted in summary judgment proceedings.<sup>154</sup> Plaintiff, M & M Medical Supplies, attempted to avoid summary judgment on its monopolization claim through the affidavit of an expert economist regarding the definition of the relevant geographic market and defendant's exercise of monopoly power. The district court refused to consider the expert's affidavit and dismissed plaintiff's monopolization claim on summary judgment, finding the affidavit conclusory and devoid of supporting facts.<sup>155</sup>

Agreeing with its panel's earlier decision, the en banc Fourth Circuit reversed the district court, holding that the affidavit satisfied Federal Rule of Civil Procedure 56(e) which requires that affidavits submitted in summary judgment proceedings set forth spe-

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150. *Id.* at 3.

151. The Attorney General argued that Rhoads' attorney had a conflict of interest because he could not advise Rhoads to cooperate with the Civil Investigation Demand investigation without violating his duty to zealously represent Meadow Gold, a target of the CID investigation, as it was in Meadow Gold's best interest to avoid Rhoads' disclosure of any adverse information which could lead to civil remedies against it. *Id.* at 2. The attorney argued, however, that the Attorney General had no evidence that Rhoads knew of any adverse information.

152. *Id.* at 2-3.

153. 981 F.2d 160 (4th Cir. 1992) (en banc).

154. An affidavit that states facts on which the expert bases his opinion satisfies Fed. R. Civ. P. 56(e). *Id.* at 166.

155. An expert's affidavit that is wholly conclusory does not comply with Fed. R. Civ. P. 56(e). *Id.* at 165 (citing *Military Serv. Realty, Inc. v. Realty Consultants of Va., Ltd.*, 823 F.2d 829, 832 (4th Cir. 1987)).



cific facts. Specifically, the majority noted that the affidavit set forth sufficient facts and reasons for the conclusions drawn, and the omission of the underlying data supporting those facts was not fatal.<sup>156</sup> In this vein, the court held that while Rule 56(e) trumped Federal Rule of Evidence 705<sup>157</sup> with regard to disclosure of facts in a summary judgment proceeding, the two rules are reconcilable because neither requires prior disclosure of the supporting data.<sup>158</sup> The court was careful to acknowledge, however, that while underlying data need not be submitted with a summary judgment affidavit, the trial court may always require such disclosure if it deems necessary before ruling on the motion for summary judgment.<sup>159</sup>

In *Montgomery County Ass'n of Realtors, Inc. v. Realty Photo Master Corp.*,<sup>160</sup> plaintiff Realty Photo offered an expert affidavit containing antitrust analysis in support of its motion for a preliminary injunction.<sup>161</sup> Because the affiant had no knowledge of the real estate industry, the court declined to allow the affidavit as evidence, essentially considering it an "interesting argument in support of [plaintiff's] legal positions."<sup>162</sup> The court considered the antitrust analysis contained in the affidavit as argument akin to a section of Realty Photo's brief; a decision clearly within the sound discretion of the trial judge.<sup>163</sup>

In a milk bid rigging case won by the Antitrust Division of the United States Department of Justice, *United States v. Maryland and Virginia Milk Producers Cooperative Ass'n*,<sup>164</sup> Marva Maid also argued on appeal that the district court provided an erroneous instruction on how the jury should treat Marva Maid's economic evidence.<sup>165</sup> Marva Maid argued that the district court's use of the word "disregarded" in the instruction charged the jury to totally

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156. *Id.* at 165.

157. The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination. FED. R. EVID. 705.

158. *M & M Medical Supplies*, 981 F.2d at 165.

159. *Id.* Interestingly, five of the six dissenters would have affirmed the trial court's grant of summary judgment on the monopolization claim, taking issue with the majority's treatment of, among other things, the level of factual detail in the expert economist's affidavit. *Id.* at 169-70.

160. 7 Trade Reg. Rep. (CCH) (1993-1 Trade Cas.) ¶ 70,239 (4th Cir. May 20, 1993).

161. *Id.* at 70,181-82.

162. *Id.*

163. *Id.*

164. 1992-2 Trade Cas. (CCH) ¶ 69,959 (4th Cir. 1992).

165. *Id.* at 68,633-34. The district court instructed the jury as follows:

disregard its economic evidence.<sup>166</sup> While the district court admitted all of Marva Maid's economic evidence, it limited the scope of the evidence with a cautionary instruction designed to indicate that although the reasonableness of prices and profits may negate the existence of a price-fixing conspiracy, if the jury found that price-fixing existed, then the fact that the fixed prices were reasonable is no defense.<sup>167</sup> The Fourth Circuit held that the instruction did not "undermine the fundamental fairness of the trial and [result in] a miscarriage of justice," and therefore found no error.<sup>168</sup>

Marva Maid also contended on appeal that the convictions should be overturned because the government failed to satisfy its *Brady* and Jencks Act obligations, in that the government failed to turn over the exculpatory notes in which Elliott stated that there had been no collusion on school bids.<sup>169</sup> Under *Brady v. Maryland*,<sup>170</sup> the government has the obligation to disclose evidence which is favorable to the accused, upon the request of the accused, which if suppressed, would deprive the defendant of a fair trial.<sup>171</sup>

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You may consider the evidence relating to the cooperative's cost, prices, profits, along with all the other evidence you have seen or heard in the trial, in determining whether or not a conspiracy existed. And if so, whether or not the cooperative was a knowing, willful member of that conspiracy.

*Id.* at 68,633.

The court then stated:

[Y]ou may consider the evidence of the price, cost and profits only as it relates to whether or not there was indeed an agreed conspiracy to submit rigged bids and whether the Defendant cooperative was a member thereof.

If you should ultimately determine from all the evidence in the case, including the profit income evidence, that it has been proved beyond reasonable doubt that such conspiracy did in fact exist and that this Defendant was a member thereof and participated therein, then the economic evidence of price, cost and profits is to be disregarded by you. It is no defense to illegal bid rigging when found that the prices, cost or profits were reasonable, unreasonable, high, low, fair, or unfair.

*Id.*

166. *Id.* at 68,634.

167. *Id.* (citing *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 317 (4th Cir. 1982)).

168. *Id.* (quoting *Brasfield v. United States*, 272 U.S. 448, 450 (1926); *United States v. Polowichak*, 783 F.2d 410, 416 (4th Cir. 1986)).

169. *Id.* at 68,627.

170. 373 U.S. 83, 87 (1963) ("[T]he 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.").

171. 1992-2 Trade Cas. (CCH) at 68,627 (quoting *United States v. Curtis*, 931 F.2d 1011, 1014 (4th Cir.), *cert. denied*, 112 S. Ct. 230 (1991) ("Suppression of exculpatory evidence by the government that is material to the outcome of the trial violates due process."); *United States v. Bagley*, 473 U.S. 667, 675 (1985) (Evidence is material when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding

The court determined that the government had complied with the *Brady* requirement by providing all of the exculpatory and impeachment evidence which it possessed. The production of the actual notes would have merely been duplicative and cumulative of information already provided and would not have resulted in a different outcome.<sup>172</sup>

Marva Maid also argued that the Government violated the Jencks Act<sup>173</sup> by failing to produce Elliott's interview notes after he had testified at trial.<sup>174</sup> However, the court held that defendants had failed, on cross-examination, to establish the evidentiary foundation for an *in camera* inspection of the notes, and further that the notes were not Jencks Act "statements."<sup>175</sup>

Finally, the testimony of a statistical expert was disallowed by Judge Jackson L. Kiser United States District Court for the Western District of Virginia in *United States v. Woods*,<sup>176</sup> a criminal price fixing case, because the government's expert witness was identified too close to the time of trial.<sup>177</sup>

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would have been different."); *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990) ("A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.") (citations omitted); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (holding that *Brady* requires the disclosure of material impeachment evidence when the reliability of a witness may be determinative of guilt or innocence.)

172. 1992-2 Trade Cas. (CCH) ¶ 69,959, at 68,628. The Fourth Circuit engaged in its own *in camera* review of the notes in reaching its conclusion.

173. 18 U.S.C. § 3500 (1988). The Jencks Act requires the Government to produce "any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified" once that government witness has testified on direct examination. *Id.* § 3500(b). "Statement" is defined as: (1) a written statement made by the witness and signed or otherwise adopted or approved by him; (2) a substantially verbatim transcription and contemporaneous recording of the oral statement of the witness; or (3) a statement made by the witness to a grand jury. *Id.* § 3500(e). An *in camera* inspection may be had of interview notes by the court upon a showing by the moving defendant that there is probative evidence that such statements exist. *Id.* § 3500(c).

174. 1992-2 Trade Cas. (CCH) at 68,628.

175. *Id.* at 68,629-30 (citing *United States v. Hinton*, 719 F.2d 711, 715 (4th Cir. 1983), *cert. denied*, 465 U.S. 1032 (1984) (finding that government notes of a statement by a witness are not a Jencks Act "statement" "unless it reflects the witness' own words fully and without distortion," and is coupled with "a 'finding of unambiguous and specific approval' of specific notes.")).

176. Crim. No. 90-92-R (W.D. Va. June 24, 1992).

177. *Id.* The government abandoned its prosecution of individuals allegedly involved in this milk bid rigging case after a lengthy trial which resulted in a hung jury. The evidentiary ruling was made by Judge Kiser orally from the bench.

### 3. Discovery

In *Miranda v. Norton Community Hospital, Inc.*,<sup>178</sup> Miranda, a general surgeon, and his professional corporation sued Norton Community Hospital alleging Sherman Act Section 1 violations and various state claims. Miranda claimed that the Hospital was conspiring with its medical staff to withhold referrals from him.<sup>179</sup> In response to Miranda's interrogatories relating to any "proceedings, minutes, records, and reports of any medical staff,"<sup>180</sup> The Hospital claimed that this information was privileged by statute. The court disagreed, invoking the good cause exception to the statutory peer review privilege.<sup>181</sup> The court also found that discovery should be limited to the critical issue of whether the Hospital controlled the peer review process invoking the reasoning of *Oksanen v. Page Memorial Hospital*.<sup>182</sup> Thus, only if the discovery revealed no alternative, legitimate basis for Hospital's actions or if it revealed any indication of an independent conspiracy among the medical staff, could Miranda petition for further discovery.<sup>183</sup>

### 4. Remedies

In *United States v. Maryland and Milk Producers Cooperative Ass'n*,<sup>184</sup> Marva Maid was convicted of a Sherman Act violation and fined one million dollars and was convicted on two counts of mail fraud and fined \$50,000 on each count.<sup>185</sup> The district court, working under the guidelines established under the Criminal Fines Enforcement Act,<sup>186</sup> considered the following factors in imposing the sentence: (1) the nature of the activities; (2) any burden a fine would inflict on Marva Maid; (3) the pecuniary loss inflicted on school districts; and, (4) the need to deprive Marva Maid of ille-

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178. No. 91-0086-B (W.D. Va. Mar. 3, 1993).

179. *Id.* at 1.

180. *Id.* at 4.

181. VA. CODE ANN. § 8.01-581.17 (Repl. Vol. 1992) recognizes an exception to the peer review privilege "for good cause arising from extraordinary circumstances." Judge Williams found that as Norton had not yet secured a dismissal of Miranda's claims, the situation fell within this statutory exception. *Miranda*, No. 91-0086-B at 4.

182. 945 F.2d 696 (4th Cir. 1991). In *Oksanen*, the Fourth Circuit held that a hospital which maintains ultimate control over its peer review process cannot conspire with its medical staff during that process because the medical staff is acting as its agent. *Id.* at 705-06.

183. *Miranda*, No. 91-0086-B at 7.

184. 1992-2 Trade Cas. (CCH) ¶ 69,959, at 68,633, *cert. denied*, 113 S. Ct. 1580 (1993).

185. *Id.* at 68,634.

186. 18 U.S.C. § 3622 (1988).

gally gotten gains gotten from the bid rigging.<sup>187</sup> Marva Maid argued that the profits it derived from bid rigging were minimal, thereby making the district court's assessment of a large fine clearly erroneous.<sup>188</sup> The court easily disposed of this argument noting that the record established that the court did not abuse its discretion in assessing the fines at \$1.1 million.<sup>189</sup> Marva Maid argued that the district court had improperly included Norfolk schools in its assessment of fines when Norfolk had not been named in the indictment.<sup>190</sup> The Fourth Circuit disagreed, noting that while Norfolk was not specifically mentioned in the indictment, its inclusion did not broaden the charges in the indictment.<sup>191</sup> Thus, the government could introduce evidence of overt acts which were not specifically enumerated in the indictment.<sup>192</sup> Further, the Fourth Circuit held that regardless of whether evidence regarding Norfolk was admitted, the sentencing court can and should consider the total amount of pecuniary loss to the victims of a crime in imposing an appropriate sentence.<sup>193</sup>

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

#### A. *Criminal Enforcement Efforts*

Apparently, the United States Justice Department has finally begun to conclude its investigation of the dairy industry, but with mixed results. In *United States v. Land-O-Sun Dairies, Inc.*,<sup>194</sup> Land-O-Sun Dairies pled guilty to Sherman Act Section 1 violations for four separate conspiracies to rig bids on contracts to supply dairy products to public schools in North Carolina, South Carolina, and Georgia. Land-O-Sun agreed to pay \$3.5 million in fines, including \$750,000 in Virginia.

The Justice Department also obtained guilty pleas and fines from two southwestern Virginia dairy companies. Those compa-

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187. *Milk Producers*, 1992-2 Trade Cas. (CCH) at 68,634.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* (citing *United States v. American Waste Fibers Co.*, 809 F.2d 1044, 1046-47 (4th Cir. 1987)).

193. *Id.* (citing *United States v. Rothberg*, 954 F.2d 217, 219 (4th Cir. 1991) (regarding sentencing guidelines)).

194. No. 92-162-N (E.D. Va. Sept. 15, 1992).

nies, Meadow Gold Dairies, Inc., owned by Borden, Inc., and Valley Rich Dairy, a Roanoke joint venture, pled guilty to single count informations alleging conspiracy in violation of Sherman Act Section 1 to fix prices and rig bids on dairy products contracts for school systems in Virginia and West Virginia. Meadow Gold agreed to pay a one million dollar fine and Valley Rich paid \$500,000.<sup>195</sup>

The Antitrust Division's Cleveland Field Office, however, failed to obtain convictions against the individuals alleged to have participated in the alleged school milk bid rigging. While no Valley Rich employees were charged, three Meadow Gold employees were indicted in June, 1992.<sup>196</sup> After a two week trial resulting in a hung jury, the government dropped all charges.

### B. *FTC Enforcement Activity*

The Federal Trade Commission (FTC) reported two enforcement actions during the past year. In the first, the FTC filed a complaint alleging that Business Computer Systems (BCS) a.k.a. Megasource, a mail order computer company, and its founders, violated the FTC's Mail Order Rule<sup>197</sup> in numerous instances.<sup>198</sup> The complaint charged the defendants with missing shipping deadlines for customers' orders and failing to deliver orders.<sup>199</sup> BCS and its founders were also charged with failing to issue promised credits or refunds to its customers.<sup>200</sup> At the request of the FTC, the district court granted a temporary restraining order which barred BCS from engaging in any of the alleged illegal activities, pending decision on the FTC's request for a permanent injunction and payment of consumer redress.<sup>201</sup>

In the other enforcement action, the Circuit Court of Campbell County granted the FTC an investigative order to force American Dollar Exchange Inc., trading as AMDEX, a coin dealer, and its

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195. See *United States v. Meadow Gold Dairies, Inc.*, Crim. No. 92094 (W.D. Va. July 7, 1992); *United States v. Valley Rich Dairy*, Crim. No. 92-91 (W.D. Va. July 24, 1992).

196. 92-90-R (W.D. Va. June 24, 1992).

197. 16 C.F.R. § 435 (1975).

198. 1992-3 Trade Cas. (CCH) ¶ 23,344 (E.D. Va. Mar. 3, 1993). The Federal Trade Commission alleged BCS violated the Mail Order Rule by failing to: have any reasonable basis to expect that it could ship customers' orders within the time frames it gave to customers; give customers the option of a refund or consent to a delay when the orders could not be delivered within the promised time; and, refund promptly. *Id.* at 23,021-22.

199. *Id.*

200. *Id.* at 23,021.

201. *Id.*

president to disclose certain information which would enable the court to determine if AMDEX had violated the Consumer Protection Act.<sup>202</sup> AMDEX moved to protect for some of the requested information<sup>203</sup> under the theory that the government lacked reasonable cause to investigate.<sup>204</sup> The court disagreed, finding that reasonable cause existed from the very promotional material AMDEX created.<sup>205</sup> The court therefore denied AMDEX's motion to protect its customer list, but stayed the investigative order regarding AMDEX's purchasing information because that information was unnecessary to the investigation.<sup>206</sup>

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

The Antitrust and Consumer Litigation Section of the Attorney General's Office has been busy this past year. It settled a pending lawsuit concerning the sale and distribution of the drug Clozaril and began prosecuting a new civil antitrust suit against two more dairies for alleged bid rigging.

The settlement of the Clozaril suit, first reported in the 1991 Antitrust Law Survey,<sup>207</sup> received final approval on November 20, 1992.<sup>208</sup> The suit charged Sandoz Pharmaceuticals Corporation and Caremark, Inc. with violating both federal and state antitrust laws through their allegedly restrictive method of distributing the breakthrough schizophrenia drug Clozaril. The settlement forbids Sandoz and Caremark from continuing to distribute Clozaril through the Clozaril Patient Management System and calls for the payment of approximately ten million dollars to consumers, with

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202. 1992-1 Trade Cas. (CCH) ¶ 69,895 (Campbell County Cir. Ct. May 15, 1992); see the Consumer Protection Act, VA. CODE ANN. § 59.1-196 (Repl. Vol. 1992).

203. Section 59.1-210 of the Consumer Protection Act allows the target of an investigative order twenty-one days after service of the order to seek a protective order or other form of relief. VA. CODE ANN. § 59.1-210 (Repl. Vol. 1992). Pursuant to this section AMDEX moved to protect documents detailing its Virginia customers and silver coin purchases. 1992-1 Trade Cas. (CCH) at 68,256.

204. See VA. CODE ANN. § 59.1-201(A), (B)(2) (Repl. Vol. 1992). Reasonable cause to believe there may have been or there may be a violation of the Act must exist before an investigative order will be granted.

205. 1992-1 Trade Cas. (CCH) ¶ 69,895 at 68,257.

206. *Id.*

207. See Michael F. Urbanski, Annual Survey of Virginia Law: *Antitrust and Trade Regulation Law* 25 U. RICH. L. REV. 565, 600 (1991).

208. *Commonwealth v. Sandoz Pharmaceuticals Corp.*, No. 91C3078, MDL 874 (N.D. Ill. Dec. 18, 1990).

\$100,000 to go to consumers. The mental health departments of the thirty-three litigating states will receive three million dollars in credits toward future purchases of Clozaril, with \$100,000 going to Virginia's Department of Mental Health, Mental Retardation and Substance Abuse Services, and the states were awarded \$2.08 million in attorneys' fees. Virginia's share of the attorneys' fees award was \$195,000.

The new antitrust suit against the southwestern Virginia dairies, Meadow Gold Dairies, Inc., and Valley Rich Dairy, culminates a lengthy investigation by the Attorney General and comes in the wake of guilty pleas by the companies to violations of federal antitrust laws.<sup>209</sup> The suit alleges violations of federal and state antitrust laws on behalf of ten school systems in southwest Virginia.<sup>210</sup> It seeks damages from the companies for allegedly conspiring to rig the milk bids for the schools from 1984 through 1988 by discussing which of the dairies should be the low bidder on particular contracts, allocating contracts among themselves, intentionally submitting complimentary bids, and disclosing to each other prospective bid amounts.<sup>211</sup> The suit also alleges that the dairies fixed the prices of milk sold to non-governmental wholesale customers in southwest Virginia from 1984 through 1986 and seeks civil penalties of \$100,000 against both dairies under the Virginia Antitrust Act for this alleged conduct.<sup>212</sup> The companies' motions to dismiss the case for failing to sufficiently plead fraudulent concealment to avoid the bar of the statutes of limitations, as well as the Attorney General's lack of standing to bring a federal action on behalf of the local school boards, were denied.<sup>213</sup> The statute of limitations issue likely will be addressed on summary judgment.

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209. *Commonwealth v. Meadow Gold Dairies, Inc.*, Civil Action No. 93-0276-R (W.D. Va. filed Apr. 12, 1993).

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*



## V. FEDERAL AND STATE LEGISLATIVE ACTIVITY

A. *Federal Legislation*

## 1. Communications Act of 1934

The Cable Television Consumer Protection and Competition Act of 1992<sup>214</sup> ("Act") was passed this year to amend Title II of the Communications Act of 1934.<sup>215</sup> Consumers have been subjected to increasing prices for cable service resulting from the concentrated nature of the deregulated cable industry. The Act is designed to increase consumer protection while promoting competition in the cable television area.

The Telephone Disclosure and Dispute Resolution Act<sup>216</sup> was also passed this year<sup>217</sup> to amend certain sections of the Communications Act of 1934.<sup>218</sup> The Act seeks to effectuate a national system to regulate interstate pay-per-call services as well as to monitor advertising practices in the hope of providing increased consumer protection in this area.

## 2. Health Care Reform

With all the attention that health care reform has received recently, no less than four bills have been proposed to ease the application of the antitrust laws on hospitals and other health care facilities. One such bill, House Bill 73<sup>219</sup> would require the Secretary of Health and Human Services and the Attorney General to jointly carry out a demonstration program for hospitals to promote the sharing of medical equipment and facilities in the hope of cutting duplicative health care costs.<sup>220</sup> This would be accomplished through exemptions from certain antitrust laws for eligible medical facilities.

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214. 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.).

215. 47 U.S.C. § 531 (1988).

216. 15 U.S.C. § 5701 (1988).

217. Pub. L. 102-556, 106 Stat. 4181 (1992) (codified at 15 UCS §§ 5701-24).

218. 47 U.S.C. §§ 227, 228, 302 (1988).

219. H.R. 73, 103d Cong., 1st Sess. (1993) (entitled the Health Services Cost Control Act).

220. *Id.* § 3 (amending Part D of Title VI of the Public Health Service Act, 42 U.S.C. § 291k *et seq.*).

House Bill 286<sup>221</sup> is similar in substance to House Bill 73. It proposes amending the Public Health Service Act<sup>222</sup> to encourage cooperative agreements among hospitals and other health care providers.<sup>223</sup> Under this bill, these cooperative agreements would not be considered a violation of the antitrust laws.<sup>224</sup> A similar bill focusing on encouraging cooperative arrangements among hospitals in low population areas would also exempt eligible hospitals from certain antitrust laws.<sup>225</sup>

Finally, House Bill 47<sup>226</sup> would provide an antitrust exemption for any medical self-regulatory entity which engages in standard setting and enforcement activities designed to promote higher quality health care.<sup>227</sup> Thus, medical associations, medical staff, or recognized accrediting agencies, which engage in standard setting activities such as peer review procedures, technology assessment, and risk management would be exempt from antitrust laws.<sup>228</sup> The Clinton administrations proposed health care reform is expected to incorporate similar antitrust exemptions to facilitate the elimination of duplicative health care costs.

### 3. McCarran-Ferguson Act

A proposed amendment to the McCarran-Ferguson Act<sup>229</sup> is now pending in Congress and has been referred to the House Committee on the Judiciary.<sup>230</sup> This amendment would, in large measure, remove the antitrust exemption available to the insurance industry by making it illegal for anyone in the insurance business to engage in price fixing, allocation of geographical market areas, tying of insurance policies, or monopolization or attempting monopolization of any part of the insurance business.<sup>231</sup> An expected ruling by the

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221. H.R. 286, 103d Cong., 1st Sess. (1993) (entitled the Hospital Cooperative Agreement Act).

222. 42 U.S.C. § 201.

223. See 42 U.S.C. § 291k. (Part D of Title VI).

224. H.R. 286 § 647(G)(1).

225. H.R. 1876, 103d Cong., 1st Sess. (1993) (entitled the Hospital Antitrust Fairness Act).

226. H.R. 47, 103d Cong., 1st Sess. (1993).

227. *Id.* § 2.

228. *Id.* § 3(1), (2).

229. 15 U.S.C. § 1011.

230. H.R. 9, 103d Cong., 1st Sess. (1993).

231. *Id.*

Supreme Court concerning *McCanan-Ferguson* immunity may moot, at least in part, the need for this bill.<sup>232</sup>

### B. *State Legislation*

There was no significant antitrust legislation passed by the Virginia General Assembly this past year.

## VI. CONCLUSION

The Fourth Circuit released a very sparse collection of published antitrust decisions during the past year, and the court of appeal's sharply divided en banc decision in *M & M Medical* may be called into question by the United States Supreme Court's subsequent opinion in *Spectrum Sports*. The Supreme Court did, however, hand down two substantive opinions, one in the area of monopolization under Section 2 of the Sherman Act and the second discussing the application of the *Noerr-Pennington* antitrust immunity doctrine. The Supreme Court brought the Ninth Circuit in line with the majority of circuits by overruling the *Lessig* opinion in its decision in *Spectrum Sports*, and, in *Professional Real Estate Investors*, the Court continued its trend to expand application of the *Noerr-Pennington* antitrust immunity doctrine. In short, while the Supreme Court's opinions contributed to development of the law, Virginia's federal courts brought few significant changes to antitrust jurisprudence in the Fourth Circuit during this past year.

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232. *Hartford Fire Ins. Co. v. California and Merrett Underwriting Agency Management, Ltd. v. California*, 938 F.2d 919 (9th Cir. 1991), *aff'd in part and rev'd in part*, 113 S. Ct. 52 (1992).