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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

Once again this past year, the Fourth Circuit and the federal courts in Virginia proved inhospitable to antitrust plaintiffs. Plaintiffs consistently lost on summary judgment and only one plaintiff survived a motion to dismiss.<sup>1</sup> The only major development in the law in the Fourth Circuit came from the Western District of Virginia where Judge James C. Turk refused to recognize the theory of monopoly leveraging under Section 2 of the Sherman Act.<sup>2</sup>

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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, 1993 to June, 1994.

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1. See *infra* Part II.

2. *Advanced Health-Care Serv., Inc. v. Giles Memorial Hosp.*, 846 F. Supp. 488

The United States Supreme Court's decision in *Hartford Fire Insurance Co. v. California*<sup>3</sup> also benefitted potential defendants and the insurance industry by narrowing the boycott exception to McCarran-Ferguson Act immunity.<sup>4</sup> However, for those who may have claims for price discrimination based upon tacit coordination of predatory pricing schemes in oligopolistic markets, the Supreme Court left the door open when it refused to adopt a rule of *per se* non-liability in such cases.<sup>5</sup> The Court did note that it was very unlikely that such claims could succeed.<sup>6</sup>

Finally, while federal enforcement agencies were busy issuing policy statements establishing "antitrust safety zones" in the health care field, the Virginia Attorney General's Office continued its enforcement efforts on behalf of consumers. In two instances, the Attorney General's office teamed up with other states to force settlements.<sup>7</sup>

## II. FEDERAL COURT CIVIL ACTIONS

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

#### 1. Section 1 Conspiracy Claims Fare Poorly on Summary Judgment

Not surprisingly, antitrust plaintiffs continue to have difficulty in the Fourth Circuit pursuing their Sherman Act Section 1<sup>8</sup> claims past summary judgment.<sup>9</sup> During this past year, the Fourth Circuit affirmed a South Carolina district court's grant

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(W.D. Va. 1994).

3. 113 S. Ct. 2891 (1993).

4. *Id.* at 2900, 2915-16.

5. *Id.* *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993).

6. *Id.*

7. *See infra* Part V.

8. 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).

9. Part II.F.1.b, *infra*, addresses the viability of plaintiffs' § 1 claims at the pleading stage. As noted there, antitrust plaintiffs fared slightly better at that procedural stage.

of summary judgment in favor of defendant motor carriers.<sup>10</sup> Virginia's district courts also rejected on summary judgment the claims of a durable medical equipment supplier and a media advertising broker.<sup>11</sup>

In *Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp.*,<sup>12</sup> the Fourth Circuit affirmed, in a short unpublished *per curiam* opinion, what it considered to be a "thorough and well reasoned" opinion of the district court granting defendants summary judgment.<sup>13</sup> Plaintiff Lifschultz Fast Freight, a freight forwarder, alleged that the defendants, three common motor carriers, conspired with the Teamsters Union to force other carriers out of the "less than truckload" (LTL) freight market.<sup>14</sup> The district court, following the instruction of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,<sup>15</sup> found that the plaintiffs produced no credible evidence to support their conspiracy theory or to exclude the possibility that the alleged conspirators acted independently.<sup>16</sup> The court found the testimony from Lifschultz's primary witnesses too incredible to support Lifschultz's conspiracy theory.<sup>17</sup> Additionally, plaintiff failed to name any employee of the defendants who was involved in the conspiracy or to provide any evidence of an agreement by defendants to participate in a conspiracy with the Teamsters Union.<sup>18</sup> The court also found the speculative affidavit of plaintiff's expert laughable, noting that it "read more like

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10. *Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp.*, 998 F.2d 1009 (4th Cir. 1993), *affg per curiam*, 805 F. Supp. 1277 (D.S.C. 1992).

11. *Advanced Health-Care Serv., Inc. v. Giles Memorial Hosp.*, 846 F. Supp. 488 (W.D. Va. 1994); *Thompson Everett, Inc. v. National Cable Advertising*, 850 F. Supp. 470 (E.D. Va. 1994).

12. 998 F.2d 1009 (4th Cir. 1993), *affg per curiam*, 805 F. Supp. 1277 (D.S.C. 1993).

13. *Id.*

14. 805 F. Supp. at 1280-81.

15. 475 U.S. 574 (1986). *Matsushita* held that:

[A] plaintiff seeking damages for a violation of [Sherman Act] § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. . . . Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents.

*Id.* at 588 (citation omitted).

16. 805 F. Supp. at 1285.

17. *Id.*

18. *Id.*

a cheap novel than an economic report.”<sup>19</sup> The court found the “most profound flaw” in Lifschultz’s conspiracy theory was that it simply was not reasonable in light of the record evidence.<sup>20</sup>

The district court also dismissed as unsupported<sup>21</sup> Lifschultz’s allegations of predatory pricing.<sup>22</sup> The portion of the market allegedly affected by the predatory pricing scheme was so small that it could not have had any real effect on competition.<sup>23</sup> Moreover, there was no evidence that the alleged conspirators could recoup the losses resulting from below cost pricing because the barriers to entry to LTL trucking were so low that new entrants would appear as soon as monopoly prices were charged.<sup>24</sup> Given this evidence, a conspiracy based on Lifschultz’s theory would not make any economic sense. On this basis, the court held that defendants were entitled to summary judgment.<sup>25</sup>

The defendants in *Advanced Health-Care Services, Inc. v. Giles Memorial Hospital*<sup>26</sup> were also successful in obtaining summary judgment from Judge Turk on plaintiff’s Sherman Act Section 1 and 2 claims.<sup>27</sup> Advanced Health-Care Services (AHCS), a durable medical equipment (DME)<sup>28</sup> supplier,

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19. *Id.*

20. *Id.* at 1286.

21. *Id.* at 1287 (citing *Cargill, Inc. v. Monfort, Inc.*, 479 U.S. 104, 117 (1986)).

22. Predatory pricing is “pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run.” *Cargill, Inc. v. Monfort, Inc.*, 479 U.S. 104, 117 (1986); *see also* *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, discussed *infra* part II.C.

23. 805 F. Supp. at 1287.

24. *Id.* at 1287-88. The Supreme Court has indicated that the likelihood of recoupment of losses is an important factor in determining predatory pricing. In *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, the Court explained:

The success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator’s losses and to harvest some additional gain. Absent some assurance that the hoped-for monopoly will materialize, *and* that it can be sustained for a significant period of time, “[t]he predator must make a substantial investment with no assurance that it will payoff.” For this reason, there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.

475 U.S. 574, 589 (1986) (emphasis in original) (citation omitted).

25. 805 F. Supp. at 1288.

26. 846 F. Supp. 488 (W.D. Va. 1994).

27. *Id.* at 499.

28. As the court noted, “DME consists of canes, crutches, oxygen equipment,

brought suit against Giles Memorial Hospital and Medserv, another DME supplier.<sup>29</sup> Medserv contracted with the hospital to supply DME to residents of the hospital's service area through a home DME business located in the hospital.<sup>30</sup> The court had previously dismissed AHCS's numerous federal and state antitrust claims on a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, but was reversed by the Fourth Circuit which set forth the law of the case and remanded for discovery.<sup>31</sup>

AHCS alleged that the contract between the hospital and Medserv constituted an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.<sup>32</sup> After detailed discovery, Judge Turk held that AHCS had failed to prove at least one element of its claim since it had not produced any significant evidence of "adverse, anticompetitive effects" resulting from the contract between the defendants.<sup>33</sup> AHCS could not show that the contract produced a rise in the price of DME, a decline in quality, or a reduction in the number of firms supplying DME.<sup>34</sup> On the contrary, competition was apparently enhanced by the contract.<sup>35</sup> The court noted that while AHCS might have been hurt by the increased competition, there was no evidence that competition in general had been injured.<sup>36</sup> Judge Turk therefore held that defendants were entitled to summary judgment on the Section 1 claim.<sup>37</sup>

A plaintiff's Section 1 claim was also dismissed on summary judgment in *Thompson Everett, Inc. v. National Cable Advertising, L.P.*<sup>38</sup> In *Thompson*, plaintiff Thompson Everett (TE), a

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wheelchairs, walkers, hospital beds and other items used by persons recuperating at home from an accident or illness." *Id.* at 492 n.1.

29. *Id.* at 492.

30. *Id.*

31. See *Advanced Health-Care Serv., Inc. v. Radford Community Hosp.*, 910 F.2d 139 (4th Cir. 1990).

32. 846 F. Supp. at 492.

33. *Id.* at 493.

34. *Id.*

35. *Id.* As the court pointed out, "[a]fter Home Connections entered the market . . . [t]he market became less concentrated . . . as consumers had a greater choice of supplies." *Id.*

36. *Id.*

37. *Id.*

38. 850 F. Supp. 470 (E.D. Va. 1994).

buyer of broadcast and print media advertising time, brought suit against representatives of cable television systems (cable rep firms) that sell advertising time (cable spots) to national advertisers, challenging their exclusive contractual arrangements with their represented cable systems.<sup>39</sup> Under these agreements, the cable system operator committed to use the cable rep firm exclusively in exchange for the cable rep firm's agreement to make sales of advertising time on the cable systems' behalf.<sup>40</sup> TE alleged that the exclusive rep contracts constituted unlawful restraints in violation of Section 1.<sup>41</sup>

The court was unpersuaded by TE's evidence of frequent business contacts among defendants, joint presentations by defendants to industry trade groups, and documents indicating the need to organize the spot cable market.<sup>42</sup> It found more compelling defendants' evidence that exclusive contracts had been used throughout the advertising industry since the inception of defendants' respective businesses.<sup>43</sup> As a result, the court held there to be insufficient evidence of an unlawful horizontal agreement among defendants.<sup>44</sup>

The court went on to apply a rule of reason analysis<sup>45</sup> to the exclusive distributorship contracts with the cable system operators.<sup>46</sup> The court found that the defendant cable rep firms com-

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39. *Id.* at 473.

40. 850 F. Supp. at 472-73.

41. *Id.* at 473 n.1.

42. *Id.* at 480.

43. *Id.*

44. *Id.*

45. The parameters of the rule of reason were delineated by Justice Brandeis in *Chicago Board of Trade v. United States*:

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

246 U.S. 231, 238 (1918).

46. 850 F. Supp. at 480 (citing *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977)).

peted for these exclusive contracts, that the contracts had reasonable termination provisions, that their geographic scope varied widely, and that they did not restrict output.<sup>47</sup> The court accepted defendants' procompetitive explanations for the contracts: to avoid free riding, attract investment capital, and produce competition within the spot cable industry and with other advertising vehicles.<sup>48</sup> Thus, under *Continental T.V., Inc. v. GTE Sylvania Inc.*,<sup>49</sup> as the vertical, nonprice restrictions posed by the contracts actually enhanced competition rather than harmed it, they were "manifestly reasonable,"<sup>50</sup> and summary judgment was appropriate.<sup>51</sup>

## 2. Section 1 Tying Claim Rejected

Plaintiffs in *Advanced Computer Services v. MAI Systems*,<sup>52</sup> fared no better on the only Section 1 tying claim<sup>53</sup> ruled upon this past year. Advanced Computer and other small independent service organizations (ISOs) brought suit against MAI, a manufacturer of minicomputers, alleging that MAI had unlawfully tied the sale of its copyrighted operating system and diagnostic software (the tying product) to the sale of maintenance and repair services for MAI computers (the tied product), thereby impairing competition in the repair and service market.<sup>54</sup>

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47. *Id.* at 481-82.

48. *Id.* at 482.

49. 433 U.S. 36 (1977).

50. 850 F. Supp. at 481.

51. *Id.* at 483.

52. 845 F. Supp. 356 (E.D. Va. 1994).

53. Stated simply, a tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product . . ." *Northern P.R. Co. v. United States*, 356 U.S. 1, 5-6 (1958). Four factors must be shown to prove an illegal tying arrangement under either a *per se* or rule of reason theory:

(1) The existence of two separate products; (2) An agreement conditioning purchase of the tying product upon purchase of the tied product or upon agreement not to purchase; (3) Seller's possession of sufficient economic power in the tying product market to restrain competition in tied product market; and (4) A not insubstantial impact on interstate commerce.

*Advanced Computer*, 845 F. Supp. at 367-68; see also *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12-16, 18-21 (1984); *Service & Training, Inc. v. Data Gen. Corp.*, 963 F.2d 680, 683 (4th Cir. 1992); *Faulkner Advertising Assoc., Inc. v. Nissan Motor Corp.*, 905 F.2d 769, 772-73 (4th Cir. 1990).

54. 845 F. Supp. at 360.



MAI's software and hardware are not compatible with other types of minicomputers, and because of the unique nature of MAI computers and the specialized training required to service them, purchasers have limited choices in maintenance and service providers.<sup>55</sup> MAI chose to selectively license its copyrighted software, rather than sell it.<sup>56</sup>

The court rejected plaintiffs' tying claim because plaintiffs presented no evidence of explicit agreements conditioning the purchase of MAI rights to use its software upon the purchase of MAI service contracts.<sup>57</sup> Moreover, plaintiffs presented no evidence of forcing or coercion by MAI.<sup>58</sup> The court specifically noted that MAI was entitled to protect its copyright and license its software to whomever it chose.<sup>59</sup> Plaintiffs' tying claim therefore failed under both the *per se* rule and rule of reason.<sup>60</sup>

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

Virginia's federal courts were equally harsh in ruling on plaintiffs' Sherman Act Section 2<sup>61</sup> claims as they were on Section 1 claims. Not only did they reject plaintiffs' monopolization, attempted monopolization, and essential facilities claims on summary judgment, but in clarifying one unsettled area of Section 2 jurisprudence, the District Court for the Western District of Virginia also rejected monopoly leveraging as a viable claim in this circuit.<sup>62</sup>

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55. *Id.* at 359.

56. *Id.* at 360.

57. *Id.* at 368.

58. *Id.*

59. *Id.* at 368-69.

60. *Id.* at 369.

61. 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 or commerce among the several States, or with foreign nations." 15 U.S.C. § 2 (1988 & Supp. 1990).

62. *See infra.* part II.B.2.

## 1. Attempted Monopolization, Monopolization and Conspiracy to Monopolize

In *Advanced Health-Care Services, Inc. v. Giles Memorial Hospital*,<sup>63</sup> AHCS alleged numerous claims under Section 2 of the Sherman Act in addition to its Section 1 claims. The claims were based on the contract between Giles Memorial Hospital and Medserv, a supplier of DME, to sell DME through their joint venture, Home Connections.<sup>64</sup> AHCS's Section 2 claims included monopolization, attempted monopolization, and conspiracy to monopolize.<sup>65</sup>

With respect to the monopolization claim,<sup>66</sup> the court found unpersuasive the affidavit of AHCS's expert, Dr. Roger Blair, which stated that Home Connections' market power reached a peak of 57.8% of the DME market in Giles County.<sup>67</sup> The court noted that Dr. Blair had made several errors,<sup>68</sup> and once they were corrected, Home Connections' true market share peaked only at 44.1%, significantly below the established floor of 50% for showing monopoly power.<sup>69</sup> The court also noted that market share trends belied AHCS's monopolization claim. For ex-

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63. 846 F. Supp. 488 (W.D. Va. 1994).

64. *Id.* at 492.

65. *Id.* at 493-98.

66. The offense of monopolization requires a showing by the plaintiff that the defendants: (1) possess monopoly power in the particular relevant market; and (2) have willfully acquired and/or maintained such power in an exclusionary or predatory manner as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

67. 846 F. Supp. at 494.

68. The court explained the errors as follows:

Dr. Blair made two mistakes in his calculations. First, Dr. Blair calculated Home Connections' market share based on billed revenue, while calculating all other suppliers' market shares on collected revenue. Second, Dr. Blair calculated Home Connections' market share based on revenue from Giles County residents and from non-Giles County residents, but calculated other suppliers' market shares based on revenue from Giles County only.

*Id.* AHCS did not deny the errors, but argued that the correct measure of market share was new referrals, not revenues, and pointed to Dr. Blair's opinion that Home Connections secured over 78% of DME referrals from the defendant hospital. The court dismissed this argument, noting that the proper geographic market for the analysis was Giles County, not Giles Memorial Hospital. *Id.* at 494 n.10.

69. *Id.* at 493 & n.9, 494.

ample, Home Connections steadily lost market share to several other DME suppliers during the relevant period, eventually leading to its demise.<sup>70</sup>

The court also held that AHCS had not presented sufficient evidence of exclusionary or predatory conduct by defendants.<sup>71</sup> AHCS claimed that the hospital's discharge planners had steered its patients needing DME to Home Connections.<sup>72</sup> However, the allegations did not withstand scrutiny in light of the fact that the hospital used "freedom of choice" forms and that AHCS did not come forward with a single former Giles Memorial patient who claimed not to have had a choice.<sup>73</sup> Since defendants simply benefitted from the competitive advantages available to Home Connections, i.e., "goodwill and confidence engendered by the satisfactory provision of hospital services and continuity of care from the hospital to home," the court granted defendants' summary judgment.<sup>74</sup>

AHCS fared no better on its claims for attempted monopolization<sup>75</sup> and conspiracy to monopolize.<sup>76</sup> The court held that AHCS failed to establish any of the elements necessary to prove attempted monopolization, because it presented no direct evidence of specific intent to monopolize.<sup>77</sup> AHCS could not satisfy specific intent through a showing of predatory conduct such as steering, coercion of doctors or employees by defendants, or uncompetitively high prices or consistently inferior quality.<sup>78</sup>

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70. *Id.* at 494.

71. *Id.* at 496.

72. *Id.* at 495.

73. *Id.*

74. *Id.* at 495-96.

75. 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, p. 312 (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 Serv., Inc. v. Radford Community Hosp.*, 910 F.2d 139, 147 (4th Cir. 1990).

76. "In order to prove a conspiracy to monopolize, 'a plaintiff must show concerted action, a specific intent to achieve an unlawful monopoly, and commission of an overt act in furtherance of the conspiracy.'" 846 F. Supp. at 497-98 (citing *Radford Community Hosp.*, 910 F.2d 139, 150 (4th Cir. 1990)).

77. 846 F. Supp. at 498.

78. *Id.* at 497.

Moreover, Home Connections' low market share stymied AHCS's attempt to establish that there was a "dangerous probability of success."<sup>79</sup> Similarly, the court rejected AHCS's conspiracy to monopolize claim, finding that there was no significant probative evidence that defendants intended to engage in anything other than vigorous competition.<sup>80</sup>

In *Advanced Computer Services v. MAI Systems Corp.*,<sup>81</sup> the district court not only granted defendants summary judgment on plaintiffs' Section 1 claims, but also on their claims of monopolization.<sup>82</sup> The court found that while there was a genuine factual dispute over MAI's share of the repair and service market,<sup>83</sup> plaintiffs failed to show that MAI had engaged in any predatory or anticompetitive acts with a specific intent to monopolize the relevant market.<sup>84</sup> Plaintiffs argued that MAI was guilty of exclusionary conduct through copyright misuse when MAI attempted to enforce its copyrights by issuing letters to the plaintiffs advising them to cease and desist loading and booting its software.<sup>85</sup> The court was unimpressed, noting that MAI was within its rights to enforce its valid copyright.<sup>86</sup> In doing so, it distinguished MAI's conduct from that involved in the Supreme Court's recent decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*<sup>87</sup> The court noted that Kodak attempted to justify its actions with "valid business reasons," which the Supreme Court found to raise triable issues of fact, as opposed to MAI's conclusively valid reason for its actions—protection of its copyrighted material.<sup>88</sup>

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79. *Id.*

80. 846 F. Supp. at 497-98.

81. 845 F. Supp. 356 (E.D. Va. 1994).

82. *Id.* at 371.

83. *Id.* at 369. Plaintiffs produced evidence that the defendant's market share was 90%, while MAI claimed that its market share was less than 50%. *Id.*

84. *Id.* at 370.

85. *Id.*

86. *Id.*

87. 112 S. Ct. 2072 (1992).

88. 845 F. Supp. at 370 n.17.

## 2. Monopoly Leveraging Theory Rejected in Western District

In a most interesting development this past year, Judge Turk, sitting on the District Court for the Western District of Virginia, refused to recognize a claim for monopoly leveraging<sup>89</sup> under Section 2. Judge Turk squarely addressed this issue for the first time in the Fourth Circuit with his ruling in *Advanced Health-Care*.<sup>90</sup> There, AHCS claimed that Giles Memorial Hospital leveraged its monopoly power in the acute care services market to gain an unfair competitive advantage for Home Connections in the DME market by using its power to obtain exclusive access to patients that needed DME upon discharge.<sup>91</sup>

Judge Turk found more persuasive the reasoning of the Third and Ninth Circuits in *Fineman v. Armstrong World Industries, Inc.*<sup>92</sup> and *Alaska Airlines, Inc. v. United Airlines, Inc.*,<sup>93</sup> which both rejected monopoly leveraging as a viable claim, over the decisions of the Second and Sixth Circuits in *Berkey Photo, Inc. v. Eastman Kodak Co.*<sup>94</sup> and *Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc.*,<sup>95</sup> which embraced monopoly

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89. Monopoly leveraging is a theory in which a seller who has a monopoly in one product uses that monopoly to create a limited monopoly in another product that is required for the use of the first product. HERBERT HOVENKAMP, *ECONOMICS AND FEDERAL ANTI-TRUST LAW* §8.4 (1985); see *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *Kerasotes Michigan Theatres, Inc. v. National Amusements Inc.*, 854 F.2d 135 (6th Cir. 1988), *cert. dismissed*, 490 U.S. 1087 (1989). *But see* *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 204-06 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1285 (1993); *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 547 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1603 (1992).

90. Before remanding *Radford Community Hosp.*, the Fourth Circuit refused to address the viability of AHCS's claim for monopoly leveraging, saying "[w]e reserve definitive resolution of that issue for a case in which the issue is squarely presented." *Radford Community Hosp.*, 910 F.2d at 149 & n.17; see also *M & M Medical Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 168-69 (4th Cir. 1992) (en banc) ("There will be time enough to evaluate the validity of this assumption after the parties have developed a factual record."), *cert. denied*, 113 S. Ct. 2692 (1993).

91. 846 F. Supp. at 496.

92. 980 F.2d 171, 204-06 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1285 (1993).

93. 948 F.2d 536, 547 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1603 (1992).

94. 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

95. 854 F.2d 135 (6th Cir. 1988), *cert. dismissed*, 490 U.S. 1087 (1989).

leveraging. Judge Turk explained that "*Berkey Photo's* leveraging theory does not follow from the text of the Sherman Act and destroys the distinction between concerted conduct that 'restrains trade' in section 1 and unilateral conduct that 'monopolizes or attempts to monopolize' in section 2."<sup>96</sup> In any event, Judge Turk held that even if monopoly leveraging stated a claim, in the absence of "some sort of overt conduct such as steering, Home Connections had no way to 'pull the alleged lever."<sup>97</sup>

### 3. Essential Facilities Doctrine

Two essential facilities claims<sup>98</sup> under Sherman Act Section 2 were unsuccessful this past year; one was addressed by the Fourth Circuit, and the other by Judge Turk in *Advanced Health-Care*. The Fourth Circuit decision came in an unpublished *per curiam* opinion in *North Carolina Electric Membership Corp. v. Carolina Power & Light Co.*<sup>99</sup> In that case, the court affirmed the district court's directed verdict for the defendant, Carolina Power and Light (CPL).<sup>100</sup> The court found that North Carolina Electric Membership Corporation (NCEMC) had failed to produce sufficient evidence that CPL had violated Section 2 by refusing to grant NCEMC access to an essential facility.<sup>101</sup>

NCEMC, an organization comprised of sixteen retail electric cooperatives, filed this suit against CPL in 1977. The suit followed after three years of abortive negotiations to purchase part interest in a CPL generating plant in an attempt to enter the wholesale power market.<sup>102</sup> After CPL refused to sell

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96. 846 F. Supp. at 496-97 (quoting *Fineman*, 980 F.2d at 205-06).

97. *Id.* at 497.

98. The four elements necessary to prove an essential facilities claim are: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility to competitors. *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.* 924 F.2d 539, 544 (4th Cir.), *cert. denied*, 112 S. Ct. 64 (1991) (citing *MCI v. AT&T Co.*, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983)).

99. 1993-1 Trade Cas. (CCH) ¶ 70,264 (4th Cir. 1993).

100. *Id.* at 70,318.

101. *Id.* at 70,321.

102. *Id.* at 70,318-19.

NCEMC part interest in the plant, NCEMC alleged denial of an essential facility and sought treble damages of \$1.2 billion.<sup>103</sup> The district court granted CPL a directed verdict, holding that CPL had no duty to sell NCEMC any interest in one of its generating plants regardless of whether CPL had a monopoly.<sup>104</sup>

The Fourth Circuit affirmed the district court's decision, holding that, notwithstanding any showing by NCEMC of a CPL monopoly in the relevant market, NCEMC's claim must fail.<sup>105</sup> The court explained that a firm with a lawful monopoly does not have a general duty to help its competitors,<sup>106</sup> except under the essential facilities doctrine.<sup>107</sup> The court found the second element of the doctrine—the competitor's inability to practically or reasonably duplicate the facility—to be dispositive.<sup>108</sup> "To satisfy the second element, NCEMC had to show that, in seeking to generate its own power, it had no 'economically feasible' alternative to purchasing a part interest in a CPL generation plant."<sup>109</sup> NCEMC clearly failed to prove that it had no "economically feasible alternative,"<sup>110</sup> because NCEMC could have purchased a part-interest in a generation plant owned by other large power companies in the region.<sup>111</sup> In fact, four years after the negotiations with CPL broke down, NCEMC actually purchased part interest in a Duke Power generation plant.<sup>112</sup> Given this evidence, the court held that a reasonable jury could not have found that NCEMC had no feasible alternative to purchasing part of a CPL plant, and affirmed the directed verdict in defendant's favor.<sup>113</sup>

An essential facilities claim was also one of the many claims made by AHCS in *Advanced Health-Care*. AHCS claimed that

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103. *Id.* at 70,318.

104. *Id.* at 70,319.

105. *Id.* at 70,320.

106. See also *Olympia Equip. Leasing Co. v. Western Union Tele. Co.*, 797 F.2d 370, 375 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987).

107. 1993-1 Trade Cas. (CCH) at 70,320.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 70,320-21.

the hospital's rules denying access to inpatients constituted denial of an essential facility under section 2.<sup>114</sup> However, the court found that such access was not "essential" since the evidence demonstrated that DME suppliers, even if they did not have access to the hospital's patients, were consistently gaining market share.<sup>115</sup> In any event, the court noted that AHCS had neither demonstrated a denial of access, nor had it shown that it was feasible to permit DME suppliers to solicit patients directly in their hospital rooms.<sup>116</sup>

### C. Price Discrimination

In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,<sup>117</sup> the first primary-line price discrimination case on which the Supreme Court has ruled in twenty-five years,<sup>118</sup> the Court affirmed the result reached by the Fourth Circuit, but disassociated itself from the Fourth Circuit's holding.<sup>119</sup> The Court disagreed with the Fourth Circuit's apparent view that tacit coordination among oligopolists could not produce competitive injury in a predatory pricing setting because oligopoly pricing does not "provide an economically rational basis" for recouping predatory losses.<sup>120</sup> The Court declared that it was not willing to "create a *per se* rule of nonliability," and, although it considered it unlikely that a predatory pricing scheme designed to preserve or create a stable oligopoly could injure consumers, it cautioned that it will not let theory "stand in the way of liability" in the appropriate case.<sup>121</sup> With that said, however, the Court went on to hold that the Liggett Group (now the Brooke Group) had not provided sufficient evidence to

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114. 846 F. Supp. at 498.

115. *Id.*

116. *Id.*

117. 113 S. Ct. 2578 (1993).

118. *Id.* at 2586. Twenty-five years ago the Court decided *Utah Pie Co. v. Continental Baking Co.* where the Court reviewed the sufficiency of evidence supporting a jury verdict against three national pie companies that had engaged in various predatory conduct aimed at driving a local frozen pie manufacturer out of business. 386 U.S. 685 (1967).

119. 113 S. Ct. at 2591.

120. *Id.* at 2591 (quoting *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.*, 964 F.2d 335, 342 (4th Cir. 1992)).

121. *Id.*



create a jury issue under the Robinson-Patman Act, and affirmed the judgment of the trial court and the Fourth Circuit.<sup>122</sup>

Liggett, a manufacturer of cigarettes, alleged that volume rebates offered by the defendant Brown & Williamson, a competitor, to wholesalers constituted price discrimination that had a reasonable possibility of injuring competition<sup>123</sup> in violation of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.<sup>124</sup> Liggett claimed that Brown & Williamson offered the volume rebates as a part of a predatory pricing scheme to reduce its net prices for generic cigarettes below its average variable costs.<sup>125</sup> According to Liggett, Brown & Williamson intended to force Liggett to raise its list price on generic cigarettes to narrow the price difference between generic and branded cigarettes.<sup>126</sup> Liggett contended that the resulting reduction in the gap between branded and generic cigarettes would restrain the growth of the generic segment of the cigarette market.<sup>127</sup> Liggett argued that, because the market for cigarettes was oligopolistic, the restraint in the growth of the cigarette market would allow Brown & Williamson and the other cigarette manufacturers to coordinate prices in the branded market, thereby allowing Brown & Williamson to maintain its supracompetitive profits on its branded cigarettes and recoup the losses it suffered as a result of its predatory

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122. *Id.* at 2598.

123. *Id.* at 2584.

124. Section 2(a) of the Clayton Act, as amended by the Robinson Patman Act 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 the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

15 U.S.C. § 13(a) (1988).

125. The parties agreed that the relevant measure of cost is average variable cost. Therefore the Court declined to resolve the conflict among the lower courts over the appropriate measure of cost. 113 S. Ct. at 2587 n.1.

126. *Id.* at 2582.

127. *Id.* at 2592.

below-cost selling of generic cigarettes.<sup>128</sup> After a 115-day trial, Liggett won a jury award of \$49.6 million in damages which was trebled to \$148.8 million.<sup>129</sup> However, the district court ruled that Brown & Williamson was entitled to judgment as a matter of law, and the Fourth Circuit affirmed.<sup>130</sup>

The only issue before the Supreme Court was whether Liggett had shown injury to competition.<sup>131</sup> The Supreme Court explained that a primary-line competitive injury under the Robinson-Patman Act is similar to predatory pricing injuries under Section 2 of the Sherman Act.<sup>132</sup> As a result, a Robinson-Patman plaintiff must establish the same two prerequisites to recovery: the rival company must sell below cost, and it must have a "reasonable prospect" of being able to recoup its losses through later monopoly pricing.<sup>133</sup> If recoupment is not possible and competition is not injured, predation is not actionable because predatory pricing is generally a boon to consumers.<sup>134</sup>

The Court went on to explain that recoupment could only occur where the below-cost pricing would cause the target company to act as the competitor intended.<sup>135</sup> Once this hurdle is cleared, however, the plaintiff must still demonstrate that the predatory scheme would injure competition in the relevant market by raising prices to supracompetitive levels.<sup>136</sup>

The Court concluded that Liggett had not carried its burden on this point.<sup>137</sup> While Liggett's evidence could have reached the jury on below-cost pricing,<sup>138</sup> Liggett completely failed to show that Brown & Williamson had a reasonable prospect of recapturing its predatory pricing losses through oligopolistic price coordination given the realities of the market.<sup>139</sup> More-

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128. *Id.* at 2584.

129. *Id.* at 2585.

130. *Id.*

131. *Id.*

132. *Id.* at 2587.

133. *Id.* at 2581-89.

134. *Id.* at 2589.

135. *Id.*

136. *Id.*

137. *Id.* at 2594.

138. *Id.*

139. *Id.*

over, Liggett failed to show that the market for generic cigarettes shrank as a result of Brown & Williamson's conduct,<sup>140</sup> that prices increased from these actions,<sup>141</sup> or that there was tacit coordination among the different corporations in the industry.<sup>142</sup> Finally, since the expert testimony offered by Liggett was not supported by the facts, it could not sustain the jury's verdict.<sup>143</sup>

While Justices Stevens, White and Blackmun agreed with the majority that it was possible to find price discrimination in an oligopolistic market through parallel pricing, they insisted that Liggett's evidence was sufficient to support the jury's verdict.<sup>144</sup> They reasoned that Brown & Williamson had a reasonable prospect of success in forcing Liggett to raise its prices in the generic cigarette market.<sup>145</sup>

#### D. Antitrust Injury

The requirement of showing legitimate "antitrust injury," derived from the Supreme Court's opinion in *Brunswick Corp. v. Pueblo Bowl-O-Mat*,<sup>146</sup> remains a formidable obstacle for many antitrust plaintiffs. For example, each of the defendants in *Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp.*,<sup>147</sup> *Thompson Everett, Inc. v. National Cable Advertising*,

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140. *Id.* at 2593.

141. *Id.* at 2594.

142. *Id.* at 2594-95.

143. *Id.* at 2597-98.

144. *Id.* at 2603-04.

145. *Id.* at 2603-04.

146. 429 U.S. 477 (1977). The Court explained the notion of antitrust injury:

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

*Id.* at 489 (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125 n.14 (1969)); see also *Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924 (4th Cir. 1990); *Sewell Plastics, Inc. v. Coca-Cola Co.*, 720 F. Supp. 1196 (W.D.N.C. 1989), *modified*, 912 F.2d 463 (4th Cir. 1990).

147. 998 F.2d 1009 (4th Cir. 1993), *affg per curiam*, 805 F. Supp. 1277 (D.S.C. 1992).

*L.P.*,<sup>148</sup> and *Advanced Health-Care Services, Inc. v. Giles Memorial Hospital*<sup>149</sup> obtained summary judgment on this issue. In *Lifschultz*, the district court, which the Fourth Circuit affirmed, found that Lifschultz was still making a profit and only began losing money after deregulation of the trucking industry in 1980.<sup>150</sup> Lifschultz could not tie its "injury" to defendants' alleged conduct.<sup>151</sup>

In *Thompson Everett*, the court engaged in a detailed analysis of TE's standing to sue under the antitrust laws.<sup>152</sup> The court first noted that in order for TE to suffer antitrust injury from defendants' exclusive distributorship agreements, TE must be a competitor or consumer in the relevant market, which the court assumed for purposes of argument was the "spot cable market."<sup>153</sup> The court held that TE could not meet the burden of showing that it competed with defendants as a cable representation firm because its own evidence demonstrated that it was a "media buying service" whose primary allegiance was to advertisers, not to cable systems.<sup>154</sup> In fact, the court determined that TE's interests were anticompetitive in that, if defendants were forced to conduct business in the advertisers' best interests, as did TE, the spot cable advertising industry would be endangered.<sup>155</sup> TE therefore could not show that it suffered antitrust injury from defendants' exclusive contracts with cable operators.<sup>156</sup>

Finally, the district court in *Advanced Health-Care* found that the entry of Home Connections into the Giles County DME market made the market more, not less, competitive.<sup>157</sup> It noted that market concentrations were reduced, consumers had more choice, and there was no evidence that prices rose or

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148. 850 F. Supp. 470 (E.D. Va. 1994).

149. 846 F. Supp. 488 (W.D. Va. 1994).

150. 805 F. Supp. at 1288.

151. *Id.*

152. 850 F. Supp. at 476-77.

153. *Id.* at 477. In any event, the court did note that TE had not offered any evidence that the product market should be confined to the narrow "spot cable" industry instead of the advertising industry as a whole. *Id.* at 478 n.5.

154. *Id.* at 478.

155. *Id.* at 479.

156. *Id.*

157. 846 F. Supp. at 493.

quality declined.<sup>158</sup> In short, although AHCS may have been injured by defendants' entry into the market, AHCS could not show "harm to the process of competition," entitling defendants to summary judgment.<sup>159</sup>

### E. Antitrust Immunity Issues

#### 1. McCarran-Ferguson Act Immunity

In *Hartford Fire Insurance Co. v. California*,<sup>160</sup> the Supreme Court significantly narrowed the boycott exception to the antitrust exemption provided to domestic insurance companies under the McCarran-Ferguson Act.<sup>161</sup> There, nineteen states filed *parens patriae* suits in California alleging that four domestic insurers, two domestic trade associations, and several London-based reinsurers violated the Sherman Act by conspiring to boycott nonconforming insurers to pressure other domestic insurers to restrict the terms of coverage of commercial general liability (CGL) insurance<sup>162</sup> in the United States.<sup>163</sup> Specifically, the four primary insurers agreed with domestic and/or London based reinsurers to boycott primary insurers to force them to eliminate both long-tail insurance<sup>164</sup> and pollution insurance products from the domestic CGL market.<sup>165</sup>

The district court dismissed the actions against the reinsurers on the grounds of McCarran-Ferguson Act immunity, state action immunity and comity.<sup>166</sup> The Ninth Circuit Court

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158. *Id.*

159. *Id.*

160. 113 S. Ct. 2891 (1993).

161. 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011-15 (1988)). The McCarran-Ferguson Act exempts insurance companies from federal antitrust laws if the companies are covered by state laws. In effect, this has completely exempted domestic insurance companies from federal antitrust law, because all fifty states have laws regulating insurance. ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW* § 8.1(a) at 931-32 (1988).

162. The Court defines CGL insurance as insurance that "provides coverage for third party casualty damage claims against a purchaser of insurance." 113 S. Ct. at 2895 n.1 (citation omitted).

163. *Id.* at 2895.

164. Long-tail insurance covers risks for which claims may be filed many years after the occurrence giving rise to such claims.

165. 113 S. Ct. at 2896.

166. *Id.* at 2899-2900.

of Appeals reversed, rejecting the insurers' McCarran-Ferguson Act defense on two grounds: (1) domestic insurers forfeited their immunity by conspiring with the foreign reinsurers, whose conduct was not immunized under the Act;<sup>167</sup> and (2) the conduct fell within the "boycott" exception<sup>168</sup> to the immunity provided under the Act.<sup>169</sup>

The Supreme Court affirmed in part and reversed in part. The Court affirmed the Ninth Circuit's ruling that plaintiffs had sufficiently pled a boycott for the purposes of section 3(b) of the McCarran-Ferguson Act,<sup>170</sup> and that principles of international comity did not bar the exercise of Sherman Act jurisdiction by the district court.<sup>171</sup> The Court reversed the Ninth Circuit on the issue of forfeiture of McCarran-Ferguson immunity, determining that the domestic insurers were engaged in the business of insurance with the foreign reinsurers and were therefore immunized if the boycott exception did not apply.<sup>172</sup>

Justice Souter wrote for a unanimous court on the issue of immunity forfeiture by the domestic insurers. According to Justice Souter, the Ninth Circuit misinterpreted the Court's opinion in *Group Life & Health Insurance Co. v. Royal Drug Co.*<sup>173</sup> in applying McCarran-Ferguson immunity as entity based immunity instead of activity based immunity (i.e., any time an insurance company acts concertedly with someone not immunized, that company forfeits their immunity).<sup>174</sup> Immunity, however, is only lost when a company acts outside the business of insurance,<sup>175</sup> which the defendant domestic insurers did not do.<sup>176</sup>

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167. *Id.* at 2900.

168. The boycott exception to the McCarran-Ferguson Act states: "Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 15 U.S.C. § 1013(b) (1994).

169. 113 S. Ct. at 2900.

170. *Id.* at 2901.

171. *Id.* at 2910-11.

172. *Id.* at 2910-11.

173. 440 U.S. 205 (1979).

174. 113 S. Ct. at 2901-02.

175. *Id.*

176. *Id.* at 2903.

The Court unanimously held that all but one of the plaintiffs' claims constituted a boycott under section 3(b) of the McCarran-Ferguson Act.<sup>177</sup> The Court split, however, over how to define a boycott. The majority opinion on this issue, written by Justice Scalia and joined by the Chief Justice and Justices O'Connor, Kennedy, and Thomas, defined boycott very narrowly as an attempt to coerce the target to engage in a transaction on certain terms by refusing to engage in unrelated transactions until the target agrees.<sup>178</sup> Therefore, a refusal to engage in related transactions with the target is not a boycott; rather, it is a cartelization or concerted agreement to terms.<sup>179</sup> According to Justice Scalia, it is "obviously not a 'boycott'" for reinsurers to refuse to reinsure coverages on insurance forms until the forms meet their approval "because the terms of the primary coverages are central elements of the reinsurance contract—they are what is reinsured."<sup>180</sup> Nevertheless, the allegations of boycott in this case—that reinsurers threatened to withdraw entirely from reinsuring primary domestic insurers who wrote insurance on disfavored forms and threatened to refuse them reinsurance, even on risks written on other forms—were held sufficient to avoid a motion to dismiss.<sup>181</sup>

While Justices Souter, White, Blackmun and Stevens agreed that plaintiffs' claims were sufficient to support a claim of boycott, they disagreed with Justice Scalia's interpretation of what constitutes a boycott for purposes of section 3(b).<sup>182</sup> Souter asserted that the majority's definition was overly narrow and would result in a severe and unwarranted limitation on the availability of the exception.<sup>183</sup> The dissenters were disturbed that under the majority's view, insurers could easily escape a boycott claim by simply showing some marginal relationship between the refusal to insure and the targeted transaction.<sup>184</sup>

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177. *Id.*

178. *Id.* at 2911.

179. *Id.*

180. *Id.* at 2912.

181. *Id.* at 2913.

182. *Id.* at 2903-08.

183. *Id.* at 2908.

184. *Id.* at 2913.

## F. *Pleading, Procedure and Evidence*

### 1. Pleading

#### a. Pleading the Equitable Doctrine of Fraudulent Concealment

Judge Kiser in the Western District of Virginia appears to have broken ranks with the Fourth Circuit over the requirements for pleading the fraudulent concealment doctrine.<sup>185</sup> In *Commonwealth v. Meadow Gold Dairies, Inc.*,<sup>186</sup> Virginia alleged that two southwestern Virginia dairies conspired to rig bids to local school districts in the mid-1980s.<sup>187</sup> Anticipating defendants' assertion of the bar of the four year statute of limitations, plaintiffs affirmatively pled that defendants' fraudulent concealment tolled the statute.<sup>188</sup> Defendants moved to dismiss the case pursuant to Federal Rule of Civil Procedure 9(b), 12(b)(6) and 12(f) on the grounds that plaintiffs failed to plead their allegations of fraudulent concealment with specificity.<sup>189</sup>

Judge Kiser denied defendants' motions, holding that, as the statute of limitations is an affirmative defense under Federal Rule of Civil Procedure 8(c) which must be pled and proven by defendants, and plaintiffs are subject only to the notice pleading requirements of Federal Rule of Civil Procedure 8(a), it was not necessary for plaintiffs to plead the fraudulent concealment exception in their complaint.<sup>190</sup> Moreover, Judge Kiser held that fraudulent concealment need not be pled with particularity

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185. The fraudulent concealment doctrine is a judicially created equitable doctrine which, if applicable, tolls the statute of limitations. To toll the statute, a claimant must show: "(1) The party pleading the statute fraudulently concealed facts which are the basis of a 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); see also *Charlotte Telecasters v. Jefferson-Pilot Corp.*, 546 F.2d 570, 574 (4th Cir. 1976); *Weinberger v. Retail Credit Co.*, 498 F.2d 552, 555 (4th Cir. 1974).

186. No. 93-0276-R, 1993 WL 476633, (W.D. Va. Aug. 19, 1993) (unpublished).

187. Details of the allegations were reported in the 1993 Antitrust Law Survey. See Michael F. Urbanski & Francis H. Casola, *Annual Survey of Virginia Law: Antitrust and Trade Regulation Law*, 27 U. RICH. L. REV. 575, 605 (1993).

188. *Meadow Gold Dairies*, No. 93-0276-R, 1993 WL 476632, at \*1 (W.D. Va. Aug. 19, 1993).

189. *Id.*

190. *Id.* at \*2.



under Federal Rule of Civil Procedure 9(b)<sup>191</sup> as the Fourth Circuit appears to suggest in *Pocahontas Supreme Coal Co. v. Bethlehem Steel*,<sup>192</sup> *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*<sup>193</sup> and *Weinberger v. Retail Credit Co.*<sup>194</sup> Judge Kiser distinguished each of these cases on the ground that, although they use the word "plead," each were decided on summary judgment after the introduction of evidence.<sup>195</sup>

#### b. Pleading Section 1 and Section 2 Claims

Historically, antitrust plaintiffs have been more successful at the pleading stage than on summary judgment, and the cases decided this year were no exception. Plaintiffs' success, however, was limited, with the Fourth Circuit affirming one dismissal and a district court denying another.

In *Estate Construction Co. v. Miller & Smith Holding Co.*<sup>196</sup> the Fourth Circuit found that a real estate developer's allegations of restraint of trade under Section 1 of the Sherman Act were insufficient to withstand a Rule 12(b)(6) motion to dismiss.<sup>197</sup> Maureen and Robert Patterson, real estate developers and sole stockholders of Estate Construction Co., purchased property in Fauquier County, Virginia and obtained a \$7.5 million construction loan.<sup>198</sup> The loan was secured by the property from Providence Savings and Loan, a wholly owned subsidiary of Miller & Smith, a holding company which owned numerous companies involved in real estate acquisitions, financing, development and sales.<sup>199</sup> The Pattersons subsequently defaulted on the loan and filed for Chapter Eleven bankrupt-

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191. *Id.*

192. 828 F.2d 211, 218 (4th Cir. 1987).

193. 546 F.2d 570, 574 (4th Cir. 1976).

194. 498 F.2d 552, 555 (4th Cir. 1974).

195. *Commonwealth v. Meadow Gold Dairies*, No. 93-0276-R, 1993 WL 476632, at \*2. Judge Kiser came to the same conclusion in the related case *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, Civil Action No. 93-0968-R (W.D. Va. July 11, 1994), holding that the issue of fraudulent concealment is more properly addressed on summary judgment.

196. 14 F.3d 213 (4th Cir. 1994).

197. *Id.* at 221.

198. *Id.* at 215-16.

199. *Id.*

cy.<sup>200</sup> After the bankruptcy court lifted the automatic stay, the property was sold to Providence at a foreclosure auction.<sup>201</sup> The Pattersons subsequently filed this suit against Providence and some twenty-six other entities and individuals alleging violations of Section 1 and Virginia's fraudulent conveyance statute.<sup>202</sup> It was dismissed, however, for failure to state a claim.<sup>203</sup>

The Fourth Circuit affirmed the district court's dismissal.<sup>204</sup> The court found the Patterson's complaint deficient for failing to allege both all the necessary legal elements of the claims asserted and an adequate factual basis to support them.<sup>205</sup> The court held that the complaint was factually inadequate because the allegations of conspiracy were set forth in conclusory terms.<sup>206</sup> The court explained that when alleging a conspiracy, the complaint must "provide, whenever possible, some details of the time, place and alleged effect of the conspiracy; it is not enough merely to state that a conspiracy has taken place."<sup>207</sup>

The Pattersons' complaint also failed to sufficiently plead that defendants' conduct restrained trade.<sup>208</sup> They did not allege that defendants had market power sufficient to restrain trade; they only alleged, in conclusory fashion, that defendants "conspired . . . to restrain trade unreasonably."<sup>209</sup> Moreover, the Pattersons failed to make any allegation that defendants' conduct occurred in or had a substantial effect on interstate commerce.<sup>210</sup> Because the Pattersons "merely reiterate[d] mechanically the words of the Sherman Act without providing any 'sufficient facts so that each element of the alleged antitrust violation can be identified,'" dismissal was appropriate.<sup>211</sup>

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200. *Id.* at 216.

201. *Id.* at 216-17.

202. *Id.* at 217.

203. *Id.*

204. *Id.* at 222.

205. *Id.* at 221.

206. *Id.* at 221-22.

207. *Id.* at 221 (quoting *National Constructors Ass'n v. National Elec. Contractors Ass'n*, 498 F. Supp. 510, 528 (D. Md. 1980)).

208. *Id.* at 222.

209. *Id.*

210. *Id.*

211. *Id.* (quoting *Municipal Util. Bd. v. Alabama Power Co.*, 934 F.2d 1493, 1501

The district court, however, in *Higgins v. Medical College of Hampton Roads*,<sup>212</sup> held that plaintiffs sufficiently pled claims under Sections 1 and 2 of the Sherman Act.<sup>213</sup> There, plaintiffs, faculty member physicians at Eastern Virginia Medical School (EVMS) and part of its Department of Radiation and Oncology, sued EVMS and the Medical College of Hampton Roads. Plaintiffs alleged that EVMS and the Medical College prevented them from concluding a contract with Maryview Medical Center under which they would replace EVMS as the exclusive providers of radiation oncology services at Maryview.<sup>214</sup> Specifically, plaintiffs claimed that defendants' exclusive contract with Maryview unreasonably restrained trade in violation of Section 1 and allowed defendants to monopolize the relevant markets in violation of Section 2.<sup>215</sup> Plaintiffs sought damages and injunctive relief to prohibit defendants from providing radiation oncology services at Maryview.<sup>216</sup> Defendants moved to dismiss these claims for lack of standing, "unclean hands," failure to state a claim under Section 1 and failure to state a claim under Section 2.<sup>217</sup>

The district court denied each of defendants' motions.<sup>218</sup> With respect to standing, the court held that plaintiffs' breach of loyalty to EVMS in negotiating with Maryview, while enough to bar a claim for tortious interference, did not bar plaintiffs' antitrust claims because those claims arose out of an exclusive contract which continued to exist after plaintiffs ended their employment with defendants.<sup>219</sup> Moreover, the court held that plaintiffs' "unclean hands" caused by their breach of loyalty did not bar their claims for injunctive relief because the defense of *in pari delicto* is unavailable in antitrust cases.<sup>220</sup> The court

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(11th Cir. 1991)).

212. 849 F. Supp. 1113 (E.D. Va. 1994).

213. *Id.* at 1121-22.

214. *Id.* at 1115-16.

215. *Id.* at 1119.

216. *Id.* at 1116.

217. *Id.*

218. *Id.* at 1123.

219. *Id.* at 1119-20.

220. *Id.* at 1120-21. For this proposition, the court relied on *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), and *Chrysler Corp. v. General Motors Corp.*, 596 F. Supp. 416 (D.D.C. 1984). The court was unper-

also denied defendants' motion to dismiss plaintiffs' Section 1 claim, holding that plaintiffs were entitled to an opportunity to prove that the exclusive contract between Maryview and defendants constituted an unreasonable restraint of trade.<sup>221</sup> Likewise, plaintiffs' Section 2 claim also survived even though plaintiffs had not specifically pled defendants' market power.<sup>222</sup> The court held that plaintiffs had sufficiently alleged that defendants possessed monopoly power and that precise quantification of that power could wait until the parties concluded discovery.<sup>223</sup>

## 2. Procedure—Class Action Certification and Sherman Act Extraterritorial Jurisdiction

In *Ticor Title Insurance Co. v. Brown*,<sup>224</sup> the Supreme Court refused to consider issues of class certification arising from an FTC enforcement action. The Court originally granted certiorari, but in this *per curiam* decision dismissed the writ as improvidently granted.<sup>225</sup> The Court believed that deciding this case would require the Court to decide a hypothetical question.<sup>226</sup>

The case has a complex history originating in an enforcement proceeding brought by the Federal Trade Commission (FTC) against six title insurance companies.<sup>227</sup> That action alleged that the six companies conspired to fix prices in thirteen states.<sup>228</sup> Shortly thereafter, private parties in twelve of those states filed separate antitrust class actions which were consolidated pursuant to the federal multi-district litigation statute as MDL No. 633.<sup>229</sup> These class action suits sought both treble damages and injunctive relief.<sup>230</sup>

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sued by defendants' attempt to distinguish *Perma Life* on the grounds that *Perma Life* involved a treble damages action whereas plaintiffs in the instant case were seeking injunctive relief. 849 F. Supp. at 1120-21.

221. 849 F. Supp. at 1122.

222. *Id.*

223. *Id.*

224. 114 S. Ct. 1359 (1994).

225. *Id.* at 1362.

226. *Id.*

227. *Id.* at 1360.

228. *Id.*

229. *Id.*

230. *Id.*

In January 1986, the class representatives in MDL No. 633 and the title insurance companies reached a settlement that provided the class members injunctive relief, payment of attorney's fees and costs, and increased amounts of coverage on specified title insurance policies.<sup>231</sup> The district court provisionally certified the settlement class under Federal Rule of Civil Procedure 23(b)(1) and (b)(2),<sup>232</sup> which do not provide an opportunity for class members to opt out of the settlement.<sup>233</sup>

The states of Wisconsin and Arizona, both as class members and as *parens patriae* for resident members of the class, objected to the proposed settlement, claiming that due process mandated that members of the proposed class must have an opportunity to opt out of the class.<sup>234</sup> The state of Wisconsin further objected that, because the original complaint sought monetary damages, the class could not be certified under Rule 23(b)(2), since the rule is limited to injunctive and equitable relief.<sup>235</sup> The district court rejected the objections of Arizona and Wisconsin, approved the settlement and certified the classes under Rules 23(b)(1)(A) and (b)(2).<sup>236</sup> The Third Circuit affirmed, and the Supreme Court denied certiorari.<sup>237</sup>

In 1990, Brown filed this suit on behalf of consumers of title insurance in Arizona and Wisconsin, alleging that the same six title insurance companies conspired to fix the rates for title search services in those states.<sup>238</sup> The district court granted

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231. *Id.* at 1360-61 (discussing the settlement in *In re Real Estate Title & Settlement Services Antitrust Litigation*, 1986-1 Trade Cas. (CCH) ¶ 67,149 (E.D. Pa. 1986)).

232. *Id.* at 1361. According to the Court:

[c]ertification under Rule 23(b)(1)(A) requires that the prosecution of separate actions would create a risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." Certification under Rule 23(b)(2) requires that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

*Id.* at 1361 n.\*.

233. *Id.* at 1361.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

summary judgment for the companies because, *inter alia*, the customers were parties to the MDL No. 633 suit and were bound by that judgment.<sup>239</sup> The Ninth Circuit reversed, finding that due process would be violated if the doctrine of *res judicata* was applied to a judgment in a class action suit when the claims sought money damages and the plaintiff in the prior suit was not given an opportunity to opt out of those claims.<sup>240</sup> The single issue on which the Supreme Court granted certiorari was “[w]hether a federal court may refuse to enforce a prior federal class action judgment, properly certified under Rule 23, on the grounds that absent class members have a constitutional due process right to opt out of any class action that asserts monetary claims on their behalf.”<sup>241</sup>

The Supreme Court’s *per curiam* decision dismissing the writ and allowing the Ninth Circuit’s decision to stand held that it is not important whether absent class members have a constitutional right to opt out as long as that right exists under the Federal Rules of Civil Procedure.<sup>242</sup> Class members would have such a right, the Court noted, “if, in actions seeking monetary damages, classes can be certified only under Rule 23(b)(3), which permits opt-out, and not under Rules 23(b)(1) and (b)(2), which do not.”<sup>243</sup> The Court held that the MDL No. 633 litigation, even if incorrectly decided, conclusively determined that the title insurance customers’ class fit within a non-opt-out provision of Rule 23.<sup>244</sup> *Res judicata*, therefore, prohibited the Court from “using the Federal Rules instead of the Constitution as the means of imposing an opt-out requirement” for the prior settlement.<sup>245</sup> The Court declined to answer the question of whether an opt-out right is constitutionally required in class actions asserting monetary damages because it was a “hypothetical question” as to all class members in actions other than the present one.<sup>246</sup> Further, the Court stated that resolution of the constitutional question might be unnecessary in law and in fact,

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239. *Id.*

240. *Id.* (citing *Brown v. Tigor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992)).

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* at 1362.

246. *Id.*

due to a proposed settlement between the parties pending before the district court.<sup>247</sup>

Justices O'Connor, Kennedy and Chief Justice Rehnquist dissented because they were concerned that the Court's decision would allow litigants in class action suits certified under Rules 23(b)(1)(A) and (b)(2) to return to federal court and relitigate their claims against the original defendants if the claims involved monetary damages.<sup>248</sup> The dissenters disagreed with the majority that it was unnecessary to resolve the constitutional question, believing that "[t]he resolution of a constitutional issue with such broad-ranging consequences is both necessary and appropriate."<sup>249</sup>

On another procedural matter, the Supreme Court recently addressed the issue of the extraterritorial applicability of the federal antitrust laws. In *Hartford Fire Insurance Co. v. California*,<sup>250</sup> the Court ruled that concerns over international comity did not prevent the application of Sherman Act jurisdiction over foreign reinsurers.<sup>251</sup> In *Hartford Fire*, four domestic insurers allegedly conspired with domestic and London based reinsurers to boycott primary insurers to restrict terms of coverage for commercial general liability (CGL) insurance in the United States.<sup>252</sup> The Court determined that, since the alleged foreign conduct was "meant to produce and did in fact produce some substantial effect" in the United States, the Sherman Act applied.<sup>253</sup> The intentions of the foreign companies to influence commerce in the United States encouraged the application of antitrust jurisdiction over these companies.<sup>254</sup> The Court noted that, when foreign law and the law of the United States are not in conflict, international comity does not prevent jurisdiction.<sup>255</sup> Conflict only exists when one cannot comply with the law of one country without violating the law of another.<sup>256</sup>

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247. *Id.*

248. *Id.* at 1363.

249. *Id.*

250. 113 S. Ct. 2891 (1993).

251. *Id.* at 2908-10.

252. *Id.* at 2895.

253. *Id.* at 2910.

254. *Id.*

255. *Id.*

256. *Id.*

The Court therefore held that because compliance with both the laws of the United States and Great Britain was not impossible, international comity did not prevent the exercise of jurisdiction.<sup>257</sup> Justice Scalia, leading the dissenters, adamantly disagreed with the majority's "breathtakingly broad proposition," arguing that it "will bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries."<sup>258</sup>

### 3. Evidence

The Fourth Circuit affirmed the district court's grant of summary judgment in *Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp.*<sup>259</sup> after excluding the hearsay testimony of Lifschultz's two key witnesses.<sup>260</sup> The district court ruled this testimony inadmissible under the co-conspirator exception to the hearsay rule found in Federal Rule of Evidence 801(d)(2)(E) because Lifschultz had not presented sufficient credible evidence of a conspiracy to qualify for the co-conspirator exception.<sup>261</sup> To qualify as non-hearsay under Rule 801(d)(2)(E), the proffering party must demonstrate the existence of a conspiracy and that the statements were made in the course of and in furtherance of that conspiracy.<sup>262</sup> In making that assessment, the court is free to consider all the evidence, including the hearsay statements.<sup>263</sup> Lifschultz still failed, however, to show the existence of a conspiracy by a preponderance of the evidence, and defendant's motion to exclude the evidence was properly granted.<sup>264</sup>

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257. *Id.* at 2910-11.

258. *Id.* at 2921.

259. 998 F.2d 1009 (4th Cir. 1993), *affg per curiam*, 805 F. Supp. 1277 (D.S.C. 1992).

260. *Id.*

261. 805 F. Supp. at 1284.

262. *Id.*

263. *Id.*

264. 805 F. Supp. at 1284.



## III. STATE COURT CIVIL ACTIONS

*Phoenix Medical Electronics Service, Inc. v. Picker International, Inc.*,<sup>265</sup> was the only case decided by the state courts in 1993-94 which touched on antitrust issues. In a case of first impression in Virginia, a Fairfax County circuit court judge held that a state court could exercise jurisdiction over a suit for tortious interference when the predicate basis of that tort claim was an alleged violation of federal antitrust law. Phoenix filed suit against Picker for tortious interference with its contracts and prospective business relations. Phoenix alleged that Picker tortiously interfered by engaging in "improper methods" which constituted various unfair trade practices, as well as violations of federal and state antitrust laws. Picker moved *in limine* "to exclude from the case, prohibit discovery on and suppress evidence" of the alleged violations of the federal and state antitrust laws.<sup>266</sup>

Denying the motion, the circuit court ruled that the federal antitrust laws, which confer exclusive jurisdiction to the federal judiciary over federal antitrust claims, do not preclude state courts from exercising jurisdiction over Phoenix's state law interference claim because proof of an element of that claim required proof of an alleged federal antitrust violation.<sup>267</sup> The court was persuaded by the reasoning in *Caraway v. Ford Motor Co.*,<sup>268</sup> which held that "[i]t is unreasonable to maintain that the antitrust statutes were intended to exclude persons who had common-law rights, arising from something also forbidden or declared to be unlawful by the acts, from pursuing their remedies in a proper jurisdiction."<sup>269</sup> In any event, while the court was skeptical that Phoenix could prove a state antitrust violation because interstate business activity was at issue,

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265. Law No. 120599, VLW # 094-8-026 (Fairfax County Cir. Ct., Nov. 11, 1993).

266. *Id.* at 1.

267. *Id.* at 5.

268. 148 F. Supp. 776 (W.D. Mo. 1957). For other conflicting federal court cases on the issue see *Hand v. Kansas City So. Ry. Co.*, 55 F.2d 712, 714 (S.D.N.Y. 1931); *Meyer v. Kansas City So. Ry. Co.*, 84 F.2d 411, 414 (2d Cir. 1936); and *Guiterman v. Pennsylvania Ry. Co.* 48 F.2d 851, 855 (E.D.N.Y. 1931).

269. *Phoenix*, Law No. 120599, VLW #094-8-026, at 7 (quoting *Caraway v. Ford Motor Co.*, 148 F. Supp. 776, 776-77 (W.D. Mo. 1957)).

it would only decide the issue on summary judgment, not by a motion *in limine*.<sup>270</sup>

Finally, the court rejected Picker's request that the motion *in limine* be granted on a discretionary basis because Phoenix's allegations would require the conduct of an antitrust trial within the scope of the trial of the interference claim. Pointing to legal malpractice cases, the court noted that "[i]t is not uncommon for the litigation of one claim to involve the litigation of predicate facts constituting another . . . ." <sup>271</sup>

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

In September, 1993, the U.S. Department of Justice and the Federal Trade Commission announced six antitrust enforcement policies regarding mergers and various joint activities in the health care area.<sup>272</sup> The policy statements are intended to provide health care providers certain "antitrust safety zones" by describing the circumstances under which the federal government will not challenge certain conduct under the antitrust laws.<sup>273</sup>

The "antitrust safety zones" announced in the policies are:

1. Hospital Mergers—where one hospital has fewer than 100 beds, and an average of less than 40 inpatients a day, and is five years or older.<sup>274</sup>

2. Hospital Joint Ventures Involving High-Tech Equipment—as long as they involve only the number of hospitals needed to support the equipment. If additional hospitals are involved, the venture will not be challenged if those hospitals

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270. *Id.* at 9.

271. *Id.* at 11.

272. *See* Statements of Antitrust Enforcement Policy in the Health Care Area, issued by the U.S. Department of Justice and the Federal Trade Commission on Sept. 15, 1993. At the time this article went to printing, the Department of Justice and Federal Trade Commission were expected to issue revised statements.

273. *Id.*

274. *Id.* at 4-5.

could not support the equipment on their own or through a competing joint venture.<sup>275</sup>

3. Physicians' Collective Provision of Underlying Medical Data—that may improve purchasers' resolution of issues relating to the mode, quality, or efficiency of treatment.<sup>276</sup>

4. The Exchange of Data Among Hospitals Through Surveys—where the data involves prices for hospital services and wages, salaries or benefits of hospital personnel, as long as the survey is managed by a third party, the data provided is more than three months old, and certain precautions are taken to aggregate the information collected so that recipients cannot identify the data attributable to any particular hospital.<sup>277</sup>

5. Joint Purchasing Among Health Care Providers—if the purchases are for less than thirty-five percent of the total market for the purchased item, and the cost of the items purchased accounts for less than twenty percent of the total revenues of each purchaser.<sup>278</sup>

6. Physician Network Joint Ventures—as long as they are comprised of twenty percent or less of the physicians in each specialty who practice in the relevant geographic market, and the physicians share substantial financial risk.<sup>279</sup>

In the only reported case this past year concerning federal antitrust enforcement in Virginia, Judge Doumar rejected Allegheny Bottling Company's attempt to overturn its 1988 conviction and \$1 million fine for price-fixing softdrink products with Mid-Atlantic Coca-Cola.<sup>280</sup> Alleco, Allegheny Bottling's former parent which had paid Allegheny Bottling's fine pursuant to an indemnity agreement, made the abortive attempt.<sup>281</sup> Alleco sought a writ of *coram nobis*, alleging that the conviction resulted from violations of the Fifth and Sixth Amendments,

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275. *Id.* at 9.

276. *Id.* at 18-19.

277. *Id.* at 23.

278. *Id.* at 28.

279. *Id.* at 34.

280. *United States v. Allegheny Bottling Co.*, 854 F. Supp. 430 (E.D. Va. 1994).

281. *Id.* at 432.

which occurred when co-defense counsel improperly communicated defense strategy to government prosecutors.<sup>282</sup>

Judge Doumar held that Alleco did not have standing to pursue the relief sought because, although it would benefit from a favorable ruling, Alleco no longer had an interest in Allegheny Bottling and Alleco was "not within the narrow zone of interests protected by the extraordinary power of a writ of *co-rum nobis*."<sup>283</sup> Moreover, Judge Doumar noted that he would not grant the writ even if it were available because the alleged misconduct would not have saved the corporation from a finding of guilt, since the conspiracy "permeated the entire fabric of the corporation . . . ."<sup>284</sup>

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

The Antitrust and Consumer Litigation Section of the Virginia Attorney General's Office was more active in Virginia than federal enforcement agencies this past year in obtaining results that directly affected Virginia consumers. It settled a bid-rigging suit brought against several southwestern Virginia dairies, a resale price maintenance action brought against a sneaker manufacturer, and a monopolization claim brought against several large cable operators.

The Commonwealth brought the bid-rigging case against Meadow Gold Dairies and Valley Rich Dairy on its own behalf and on behalf of ten school boards in southwestern Virginia, alleging civil violations of federal and state antitrust laws occurring in the mid-1980s.<sup>285</sup> The Commonwealth settled with Valley Rich, the dairy alleged to have received the greater share of the alleged conspiracy's contracts, for \$422,500, and with Meadow Gold for \$325,000. The ten school systems shared the settlement proceeds. In settling the lawsuit, neither Valley Rich nor Meadow Gold admitted any wrongdoing.<sup>286</sup>

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282. *Id.* at 433.

283. *Id.* at 435.

284. *Id.*

285. *Commonwealth v. Meadow Gold Dairies, Inc.*, No. 93-0276-R (W.D. Va. Mar. 15, 1994).

286. *Id.* (Order of Dismissal for Valley Rich Dairy) and (W.D. Va. Mar. 28, 1994)

In other enforcement activity, Virginia, along with forty-nine other states and the District of Columbia, also filed suit against Keds Corp., alleging an illegal resale price maintenance scheme involving the sale of over five million pairs of six styles of women's sneakers.<sup>287</sup> The plaintiffs alleged that the conspiracy ran from September 1, 1992, to February 28, 1993, and resulted in overcharges averaging between \$1.00-\$1.25 per pair.<sup>288</sup>

Filed simultaneously with the complaint was a settlement agreement calling for Keds to pay a total of \$7.2 million, with \$5.7 million and \$1.5 million allocated to damages and attorneys' fees, respectively. Of that amount, Virginia received \$140,443 in damages and \$2,000 in attorneys' fees. Because of the difficulty locating the purchasers of the affected shoes and because the costs associated with distributing small amounts of money would far exceed the amount of the payment, the settlement proceeds were distributed to charities that benefit the class of purchasers affected by the alleged price-fixing scheme, in this case women between the ages of 15 and 44. The settlement also includes an injunction barring Keds from setting resale prices for its products or from terminating any dealer for independently setting its retail prices for Keds products.<sup>289</sup>

Finally, as the result of a three year multistate investigation of the cable industry, the Attorney General's Office also filed actions, along with forty-four other states and the District of Columbia, against several of the largest cable operators in the nation, including, among others, Comcast Corp., Continental Cablevision, Inc., Cox Enterprises, Inc., Tele-Communications, Inc., Time Warner, Inc., and Viacom, Inc., along with their direct broadcast satellite joint venture PrimeStar Partners, L.P. Proposed settlement agreements were filed simultaneously with the complaints.<sup>290</sup>

The states alleged that the cable operators violated state and federal antitrust laws by conspiring to monopolize and restrain

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(Order of Dismissal for Meadow Gold Dairies, Inc.).

287. *Commonwealth v. Keds Corp.*, No. 93 Civ. 6757 (S.D.N.Y., filed Sept. 29, 1993).

288. *Id.*

289. *Id.*

290. *Commonwealth v. PrimeStar Partners L.P.*, No. 93 Civ. 3905 (S.D.N.Y. filed June 9, 1993).

trade through their control of programming and its distribution, and maintained their monopoly power by denying competitors access to programming, either directly by refusing to sell the programming services they control to non-cable competitors, or indirectly by coercing independent programmers not to deal or deal only on discriminatory terms with non-cable firms. The states also alleged that the cable operators forced programmers to make the cable operators the exclusive distributors of programming to technologies that were potential competitors of cable, allowing them to increase the programming costs to the alternative technologies. The states further alleged that the cable operators acquired control of the only satellite currently providing multichannel programming directly to consumers, and then allegedly agreed not to offer programming through the satellite that competes with the programming they offered through cable.<sup>291</sup>

The settlement agreement with PrimeStar partners, among other things:

(1) mandates that the programming services controlled by the PrimeStar companies be made available to non-cable competitors on reasonable terms;

(2) prohibits the PrimeStar companies as cable operators from retaliating against "independent" programmers who wish to sell to competitive technologies; and

(3) prohibits the PrimeStar companies from entering into exclusive distribution agreements with existing programmers and restricts their ability to enter into exclusives with new programming services.<sup>292</sup>

A separate settlement agreement was reached with Liberty Media Corporation, a programming spin-off of Tele-Communications, Inc. Liberty is required to make its programming available to non-cable distributors on non-discriminatory terms. Following a hearing on September 3, 1993, the United States District Court for the Southern District of New York approved the settlement agreement.<sup>293</sup>

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291. *Id.*

292. *Id.*

293. *Id.*

## VI. FEDERAL AND STATE LEGISLATIVE ACTIVITY

A. *Federal Legislation*

The National Cooperative Production Amendments<sup>294</sup> is the first major antitrust bill to pass Congress since 1990<sup>295</sup> and the only antitrust legislation to be enacted in the past year. This legislation is intended to reduce the likelihood of antitrust suits against companies participating in joint ventures when they follow the procedures in the statute.<sup>296</sup> Hopes are that the legislation will encourage joint ventures which will, according to President Clinton, "increase efficiency, facilitate entry into the markets, and create new productive capacity"<sup>297</sup> for the companies involved and the U.S. economy.

Under this statute, manufacturers are given the opportunity to file their intentions to join ventures with the enforcement agencies who then publish notice in the Federal Register.<sup>298</sup> These ventures are investigated by the agencies and evaluated under a rule of reason analysis.<sup>299</sup> Co-ventures qualify for reduced exposure to antitrust attack once they notify the Justice Department and the FTC.<sup>300</sup> Such co-ventures are exposed only to liability for actual, not treble damages.<sup>301</sup> To receive favorable treatment, the principal production facilities must be located in the U.S. and the parties must be U.S. companies or companies from nations which treat U.S. companies fairly under their antitrust laws regarding joint ventures.<sup>302</sup>

B. *State Legislation*

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

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294. Pub. L. No. 103-42, 107 Stat. 117 (1993) (codified at 15 U.S.C. §§ 4301-06).

295. 64 Antitrust & Trade Reg. Rep. (BNA) No. 688.2 (June 10, 1993).

296. Pub. L. No. 103-42, § 2(a)(3), 107 Stat. 117 (1993).

297. 64 Antitrust & Trade Reg. Rep. (BNA) No. 688.2 (June 10, 1993).

298. 15 U.S.C. § 4305 (1994).

299. *Id.* § 4302 (1994).

300. *Id.* § 4304 (1994).

301. *Id.*

302. *Id.* § 4306 (1994).

## VII. CONCLUSION

Only three reported cases substantially affected antitrust jurisprudence this past year. The Supreme Court decided two: one limiting the boycott exception to McCarran-Ferguson Act immunity, and the other defining the practical limits of Robinson-Patman Act predatory pricing claims arising in an oligopolistic setting. The third decision came from Judge Turk in *Advanced Health-Care* where he rejected monopoly leveraging as a valid cause of action under the Section 2 of the Sherman Act. However, the Fourth Circuit has once again done little to develop antitrust law. In the past few years, the majority of the Fourth Circuit's antitrust cases have been unpublished, and this last year, two of its three decisions were *per curiam*. Federal enforcement agencies, however, in an effort to avoid discouraging procompetitive conduct in the health care industry, established "antitrust safety zones" where the federal government will not challenge certain conduct under the antitrust laws.



