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Annual Survey of Virginia Law: Antitrust and Trade Regulation Law

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ANTITRUST AND TRADE REGULATION LAW

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I. INTRODUCTION

Consistent with the recent national trend, antitrust claims in Virginia met with little success in Virginia's courts over the past two years. Not only have the number of antitrust complaints dwindled, but those that are filed are routinely dismissed on the pleadings or by means of summary judgment after discovery. Recent antitrust conspiracy actions have failed for a variety of fundamental reasons, including a lack of standing to bring the action and a lack of a multiplicity of actors capable of engaging in a conspiracy. On the whole, monopolization claims fared no better, and have been dismissed largely because of the absence of any evidence of adverse impact on competition. This article addresses federal and state legislative development and enforcement activities, and antitrust decisions of the U.S. Supreme Court, the Court of Appeals for the Fourth Circuit, and state and federal courts of Virginia for the past two years.

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II. CIVIL ANTTITRUST ACTIONS

A. *Statute of Limitations and the Fraudulent Concealment Doctrine: Milk Price Fixing Saga Ends*

Plaintiff Supermarket of Marlinton (Marlinton), a small retail supermarket in Marlinton, West Virginia, brought a putative class action against Meadow Gold Dairies and other dairies (collectively "the Dairies"), alleging that the Dairies engaged in a price fixing conspiracy with regard to wholesale milk prices in southwestern Virginia and southeastern West Virginia in violation of Section 1 of the Sherman Act.¹ In its complaint, filed in September, 1993, Marlinton alleged the existence of such conspiracy from 1984 through 1987.² The district court granted the Dairies' summary judgment motion, finding that the Clayton Act's four year statute of limitations was not tolled, and, therefore, barred Marlinton's action. This decision, however, was overturned by the United States Court of Appeals for the Fourth Circuit, in an opinion clarifying the standard for application of the fraudulent concealment doctrine in this circuit.³

On remand and following further discovery, the Dairies renewed their motions for summary judgment on a limited factual record. The Dairies argued that Marlinton's action should be dismissed because Marlinton (1) lacked standing due to its inability to demonstrate that it was injured in fact by the alleged conspiracy;⁴ (2) could not demonstrate affirmative acts of concealment necessary to toll the four year statute of limitations, as required by the Fourth Circuit;⁵ and (3) failed to exercise due diligence to uncover the alleged conspiracy despite its own suspicions of such conspiracy.⁶ By Order and Memorandum

1. See *Supermarket of Marlinton v. Meadow Gold Dairies, Inc.*, No. 93-0968-R, slip op. at 1 (W.D. Va. Nov. 14, 1996) (order and memorandum opinion denying summary judgment).

2. See *id.* at 2.

3. See *Supermarket of Marlinton v. Meadow Gold Dairies, Inc.*, 71 F.3d 119 (4th Cir. 1995).

4. See *Marlinton*, slip op. at 4.

5. See *id.* at 10.

6. See *id.* at 11.

dum Opinion entered by the district court on November 14, 1996, the court denied the Dairies' renewed motion.⁷

With respect to Marlinton's standing, the court found that Marlinton offered sufficient evidence of direct purchases from Meadow Gold, one of the alleged conspirators, during every year of the alleged conspiracy.⁸ Relying on *Mid-West Paper Products Co. v. Continental Group, Inc.*,⁹ the court found the existence of a question of fact as to such purchases sufficient to overcome the Dairies' motions for summary judgment at that time.¹⁰

With respect to the Dairies' arguments regarding the absence of affirmative acts of concealment necessary to toll the statute of limitations, the court, viewing the record in the light most favorable to Marlinton, declined to distinguish the alleged acts of concealment with respect to rigging bids to public school districts from the alleged conspiracy to fix the price of wholesale milk.¹¹ The court accepted, for the purposes of the Dairies' motion for summary judgment, that the alleged acts of secrecy surrounding both the school milk and wholesale conduct be considered and held that Marlinton alleged sufficient affirmative acts of concealment to create a jury issue with respect to fraudulent concealment.¹² Moreover, the court held that Marlinton need not establish that it was "actively misled" by the Dairies' conduct in order to satisfy the fraudulent concealment test.¹³

Finally, the court found that Marlinton produced sufficient evidence to defeat summary judgment on the issue of due diligence. Although Marlinton's officers generally were suspicious about price fixing activities, the court noted that such general suspicions did not indicate they were or should have been on notice about the price fixing scheme at issue.¹⁴ The court recognized the relative isolation of Marlinton, West Virginia, from states such as Florida, Georgia, Alabama, New York, and other

7. *See id.* at 1-2.

8. *See id.* at 5.

9. 596 F.2d 573 (3d Cir. 1979).

10. *See Marlinton*, slip op. at 5.

11. *See id.* at 9.

12. *See id.*

13. *Id.* at 10.

14. *See id.* at 13.

western states, in which milk price-fixing conspiracies gained widespread publicity during the time period in question.¹⁵ As such, the court held that articles in newspapers about the other conspiracies were irrelevant and would not be considered as having put Marlinton on notice of the alleged conspiracy in this case.¹⁶ Thus, Marlinton's claims survived the Dairies' due diligence challenge as well.

The Dairies argued that, because Marlinton's officers conceded that they exercised no diligence and undertook no efforts to uncover the conspiracy, they could not satisfy that element of the fraudulent concealment standard. Essentially, the Dairies argued that an admission by Marlinton that it exercised no diligence prevents the application of the fraudulent concealment exception. Rejecting this argument, the court held that "defendants have not produced sufficient uncontradicted evidence to conclude that Marlinton was or should have been aware of facts that should have excited further inquiry. Accordingly, I find that Marlinton was under no duty to investigate its claim."¹⁷

The court's ruling, ostensibly freeing the party asserting fraudulent concealment from exercising any diligence, may be called into question by the recent United States Supreme Court decision in *Klehr v. Smith Corp.*¹⁸ In *Klehr*, a civil RICO case analogous to antitrust case law in the fraudulent concealment context, the United States Supreme Court addressed a split in the circuits concerning the requirement of "reasonable diligence" on the part of a plaintiff relying on the fraudulent concealment doctrine. The Court resolved the split in the circuits by concluding that "'reasonable diligence' does matter, and a plaintiff who is not reasonably diligent may not assert 'fraudulent concealment.'"¹⁹ The Court further noted that "we cannot say that the 'fraudulent concealment' is concerned only with the behavior of defendants. For that reason, and in light of the consensus of

15. *See id.* at 14.

16. *See id.*

17. *Id.*

18. 117 S. Ct. 1984 (1997).

19. *Id.* at 1993.

authority, we conclude that 'fraudulent concealment' in the context of civil RICO embodies a 'due diligence' requirement."²⁰

After further discovery, however, the Dairies reasserted their motion for summary judgment on standing grounds.²¹ This motion was premised on the deposition testimony of the only witness who indicated that collusive discussions had occurred.²² Largely because that witness indicated that any discussions he had with other dairies had no application to the named plaintiffs, the court granted summary judgment for the Dairies.²³

B. *Sherman Act Section 1*

1. Conspiracy Issues

The Court of Appeals for the Fourth Circuit has displayed little tolerance over the past two years for Sherman Act claims that failed to measure up to accepted standards of pleading and practice for such actions. For example, in four per curiam opinions, three of which were a mere paragraph in length, the Fourth Circuit affirmed the district courts' dismissals of actions, two on summary judgment motions²⁴ and two on motions to dismiss.²⁵

Most recently, in *Howerton v. Grace Hospital, Inc.*,²⁶ the Fourth Circuit affirmed the decision of the District Court for the Western District of North Carolina in granting summary judgment for defendants. Plaintiffs, Drs. Howerton and Antley, practicing under the name Blue Ridge Radiology Associates,

20. *Id.*

21. See *Supermarket of Marlinton, Inc.*, Nos. 93-0968-R & 96-0407-R (W.D.Va. Aug. 27, 1997) (Mem.).

22. See *id.* at 12.

23. See *id.* at 16.

24. See *Howerton v. Grace Hosp., Inc.*, 1996-2 Trade Cas. (CCH) ¶ 71,547 (4th Cir. Sept. 4, 1996); *Montgomery County Ass'n of Realtors, Inc. v. Realty Photo Master Corp.*, 91 F.3d 132 (4th Cir. July 24, 1996) (text available at 1996 WL 412584).

25. See *Dehoney v. South Carolina Dep't of Corrections*, No. 95-7270, 1995 WL 736863 (4th Cir. Dec. 12, 1995); *Binder v. Washington Gas-District of Columbia Division*, No. 95-2946, 1996 WL 73705 (4th Cir. Feb. 21, 1996).

26. No. 95-2549, 1996 WL 498095 (4th Cir. Sept. 4, 1996). In reaching its decision, the district court relied upon the recommendations of the magistrate judge. See *Howerton v. Grace Hosp., Inc.*, No. 4:90CV187, 1995 WL 787529 (W.D.N.C. July 7, 1995) (memorandum and order).

P.A., (Blue Ridge), provided radiology services to Grace Hospital (Grace) from 1984 to 1990 pursuant to a non-exclusive written contract.²⁷ In 1990, when Blue Ridge proceeded with its plans of opening an outpatient imaging facility, Grace terminated its contract with Blue Ridge on ninety days notice and approached Piedmont Medical Imaging, P.C. (PMI) to replace Blue Ridge as provider of radiological services.²⁸ In April of 1990, Grace and PMI entered into an exclusive contract.²⁹ Plaintiffs subsequently filed suit against Grace and PMI, alleging violations of Section 1 of the Sherman Act by means of a tying arrangement, exclusive dealing and unreasonable restraint of trade.³⁰

The district court rejected plaintiffs' exclusive dealing claim on the grounds that they had failed to show concerted action between two legally distinct economic entities.³¹ The court found that plaintiffs had failed to establish anything other than unilateral conduct on the part of Grace, since Grace alone decided to terminate Blue Ridge's contract as a provider of radiology services.³² The fact that PMI was interested in entering into a contract with Grace to provide the same services did not show a combination or concerted action to restrain trade as required under a Section 1 claim.³³

The district court also found that the Grace/PMI contract was not an unreasonable restraint on trade, that the contract had not been shown to lessen competition, and that it might even encourage competition and improve care and prices in outpatient services, since the contract provided that PMI could be terminated without cause upon 180 days notice.³⁴ The district court noted that the Fourth Circuit previously rejected similar claims in *Steur v. National Medical Enterprises, Inc.*³⁵ The dis-

27. *See id.* at *2-3.

28. *See id.* at *4.

29. *See id.*

30. *See id.* at *6.

31. *See id.* at *7. The court noted that "a plaintiff claiming a § 1 violation must first establish a combination or some form of concerted action between at least two legally distinct economic entities. Unilateral conduct on the part of a single person or enterprise falls outside the purview of this provision in the antitrust law." *Id.* at *6 (quoting *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 542 (2d Cir. 1993)).

32. *See id.*

33. *See id.*

34. *See id.* at *8-10.

35. 672 F. Supp. 1489 (D.S.C. 1987), *aff'd*, 846 F.2d 70 (4th Cir. May 10, 1988)

strict court quoted with approval from the court's decision in *Steur*, noting "reduced to its essentials, plaintiffs' [claims] rest [] not on any showing of lessened competition, but merely on the fact that they are disappointed competitors who must now provide their services elsewhere."³⁶

Plaintiffs' main complaint was that their ability to acquire outpatient business was damaged by their inability to also perform inpatient radiology services at Grace, since they no longer had day-to-day contact with referring physicians.³⁷ As the court noted, however, the number of referrals Blue Ridge received after its split with Grace did not decrease.³⁸ Moreover, plaintiffs failed to show that they could not acquire staff privileges at another nearby hospital.³⁹ The court explained that "[m]erely changing exclusive contractors . . . cannot constitute a violation of the antitrust laws.' This is true despite the fact that substituting one exclusive contractor for another may have the consequence of 'boycotting or shutting out' the displaced contractor."⁴⁰

The court also rejected plaintiffs' tying claim.⁴¹ Since Grace did not share any portion of the fees generated by PMI, plaintiffs had no economic interest in such arrangement and did not directly benefit from the sale of the tied product.⁴² Therefore, as a matter of law, there could be no unlawful tying arrangement, either under the per se or rule of reason approaches.⁴³ The Fourth Circuit affirmed the district court's grant of summary judgment in a per curiam, one-paragraph decision.⁴⁴

The Fourth Circuit also considered antitrust claims in a dispute involving the real estate industry in *Montgomery County*

(text available at 1988 WL 46286).

36. *Howerton*, 1995 WL 787529, at *8 (quoting *Steur*, 672 F. Supp. at 1501).

37. *See id.*

38. *See id.*

39. *See id.*

40. *Id.* at *10 (quoting *Steur*, 672 F. Supp. at 1502).

41. *See id.* at *11.

42. *See id.*

43. *See id.*

44. *See Howerton v. Grace Hosp., Inc.*, 96 F.3d 1438 (4th Cir. Sept. 4, 1996) (text available at 1996 WL 498095).

*Ass'n of Realtors, Inc. v. Realty Photo Master Corp.*⁴⁵ Relying on the district court's analysis, the Fourth Circuit affirmed the court's grant of summary judgment for Montgomery County Association of Realtors (MCAR) on each of Realty Photo's anti-trust counterclaims.⁴⁶

Plaintiff MCAR published the "multiple listing service" (MLS), a directory of real estate listed for sale in the Montgomery County, Maryland, area and provided the MLS to its members for a fee. MCAR also provided a computerized version of the MLS which did not contain photographs of the listings.⁴⁷ Realty Photo began to fill this void by accessing the computerized MLS, obtaining the addresses of new listings, photographing the listings, and downloading the photographs into its customers' personal computers.⁴⁸ MCAR learned of Realty Photo's activities and demanded that it cease accessing the MLS.⁴⁹ MCAR then sued Realty Photo for copyright infringement, unfair competition, unauthorized wiretapping, misappropriation of trade secrets, and breach of contract.⁵⁰ In response, Realty Photo counterclaimed, alleging that MCAR and certain realtors conspired to restrain trade in violation of Section 1 of the Sherman Act. Specifically, Realty Photo argued that it was the victim of a concerted refusal to deal, of a denial of access to an essential facility, and of an illegal tying arrangement.⁵¹

Distinguishing *Copperweld Corp. v. Independence Tube Corp.*,⁵² the district court initially determined that, unlike a corporation and its subsidiaries, an association, which is nothing more than a group of persons combined for a common purpose, *can* conspire with itself for purposes of the Sherman Act.⁵³ The court found, however, that Realty Photo failed to establish the second element of its Sherman Act claim, namely,

45. 91 F.3d 132 (4th Cir. 1996).

46. See *Montgomery County Ass'n of Realtors, Inc. v. Realty Photo Master Corp.*, 878 F. Supp. 804 (D. Md. 1995).

47. See *id.* at 808.

48. See *id.* at 808-09.

49. See *id.* at 809.

50. See *id.*

51. See *id.*

52. 467 U.S. 752 (1984).

53. See *Montgomery*, 878 F. Supp. at 815-16.

that MCAR's conduct unreasonably restrained trade.⁵⁴ Recognizing that courts have found refusal to deal claims viable when realtors exclude competitors from a real estate association,⁵⁵ the court distinguished Realty Photo's status and actions from those realtors seeking access to the market. Here, Realty Photo merely sought access to MCAR's copyrighted materials, not to MCAR's association as a member. The court noted that the antitrust laws do not mandate that MCAR give Realty Photo free access to its copyrighted materials in order to allow Realty Photo to compete with it more effectively.⁵⁶

Finally, the court found that Realty Photo "utterly failed to bring forward evidence establishing the elements of the essential facilities rule."⁵⁷ Reluctantly dismissing Realty Photo's essential facilities claim, the district court noted that "[t]his doctrine is probably the most germane of the antitrust doctrines RPM advances. Making the required showings would have presented little apparent difficulty, given that MCAR freely concedes that it owns the admittedly essential facility and that it refuses RPM access to the facility."⁵⁸ Because, however, Realty Photo wholly failed to show that it cannot practically duplicate the MLS, the court found that it had no choice but to grant summary judgment for defendants as to this aspect of Realty Photo's claim as well.⁵⁹

In two other cases, the Fourth Circuit made short work of affirming its own intolerance for poorly pled or meritless causes of action. In *Dehoney v. South Carolina Department of Corrections*,⁶⁰ plaintiff, a South Carolina inmate, brought a pro se action alleging that the Department of Corrections violated Section 1 of the Sherman Act by requiring all prisoners to pur-

54. See *id.* at 816.

55. See *id.*

56. See *id.* at 817.

57. *Id.* To establish a claim pursuant to the "essential facilities" doctrine, it is necessary to establish (1) control by the defendant of the essential facility; (2) the inability of the competitor seeking access to practically or reasonably duplicate the facility; (3) the denial of the facility to the competitor; and (4) the feasibility of the monopolist to provide the facility. See *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 544 (4th Cir. 1991).

58. *Montgomery*, 878 F. Supp. at 817.

59. See *id.* at 819-20.

60. No. 95-7270, 1995 WL 736863 (4th Cir. Dec. 12, 1995).

chase their goods from the prison canteen at a ten percent markup.⁶¹ The magistrate judge recommended that the district court grant the defendant's motion for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and noted that, in adopting and enforcing the canteen program, South Carolina "made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit."⁶² The district court adopted the magistrate judge's report and dismissed the action pursuant to Rule 12(b)(6),⁶³ which decision was affirmed by the Fourth Circuit.⁶⁴

Shortly thereafter, in *Binder v. Washington Gas-District of Columbia Division*,⁶⁵ the Fourth Circuit affirmed, in a one paragraph per curiam opinion, the district court's dismissal of another pro se plaintiff's claim under the Sherman Act. The Court adopted the reasoning of the district court, without the benefit of oral argument.⁶⁶

Plaintiff alleged, among other things, that Washington Gas and the District of Columbia conspired to require plaintiff, an owner of an eleven-unit apartment building in the District of Columbia, to support financially the District of Columbia and defendant's "race-based" programs, there by constituting a "price-fixing and tie-in scheme in restraint of trade" in violation of Section 1 of the Sherman Act.⁶⁷ The court granted defendant's motion to dismiss, finding that, although plaintiff used the relevant vocabulary necessary to plead a Sherman Act claim, he had not alleged with the required specificity the facts necessary to support his claim.⁶⁸ For example, the court noted

61. See *Dehoney v. South Carolina Dep't of Corrections*, Nos. Civ.A.3:94-3169-21BD, Civ.A.0:94-3169-21BD & 1995 WL 842006 (D.S.C. July 31, 1995), *aff'd*, 72 F.3d 126 (4th Cir. Dec. 12, 1995) (text available at 1995 WL 736863).

62. *Id.* at *4.

63. See *id.* at *2.

64. See *Dehoney* 1995 WL 736863, at *1. Dehoney was also later denied relief on claims under 42 U.S.C. § 1983. See *Dehoney v. South Carolina Dep't of Corrections*, No. 96-7391, 1997 WL 3178 (4th Cir. Jan. 6, 1997).

65. No. 95-2946, 1996 WL 73705 (4th Cir. Feb. 21, 1996).

66. See *Binder v. Washington Gas-Dist. of Columbia Div.*, No. 2:95CV319, 1995 WL 842001 (E.D. Va. Oct. 6, 1995).

67. See *id.* at *1.

68. See *id.* at *7.

that the complaint lacked "any allegations of communications, meetings, or other means through which one might infer the existence of a conspiracy."⁶⁹

In *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*⁷⁰ Judge James Harry Michael, Jr., in Charlottesville, considered arguments on motions to dismiss in a battle between two major miners of the mineral vermiculite in Central Virginia. Defendant Grace owned reserves in South Carolina, and both Virginia Vermiculite, Ltd. (VVL) and Grace owned mining rights in Virginia, with the bulk of Virginia reserves located in Louisa County.⁷¹ VVL owned mining rights in only a small parcel of land in Louisa County, whereas Grace owned mining rights in more than 1400 acres of land in the county representing more than eighty percent of the vermiculite deposits in Virginia.⁷² The Historic Green Springs, Inc. (HGSI), also a defendant, is a non-stock, non-profit corporation organized to maintain the historic Green Springs area of Louisa County by, among other things, opposing mining operations in and around Louisa County.⁷³

In 1992 and 1994, Grace conveyed to HGSI certain parcels of land in Louisa County subject to restrictive covenants prohibiting the mining of vermiculite thereon. VVL thereafter brought this antitrust action against Grace and HGSI alleging violations of Sections 1 and 2 of the Sherman Act and their Virginia Antitrust Act counterparts.⁷⁴ VVL alleged that by removing more than eighty percent of the vermiculite mining reserves in Louisa County from the mining market, Grace and HGSI conspired to limit VVL's Virginia operations to its finite reserves,

69. *Id.*

70. 965 F. Supp. 802 (W.D. Va. 1997).

71. *See id.* at 808. From the late 1970s to present, plaintiff VVL and defendant Grace have mined the mineral vermiculite in the United States. Significantly, since 1990, Virginia and South Carolina have been the only two domestic areas in which vermiculite has been mined. *See id.*

72. *See id.*

73. *See id.* at 809.

74. Subsequent to the initial complaint, VVL filed two virtually identical complaints against Grace, one by itself and the second with additional plaintiffs. *See Virginia Vermiculite, LTD. v. W.R. Grace & Co.-Conn.*, Civil Action No. 96-0012-C (March 12, 1996) and *Peers v. Grace & Co.-Conn.*, Civil Action No. 96-0013-C (March 12, 1996). Because of the identity of issues, parties, etc., the cases were consolidated for resolution.

with the effect of diminishing its ability to compete with Grace, and thereby increased the value of Grace's South Carolina mineral reserves.⁷⁵

In two Reports and Recommendations, U.S. Magistrate Judge B. Waugh Crigler considered the case.⁷⁶ In his analysis, he focused on whether the joint action of Grace and HGSI constituted a restraint of trade, and whether VVL was injured thereby. Reasoning that Grace could have held its property perpetually without obligation to sell to anyone, Magistrate Judge Crigler found that no one in the vermiculite mining market in Louisa County, Virginia, could have had an expectation of acquiring mining rights in the property before Grace conveyed it to HGSI.⁷⁷ Thus, Grace's restriction of mining rights pursuant to its conveyance to HGSI could not constitute an unreasonable restraint of trade. Magistrate Judge Crigler found that, at most, VVL pled facts showing a land transaction between a grantor, who had no obligation to deal with VVL, and a grantee, who similarly was unwilling to deal with VVL or any other party wishing to mine vermiculite.⁷⁸

In addition, Magistrate Judge Crigler found VVL's complaint to contain insufficient allegations of actual adverse effects on competition in the vermiculite mining market to state an antitrust claim arising out of the land transactions. Finding VVL's failure to plead a restraint of trade or antitrust injury sufficient to justify dismissal of the action, the Magistrate Judge deferred ruling on whether HGSI, as a non-profit organization, could be deemed to have been engaged in "interstate commerce" for purposes of applying the Sherman Act to the land transactions at issue.⁷⁹

In district court, Judge Michael, in an expansive dissertation on the history and principles of antitrust law, first considered

75. See *Virginia Vermiculite*, 965 F. Supp. at 809-10.

76. See *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, Civil Action No. 96-0013-C (W.D. Va. Sept. 19, 1996) (report and recommendation); *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, Civil Action No. 95-0015-C (W.D. Va. Sept. 19, 1995) (report and recommendation).

77. See *Virginia Vermiculite, Ltd.*, Civil Action No. 95-0015-C, report and recommendation at 9.

78. See *id.* at 9-10.

79. See *Virginia Vermiculite*, 965 F. Supp. at 10-11.

whether Section 1 of the Sherman Antitrust Act applied to defendant HGSI, a non-profit entity.⁸⁰ Based upon legislative history and precedent, the court concluded that, because HGSI was not engaged in commercial activities, it should not be exposed to antitrust liability.⁸¹ Judge Michael recognized that, although HGSI had a stake in the market for vermiculite and vermiculite mining rights, HGSI did not wish to suppress supply and dominate the market as a for-profit competitor would. HGSI's goals, the court observed, were not designed to increase the profit of HGSI, nor were they concerned with the price of vermiculite or its mining rights.⁸² The court was unpersuaded by VVL's contrary arguments that the presence of Grace, a for-profit competitor, as a co-conspirator changed this fact.⁸³

In support of its conclusion, the court compared HGSI's activities to that of anti-abortion activists and those opposed to the sale of liquor, two groups whose activities have been held to be outside the reach of antitrust liability despite their effect on competition.⁸⁴ Judge Michael remarked: "the Act does not control the conduct of an eleemosynary organization pursuing primarily political or social objectives, from which it does not receive pecuniary gain."⁸⁵ For these reasons, Judge Michael dismissed HGSI as a defendant from each of the consolidated actions.

HGSI's exemption from Sherman Act liability did not exempt Grace, however. Judge Michael saw through Grace's thinly veiled argument that a unity of anti-competitive intent or similar objectives on the part of both parties must be present before a Section 1 conspiracy could exist.⁸⁶ The court found only that both parties must have agreed to a certain course of conduct

80. *See id.* at 812.

81. *See id.* at 816.

82. *See id.* at 815.

83. *See id.* at 817.

84. *See id.*; *see also* National Org. for Women v. Scheidler, 968 F.2d 612, 617-23 (7th Cir. 1992).

85. *Virginia Vermiculite*, 965 F. Supp. at 813 (citing HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY § 5.4e (1994)); *see* HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW § 10.2 (1985).

86. *See Virginia Vermiculite*, 965 F. Supp. at 818-19 ("Grace is led astray by the language in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), emphasizing the need for 'a conscious commitment to a common scheme designed to achieve an unlawful objective.'").

from which anti-competitive effects may arise, and that VVL sufficiently had alleged such agreement to escape dismissal on the Rule 12(b)(6) motion before the court.⁸⁷

VVL's shortcoming, however, was found to lie in its allegations of antitrust injury and the element of proximate causation. Upon examination of VVL's complaint, Judge Michael found that VVL failed to allege that, without the allegedly illegal restraint of trade, injury to VVL would have been avoided. In fact, Judge Michael noted that the opposite conclusion was compelled: "that the alleged restraint was entirely superfluous."⁸⁸ As alleged by VVL in its complaint, "[f]or over 20 years, HGSI conducted a campaign to obtain from Grace all of its mining rights and other property interests in Louisa County."⁸⁹ The court found that this allegation could not be reconciled with the necessary, but lacking, allegation that, but for an implicit or explicit agreement with Grace, HGSI would permit vermiculite mining on donated conveyances. In other words, there was no room for finding that Grace's agreement with HGSI caused this restraint on trade; HGSI would have restricted the mining on such parcels without the inclusion of such commitment in the agreement with Grace.⁹⁰ For these reasons, the court dismissed all of VVL's Section 1 claims.⁹¹

2. Intracorporate Immunity

In the last two years, the intracorporate or intraenterprise immunity doctrine has been recognized as alive and well, both by the Fourth Circuit and in the Eastern District of Virginia, as a protection against Sherman Act antitrust claims levied against entities and their principals or agents.

In *Patel v. Scotland Memorial Hospital*,⁹² the Fourth Circuit affirmed a lower court's decision dismissing a physician's claims against a hospital, its Chief Administrator, and its Chief of

87. See *id.* at 819.

88. *Id.* at 820.

89. *Id.*

90. See *id.* at 821.

91. See *id.*

92. No. 95-2704, 1996 WL 383920 (4th Cir. July 10, 1996), *cert. denied*, 117 S. Ct. 767 (1997).

Staff alleging, among other things, violations of Section 1 of the Sherman Act and North Carolina's Antitrust Act.⁹³

Dr. Patel entered into a series of contracts with Scotland Memorial Hospital (SMH) whereby she agreed to serve as the hospital's Medical Director of the Department of Anesthesiology, to provide twenty-four hour anesthesiology services for the hospital and to direct SMH's certified registered nurse anesthetists (CRNAs); SMH agreed not to enter into any other similar contracts.⁹⁴ The agreement between Dr. Patel and SMH also required Dr. Patel to pass her medical boards within two years of the start of her employment by SMH. Dr. Patel, however, failed to pass the boards, and SMH terminated her contract and withdrew her contract privileges. While she maintained hospital privileges, the CRNAs were forbidden to work with her.⁹⁵ The lack of CRNAs to assist her practice allegedly prevented Dr. Patel from maintaining a successful practice, and she experienced a substantial decline in income.⁹⁶

Regarding her Sherman Act claim, Dr. Patel alleged that the hospital's prohibition of her use of CRNAs, which were essential to her practice, was motivated by a malicious desire to harm her practice. Citing both *Monsanto Co. v. Spray-Rite Service Corp.*,⁹⁷ and *Oksanen v. Page Memorial Hospital*,⁹⁸ the Fourth Circuit found that this claim did not constitute (1) an agreement between at least two legally distinct persons or entities, or (2) an agreement imposing an unreasonable restraint on trade⁹⁹ as set forth in *Estate Construction Co. v. Miller & Smith Holding Co.*¹⁰⁰ Relying on its prior holding in *Oksanen*, the court found that the Chief Administrator and Chief of Staff clearly acted as agents of SMH, and therefore, together with SMH, comprised a single entity with a unity of economic interests between them.¹⁰¹ Hence, they were protected by the

93. See *id.* at *2.

94. See *id.* at *1.

95. See *id.*

96. See *id.* at *4.

97. 465 U.S. 752, 761 (1984).

98. 945 F.2d 696, 702 (4th Cir. 1991) (en banc).

99. See *Patel*, 1996 WL 383920, at *6-7.

100. 14 F.3d 213, 220-21 (4th Cir. 1994).

101. See *Patel*, 1996 WL 383920, at *8.

intracorporate or intraenterprise immunity doctrine of *Copperweld Corp. v. Independence Tube Corp.*¹⁰²

The Fourth Circuit easily disposed of Dr. Patel's attempt to avoid the intraenterprise immunity doctrine by arguing that the personal stake exception applied to SMH's staffing decision.¹⁰³ The court reaffirmed its holding in *Oksanen* that the exception applies only where the conspiring individual has a personal financial interest in the conspiracy independent of the principal. Here, none of the defendants had a direct economic interest in Dr. Patel's status at SMH or competed with her. Hence, the court found that the exception did not apply.¹⁰⁴

Judge Ellis, in Alexandria, reached a similar conclusion in *Williams v. 5300 Columbia Pike Corp.*¹⁰⁵ In *Williams*, shareholder residents of a cooperative apartment corporation who were either unable or unwilling to participate in the conversion of the co-op into condominium units brought suit against the Co-op Corporation, the Condominium Association, and five individual directors of both the Co-op Corporation and the Condominium Association. Plaintiffs alleged that the increase in value resulting from the conversion was enjoyed only by those residents who were able to participate in the conversion.¹⁰⁶ Plaintiffs asserted state law claims based on breach of contract and breach of fiduciary duty and alleged, among other things, that defendants had violated Sections 1 and 2 of the Sherman Act.¹⁰⁷

Upon defendants' motion to dismiss all claims for failure to state a claim, the district court granted the motion as to plaintiffs' antitrust claims, but denied such motion as to plaintiffs' remaining claims.¹⁰⁸ Ultimately, by subsequent decision, the court granted defendants' motion for summary judgment as to all claims, dismissing plaintiffs' action in its entirety.¹⁰⁹

102. 467 U.S. 752 (1984).

103. See *Patel*, 1996 WL 383920, at *8-10.

104. See *id.* at *9-10.

105. 891 F. Supp. 1169 (E.D. Va. 1995).

106. See *id.* at 1173.

107. See *id.* at 1174.

108. See *id.* at 1186.

109. See *Williams v. 5300 Columbia Pike Corp.*, 901 F. Supp. 208, 212 (E.D. Va.

Plaintiffs' suit was based on the following facts. In 1993, the directors of the Co-op Corporation decided it would be in the best interest of the shareholders if the apartment building units were converted into condominium units.¹¹⁰ To facilitate this plan, the Condominium Association was formed to purchase all the assets of the Co-op Corporation, and any profits resulting from the transaction would be distributed pro rata to the shareholders. The price set for the purchase of the units was the market value of the units as co-ops rather than as condominium units.¹¹¹ The Co-op Corporation's board used the co-op market value despite the fact that it held appraisals showing that the value of the units as condominiums was substantially greater than that as co-op units.¹¹² Plaintiff Co-op shareholders were either unwilling or unable to participate in the purchase of their condominium units and were not allowed to share in the appreciation of the units' market value. Plaintiffs alleged that defendants conspired to both monopolize the market for the building's nonparticipating and vacant units and to fix prices for the sales of units.¹¹³

Dismissing plaintiffs' antitrust claims, the district court held that plaintiffs failed to demonstrate the existence of a conspiracy between the named defendants.¹¹⁴ Citing *Copperweld Corp. v. Independence Tube Corp.*,¹¹⁵ the court noted that the individual directors could not be deemed to have conspired with either the Co-op Corporation or the Condominium Association.¹¹⁶ The court also held that the board defendants did not have an independent stake in achieving the corporation's alleged illegal motive of approving the sale of the units, thereby bringing them within the exception to the *Copperweld* doctrine.¹¹⁷ Although the directors, as Condominium Association members, did enjoy a portion of any unjust enrichment the Condominium Association may have received from the sale, the

1995).

110. See *Williams*, 891 F. Supp. at 1172.

111. See *id.* at 1173.

112. See *id.*

113. See *id.* at 1174.

114. See *id.* at 1176.

115. 467 U.S. 752 (1984).

116. See *Williams*, 891 F. Supp. at 1174.

117. See *id.* at 1174-75.

court found that this interest was derived solely from their affiliation with the Co-op Corporation and Condominium Association, and was not separable for the purpose of finding a conspiracy.¹¹⁸ Similarly, the court held that the Condominium Association was incapable of conspiring with the Co-op Corporation because, although not a subsidiary of the Co-op Corporation, it was a successor corporation with the same function, directors, core of shareholders and unity of interest.¹¹⁹

The district court also held that the plaintiffs' claims of a conspiracy to monopolize also failed because the key element to such a claim, namely an agreement directed toward excluding or lessening competition, was missing.¹²⁰ The gravamen of the plaintiffs' complaint was that the Condominium Association did not pay a fair price for the assets. Cutting through the arguments, the court correctly recognized that the effect of the sale on competition would have been the same regardless of the sale price; hence, the deal had no anti-competitive result.¹²¹

3. Resale Price Fixing

The United States Supreme Court handed down a decision November 4, 1997 in the matter of *Khan v. State Oil Co.*,¹²² in which it revisited the application of the per se rule to maximum vertical resale price fixing and, in the process, overruled its 1968 decision in *Albrecht v. Herald Co.*¹²³ Khan operated a gas station under a contract with State Oil, a distributor of gasoline and related products. Khan brought suit after State Oil terminated the contract, alleging that State Oil's contract had fixed the maximum price at which Khan could resell its gasoline in violation of Section 1 of the Sherman Act.¹²⁴ Specifically, the contract required Khan to rebate to State Oil the differ-

118. See *id.*

119. See *id.* at 1175 (citing *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 703 (4th Cir. 1991)).

120. See *id.* at 1176.

121. See *id.*

122. 118 S. Ct. 275 (1997), *vacating* 93 F.3d 1358 (7th Cir. 1996).

123. See *id.* at 283-85 *overruling* *Albrecht v. Herald*, 390 U.S. 145 (1968). A full discussion of this recent case is not possible here.

124. See *Khan*, 93 F.3d at 1360.

ence between his higher prices and State Oil's suggested retail price.¹²⁵

The district court granted State Oil summary judgment after applying the rule of reason, rather than the per se rule, to State Oil's alleged conduct.¹²⁶ The Seventh Circuit had no trouble finding that the challenged contract provision amounted to maximum price fixing by State Oil. After a detailed examination of the policies underlying application of the per se rule in resale price fixing cases, the Seventh Circuit reversed, announcing that, although it disagreed with the result, it was bound by Supreme Court precedent.¹²⁷ The Seventh Circuit invited the Supreme Court to reexamine its decision in *Albrecht v. Herald Co.*,¹²⁸ in which it held that the per se rule was applicable to maximum resale price fixing.¹²⁹

In *Williams v. 5300 Columbia Pike Corp.*,¹³⁰ discussed above, the district court granted defendant's motion to dismiss plaintiffs' antitrust claims,¹³¹ and, by subsequent decision, granted defendants' motion for summary judgment as to all claims, dismissing plaintiffs' action in its entirety.¹³² As with plaintiffs' other antitrust claims, the district court held plaintiffs' price-fixing claim to be meritless.¹³³ Plaintiffs objected to the price "fixed" by the Co-op Corporation and the Condominium Association for their units. In dismissing this claim, the court noted that the antitrust laws do not prohibit "price-fixing" agreements between the buyer and seller of an asset because every sale, of necessity, requires the setting of a price.¹³⁴ The one-time sale involved did not rise to an agreement to limit or establish future pricing actions, which the Sherman Act prohibits.¹³⁵

125. *See id.*

126. *See id.*

127. *See id.* at 1367-69.

128. 390 U.S. 145 (1968).

129. *See id.* at 152-54.

130. 891 F. Supp. 1169 (E.D. Va. 1995).

131. *See id.* at 1186.

132. *See Williams v. 5300 Columbia Pike Corp.*, 901 F. Supp. 208, 212 (E.D. Va. 1995).

133. *See Williams*, 891 F. Supp. at 1176.

134. *See id.*

135. *See id.* at 1177-78.

4. Injunctive Relief Disfavored

In *Omega World Travel, Inc. v. Trans World Airlines*,¹³⁶ the Fourth Circuit considered a request for a preliminary injunction predicated on a Sherman Act claim. Previously, TWA sued Omega World Travel in Missouri state court alleging breaches of Omega's obligations of loyalty and good faith when Omega, over TWA's objections, persisted in marketing TWA tickets for a company controlled by former TWA controlling shareholder Carl Icahn.¹³⁷ Omega reciprocated by suing TWA in the federal district court for the Eastern District of Virginia on federal antitrust and state contract law grounds.¹³⁸ After TWA allegedly threatened termination of its agency relationship with Omega, Omega sought and obtained a preliminary injunction prohibiting TWA from terminating the relationship.¹³⁹ The Fourth Circuit stayed the injunction, and TWA terminated the relationship.¹⁴⁰ TWA then appealed the district court's grant of the mandatory preliminary injunction.¹⁴¹

Reversing the district court's grant of the injunction, the Fourth Circuit held that, as a matter of law, the Sherman Act could not support an injunction requiring TWA to remain involuntarily in a contractual business relationship with Omega.¹⁴² The court reasoned that Omega sought and obtained the injunction to prevent the alleged harm that would result were its agency relationship with TWA terminated.¹⁴³ However, Omega's underlying federal antitrust suit alleged that very same relationship was invalid under the Sherman Act, and that it had been injured by the continuation of an allegedly coerced relationship.¹⁴⁴ The court held that "[w]hen the injury that the movant seeks to prevent through a preliminary injunction is not only unrelated, but directly contradictory to, the injury for

136. 111 F.3d 14 (4th Cir. 1997).

137. See *id.* at 15.

138. See *id.*

139. See *id.*

140. See *id.*

141. See *id.*

142. See *id.* at 15-16.

143. See *id.* at 16.

144. See *id.*

which it seeks redress in the underlying complaint," the injunction should not be issued.¹⁴⁵ The court also held that the preliminary injunction could not be supported by Omega's state law contract claims because they could not be successful.¹⁴⁶

In *Strauss v. Peninsula Regional Medical Center*,¹⁴⁷ the Fourth Circuit affirmed a district court's denial of plaintiffs' motion for injunctive relief under the Sherman Act.¹⁴⁸ There, the plaintiff doctors had an exclusive contract with Peninsula Regional Medical Center (PRMC) to provide radiation oncology services. In 1992, the contract expired and PRMC began operating its radiation oncology department with an open staff.¹⁴⁹

Two years later, PRMC entered into discussions to purchase from plaintiffs an independent radiation therapy facility. Those plans fell through, and PRMC decided to enter into another exclusive agreement for radiation oncology services with a third practice group, Drake, Blumberg, that promulgated regulations for physicians at PRMC facilities.¹⁵⁰ Plaintiffs' group was unable to agree to new regulations, leading to the termination of plaintiffs' privileges at PRMC.¹⁵¹ Plaintiffs brought this action seeking injunctive relief on the grounds that the termination of their privileges constituted, among other things, a violation of the Sherman Act.¹⁵²

Affirming the lower court's denial of plaintiffs' motion, the appellate court found that there was no irreparable injury because plaintiffs' complaints could be properly addressed by a monetary judgment, and any reputational injury to plaintiffs' practice group was too speculative to merit injunctive relief.¹⁵³ The court also held that the balance of hardships did not tip in plaintiffs' favor because there would be continued strife at PRMC if plaintiffs' practice group returned by court order.¹⁵⁴

145. *Id.*

146. *See id.* The court held that since the TWA-Omega contract was terminable "at will," both Virginia and Missouri law do not allow an implied duty of good faith and fair dealing to override explicit contract terms. *See id.*

147. No. 95-2424, 1996 WL 265928 (4th Cir. May 20, 1996).

148. *See id.* at *6.

149. *See id.* at *3.

150. *See id.* at *3-4.

151. *See id.*

152. *See id.* at *4.

153. *See id.* at *1.

154. *See id.* at *2 (citing *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 702-03 (4th

The court noted that plaintiffs also had to overcome the fact that Drake, Blumberg and the hospital were not separate actors within the meaning of the Sherman Act.¹⁵⁵ In addition, the court recognized that plaintiffs were alleging, at most, harm to themselves as individual competitors rather than cognizable harm to competition in general.¹⁵⁶

C. *Sherman Act Section 2: Monopolization Issues*

In *Howerton v. Grace Hospital, Inc.*,¹⁵⁷ the Fourth Circuit, in a per curiam opinion, affirmed the decision of the district court for the Western District of North Carolina which granted summary judgment in favor of the defendants. As discussed above,¹⁵⁸ Blue Ridge had provided radiology services to Grace Hospital from 1984 to 1990 pursuant to a non-exclusive written contract.¹⁵⁹ In 1990, however, when Blue Ridge proceeded with its plans of opening an outpatient imaging facility, Grace terminated its contract with Blue Ridge on ninety days notice and approached PMI to replace Blue Ridge as provider of radiological services.¹⁶⁰ In April of 1990, Grace and PMI entered into an exclusive contract.¹⁶¹ Plaintiffs subsequently filed suit against Grace and PMI, alleging violations of Sherman Act Section 1 as well as violations of Sherman Act Section 2 by monopolization and attempted monopolization.¹⁶²

The court rejected plaintiff's Section 2 claim that the exclusive contract with PMI effectively eliminated competition in the outpatient radiology market.¹⁶³ The court held that Grace could not be held liable as a monopolist in Blue Ridge's product market because Grace did not compete with Blue Ridge for outpatient services and does not receive any portion of the fees

Cir. 1991).

155. *See id.*

156. *See id.*

157. No. 95-2549, 1996 WL 498095 (4th Cir. Sept. 4, 1996).

158. *See supra* text accompanying notes 26-43.

159. *See Howerton*, No. 4:90CV187, 1995 WL 787529, at *3 (W.D.N.C. July 7, 1995).

160. *See id.* at *4.

161. *See id.*

162. *See id.* at *6.

163. *See id.* at *7-9.

generated by PMI.¹⁶⁴ Moreover, the court concluded that PMI had no "dangerous probability" of successful monopolization because it could be terminated without cause under the contract with Grace.¹⁶⁵ Also, the court ruled that PMI did not have the specific intent necessary for a Section 2 claim because Grace officials were the ones who had insisted that the contract with PMI be exclusive.¹⁶⁶

The court also rejected plaintiffs' conspiracy to monopolize claim on grounds that there was insufficient evidence for a jury to find a conspiracy between Grace and PMI.¹⁶⁷ In addition, the court stated that the plaintiffs' monopoly leveraging claim, even if recognized by the Fourth Circuit, must also fail because defendants did not have monopoly power in the relevant markets.¹⁶⁸

Judge James Harry Michael, Jr., of Charlottesville, has decided two complex Section 2 cases in the last eighteen months. Most recently, in *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*,¹⁶⁹ discussed above,¹⁷⁰ Judge Michael confronted the claims of Virginia Vermiculite, Ltd. (VVL) that W.R. Grace & Co. (Grace), its competitor in the vermiculite mining industry, had removed over eighty percent of the vermiculite mining reserves in Louisa County from the mining market. VVL argued that this removal limited VVL's Virginia operations to its finite reserves, thereby increasing the value of Grace's South Carolina mineral reserves and diminishing VVL's opportunity to compete with Grace.¹⁷¹

With respect to VVL's Sherman Act Section 2 claims, the court noted at the outset that it was "persuaded that economic reality probably supports [Grace's] position with respect to the Section 2 claims against it."¹⁷² This observation notwithstanding-

164. *See id.* at *11-12.

165. *See id.* at *12.

166. *See id.* at *13.

167. *See id.*

168. *See id.* at *12. In recent years, the Fourth Circuit has assumed the existence of, but has yet to recognize a monopoly leveraging claim. *See Advanced Health-Care Serv. v. Radford Community Hosp.*, 910 F.2d 139, 149, 149 n.17 (4th Cir. 1990).

169. 965 F. Supp. 802 (1997).

170. *See supra* text accompanying notes 69-90.

171. *See Virginia Vermiculite*, 965 F. Supp. at 808-09.

172. *Id.* at 821.

ing, the court remarked that Grace's arguments were somewhat premature at the summary judgment stage, given their focus on the facts and evidence likely to be adduced.¹⁷³ The court therefore found that VVL had stated sufficiently viable claims of monopolization,¹⁷⁴ attempted monopolization¹⁷⁵ and conspiracy to monopolize¹⁷⁶ against Grace to proceed.

Following a lengthy law review-styled analysis of the economic principles at play in this antitrust scenario, Judge Michael concluded that, both the supply of and demand for vermiculite being relatively inelastic, Grace's market share—alleged to be fifty-seven percent in 1992—sufficed to permit a finding of the exercise of monopoly power for purposes of allowing VVL to proceed on its claims.¹⁷⁷ Despite recognizing that competitors “normally can refuse to deal at whim with rivals or to aid competitors,” Judge Michael found that VVL's allegations of Grace's conduct in reducing both the supply and output of vermiculite through its donation to HGSI sufficiently stated a claim that Grace refused to deal with its competitors in a manner prohibited by Section 2.¹⁷⁸ “A competitor's unilateral refusal to deal with rivals may violate Section 2 if the purpose or effect is to create or maintain a monopoly.”¹⁷⁹ The court therefore rejected Grace's numerous attempts to distinguish or otherwise criticize the decision in *Aspen Skiing Co. v. Aspen Highlands Skiing*

173. “[C]onviction by the court that the plaintiff will not succeed on his claim does not justify dismissal under Rule 12(b)(6) when the plaintiff has colorably stated the allegations necessary to his cause of action.” *Id.* (citing *Advanced Health-Care Serv. v. Radford Community Hosp.*, 910 F.2d 139, 145 n.8 (4th Cir. 1990)).

174. “To state a claim of monopolization, a private antitrust plaintiff must allege ‘possession of monopoly power in the relevant market,’ ‘willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.’” *Id.* at 821-22 (quoting *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 n.19 (1985)).

175. “To state a claim of attempted monopolization, the plaintiff must allege ‘a specific intent to monopolize a relevant market, predatory or anti-competitive acts, and a dangerous probability of successful monopolization.’” *Id.* at 821 (quoting *Aspen Skiing Co.*, 472 U.S. at 596 n.19).

176. “To state a claim of conspiracy to monopolize the plaintiff must allege a conspiracy, an overt act committed in furtherance of the conspiracy, a substantial effect on commerce, and specific intent to monopolize.” *Id.* at 822 (citing *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947)).

177. *See id.* at 823-28.

178. *Id.* at 825.

179. *Id.* (citing *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 483 n.32 (1992)).

Corp.,¹⁸⁰ and found that VVL adequately alleged anti-competitive conduct such that its Section 2 claims passed muster at this initial stage of the litigation.¹⁸¹ Furthermore, the court was unpersuaded by Grace's arguments that its transaction with HGSI qualified it for a "sizeable" tax deduction, thereby qualifying as a legitimate business reason justifying its conduct.¹⁸²

Previously, Judge Michael handled the protracted antitrust litigation in *Virginia Panel Corp. v. Mac Panel Co.*,¹⁸³ involving Virginia Panel's (VPC) claims of patent infringement and false advertising against defendant Mac Panel Company (MPC). MPC levied its own counterclaims and affirmative defenses of patent misuse and anti-competitive behavior, including monopolization and attempted monopolization in violation of Section 2 of the Sherman Act.¹⁸⁴ The court bifurcated the trial into two phases: (a) patent infringement issues and (b) patent misuse, anti-competitive behavior and false advertising issues.¹⁸⁵ During the first proceeding, the jury returned a verdict of over \$1.2 million for VPC on its infringement claims.¹⁸⁶

Prior to the second trial phase, VPC moved for leave to file a renewed motion for summary judgment on MPC's monopolization and attempted monopolization counterclaims. VPC contended that, because the jury previously had found that VPC had a valid patent that MPC was infringing, it merely was "exploiting a legitimate competitive advantage" arising out of such patent, which was insufficient to constitute exclusionary conduct.¹⁸⁷ In response, MPC argued, among other things, that VPC attempted to extend its patent rights beyond the scope of the patent, thereby resulting in antitrust violations.¹⁸⁸ Without addressing the merits of either party's arguments, Judge Michael found that evidence suggesting that VPC had used its patent rights to attempt to tie in sales of non-patented component parts and to

180. 472 U.S. 585 (1985).

181. See *Virginia Vermiculite*, 965 F. Supp. at 826.

182. See *id.* at 827.

183. 887 F. Supp. 880 (W.D. Va. 1995).

184. See *id.* at 884, 889.

185. See *id.* at 883.

186. See *id.* at 884.

187. *Id.* at 889.

188. See *id.*

preclude sales by others of non-patented component parts was sufficient to preclude summary judgment on MPC's monopolization and attempted monopolization claims.¹⁸⁹

The jury in the second proceeding finding that VPC, in fact, had misused its patents and had engaged in anti-competitive behavior, awarded MPC over \$152,000 in untrebled damages.¹⁹⁰ The jury also found that MPC had engaged in false advertising and awarded VPC almost \$65,000.¹⁹¹

Numerous post-trial motions were filed, including a motion by VPC to set aside the jury's adverse verdict on MPC's monopolization claims against it.¹⁹² As to VPC's arguments that MPC impermissibly defined the relevant product market to be limited only to those products covered by the patent in suit, Judge Michael noted that the question was "properly characterized as the quintessential 'battle of the experts.'"¹⁹³ Judge Michael concluded, however, that there was ample evidence offered by MPC's expert to suggest that he utilized proper methodology upon which the jury could base its finding of the relevant market.¹⁹⁴

As to whether VPC's infringement notices to MPC's customers constituted antitrust violations, the court noted that where such litigation threats have the effect of eliminating competition and of monopolizing the relevant market by ninety percent, the conduct may reasonably be characterized as anti-competitive.¹⁹⁵ The court also noted that evidence adduced at trial showed that MPC was VPC's only viable competitor in the relevant market, and VPC's conduct actually succeeded in reducing MPC's market share from twenty-one percent to ten percent.¹⁹⁶ In addition, the court found that the jury reasonably could find that VPC's threat to void warranties of customers using non-VPC components with VPC's products effectively

189. *See id.*

190. *See Virginia Panel Corp. v. Mac Panel Co.*, No. 93-0006-H, 1996 WL 335381 at *1 (W.D. Va. May 29, 1996).

191. *See id.*

192. *See id.* at *5.

193. *Id.*

194. *See id.*

195. *See id.*

196. *See id.*

extended VPC's lawful monopoly power derived from its patented product to include those items MPC could sell legally without infringing VPC's patent.¹⁹⁷

VPC also argued that there was insufficient evidence to support a jury verdict that VPC acted with specific intent to attempt to monopolize a relevant product market.¹⁹⁸ The court recognized that MPC must have shown that (1) VPC formed a specific intent to monopolize the relevant product market; (2) VPC engaged in anti-competitive or predatory conduct designed to further that intent; and (3) there existed a dangerous probability that VPC would succeed.¹⁹⁹ Relying on *Abcor Corp. v. AM International Inc.*,²⁰⁰ VPC argued that specific intent is shown by direct evidence that a defendant sought to create a monopoly by circumventing the competitive process.²⁰¹ MPC argued from *M&M Medical Supplies & Services Inc. v. Pleasant Valley Hospital, Inc.*,²⁰² that specific intent may be inferred generally from the defendant's anti-competitive practices.

Judge Michael concluded that the evidence, taken as a whole, presented a sufficient basis from which the jury properly could have concluded that VPC possessed the specific intent to monopolize the market. VPC's conduct constituting patent misuse, sending infringement notices, threatening to void warranties, and exploiting its patented products to increase sales of its unpatented products, provided ample evidence of anti-competitive behavior from which the jury could have arrived at its finding of the specific intent to monopolize.²⁰³ In addition, Judge Michael concluded that this same evidence supported a finding that VPC's attempts to squeeze MPC out of the market had a "significantly dangerous probability of success."²⁰⁴ Hence, the court overruled VPC's post-trial motions on MPC's counterclaim of attempted monopolization.²⁰⁵

197. *See id.*

198. *See id.* at *7.

199. *See id.* (citing *Advanced Health-Care Servs., Inc. v. Radford Community Hosp.*, 910 F.2d 139, 147 (4th Cir. 1990)).

200. 916 F.2d 924 (4th Cir. 1990).

201. *See id.* at 926.

202. 981 F.2d 160 (4th Cir. 1992).

203. *See Virginia Panel Corp.*, 1996 WL 335381, at *7.

204. *Id.* at *8.

205. *See id.*

Finally, the court concluded that MPC presented adequate evidence of actual antitrust injury, and that the jury properly considered VPC's arguments of mitigation.²⁰⁶ For example, MPC established a total actual lost profit figure by calculating the actual amount of its lost sales over a nine-quarter period (during which MPC's market share waned in the relevant market) and by applying MPC's incremental profit margin.²⁰⁷ Because the jury awarded the full amount requested, the court concluded that the jury considered VPC's evidence, which suggested that MPC's loss of market share was "attributable to legitimately competitive factors."²⁰⁸

On a rather unique antitrust front, in *Sofer v. United States*,²⁰⁹ Judge Kellam, of the Eastern District of Virginia, held that a cable operator's refusal to air plaintiff's editorial advertisement, and the Federal Communications Commission (FCC) and City of Chesapeake's concurrence in the cable operator's right to do so, did not violate Section 2 of the Sherman Act.²¹⁰

Plaintiff had sought to purchase programming time on defendant TCI's cable system to air the following advertisement:

BULLETIN
MESSIAH IS HERE!
RAPTURE IS ON!
call for facts
1-900-???-????
\$1.99/min., must be 18²¹¹

TCI refused, claiming full editorial discretion to reject commercial advertisements, and the FCC and the City of Chesapeake supported TCI's right to reject the advertisement.²¹²

206. *See id.* at *7.

207. *See id.*

208. *Id.*

209. No. 2:94CV1182, 1995 WL 576833 (E.D. Va. June 7, 1995).

210. *See id.* at *4.

211. *Id.* at *1.

212. *See id.*

Plaintiff brought suit against TCI, the FCC, the City of Chesapeake, and the United States, claiming that TCI's refusal constituted a violation of the Communications Act,²¹³ the Cable Act,²¹⁴ the Sherman Act,²¹⁵ the Clayton Act,²¹⁶ the First Amendment²¹⁷ and the Civil Rights Act.²¹⁸ After denying plaintiff's motion to add the United Nations, the Roman Catholic Church, Pope John Paul II and former President George Bush as defendants, the district court granted defendants' motion for summary judgment as to all claims.²¹⁹ In particular, Judge Kellam found plaintiff's antitrust claims deficient in that plaintiff failed to establish a competitive relationship between plaintiff and defendant, or an area of effective competition.²²⁰ Moreover, the court found insufficient indicia of a conspiracy merely in the FCC and the City of Chesapeake's concurrence in TCI's determination that it had full editorial discretion to reject the commercial advertisement.²²¹

D. *Antitrust Injury and Standing*

In three separate decisions discussed above, the Fourth Circuit demonstrated its reluctance to entertain claims in which antitrust plaintiffs failed to bring forth clear evidence of injury to competition. For example, in *Howerton v. Grace Hospital, Inc.*,²²² the Fourth Circuit affirmed the grant of summary judgment by the district court in favor of the defendants, which noted that plaintiffs failed to prove the existence of antitrust

213. 47 U.S.C. § 315 (1994).

214. 47 U.S.C. § 532 (1994).

215. 15 U.S.C. § 2 (1994).

216. 15 U.S.C. § 26 (1994).

217. U.S. CONST. amend. I.

218. 42 U.S.C. §§ 1983-1985 (1994).

219. See *Sofer v. United States*, No. 2:94CV1182, 1995 WL 576833, at *5 (E.D. Va. June 7, 1995).

220. See *id.* at *4.

221. See *id.*

222. No. 95-2549, 1995 WL 498095 (4th Cir. Sept. 4, 1996).

injury.²²³ The court reasoned that the only injury shown was a result of competition, not an injury to competition itself.²²⁴

Similarly, in *Strauss v. Peninsula Regional Medical Center*,²²⁵ the Fourth Circuit affirmed a district court's denial of plaintiffs' motion for injunctive relief under the Sherman Act. In so doing, the court recognized that plaintiffs were alleging, at most, harm to themselves as individual competitors rather than cognizable harm to competition in general.²²⁶

Finally, in *Patel v. Scotland Memorial Hospital*,²²⁷ the Fourth Circuit found that Dr. Patel had failed to adequately allege an antitrust injury, whether through establishing a per se illegal agreement with plainly anti-competitive effects, or through the "rule of reason" approach.²²⁸ The court found that Dr. Patel alleged only that the defendants destroyed her medical practice, causing economic injury to her alone, rather than that their conduct adversely affected competition in the market for anesthesiology services.²²⁹ Affirming the lower court's dismissal on this basis, the court held that a staffing decision by a single hospital as to a single practitioner, in the absence of harm to the relevant market, does not constitute an antitrust injury.²³⁰

In the only district court opinion addressing standing, Judge Jackson L. Kiser dismissed on summary judgment plaintiffs' price fixing class action suit on the grounds that plaintiffs failed to produce sufficient evidence showing that they had been injured by the milk price fixing conspiracy they had alleged.²³¹ In a detailed discussion of the testimony of plaintiffs' chief

223. See *Howerton v. Grace Hosp., Inc.*, No. 4:90CV187, 1995 WL 787529 (W.D.N.C. July 7, 1995); see also *supra* text accompanying notes 26-43.

224. See *Howerton*, 1995 WL 787529 at *14.

225. No. 95-2424, 1996 WL 265928 (4th Cir. May 20, 1996).

226. See *id.* at *2.

227. No. 95-2704, 1996 WL 383920 (4th Cir. July 10, 1996) *cert. denied*, 117 S. Ct. 767 (1997).

228. See *id.* at *4; see also *supra* text accompanying notes 91-103.

229. See *Patel*, 1996 WL 383920, at *4.

230. See *id.*

231. See *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, Nos. 93-0968-R and 96-0407-R, slip op. at 16 (W. D. Va., August 27, 1997) (order and memorandum opinion granting non-settling defendants summary judgment); see also *supra* text accompanying notes 1-23.

witness, the sole evidence of the alleged conspiracy, who testified that his discussion with another dairy had "no application" to plaintiffs, the court ruled that "plaintiffs are no longer able to demonstrate that a jury question exists that the products they purchased from [the dairies] were a subject of the conspiracy."²³²

E. Exemptions and Immunities

The United States Supreme Court issued one antitrust decision of significance in 1996, in which it affirmed an extension of the federal antitrust exemption to employers' collective bargaining agreements. In *Brown v. Pro Football, Inc.*,²³³ the National Football League and the NFL Players Association, a labor union, began to negotiate a new contract after their collective bargaining agreement expired in 1987.²³⁴ In March of 1989, the NFL presented a plan that would permit each member club to establish a developmental squad of up to six rookie or substitute players, each of whom would be paid the same \$1,000 weekly salary.²³⁵ The union disagreed and insisted that developmental players be provided with benefits and protections similar to those of regular players, and that they be free to negotiate their own salaries.²³⁶ In June 1989, the two groups reached an impasse in negotiations, at which point the NFL unilaterally implemented the plan, warning club owners that if they paid developmental players more or less than \$1,000 per week, they would face disciplinary action, including the loss of draft choices.²³⁷ In May of 1990, 235 developmental players filed an antitrust suit against the League and its member clubs, claiming that the employer's agreement to pay a fixed salary restrained trade in violation of Section 1 of the Sherman Act.²³⁸

232. *Marlinton*, slip op. at 13.

233. 116 S. Ct. 2116 (1996).

234. *See id.* at 2119.

235. *See id.*

236. *See id.*

237. *See id.*

238. *See id.*

After a jury trial, the United States District Court for the District of Columbia entered judgment for the players and awarded treble damages in excess of \$30 million.²³⁹ The Court of Appeals, however, reversed on grounds that the League was immune from liability under a federal antitrust exemption for restraints on competition imposed through the collective-bargaining process.²⁴⁰ The Supreme Court affirmed the decision of the Court of Appeals, holding that federal labor laws shield from antitrust attack agreements among employers bargaining together to implement after impasse the terms of their last best good-faith wage offer.²⁴¹

Justice Breyer, writing for the Court, recognized that the Court previously had found in the labor laws an implicit non-statutory antitrust exemption that applies where needed to make the collective bargaining process work.²⁴² Breyer noted that it would be difficult, and perhaps impossible, "to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other *any* of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable."²⁴³ Therefore, Breyer concluded that "some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions."²⁴⁴ The Court held that subjecting the post-impasse imposition to antitrust law might introduce instability and uncertainty into the collective-bargaining process, since antitrust laws often forbid and discourage the "kinds of joint discussions and behavior that collective-bargaining invites or requires."²⁴⁵ The Court expressed concern about allowing courts to apply the antitrust laws to determine whether particular kinds of employer understandings are "reasonable" where justified by collective bargaining necessity.²⁴⁶ Such a practice, the Court feared, would lead to a "web of detailed rules spun by many different nonexpert

239. *See id.*

240. *See Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1056 (D.C. Cir. 1995).

241. *See Brown*, 116 S. Ct. at 2117-18.

242. *See id.* at 2120.

243. *Id.* (emphasis in original).

244. *Id.*

245. *Id.* at 2123.

246. *See id.*

antitrust judges and juries," instead of a set of labor rules enforced by the Labor Board.²⁴⁷

The Court rejected as unworkable the Petitioners' claim that the exemption applied only to labor-management agreements. The Court also rejected the Solicitor General's argument that the exemption should terminate at the point of impasse.²⁴⁸ The Court did, however, caution that an agreement among employers could be sufficiently distant in time and circumstances from the collective bargaining process to fall outside of the exemption.²⁴⁹ The lone dissent from the Court's opinion was filed by Justice Stevens, who argued that the Court was expanding the limited nonstatutory exemption to new ground, a role for Congress, not the Court.²⁵⁰

The Fourth Circuit considered the State of South Carolina exempt from antitrust liability under the circumstances presented in *Dehoney v. South Carolina Department of Corrections*.²⁵¹ In *Dehoney*, the plaintiff, a state inmate in South Carolina, brought a pro se action alleging that the Department of Corrections had violated Section 1 of the Sherman Act by requiring all prisoners to purchase their goods from the prison canteen at a ten percent markup.²⁵² Finding that the canteen was state run, and therefore not subject to the antitrust laws, the federal magistrate judge recommended that the district court grant the defendant's motion for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure.²⁵³ The magistrate judge noted that "nothing in the language of the Sherman Act or in its history suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."²⁵⁴

Moreover, the magistrate judge noted that in adopting and enforcing the canteen program, South Carolina "made no contract or agreement and entered into no conspiracy in restraint

247. *Id.*

248. *See id.* at 2124-25.

249. *See id.* at 2127.

250. *See id.* at 2134 (Stevens, J., dissenting).

251. No. 95-7270, 1995 WL 736863 (4th Cir. Dec. 12, 1995).

252. *See Dehoney v. South Carolina Dep't of Corrections*, 1995 WL 842006 (D.S.C. July 31, 1995); *see also supra* text accompanying notes 59-63.

253. *See Dehoney*, 1995 WL 842006, at *4.

254. *Id.*

of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.²⁵⁵ The district court for the District of South Carolina adopted the magistrate judge's report and dismissed the action pursuant to Rule 12(b)(6).²⁵⁶ On review, the Fourth Circuit affirmed the decision of the district court in a one-paragraph per curiam opinion.²⁵⁷

Earlier this year, the Eastern District of Virginia also addressed several immunities to the antitrust laws in the matter of *Forest Ambulance Services, Inc. v. Mercy Ambulance of Richmond, Inc.*²⁵⁸ In 1990, the City of Richmond became the first locality in Virginia to act on state legislation authorizing municipal regulation of "emergency medical services vehicles" through franchising and permitting.²⁵⁹ The City enacted an ordinance extending permits to all volunteer rescue squads then in operation and granting an interim permit to defendant Multi-Hospital High-Tech Services (MHS), a partnership of several hospitals, allowing MHS to transport patients between its members.²⁶⁰ In 1991, the City adopted a subsequent ordinance creating a monopoly over the emergency medical services system and creating the Richmond Ambulance Authority (RAA), a non-profit governmental entity, to oversee the system.²⁶¹ RAA owns and maintains the ambulances but contracts out their operation, at the time to Mercy Ambulance of Richmond, Inc. (Mercy).²⁶²

Plaintiff Forest Ambulance Service, Inc. (Forest), was one of three existing major ambulance services when the City entered the market, and the only service that was unsuccessful in obtaining a permit to operate within the City under the new ordinance.²⁶³ Forest brought a two-count complaint against the City, RAA and the other ambulance companies, alleging a host

255. *Id.*

256. *See id.* at *2.

257. *See Dehoney v. South Carolina Dep't of Corrections*, No. 95-7270, 1995 WL 736863 (4th Cir. Dec. 12, 1995).

258. 952 F. Supp. 296 (E.D. Va. 1997).

259. *See id.* at 298.

260. *See id.*

261. *See id.*

262. *See id.*

263. *See id.*

of antitrust violations as well as violation of 42 U.S.C. § 1983.²⁶⁴ Among Forest's antitrust allegations were the following: (1) that the City, RAA and Mercy combined to implement the monopolization of the ambulance market; (2) that the defendants created unreasonable barriers to obtaining a permit; (3) that MHS was the only private ambulance service granted a permit to operate in the city; (4) that Lifeline Ambulance, the only major provider other than MHS and Forest, was operating under MHS' permit without the City's consent; (5) that Forest, therefore, was the only major private ambulance provider of non-emergency services not permitted to operate in the City; (6) that all of the defendants had combined or conspired to monopolize and restrain trade; and (7) that the defendants' acts were designed to selectively allow competition in the market for ambulance services, to Forest's exclusion.²⁶⁵

Before addressing the merits of Forest's antitrust claims, the court initially ruled, citing Ninth Circuit precedent, that Forest's shareholders, who were named as plaintiffs along with the company, lacked standing to bring suit on the ground that the individuals had neither suffered nor alleged any antitrust injury as a result of the challenged conduct.²⁶⁶

The court next held that the Local Government Antitrust Act barred Forest's claims for treble and other money damages against the Richmond City Council, also named as a defendant.²⁶⁷ The court also ruled that where, as here, the legislative authority for municipal regulation of ambulance services clearly anticipated anti-competitive conduct, the state action immunity doctrine under *Parker v. Brown*,²⁶⁸ provides immunity from claims under the Sherman Act, including both injunctive and monetary relief.²⁶⁹ In so holding, the court rejected Forest's argument for application of a "proprietary interest" exception to municipal immunity which applies to municipal-

264. *See id.*

265. *See id.* at 298-99.

266. *See id.* at 299 (citing *Vinci v. Waste Management, Inc.*, 80 F.3d 1372, 1375 (9th Cir. 1996)).

267. *See id.*

268. 317 U.S. 341 (1943).

269. *See Forest Ambulance Serv.*, 952 F. Supp. at 299.

ities acting as active market participants.²⁷⁰ Rather, assuming without deciding that such an exception exists, the court held that the City's subsidization of RAA's operation was inconsistent with the role of a market participant.²⁷¹

With respect to the private defendants, the Court declined to address the issue of whether they were protected by the state action doctrine, finding instead that they clearly were entitled to *Noerr-Pennington* immunity under *Eastern R.R. Presidents Conference v. Noerr Motor Freight*²⁷² and *United Mine Workers v. Pennington*.²⁷³ Although Forest urged a "commercial exception" to the doctrine—that the challenged conduct is primarily the result of commercial, rather than political motivations—the Court held that no such exception had been recognized by the courts.²⁷⁴ The court also rejected out of hand Forest's argument that because MHS' permit had become invalidated due to a change in ownership, which was prohibited by the ordinance, MHS should be divested of its immunity.²⁷⁵

Finally, the court found that the antitrust claims against RAA must be dismissed, as either being barred by the Local Government Antitrust Act and *Parker* state action immunity for government actors or by *Noerr-Pennington* immunity for private actors.²⁷⁶

F. *Practice and Procedure*

In a terse per curiam opinion, the Fourth Circuit affirmed the district court's grant of summary judgment to defendants on procedural grounds in *Martinez v. Roig*.²⁷⁷ In *Martinez*, plaintiff anesthesiologist brought antitrust claims arising from his peer review, termination of medical staff privileges, and loss of medical malpractice insurance.²⁷⁸ Although disagreeing with

270. *See id.* at 301.

271. *See id.*

272. 365 U.S. 127 (1961).

273. 381 U.S. 657 (1965).

274. *See Forest Ambulance Serv.*, 952 F. Supp. at 302.

275. *See id.* at 303.

276. *See id.*

277. Nos. 93-1309, 93-1389, 93-1390, 93-1409, 1995 WL 626512 (4th Cir. Oct. 25, 1995).

278. *See id.* at *6.

the district court's holding that plaintiff's claims were barred by res judicata or claim preclusion, the appellate court found that collateral estoppel or issue preclusion did bar such claims.²⁷⁹ The Fourth Circuit also affirmed the district court's denial of sanctions.

III. FEDERAL REGULATORY, ADMINISTRATIVE AND ENFORCEMENT EFFORTS

A. *Antitrust Division Civil Investigations*

On August 22, 1996, the United States filed a civil action in United States District Court in Alexandria, Virginia, against Universal Shippers Association alleging that it had violated Section 1 of the Sherman Act by entering into an agreement with an ocean common carrier that unreasonably restrained competition for ocean transportation services.²⁸⁰ The alleged illegal agreement between Universal and the common carrier contained an "automatic rate differential clause,"²⁸¹ which provided that the carrier would guarantee Universal shipping rates and charges at least five percent less than those given to competing shippers and shippers' associations.²⁸²

On the same day the action was filed, the United States and Universal filed a Stipulation by which they consented to the entry of a Final Judgment to undo the challenged agreement

279. *See id.* at n.1.

280. *See* United States v. Universal Shippers Ass'n, 1996 WL 760279, at *3 (E.D. Va. Nov. 6, 1996). A shippers' association is "a group of ocean transportation customers ('shippers') that consolidates or distributes freight for its members on a nonprofit basis in order to secure volume discounts." *Id.* As a shippers' association, Universal accounts for about half of the wine and spirits carried across the North Atlantic. *See id.*

281. An "automatic rate differential clause" as defined by the court is any provision in a contract the defendant has with an ocean common carrier or conference that requires the ocean common carrier or conference to maintain a differential in rates, whether expressed as a percentage or as a specific amount, between rates charged by the ocean common carrier or conference to the defendant under the contract and rates charged by the ocean common carrier or conference to any other shipper of the same or competing commodities for lesser volumes.

Id. at *1.

282. *See id.* at *4.

and prevent recurrence of such agreements in the future.²⁸³ In this consent decree, District Court Judge Bryan enjoined the defendant from "maintaining, adopting, agreeing to, abiding by, or enforcing an automatic rate differential clause in any contract."²⁸⁴ The court also nullified and voided all rate differential clauses in any of the defendant's other shipping contracts.²⁸⁵ The court noted that entry of the consent decree would neither impair nor assist a private litigant in bringing an action under Section 4 of the Clayton Act.²⁸⁶

B. *Criminal Enforcement Efforts*

As part of a continuing investigation by the Department of Justice Antitrust Division, six individuals have been convicted in the last two years of violating Section 1 of the Sherman Act by rigging bids at residential real estate foreclosure auctions in Northern Virginia.²⁸⁷ The individuals allegedly conspired with real estate speculators not to bid against each other at certain real estate foreclosure auctions, allowing the participants to obtain real estate at low, non-competitive prices. They would then meet secretly and hold a second auction during which each conspirator bid an amount above the public auction price. The conspirator who bid the highest amount won the property. That amount was the group's illicit profit, which was divided among the conspirators in payoffs made later.

In September of 1995, Donald M. Kotowicz, Alexander Giap, and Leo E. Gulley pled guilty for participation in the conspiracy. Similarly, in November of 1996, G. Frank Stinnet pled guilty to the same charges and was sentenced to three years' probation. In 1997, Mija S. Romer and Khem C. Batra were convicted after a trial as part of the same investigation. The court sentenced Romer to a \$20,000 fine and 547 days in jail

283. *See id.* at *3.

284. *Id.* at *2.

285. *See id.*

286. *See id.* at *6.

287. *See United States v. Romer*, Criminal No. 96-350-A-(1,2) (E.D. Va. Apr. 18, 1997); *United States v. Stinnet*, Criminal No. 96-00435-A (E.D. Va. Nov. 15, 1996); *United States v. Kotowicz*, Crim. No. 95-414-A (E.D. Va. Sept. 28, 1995); *United States v. Giap*, Crim. No. 95-415-A (E.D. Va. Sept. 28, 1995); *United States v. Gulley*, Crim. No. 95-416-A (E.D. Va. Sept. 28, 1995).

for bid rigging, and three years probation for bank fraud. Katra was sentenced to ninety days in jail and three years probation for bid rigging. In all, the investigation has resulted in the convictions of twelve individuals and one corporation, and is continuing.

C. *Enforcement Guidelines Issued*

1. Clarification of Efficiencies Analysis.

In April, 1997, the Department of Justice's Antitrust Division issued a *Revision to Section 4 of the Horizontal Merger Guidelines*²⁸⁸ clarifying its efficiencies analysis in the merger context. The revised guidelines reemphasize that the Department of Justice will consider only those efficiencies likely to be accomplished by the proposed merger and unlikely to be accomplished in the absence of the proposed merger.²⁸⁹ The guidelines also emphasize that the merging firms must substantiate efficiency claims so that government regulators can verify (1) the likelihood and magnitude of each asserted efficiency, (2) how and when they would be achieved, (3) how each would enhance the merged entity's ability and incentive to compete, (4) and why each would only be realized through a merger.²⁹⁰ Efficiency claims that are vague, speculative or unverifiable will not be considered.²⁹¹

The revised guidelines make clear that resulting efficiencies rarely will justify an otherwise anti-competitive merger and will almost never justify a merger to monopoly or near-monopoly.²⁹² Resulting efficiencies are most likely to make a difference where the likely adverse competitive effects from the merger, absent the efficiencies, are not great. To make a difference, the efficiencies must be likely to reverse the merger's potential harm to consumers in the relevant market, e.g., by preventing price increases in the market. The revised guide-

288. UNITED STATES DEPT OF JUSTICE & FEDERAL TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 4 (1997).

289. *See id.* at 30.

290. *See id.* at 31.

291. *See id.*

292. *See id.* at 32.

lines, however, specifically note that efficiencies relating to procurement and management are less likely to meet this standard.²⁹³

The revised guidelines provide new insight into how government regulators are likely to view certain types of efficiencies. While government regulators may view efficiencies affecting management and procurement more skeptically, it remains important that merging entities thoroughly document expected efficiencies prior to consummation of the merger.

2. Expanded Health Care Enforcement Policy

On August 28, 1996, the Department of Justice (DOJ) and Federal Trade Commission (FTC) issued newly revised *Statements of Antitrust Enforcement Policy in Health Care*²⁹⁴ which contain significantly expanded discussions of the antitrust principles that the DOJ and the FTC apply when analyzing physician network joint ventures and multiprovider networks. The nine statements revisit and elaborate on a set of similar statements the DOJ and the FTC issued in 1993 and revised in 1994. The statements also contain new hypothetical examples involving physician hospital organizations and "messenger model" arrangements designed to avoid unlawful price agreements. The revised statements still contain safety zones, and clarify that conduct falling outside the safety zones is not necessarily anti-competitive and likely to be challenged. The revised statements assist practitioners by providing them with the analysis used by agencies reviewing conduct that falls outside the safety zones.

3. State-Federal Criminal Prosecution Protocol

The Antitrust Division of the DOJ also announced a new protocol for increased state prosecution of criminal antitrust offenses.²⁹⁵ The protocol sets forth the circumstances under

293. *See id.*

294. 4 Trade Reg. Rep. (CCH) ¶ 13,153 (Aug. 28, 1996).

295. A full copy of the text of the Protocol is reprinted at 70 Antitrust & Trade Reg. Rep. (BNA) No. 1755, at 362 (Mar. 28, 1996).

which the Antitrust Division may transfer to State Attorneys General prosecutorial responsibility, including relevant evidence, for certain antitrust offenses, such as price fixing and bid rigging, which have particularly local impacts.²⁹⁶ Transfer will depend in large measure on whether the State Attorney General has the legal and personnel re-sources to undertake the criminal prosecution and whether the State Attorney General is indeed willing to undertake the prosecution.²⁹⁷

IV. CIVIL ENFORCEMENT ACTIVITIES OF THE ATTORNEY GENERAL OF VIRGINIA

Attorney General James S. Gilmore, III announced on January 30, 1997, that his Office had participated in a multi-state investigation of antitrust violations by a manufacturer of farm chemicals, in *Missouri v. American Cyanamid Co.*²⁹⁸ On January 30, 1997, all fifty states, the District of Columbia and Puerto Rico settled claims that American Cyanamid (AmCy), a manufacturer of agricultural chemicals, entered into resale price maintenance agreements with its retail dealers. According to the complaint, which was filed simultaneously with the settlement, AmCy, a Maine corporation that has its principal place of business in New Jersey, used its "Cash Reward on Performance" and "Award for Professional Excellence" incentive programs to establish floor prices to be charged by the retail dealers when making retail sales of certain crop protection chemicals.²⁹⁹ These floor prices were AmCy's wholesale prices. Dealers received monetary rebates from AmCy only for retail sales made above the floor prices established in the written contracts. Dealers therefore only earned profits on retail sales of the affected crop protection chemicals if they earned a rebate or charged a price that exceeded the floor prices. Under the terms of the contracts executed under the incentive programs, AmCy was entitled to audit each dealer's records to ensure compliance with the floor prices.³⁰⁰

296. *See id.*

297. *See id.*

298. No. 97-4024, 1997 WL 129408 (W.D. Mo. Jan. 30, 1997).

299. *See In re American Cyanamid*, F.T.C. No. C. -3739 (1997).

300. *See id.*

The settlement agreement reached with AmCy provides for a \$7.3 million payment to the states³⁰¹ and enjoins AmCy, for a period of ten years, from conditioning the payment of any rebate or other incentive to any dealer, in whole or in part, on the price charged by that dealer and otherwise agreeing on prices to be charged by any dealer.³⁰² The FTC similarly entered into a consent order which would prohibit AmCy from agreeing to pay its dealers substantial rebates if the dealers sell AmCy chemicals above specified prices.³⁰³

In another enforcement action, Attorney General Gilmore announced on December 18, 1996, that Virginia and twenty-two other states filed an antitrust lawsuit in federal court against three contact lens manufacturers, eight optometric associations and eight optometrists, alleging a conspiracy to limit the availability of contact lenses from retail businesses other than optometrists.³⁰⁴ The lawsuit alleged that Vistakon (a Johnson & Johnson, Inc. company), Bausch & Lomb, Inc., CIBA Vision Corp., and optometrists, individually and through their professional associations, including the American Optometric Association, conspired to restrain consumer access to the prescriptions needed to obtain contact lenses and eliminate the supply of contact lenses to mail order companies, pharmacies, buying clubs, department stores, mass merchandise outlets, and other alternative channels of distribution. The amended complaint alleged that, absent this unlawful conspiracy, contact lenses would now be more widely available at a much lower cost.

According to the amended complaint, the conspiracy began when disposable contact lenses were first introduced. From that time, the defendants jointly tried to keep lenses from being sold by anyone other than a licensed eye care practitioner who was selling to his or her own patients. Optometrists used their collective leverage against the lens manufacturers who agreed to supply only the eye care practitioners. The manufacturers developed almost identical policies against selling to mail order companies, pharmacies, and other similar outlets and began to

301. See *American Cyanamid*, 1997 WL 129408 at *2.

302. See *id.* at *1.

303. See *id.*

304. See *California v. American Optometric Ass'n*, No. 96 Civ. 6200 (E.D.N.Y. filed Dec. 18, 1996).

increase the enforcement of those policies in response to demands by the optometrists. Once the cheaper sources for lenses were eliminated, optometrists would not be faced with competition for the sale of lenses. The conspiracy thus had the effect of keeping the price of contact lenses artificially high.

The amended complaint also alleged that optometrists shared ideas on how to keep patients from obtaining their prescriptions for contact lenses. They would either refuse to release the prescription or put limits and conditions on the release so that it could not be used to obtain lenses from other sources.

Finally, the Commonwealth of Virginia also participated in a civil antitrust action against Reebok and its subsidiary, Rockport.³⁰⁵ The Attorneys General of the fifty states and territories filed a suit as *parens patriae* on behalf of individuals in their states who had purchased certain models of Reebok and Rockport brand athletic and casual footwear between January 1, 1990, and December 31, 1994.³⁰⁶ The defendants were alleged to have fixed prices by conspiring with various distributors to sell some of their products to consumers at or above certain minimum prices, forcing consumers to pay higher prices for them than they would have paid if there had been no agreements.³⁰⁷

On October 20, 1995, United States District Court Judge John G. Koeltl granted final approval of a settlement between the parties.³⁰⁸ As part of the settlement, Reebok and Rockport denied all liability but, nonetheless, agreed to pay \$1.5 million to cover attorneys' fees and costs, and \$8 million for distribution to the states and territories to be used to benefit athletic purchases and improvement or construction of facilities.³⁰⁹ Virginia's share of the settlement amounted to \$194,295, which was divided among projects in localities throughout the Commonwealth. Reebok also agreed to an injunction providing that it will not violate specified provisions of the antitrust laws for

305. See *New York v. Reebok Int'l, Ltd.*, 903 F. Supp. 532 (S.D.N.Y. 1995), *appeal dismissed*, 96 F.3d 44 (2d Cir. 1996).

306. See *id.* at 532-33.

307. See *id.* at 533-34.

308. See *id.* at 538.

309. See *id.* at 534.

five years and that it will notify its dealers that they are free to price and advertise Reebok products however they choose.³¹⁰

Subsequently, the purported victims of the alleged violations appealed to the Second Circuit, challenging the settlement.³¹¹ The Second Circuit, however, dismissed the appeal, finding that appellants lacked standing to appeal³¹² or, alternatively, assuming arguendo they did have standing, the appeal was without merit.³¹³

V. FEDERAL AND STATE LEGISLATIVE ACTIVITY

A. *Federal Legislation*

Numerous bills were introduced this past year which impact on antitrust issues. Only one such bill has been passed to date; the remainder remain in Committee for hearing and further study.

1. Passed Legislation

On July 3, 1997, the *Charitable Donation Antitrust Immunity Act of 1997*³¹⁴ amended the Charitable Gift Annuity Antitrust Relief Act of 1995³¹⁵ and immunized donations made in the form of charitable gift annuities and charitable remainder trusts from the federal antitrust laws and their state law counterparts.

2. Legislation in Committee

The *Television Improvement Act of 1997*³¹⁶ was introduced in the Senate on April 9, 1997, and in the House on May 1, 1997. This bill proposes to exempt agreements relating to vol-

310. See *id.* at 535.

311. See *New York v. Reebok Ltd.*, 96 F.3d 44 (2d Cir. 1996).

312. See *id.* at 46-48.

313. See *id.* at 49-50.

314. Pub. L. No. 105-26, 111 Stat. 241 (1997).

315. 15 U.S.C. § 37 (1996).

316. H.R. 1510, S. 539, 105th Cong. (1997).

untary guidelines governing telecast material from the applicability of the antitrust laws. It has been referred to the Committee on Judiciary in House and Senate.

The *Fishing Industry Bargaining Act*³¹⁷ was introduced on April 9, 1997. This bill proposes to exempt persons engaged in the fishing industry from certain federal antitrust laws. Specifically, it authorizes fishermen or planters of aquatic products to collectively agree with fish processors on the price paid to the fishermen or planters for aquatic products and on the minimum price that fish processors may accept for the sale of an aquatic product. The bill also proposes to exempt such agreement from federal antitrust laws, providing that a price paid pursuant to such agreement shall not constitute a monopolization or restraint of trade in interstate or foreign commerce. The bill has been referred to the Committee on Judiciary.

The *Electric Consumers' Power to Choose Act of 1997*,³¹⁸ introduced on February 10, 1997, proposes to give consumers the right to choose among competitive providers of electricity in order to secure lower rates, higher quality services, and a more robust economy. The bill has been referred to the House Commerce Committee.

The *Give Fans a Chance Act of 1997*³¹⁹ was introduced on February 5, 1997, and proposes to amend the Act of September 30, 1961, limiting the antitrust exemption applicable to broadcasting agreements made by professional sports leagues, and for other purposes. The bill has been referred to the House Committee on the Judiciary.

The *Curt Flood Act of 1997*³²⁰ was introduced on January 21, 1997. This bill proposes to amend the Clayton Act³²¹ to require the general application of the antitrust laws to major league baseball, and specifically to the amateur draft, minor leagues and restraint on franchise relocation, among others. The bill has been referred to the Committee on Judiciary, with some hearings held already.

317. S. 533, 105th Cong. (1997).

318. H.R. 655, 105th Cong. (1997).

319. H.R. 590, 105th Cong. (1997).

320. S. 53, 105th Cong. (1997).

321. 15 U.S.C. § 12 (1994).

The *Antitrust Health Care Advancement Act of 1997*,³²² introduced on January 9, 1997, proposes to modify the application of the antitrust laws to health care provider networks that provide health care services, and for other purposes. It also provides that certain activities shall not be deemed illegal per se in any action under the federal antitrust laws or similar state law, but shall be judged based on reasonableness. The bill has been referred to the House Committee on Judiciary.

The *Intellectual Property Antitrust Protection Act of 1997*³²³ was introduced on January 9, 1997. This bill proposes to modify the application of the antitrust laws to encourage the licensing and other use of certain intellectual property. The bill has been referred to the House Committee on Judiciary.

B. *Virginia State Legislation*

The Virginia General Assembly did not pass any significant antitrust legislation in the past two years.

VI. CONCLUSION

Bringing an antitrust action in Virginia remains a course of conduct not to be undertaken by the faint of heart. Rarely do these actions meet with success at trial, and they are routinely dismissed in pretrial proceedings. While the language of the antitrust statutes themselves appears expansive, the required elements of these offenses developed over the years by the courts make it difficult to get these actions to a jury.

On the enforcement and legislative end, recent activity exhibits a definite consumer welfare orientation. Both of the actions joined by the Virginia Attorney General's office were resale price maintenance claims brought to curb efforts by large manufacturers to keep the price of agricultural chemicals and athletic shoes above competitive levels. The legislative front saw no sweeping changes, and the bills being considered tend to involve consumer issues or industry-specific exemptions. Of inter-

322. H.R. 415, 105th Cong. (1997).

323. H.R. 401, 105th Cong. (1997).

est are the proposed bills to eliminate baseball's antitrust exemption and the proposed bill to carve out an exception to the per se rule for certain actions of health care providers.

