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ARTICLES

ANTITRUST AND TRADE REGULATION LAW

*Michael F. Urbanski**

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I. INTRODUCTION

The antitrust laws are a minefield for the uninitiated. Indicative of this reality is the fact that there were no successful civil lawsuits alleging a violation of the antitrust laws brought in Virginia over the past year. A number of conspiracy, monopolization and price discrimination cases were attempted, but they all failed for a variety of reasons outlined in greater detail below. In contrast to the national trend, no antitrust cases with regard to health care were decided in Virginia during the past year. The absence of such cases represents a dramatic change from previous experience, which perhaps reflects the reality that staff privilege and exclusive dealing cases involving hospi-

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tals or physicians are rarely successful under the antitrust laws.

Although civil antitrust plaintiffs generally were unsuccessful, federal prosecutors were successful. In one noteworthy case, the United States Court of Appeals for the Fourth Circuit affirmed the convictions of real estate speculators for bid rigging at foreclosure auctions. This article addresses antitrust decisions of the United States Supreme Court, the Court of Appeals for the Fourth Circuit, and the state and federal courts of Virginia during the last year.

II. SUPREME COURT LIFTS BAN ON VERTICAL MAXIMUM PRICE FIXING

In a much anticipated and heralded decision, the United States Supreme Court, in *State Oil Co. v. Khan*,¹ lifted the per se ban on vertical maximum price fixing established nearly three decades earlier in *Albrecht v. Herald Co.*² The Court declared that vertical maximum price fixing no longer should be subject to this per se rule, which would continue to apply to vertical minimum price fixing arrangements.³ Rather, vertical maximum price fixing should be subject to a "rule of reason" analysis.⁴ The Court's ruling in *Khan*, therefore, gives manufacturers more freedom to dictate to their retailers the price ceilings for the resale of their products.

Writing for a unanimous Court, Justice Sandra Day O'Connor observed that there was no evidence to suggest that vertical maximum price fixing arrangements harmed consumers and reversed the decades old ruling in *Albrecht*, in which the Court branded maximum retail price fixing unlawful per se.⁵ In *Albrecht*, a newspaper publisher granted exclusive territories to

1. 118 S. Ct. 275 (1997) (overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968)).

2. 390 U.S. 145, 152-54 (1968).

3. See *Khan*, 118 S. Ct. at 279. The Court first announced the per se rule as applicable to minimum vertical price fixing arrangements in *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), in which the Court recognized the illegality of agreements that allow manufacturers or suppliers to establish minimum resale prices to be charged by their distributors. See *id.* at 408.

4. See *Khan*, 118 S. Ct. at 279.

5. See *id.* at 278.

independent carriers on the condition that they adhere to a maximum price for resale of newspapers to the public. The Court expressed concern that vertical maximum price fixing would allow suppliers to discriminate against certain dealers, restrict the services that dealers could afford to offer customers, or disguise minimum price fixing schemes.⁶ The Court rejected the notion that, because the newspaper's publisher "granted exclusive territories, a price ceiling was necessary to protect the public from price gouging by dealers who had monopoly power in their own territories."⁷

Subsequent to *Albrecht*, the Court made two decisions that provoked a demonstrable shift in the focus of antitrust analysis of vertical restraints from protecting intrabrand competition to protecting interbrand competition. In 1977, the Court overruled *United States v. Arnold Schwinn & Co.*,⁸ also of the *Albrecht* era, in *Continental T.V., Inc. v. GTE Sylvania, Inc.*,⁹ denouncing application of the per se rule in the context of vertical nonprice restraints.¹⁰ Then in 1990, the Court, in *Atlantic Richfield Co. v. USA Petroleum Co.*,¹¹ again recognized that maximum price fixing may have pro-competitive interbrand effects and subtly noted its concern over the continuing validity of the rule in *Albrecht* without expressly denouncing it.¹² In 1997, however, *Khan* presented the Court with the direct opportunity to sanction this new focus and, finally, to abandon the antitrust law established in *Albrecht*.¹³

At issue in *Khan* was the legality of an agreement to lease and operate a gas station and convenience store, which set the maximum price at which the dealer, Barkat U. Khan, could resell gasoline. The agreement provided that Khan would obtain

6. See *Albrecht*, 390 U.S. at 153.

7. *Id.* In deciding *Albrecht*, the Court was guided by the principle established in *Kiefer Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), that agreements to fix maximum prices, "no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *Id.* at 213.

8. 388 U.S. 365 (1967).

9. 433 U.S. 36 (1977).

10. See *id.* at 58.

11. 495 U.S. 328 (1990).

12. See *id.* at 335 n.5.

13. See *State Oil Co. v. Khan*, 118 S. Ct. 275, 285 (1997).

the station's gasoline supply from State Oil at a price equal to a suggested retail price set by State Oil, less a margin of three and one quarter cents per gallon. Under the agreement, Khan could charge any amount for gasoline sold to the station's customers, but if the price charged was higher than State Oil's suggested retail price, the excess was to be rebated to State Oil. Khan could sell gasoline for less than State Oil's suggested retail price, but any such decrease would reduce his three and one quarter cents per gallon margin.¹⁴

When Khan fell behind in making lease payments, State Oil terminated the lease and evicted him. A receiver was appointed to operate the station. The receiver, who was free of the pricing restriction imposed by State Oil, produced a profit by lowering the price of regular fuel and increasing the price of premium fuel over and above the price ceiling. Khan then brought suit, alleging that the maximum resale price restriction violated the antitrust laws.¹⁵

Refusing to follow *Albrecht*,¹⁶ the Court restated its general view that the primary purpose of the antitrust laws is to protect competition between competing brands of products, thereby benefitting consumers.¹⁷ "Our interpretation of the Sherman Act also incorporates the notion that condemnation of practices resulting in lower prices to consumers is 'especially costly' because 'cutting prices in order to increase business often is the very essence of competition.'"¹⁸ The Court reasoned that maximum resale prices could not harm either consumers or competition because, if a supplier squeezes his dealers' margins below a competitive level, the attempt to do so would drive the dealers to a competing supplier.¹⁹ Moreover, given the re-emer-

14. *See id.* at 278 (1997).

15. *See id.*

16. The Court agreed with the Seventh Circuit's criticism that *Albrecht* suffered from "infirmities, [and] its increasingly wobbly, moth-eaten foundations." *Id.* at 284. Nonetheless, the Court was reticent to tread lightly on the doctrine of stare decisis, by which the Seventh Circuit had felt bound in upholding *Albrecht* in its decision. The Court noted that the doctrine was less compelling in the field of antitrust law, where considerations of changing business experience mandated an evolution of the law to keep up with contemporary economic principles. *See id.*

17. *See id.* at 282.

18. *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

19. *See id.*

gence of exclusive territories in the wake of *GTE Sylvania*, the Court recognized the potential for dealer monopolies within such territories under the per se rule of *Albrecht*.²⁰

The Court also took issue with the potential injuries to competition asserted in *Albrecht* in defense of the per se rule. The Court noted that the prohibition on maximum prices directly resulted in many suppliers themselves becoming distributors, thereby denigrating the independence of the those dealers that the rule sought to protect.²¹ Moreover, the Court noted that a supplier's practice of intentionally establishing unnecessarily low maximum prices may actually harm consumers and other suppliers.²² In addition, the dealers will be harmed due to their inability to offer their products to consumers at such prices.²³ Therefore, the Court concluded that there was "insufficient economic justification for per se invalidation of vertical maximum price fixing."²⁴

Although the Supreme Court did not declare maximum price fixing lawful, its abandonment of the per se rule will provide suppliers with greater flexibility in establishing and enforcing maximum resale prices. Under the flexible "rule of reason" approach, if it can be shown that a price ceiling is established for legitimate business purposes and is necessary to compete against other supplier's brands, such a ceiling should survive antitrust scrutiny. Procompetitive justifications will continue to be weighed against likely anticompetitive effects in such analysis.

III. CIVIL ANTITRUST ACTIONS

Antitrust plaintiffs in the Fourth Circuit and Virginia courts fared little better than Khan, with the majority of claimants' cases being dismissed on fundamental principles of pleading requirements or standard defenses. The few cases that were considered, as discussed below, illustrate the continued reluc-

20. *See id.* at 283.

21. *See id.*

22. *See id.* at 282-83.

23. *See id.*

24. *Id.* at 283.

tance of the courts to stifle competition on little more than the pleas of unsuccessful market players.

A. Immunity Issues

1. Intracorporate Conspiracy Doctrine

In *Zachair, Ltd. v. Driggs*,²⁵ the Fourth Circuit had the occasion to apply the intracorporate conspiracy doctrine to a claimed antitrust conspiracy among related entities. Building on its decisions in *Okasanen v. Page Memorial Hospital*²⁶ and *Advanced Health-Care Services, Inc. v. Radford Community Hospital*,²⁷ the Fourth Circuit affirmed the dismissal of a Sherman Act conspiracy case brought against an individual and several businesses controlled by him.²⁸

At issue in *Zachair* was a parcel of land in Maryland used both as a commercial airport and a gravel and sand mine. Defendant Washington Executive Airpark Limited ("WEALP") purchased the parcel in 1988 and began a mining operation thereon. WEALP's general partner, Washington Executive Airpark, Inc. ("Airpark"), operated an aviation facility on the same parcel. When WEALP ran into difficulty, defaulting on several loans and filing for bankruptcy, plaintiff *Zachair, Ltd.* ("Zachair") bought the parcel at foreclosure. *Zachair* could make little use of the parcel, though, and claimed that the defendants used various means to frustrate its purchase, including challenging the sale's validity, refusing to remit rental payments and mining royalties, refusing to vacate the property, depleting mineral resources on the property, and preventing *Zachair* from obtaining a mining permit.²⁹

The district court rejected *Zachair's* claim that the conduct by the various defendants stated a Sherman Act claim.³⁰ The court focused on plaintiff's allegation that defendant John

25. No. 97-1811, 1998 WL 211943, at *1 (4th Cir. Apr. 30, 1998) (per curiam) (unpublished table decision).

26. 945 F.2d 696 (4th Cir. 1991).

27. 910 F.2d 139 (4th Cir. 1990).

28. See *Zachair*, 1998 WL 211943, at *3.

29. See *id.*

30. See *Zachair, Ltd. v. Driggs*, 965 F. Supp. 741, 749 (D. Md. 1997).

Driggs controlled the defendant corporations as a barrier to establishing a conspiracy.³¹ Reviewing the Rule 12(b)(6)³² dismissal de novo, the Fourth Circuit had little difficulty affirming the district court's decision. The Fourth Circuit acknowledged that the Supreme Court, in *Copperweld Corp. v. Independence Tube Corp.*,³³ specifically declined to decide whether a parent corporation may conspire with an affiliated company that it does not wholly own.³⁴ The court, however, used the factors articulated in *Copperweld* to find the entities controlled by defendant John Driggs "incapable of conspiring in restraint of trade."³⁵ Examining the allegations in the complaint, the court found that "Zachair failed to allege concerted action by separate legal entities within the meaning of the Sherman Act."³⁶

Unlike earlier cases decided on the basis of intracorporate immunity, in *Zachair*, the Fourth Circuit was willing to apply the immunity doctrine, notwithstanding the fact that the precise business relationships among the various corporate defendants were not established clearly. Building upon the principles established in *Copperweld*, *Oksanen*, and *Advanced Health Care Services*, the court upheld the dismissal of the action merely because the plain language of the complaint alleged that the corporate defendants all were controlled by John Driggs, which rendered these entities incapable of conspiring to violate the antitrust laws.³⁷ The Fourth Circuit's willingness to apply the intracorporate immunity doctrine, despite the fact that the specific corporate relationship was not articulated clearly, represents a logical expansion of that doctrine in this circuit.

2. Local Government Antitrust Act ("LGAA") and State Action Immunity

In *Command Force Security, Inc. v. City of Portsmouth*,³⁸ a private security firm filed an antitrust action against the City

31. *See id.*

32. FED. R. CIV. P. 12(b)(6).

33. 467 U.S. 752 (1984).

34. *See id.* at 766-77.

35. *Zachair*, 1998 WL 211943, at *3.

36. *Id.* at *2.

37. *See id.*

38. 968 F. Supp. 1069 (E.D. Va. 1997).

of Portsmouth, its sheriff and chief of police, alleging an anti-trust conspiracy to set prices and monopolize the market for unlicensed, off-duty security workers in violation of sections 1 and 2 of the Sherman Act³⁹ and the Virginia Antitrust Act.⁴⁰ The violation, alleged by plaintiff Command Force Security, Inc. ("Command Force"), consisted of Portsmouth deputy sheriffs and police officers moonlighting as private security guards while utilizing municipal-owned uniforms, weapons and equipment.⁴¹ Command Force also maintained that defendants encouraged on-duty personnel to solicit private security positions for off-duty personnel.⁴² Defendants moved to dismiss the claims on the ground that they were absolutely immune from suit pursuant to the Local Government Antitrust Act ("LGAA"),⁴³ the state action doctrine, and the applicable state-law provisions that mirror these federal bars.⁴⁴

The court found that both the City of Portsmouth and its police chief were immune from paying monetary damages pursuant to the LGAA because the city is covered as a "local government" and the police chief was acting within his official capacity.⁴⁵ The court stated "[s]imply put, then, insofar as the complaint attacks the City of Portsmouth on federal antitrust grounds, the plaintiff simply cannot obtain money damages."⁴⁶ Following the decision in *Sandcrest Outpatient Services v. Cumberland County Hospital*,⁴⁷ the court declined to require a showing of an affirmative grant of explicit authority for an employee or governmental official to act in an official capacity under the LGAA.⁴⁸ Also, the court noted that Congress intended the "official capacity" proviso in the LGAA to shield local government officials from liability to the same extent as the local government itself.⁴⁹ Although the LGAA provides immunity from money damages, it does not bar claims for injunctive

39. 15 U.S.C. §§ 1, 2 (1994).

40. VA. CODE ANN. §§ 59.1-9.1 to -9.18 (Repl. Vol. 1998).

41. See *Command Force Sec.*, 968 F. Supp. at 1071.

42. See *id.*

43. 15 U.S.C. § 34 (1994).

44. See *Command Force Sec.*, 968 F. Supp. at 1071.

45. See *id.* at 1072.

46. *Id.*

47. 853 F.2d 1139 (4th Cir. 1988).

48. See *Command Force Sec.*, 968 F. Supp. at 1072.

49. See *id.*

relief.⁵⁰ At the same time, the court held that the Portsmouth sheriff was not immune under the LGAA because he did not qualify as a "local government official," as he was a state constitutional officer.⁵¹

The remaining issues were dispelled by application of the state action doctrine, which provided immunity from injunctive relief and immunity for the Portsmouth sheriff.⁵² First articulated in *Parker v. Brown*,⁵³ the state action doctrine provides that the federal antitrust laws are not intended to prohibit states from imposing restraints on competition; thus, a state is immune from antitrust actions seeking either monetary or injunctive relief.⁵⁴ To the extent that state officials are acting in their official capacity, they also benefit from state action immunity.⁵⁵ In *Town of Hallie v. City of Eau Claire*,⁵⁶ the Supreme Court recognized that in order to receive state action immunity, localities "must demonstrate that their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation.'"⁵⁷ Citing *Town of Hallie*, the district court in *Command Force Security* held that "[s]tate policy need not expressly set forth that it intends the delegated action to have anticompetitive effects; instead, the test is met when the anticompetitive effects are a 'foreseeable result' of the grant of authority to regulate."⁵⁸

Reviewing the statutory scheme which allows localities to adopt ordinances permitting deputy sheriffs and police officers to engage in off-duty employment,⁵⁹ the court held that it was clearly foreseeable that these statutes would cause moonlighting police officers and deputy sheriffs to compete with private secu-

50. *See id.*

51. *See id.*

52. *See id.* at 1072-74.

53. 317 U.S. 341 (1943).

54. *See Command Force Sec.*, 968 F. Supp. at 1072.

55. *See id.* at 1072-73.

56. 471 U.S. 34 (1985).

57. *Id.* at 39 (quoting *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978)).

58. *Command Force Sec.*, 968 F. Supp. at 1073 (citing *Town of Hallie*, 471 U.S. at 41-44).

59. *See* VA. CODE ANN. § 15.2-1712 (Cum. Supp. 1998); *id.* § 9-183.2 (Repl. Vol. 1998).

rity companies.⁶⁰ Thus, pursuant to *Town of Hallie*, the state action doctrine immunized the city and its police chief. The court applied state action immunity, notwithstanding the fact that Portsmouth had not enacted an ordinance permitting its deputy sheriffs and police officers to engage in off-duty employment.⁶¹ Following the decisions in *City of Columbia v. Omni Outdoor Advertising*,⁶² *Allright Colorado, Inc. v. City and County of Denver*,⁶³ and *Boone v. Redevelopment Agency of San Jose*,⁶⁴ the court held that principles of federalism prevent a plaintiff from circumventing state action immunity by arguing that the municipality imperfectly exercised its authority under state law.⁶⁵

The court also applied the state action doctrine to bar plaintiff's claims under the Virginia Antitrust Act.⁶⁶ First, the court held that "the immunities available to the defendants from liability under state antitrust law exactly mirror the immunities available to the defendants from liability under federal antitrust law."⁶⁷ Second, the court noted that, to the extent the challenged conduct was "authorized, regulated or approved . . . by a statute of this Commonwealth," it was exempt.⁶⁸

B. Sufficiency of Section 1 Conspiracy Allegations

As with past precedent, the Fourth Circuit continued to display intolerance for insufficiently pleaded and supported conspiracy claims. For example, in *Zachair, Ltd. v. Driggs*,⁶⁹ the Fourth Circuit affirmed the district court's dismissal of the plaintiff's section 1 claims under the Sherman Act, concluding that Zachair's complaint failed to "provide sufficient factual

60. See *Command Force Sec.*, 968 F. Supp. at 1073.

61. See *id.*

62. 499 U.S. 365 (1991).

63. 937 F.2d 1502 (10th Cir. 1991).

64. 841 F.2d 886 (9th Cir. 1988).

65. See *Command Force Sec.*, 968 F. Supp. at 1073.

66. VA. CODE ANN. §§ 59.1-9.1 to -9.18 (Repl. Vol. 1998).

67. *Command Force Sec.*, 968 F. Supp. at 1074 (citing *Reasor v. City of Norfolk*, 606 F. Supp. 788 (E.D. Va. 1984)).

68. *Id.* (citing VA. CODE ANN. § 59.1-9.4(b)(1) (Repl. Vol. 1998)).

69. No. 97-1811, 1998 WL 211943, at *1 (4th Cir. Apr. 30, 1998) (per curiam) (unpublished table decision); see generally *supra* Section III.A.1.

support” for its conclusory conspiracy claims.⁷⁰ The plaintiff had alleged that the corporate defendants conspired with two independent persons at a foreclosure sale in an effort to subvert the sale to prevent the plaintiff from entering the mining industry. The court reasoned that “[n]owhere does the complaint make allegations of communications, meetings, or any other means through which one might infer that [the bidders] knowingly participated in an alleged scheme to prevent Zachair from operating a sand and gravel mine.”⁷¹ The court noted that the plaintiff’s only conspiracy allegation—that some of the defendants merely attended the foreclosure auction—failed to allege facts sufficient to show a conspiracy.⁷²

In *Carolina Security and Fire, Inc. v. Control Systems International, Inc.*,⁷³ the Fourth Circuit also briefly addressed and affirmed a dismissal of a claim under section 1 of the Sherman Act. The claim was brought by contractors acting as resellers against a manufacturer of energy controls equipment for heating and air conditioning units. Control Systems International (“CSI”) sold its energy controls both directly and through “authorized” value-added resellers (“VARs”) who were trained by CSI and had ongoing contracts with CSI, which dealt with sales quotas and non-exclusive territories.⁷⁴ The plaintiffs were mechanical and security contractors who bid on and received a government contract for the installation of heating and air conditioning systems at Fort Jackson, South Carolina. The government contracts required the contractor to be an authorized CSI installer, but the plaintiffs failed to use the authorized CSI subcontractor.⁷⁵

When the authorized CSI subcontractor learned of the plaintiffs’ procurement of the contracts, it questioned the government about the CSI authorization being used by the contractor. Ultimately, these inquiries went to CSI, who confirmed that the contractor being used was not authorized. This resulted in

70. *Zachair*, 1998 WL 211943, at *2.

71. *Id.*

72. *See id.*

73. No. 97-1528, 1998 WL 417285, at *1 (4th Cir. Apr. 10, 1998) (unpublished table decision).

74. *See id.* at *1.

75. *See id.*

the plaintiffs' termination from the contracts. The plaintiffs, therefore, sued CSI for violations of section 1 of the Sherman Act, the Unfair Trade Practices Act ("UTPA"), and a host of other contract and tort claims. The district court awarded summary judgment to CSI on each claim.⁷⁶ The court's decision was affirmed by the Fourth Circuit on the same reasoning.⁷⁷

In affirming the decision of the district court, the Fourth Circuit held that a conspiracy will not be inferred when a manufacturer responds to one of its dealers' complaints, as CSI did for its authorized VAR.⁷⁸ Moreover, the dealer's legitimate complaint and CSI's response thereto did not give rise to a reasonable inference of conspiracy.⁷⁹ Finally, with regard to the UTPA claim, the Fourth Circuit agreed with the district court that the "plaintiffs failed to prove that CSI's allegedly unfair acts adversely impacted the public interest because plaintiffs did not show that the acts were capable of repetition."⁸⁰

Similarly, in *Grinnell Corp. v. Road Sprinkler Fitters Local Union No. 669*,⁸¹ the Fourth Circuit affirmed the dismissal of a Sherman Act conspiracy claim brought by Grinnell Corporation ("Grinnell"), a manufacturer of fire sprinkler systems, against a local and national labor union. Grinnell charged that the union conspired with the National Fire Sprinkler Association ("NFSA"), a trade association to which Grinnell belonged and had assigned its collective bargaining rights, to engage in activity that constituted an illegal restraint of trade under section 1 of the Sherman Act. More specifically, Grinnell, a designer, manufacturer, and installer of fire sprinkler systems, maintained that the defendants conspired with NFSA to withdraw the availability of a job program from which Grinnell benefitted as a means of forcing it to reassign its bargaining rights to NFSA.⁸² The program in question allowed for a contractor and the local union to negotiate various concessionary

76. See *Hatfield v. Control Sys. Int'l, Inc.*, No. 3:95-1577-23, 1997 U.S. Dist. LEXIS 22927, *1 (D.S.C. Mar. 14, 1997).

77. See *Carolina Sec. and Fire*, 1998 WL 417285, at *3.

78. See *id.*

79. See *id.*

80. *Id.*

81. No. 97-1855, 1998 WL 24958, at *1 (4th Cir. Jan. 21, 1998) (unpublished table decision).

82. See *id.* at *1.

rate agreements for individual projects located in a particular geographical area as a means of competing with lower-cost, nonunion contractors.⁸³ Grinnell also contended that the defendants conspired to prevent it from obtaining a more favorable collective bargaining agreement.⁸⁴

In a per curiam affirmation of the district court's grant of summary judgment for the union, the Fourth Circuit accepted the district court's finding that the union acted unilaterally in withdrawing from Grinnell the right to participate on the job program.⁸⁵ The court repeated the now famous refrain from *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*,⁸⁶ that "[c]onduct as consistent with permissible competition as with illegal conspiracy, does not, standing alone, support an inference of antitrust conspiracy."⁸⁷ The Fourth Circuit agreed with the district court's ruling that the plaintiff did not discharge its burden of bringing forward evidence which excludes the possibility that the alleged co-conspirators acted independently or based on a legitimate business purpose.⁸⁸

At the other end of the spectrum, the plaintiffs in *Dee-K Enterprises, Inc. v. Heveafil Sdn. Bhd.*⁸⁹ were successful in pleading an actionable antitrust conspiracy. Their complaint provided more than the bare bones allegation of antitrust conspiracy and included references to particular meetings between distributors and producers, a listing of the acts engaged in by distributors in furtherance of the conspiracy, and a description of how the terms of the cartel were enforced. Plaintiffs Dee-K Enterprises and Asheboro Elastics Corporation, both end-users of extruded rubber products, filed a class-action complaint against certain international producers and domestic distributors of extruded rubber thread, alleging that the defendants engaged in a conspiracy to fix prices and to restrain competition in the sale of extruded rubber thread throughout the world,

83. *See id.*

84. *See id.*

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

86. 475 U.S. 574 (1986).

87. *Grinnell*, 1998 WL 24958, at *1 (quoting *Matsushita Elec. Indus.*, 475 U.S. at 574).

88. *See id.*

89. 177 F.R.D. 351 (E.D. Va. 1998).

including the United States, in violation of section 1 of the Sherman Act.⁹⁰ Specifically, the plaintiffs alleged that the defendants agreed to raise rubber thread prices worldwide, to restrict rivalry for customers, and to discipline employees and distributors who discounted prices or otherwise violated the terms of the cartel.⁹¹

The court held that the plaintiffs' complaint contained sufficient facts to support allegations of such a conspiracy under *Estate Construction Co. v. Miller & Smith Holding Co.*⁹² Although identifying no specific times or dates and only one specific communication to substantiate their allegations, the plaintiffs alleged that the defendant-distributors did the following: (1) coordinated a series of significant price increases in the United States; (2) reported to the producers any prices of other distributors that were below the level set by the conspirators; and (3) refused requests from their customers for discounts when they were instructed to do so by the producers.⁹³

Noting the extensive cost and burden of antitrust discovery, the court took issue with the contention that *Estate Construction* represented a departure from traditional notice pleading requirements, reasoning as follows:

Federal discovery, which extends beyond the boundaries of the relevant to include that which might lead to the relevant, can often be extensive, expensive and burdensome. Before this is inflicted on defendants, it is reasonable to insist that the claim asserted be based on more than a plaintiff's hope or suspicion. In other words, discovery is the cart, not the horse, and skeletal allegations of antitrust conspiracy based on no more than hope or suspicion wrongly put the cart before the horse.⁹⁴

Also, the court rejected the plaintiffs' contention that a complaint need not contain specific allegations regarding each and every defendant. The court noted that in *In re Mid-Atlantic*

90. See *Dee-K Enters., Inc. v. Heveafil Sdn. Bhd.*, 982 F. Supp. 1138, 1142 (E.D. Va. 1997).

91. See *id.* at 1142.

92. 14 F.3d 213 (4th Cir. 1994).

93. See *Dee-K Enters.*, 982 F. Supp. at 1150-51.

94. *Id.* at 1150 n.25.

Toyota Antitrust Litigation,⁹⁵ the pleadings contained specific allegations of the persons in attendance at meetings, the topics discussed, and the impact those discussions had on the alleged conspiracy to restrain price competition.⁹⁶ In that regard, the court found *Mid-Atlantic Toyota* to be consistent with the requirements of *Estate Construction*.⁹⁷

The plaintiffs' complaint in *Dee-K Enterprises* was held sufficient despite the fact that it did not contain any specific times or dates or any specific communications to substantiate the conspiracy allegations.⁹⁸ The court noted that *Estate Construction* requires only such details "whenever possible" and held that the failure to list such details would not defeat a plaintiff's claim where the complaint otherwise contains allegations of communications, meetings, or other means through which one might infer the existence of a conspiracy.⁹⁹

Similarly, the Fourth Circuit reversed the dismissal of the plaintiffs' section 1 claims in *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*,¹⁰⁰ in a case in which the plaintiffs alleged that, by removing over eighty percent of the vermiculite mining reserves in Louisa County from the mining market through non-mining agreements, the defendants conspired to constrain plaintiff Virginia Vermiculite, Ltd.'s ("VVL") operations and, ultimately, its ability to compete with defendants W.R. Grace & Co.-Connecticut ("Grace"), the only other domestic producer of vermiculite. Contrary to the findings of Judge Michael in the Western District, the Fourth Circuit found an adequate basis for a colorable section 1 claim in the business transaction between the defendants, by which Grace donated to Historic Green Springs, Incorporated ("HGSI"), a nonprofit land conservation organization, 1400 acres of land comprising over forty percent of the known vermiculite deposits in the United States

95. 525 F. Supp. 1265 (D. Md. 1981).

96. See *Dee-K Enters.*, 982 F. Supp. at 1150 n.27.

97. See *id.* at 1150.

98. See *id.*

99. *Id.* (quoting *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994)).

100. 156 F.3d 535 (4th Cir. 1998). For extensive consideration of the lower court's opinion, see Michael F. Urbanski, et al., *Antitrust and Trade Regulation Law*, 31 U. RICH. L. REV. 943, 953-56, 965-67 (1997).

pursuant to a non-mining agreement.¹⁰¹ The court noted that not only might the land have been mined by HGSI were the non-mining agreement not entered, but also “[a]bsent its transaction with HGSI, Grace may even have been required to grant VVL access to its Virginia holdings, on the ground that failure to do so would constitute an improper, unilateral refusal to deal.”¹⁰² Thus, the court found that the plaintiffs had satisfied their burden of making only a “colorable” showing that it was ‘reasonably probable’ that the behavior in question caused their injury.”¹⁰³

The Fourth Circuit also reinstated the plaintiffs’ section 1 claims against HGSI, which Judge Michael had dismissed on the ground that HGSI, as a nonprofit organization pursuing non-commercial objectives, was exempt from the antitrust laws.¹⁰⁴ The Fourth Circuit rejected the rationale by which other circuits have found nonprofit organizations exempt, relying instead on both the clear and unambiguous application of section 1 to “[e]very person’ who acts in restraint of trade or commerce” and the Supreme Court’s refusal to recognize a per se exemption for nonprofit organizations.¹⁰⁵ Lest there be any question, however, of the existence of such an exemption, the Fourth Circuit explicitly delineated two bases by which HGSI was removed from the protective umbrella of any such exemption: (i) that the transaction in which it participated with Grace was “essentially commercial”; and (ii) that HGSI conspired with a nonexempt party that had knowledge of the anticompetitive effects to be derived from such conduct.¹⁰⁶

C. Antitrust Standing

1. Indirect Purchaser

The court in *Dee-K Enterprises, Inc. v. Heveafil Sdn. Bhd.*¹⁰⁷

101. See *Virginia Vermiculite*, 156 F.3d at 538.

102. *Id.* at 539.

103. *Id.*

104. See *id.*

105. *Id.* at 540.

106. See *id.*

107. 982 F. Supp. 1138 (E.D. Va. 1997).

also considered the plaintiffs' standing as indirect purchasers of imported extruded rubber products. The defendants contended that because the plaintiffs did not purchase directly from the alleged producer-conspirators, they were not "injured in [their] business or property" as required by section 4 of the Clayton Act.¹⁰⁸

In *Illinois Brick Co. v. Illinois*,¹⁰⁹ the Supreme Court determined that one who does not buy directly from the antitrust violator but, instead, is at least one step removed in the distribution chain, cannot maintain a private antitrust action.¹¹⁰ The court in *Dee-K Enterprises* held that the rule in *Illinois Brick* did not bar the plaintiffs from suing the defendants for the price-fixing conspiracy alleged.¹¹¹ The court held that the plaintiffs sufficiently alleged that the distributors themselves were part of the conspiracy and that the plaintiffs' claims also might survive under the "ownership-control" exception to *Illinois Brick*¹¹² because the plaintiffs had alleged facts indicating ownership or controlled relationships between several of the international distributors and domestic producers.¹¹³

Although the Supreme Court has never directly addressed the existence of the ownership-control exception, Judge Ellis of the Eastern District of Virginia opined that it has "gained a strong foothold in federal antitrust jurisprudence."¹¹⁴ Acknowledging that the exception exists and is applicable when the direct purchaser is owned or controlled by the manufacturer, the court found that the plaintiffs' amended complaint alleged facts indicating control relationships that were sufficient to avoid the limitations of *Illinois Brick* and to overcome the motion to dismiss.¹¹⁵

108. See *id.* at 1151.

109. 431 U.S. 720 (1977).

110. See *id.* at 735.

111. See *Dee-K Enters.*, 982 F. Supp. at 1151-52.

112. See 431 U.S. at 736 n.16. Also, the district court noted in its decision that "counsel for defendants conceded at oral argument that there is an ownership-control exception to the indirect-purchaser rule." *Dee-K Enters. Co.*, 982 F. Supp. at 1153.

113. See *Dee-K Enters. Co.*, 982 F. Supp. at 1152-53.

114. *Id.* at 1153.

115. See *id.* at 1155.

The district court also grappled with the issue of whether the action could proceed even though the plaintiffs had failed to name all distributors involved in the conspiracy as defendants.¹¹⁶ The court held that when a plaintiff, who is an indirect purchaser, alleges that the direct purchasers were part of a conspiracy, the *Illinois Brick* rule, seeking to avoid multiple liability, does not apply.¹¹⁷ The court provided two reasons for employing this rationale. The first was that the "plaintiff has in a sense converted itself into a direct purchaser—in this event from the producer-distributor unit."¹¹⁸ The second reason was that "there is no danger of double-liability on the producers' part because the antitrust laws prohibit one co-conspirator from suing another."¹¹⁹ Thus, the mere fact that the plaintiffs failed to name all of the distributors involved in the conspiracy as defendants in the action does not preclude the plaintiffs from sustaining the action.

Finally, in support of the defendants' assertion that the plaintiffs had not suffered any antitrust injury, the defendants argued that the Department of Commerce determined that the defendants' domestic prices for extruded rubber were below fair value; therefore, their prices must be below the competitive price. The court held, however, that "below fair value" did not mean "below competitive prices in the U.S. market."¹²⁰ Hence, the court denied the defendants' various motions to dismiss the plaintiffs' second amended complaint.¹²¹ In a subsequent opinion issued on January 22, 1998,¹²² the court dismissed one defendant from the aforementioned action pursuant to Federal Rule 41 but refused to grant payment for its attorney's fees, pursuant to Rule 41(a)(2).¹²³

116. *See id.* at 1153.

117. *See id.*

118. *Id.*

119. *Id.* at 1153-54 (citing *Sullivan v. National Football League*, 34 F.3d 1091, 1107 (1st Cir. 1994)). The court in *Sullivan* established that "a plaintiff's complete, voluntary, and substantially equal participation in an illegal practice under the antitrust laws precludes recovery for that antitrust violation." *Id.*

120. *Id.* at 1156.

121. *See id.* at 1157.

122. *See Dee-K Enters., Inc. v. Heveafil Sdn. Bhd.*, 177 F.R.D. 351 (E.D. Va. 1998).

123. *See id.* at 356.

2. Injury in Fact

Most recently, the Fourth Circuit, in a per curiam opinion affirming the grant of summary judgment in a class action case alleging milk price fixing, provided an extensive discussion of antitrust standing and the injury in fact requirement under section 4 of the Clayton Act.¹²⁴ In a case whose tortured history dates back to the middle 1980s, the Fourth Circuit ruled that two small grocery stores, who were the named plaintiffs in two consolidated class action suits, failed to produce sufficient evidence of injury in fact and, therefore, lacked antitrust standing.¹²⁵ The case arose out of a school milk bid-rigging investigation conducted by the government and was founded upon bits of ambiguous testimony from an earlier criminal trial, which had ended in a hung jury. After failing in their effort to have the case dismissed on the ground that the statute of limitations had run,¹²⁶ the dairies took the deposition of a former dairy employee, whose earlier testimony formed the basis of the grocery stores' case.

In the deposition, however, the former dairy employee testified that his discussions with his competitors had very narrow application and specifically had "no application" to the named plaintiffs.¹²⁷ The Fourth Circuit noted that this testimony was significant because "it reveals the narrow scope of his price-fixing discussions and the fact that the alleged conspiracy did not have the all-encompassing effects which the grocery stores urge."¹²⁸

The Fourth Circuit also noted that pricing data from the dairies did not support the claimed conspiracy that the dairies had agreed upon joint responses to the change in the regulated cost of raw milk.¹²⁹ Quoting *Matsushita Electrical Industrial*

124. See *Supermarket of Marlinton, Inc. v. Valley Rich Dairy*, Nos. 97-2314 & 97-2315, 1998 WL 610648, at *1 (4th Cir. Aug. 27, 1998). The author was counsel of record for Valley Rich Dairy.

125. See *id.* at *26-27.

126. See *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 874 F. Supp. 721 (W.D. Va. 1994), *rev'd*, 71 F.3d 119 (4th Cir. 1995).

127. *Supermarket of Marlinton*, 1998 WL 610648, at *5.

128. *Id.* at *26.

129. *Id.* at *25.

*Co. v. Zenith Radio Corp.*¹³⁰ for the proposition that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case,"¹³¹ the court rejected the speculative inference of injury claimed by the grocery stores.¹³²

The Fourth Circuit ruled that an antitrust standing analysis should begin by examining the plaintiff's alleged injury, which the court termed "potentially dispositive."¹³³ The court noted that "injury is the 'crux' of every private antitrust action."¹³⁴ The court reasoned that "[t]his threshold showing of injury, sometimes labeled injury in fact, is satisfied if the plaintiff can produce sufficient evidence of an injury 'proximately caused by the defendants' conduct."¹³⁵

The court concluded that the grocery stores "failed to produce sufficient evidence that the products they purchased were affected by the alleged price-fixing conspiracy. As such, they have failed to satisfy the threshold requirement of demonstrating injury in fact, and therefore, lacked antitrust standing."¹³⁶

D. Price Discrimination

The District Court for the Western District of Virginia recently grappled with a significant Robinson-Patman Act case, dismissing the plaintiff's case on summary judgment in *Hoover Color Corp. v. Bayer Corp.*¹³⁷ Hoover Color Corporation ("Hoover"), a manufacturer and distributor of natural and synthetic iron oxides, brought suit against Bayer Corporation ("Bayer") alleging that Bayer engaged in price discrimination under the Robinson-Patman Act by selling the Bayferrox brand of synthetic iron oxide pigments to other distributors at prices lower than

130. 475 U.S. 574 (1986).

131. *Id.* at 588.

132. *See Supermarket of Marlinton*, 1998 WL 610648, at *26.

133. *Id.*

134. *Id.* at *10 (citing *Windham v. American Brands, Inc.*, 565 F.2d 59, 66 (4th Cir. 1977)).

135. *Id.* (quoting *Doctor's Hosp. of Jefferson, Inc. v. Southeast Med. Alliance, Inc.*, 123 F.3d 301, 305 (5th Cir. 1997)).

136. *Id.* at *6.

137. No. 96-0841-R, 1998 U.S. Dist. LEXIS 15452, at *1 (W.D. Va. July 30, 1998) (granting summary judgment).

the price at which Bayer sold the products to Hoover.¹³⁸ In particular, Hoover challenged Bayer's administration of its volume discount system under which Hoover contended that it was disfavored.¹³⁹ Although Hoover did not claim that it was impermissible for Bayer to offer a volume discount schedule, it nonetheless asserted that Bayer failed to provide "uniform prices" to its distributors because Bayer based its volume discount at the outset of a year upon the prior year's aggregate purchases.¹⁴⁰

Although the suit was brought in 1996, the first count of Hoover's complaint alleged price discrimination violations during the 1982-1992 period. Consequently, Bayer moved to dismiss Hoover's pre-1992 claims, asserting that it was barred by the Clayton Act's four-year statute of limitations.¹⁴¹

Judge Jackson L. Kiser, relying on *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*,¹⁴² held that Hoover could not assert a claim for damages beyond the four-year statute of limitations.¹⁴³ In *Pocahontas Supreme Coal*, the Fourth Circuit held that "[a]ccrual of a private antitrust cause of action for the purposes of the statute of limitations occurs when defendants commit an act that causes economic harm to a plaintiff."¹⁴⁴ Judge Kiser reasoned that in a price discrimination action, the plaintiff's cause of action accrues from the date of each discriminatory sale, and it is at that time that the plaintiff is injured.¹⁴⁵ Thus, any claim for damages based on sales outside of the four-year statute of limitations was time-barred.

Hoover argued that further discovery was necessary to determine whether sales prior to September 1992, had a residual adverse economic impact that came to fruition at a later

138. See *id.* at *3.

139. See *id.*

140. See *id.*

141. See *Hoover Color Corp. v. Bayer Corp.*, No. 96-841-R, 1997 U.S. Dist. LEXIS 12676, at *4 (W.D. Va. July 24, 1997) (granting motion to dismiss). The author was counsel of record for Bayer Corporation.

142. 828 F.2d 211 (4th Cir. 1987).

143. See *Hoover Color*, 1997 U.S. Dist. LEXIS 12676, at *4-5.

144. See *Pocahontas Supreme Coal*, 828 F.2d at 217-18 (citing *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 338 (1971)).

145. See *Hoover Color*, 1997 U.S. Dist. LEXIS 12676, at *5.

date.¹⁴⁶ The court was quick to dismiss this alternative theory, stating that “[t]here are no other acts alleged that could give rise to the cause of action, and no explanation, not even a hypothetical one, has been given for how further discovery may reveal economic harms within the statutory period emanating from pre-1992 discriminatory sales.”¹⁴⁷ After substantial discovery, Bayer moved for summary judgment, which the district court granted on the basis of the statutory affirmative defense of meeting competition.¹⁴⁸

Price discrimination violations are difficult to prove, and for that reason, they are seldom successful. The court noted that the plaintiff must prove the following elements to establish the existence of a price discrimination violation under section 2(a) of the Robinson-Patman Act:

First, the seller must be “engaged in commerce,” the price discrimination must occur “in the course of such commerce,” and at least one of the sales constituting the discrimination must occur “in commerce.” Second, the discrimination must involve contemporaneous “sales” to two or more purchasers at different prices. Third, the items sold must be “commodities of like grade and quality.” Fourth, there must be a reasonable possibility that the discriminatory prices will substantially lessen competition, or injure, destroy, or prevent competition.¹⁴⁹

With regard to damages under section 4 of the Clayton Act, for a plaintiff to recover on a claim of price discrimination, there also must be a demonstration that actual injury to its business or property was sustained because of the discrimination.¹⁵⁰

In response to Hoover’s claim, Bayer not only challenged Hoover’s ability to prove two of these required elements, it also raised two affirmative defenses to the price discrimination claim. In rendering his decision, Judge Kiser assumed, without deciding, that Hoover had introduced sufficient evidence to

146. *See id.*

147. *Id.*

148. *See Hoover Color Corp. v. Bayer Corp.*, No. CIV.A.96-0841-R, 1998 WL 690991 at *3 (W.D. Va. July 30, 1998) (mem.) (granting summary judgment).

149. *Id.* *2 (quoting 15 U.S.C. § 13(a) (1994)).

150. *See id.*

establish a prima facie case and focused upon the validity of the affirmative defense of meeting competition that was asserted by Bayer.¹⁵¹

Under the meeting competition defense set forth in section 2(b) of the Robinson-Patman Act, a seller may provide lower prices to certain market competitors as long as the prices are set "in good faith to meet an equally low price of a competitor."¹⁵² Following the Supreme Court's opinion in *United States v. Gypsum*,¹⁵³ the court in *Hoover Color* articulated the following non-exhaustive list "of factors that could be relevant to determining a seller's good faith."¹⁵⁴

(1) whether the seller had received reports of similar discounts from other customers, (2) whether the seller was threatened with a termination of purchases if the discounts were not met, (3) whether the seller made efforts to corroborate the reported discount by seeking documentary evidence or by appraising its reasonableness in terms of available market data, and (4) whether the seller had past experience with the buyer.¹⁵⁵

Judge Kiser applied the *Gypsum* factors and examined the context into which each of the pricing agreements was entered.¹⁵⁶ The court concluded that any indication of disparate pricing was justified because certain distributors threatened to decrease Bayerferrox purchases and buy from an alternative supplier if Bayer did not provide lower prices.¹⁵⁷ Similarly, Bayer was aware that the distributors making the threats were capa-

151. See *id.* at *3. Bayer moved for summary judgment on three other grounds in addition to that of meeting competition. Bayer contended that Hoover had not demonstrated competitive injury under section 2(a) of the Robinson-Patman Act, that Hoover had not shown injury in fact under section 4 of the Clayton Act, and that the prices at which Bayerferrox was sold to other national distributors were "functionally available" to Hoover. Because the court granted Bayer's motion on meeting competition grounds, it did not decide any of these other issues. See *id.* at *12 n.7.

152. 15 U.S.C. § 13(b) (1994).

153. 438 U.S. 422 (1978).

154. *Hoover Color*, 1998 WL 690991 at *4 (citing *Reserve Supply Corp. v. Owens-Corning Fiberglass Corp.*, 971 F.2d 37 (7th Cir. 1992) (citing *Gypsum*, 438 U.S. at 455)).

155. *Id.*

156. See *id.* at *6-12.

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

ble of substituting synthetic iron oxides for Bayferrox and that such iron oxides were being imported into the country in greater volumes.¹⁵⁸ Judge Kiser verified the availability of such alternatives and found that Bayer had reason to believe that these threats were real.¹⁵⁹ Furthermore, the court reasoned that, given Bayer's need to maximize production at its West Virginia manufacturing facility, it was necessary for Bayer to meet the competitive prices offered to its other distributors.¹⁶⁰

Judge Kiser concluded by stating:

[b]ased on these uncontested facts, I have no trouble concluding that, as a matter of law, Bayer's proposed discount pricing schedule was made in a good faith attempt to meet competition Bayer has shown the "existence of facts that would lead a reasonable and prudent person to believe that [Bayer's] lower price would meet the equally low price of a competitor." Indeed, that is the only reasonable conclusion which the evidence supports.¹⁶¹

Judge Kiser noted that Bayer's meeting competition evidence was uncontested by Hoover.¹⁶² In addition, the court held that Hoover failed to present any material evidence to counter the conclusion that Bayer offered lower prices to its other national distributors due to a good faith competitive necessity to meet competition for their business.¹⁶³ As a result, the court had little difficulty granting Bayer's summary judgment motion on the meeting competition defense.¹⁶⁴

Similarly, in *Soth v. Baltimore Sunpapers, Inc.*,¹⁶⁵ the Fourth Circuit had little difficulty affirming the dismissal of another suit charging a violation of the Robinson-Patman Act. Edward Soth, Jr. filed two suits in the Circuit Court for Baltimore City against his former employer, Baltimore Sunpapers,

158. *See id.* at *6.

159. *See id.*

160. *See id.* at *7.

161. *Id.* (citation omitted) (quoting *Falls City Indus. v. Vanco Beverage, Inc.*, 460 U.S. 428, 451 (1983)).

162. *See id.*

163. *See id.*

164. *See id.* at *8.

165. Nos. 96-2385 & 96-2390, 1998 WL 225140, at *1 (4th Cir. May 4, 1998) (unpublished table decision).

Inc. ("Sunpapers"), alleging identical state law claims of abusive discharge, violations of the Maryland Antitrust Act, tortious interference with contract, and civil conspiracy. Soth essentially claimed that he was terminated for not going along with an alleged episode of price discrimination by his employer.¹⁶⁶

After the newspaper removed the claims to federal court, Soth withdrew the lone federal claim he had filed against his former employer in an attempt to have the action remanded.¹⁶⁷ The district court denied Soth's motion to remand and granted summary judgement in favor of the defendants on all of Soth's claims.¹⁶⁸ In reviewing the findings of the district court, the Fourth Circuit affirmed, finding no violation of the antitrust laws.¹⁶⁹

Employed as an automotive advertising sales manager, Soth's primary responsibility was selling advertising space in the defendant's newspapers to automobile dealerships located within a specified geographical area. His employment was governed by a collective bargaining agreement which prohibited employees from exploiting their position with the newspaper for personal gain.¹⁷⁰ On July 30, 1990, Sunpapers discovered that Soth was using his employment position to facilitate the advertisement of three automobile dealerships in newspapers other than those operated by Sunpapers. In exchange for his services, the dealerships gave Soth a 1987 GMC truck and approximately \$24,000 a year.¹⁷¹

Sunpapers placed Soth on a five-day, unpaid suspension. During this period, Sunpapers learned that Soth had placed advertisements for two of his "personal clients," and on August 3, 1990, Sunpapers discharged Soth for "gross insubordination for violating the terms of his suspension."¹⁷² Soth unsuccessfully challenged the discharge by filing complaints with the National Labor Relations Board, the Equal Employment Opportunities Commission, and the American Arbitration Associa-

166. *See id.* at *1.

167. *See id.*

168. *See id.* at *2.

169. *See id.* at *3.

170. *See id.* at *2.

171. *See id.*

172. *Id.*

tion.¹⁷³ Soth then filed a complaint in the United States District Court for the District of Maryland, which subsequently dismissed the claim pursuant to Federal Rules of Civil Procedure 12(b)(6) and 4(j).¹⁷⁴ In the wake of the district court's dismissal, Soth filed identical claims in the Circuit Court for Baltimore City.¹⁷⁵

In both suits, Soth asserted that the impetus behind his dismissal was an episode in which he openly disagreed with his superiors regarding a discounted advertising rate that Sunpapers provided one dealership and not other regularly paying customers.¹⁷⁶ Soth maintained that he confronted his superiors, informing them that the advertising discount was price discrimination and was a violation of Maryland's Antitrust Act.¹⁷⁷ Soth claimed that he was fired because he threatened to reveal this discriminatory practice to the publisher of the newspaper, as well as to the Federal Trade Commission.¹⁷⁸

Upon reviewing the record, the Fourth Circuit affirmed the decision of the district court, which held that Soth had adduced no evidence of competitive injury in support of his price discrimination claim.¹⁷⁹ Further, the circuit court noted that Soth utterly failed to raise a genuine issue of material fact as to whether a "monopoly power existed and was maintained in the relevant market through the Sunpapers' half-price discounting of one advertisement on one day."¹⁸⁰ The Fourth Circuit also agreed with the district court's finding that Soth's conspiracy claim failed because he was unable to prove that Sunpapers had agreed to commit an unlawful act.¹⁸¹

173. *See id.*

174. *See id.* at *3.

175. *See id.*

176. *See id.*

177. *See id.*

178. *See id.*

179. *See id.* Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, contains a competitive injury requirement. *See* 15 U.S.C. § 13 (a)(1994). In order to prove a section 2(a) violation, a plaintiff must establish that the defendant sold to two buyers at different prices and that such discrimination may substantially injure competition. *See id.*

180. *Soth*, 1998 WL 225140, at *3.

181. *See id.* (citing *Yousef v. Trustbank Sav.*, 568 A.2d 1134, 1139 (Md. Ct. Spec. App. 1990)).

E. Monopolization

Caught in the cross-fire between patent and antitrust laws, Semiconductor Energy Laboratory ("SEL") and Samsung Semiconductor, Inc. ("Samsung") squared off in the Eastern District of Virginia in *Semiconductor Energy Laboratory Co. v. Samsung Electronics Co.*¹⁸² Samsung brought its antitrust counterclaims asserted in *Walker Process Equipment, Inc. v. Food Machine & Chemical Corp.*¹⁸³ to SEL's patent infringement suit. Samsung contended that SEL was "attempting to unlawfully monopolize particular markets by initiating litigation over patents SEL knows are invalid or unenforceable."¹⁸⁴ Judge Cacheris dismissed Samsung's antitrust counterclaims asserted under the Sherman Act, as well as the New Jersey¹⁸⁵ and California¹⁸⁶ antitrust statutes.¹⁸⁷

The district court first addressed Samsung's counterclaim in *Walker Process Equipment*.¹⁸⁸ *Walker Process Equipment* established that a patentee who initiates an infringement suit may be subject to antitrust liability for anticompetitive effects caused by the suit if the alleged infringer can establish that the asserted patent was procured through knowing and willful fraud.¹⁸⁹ The district court noted that most of Samsung's contentions involved failures to disclose information to the Patent and Trademark Office ("PTO"), which are not encompassed within a *Walker Process Equipment* claim.¹⁹⁰

The court also rejected claims asserted by Samsung based on allegations of knowing, willful and affirmative misrepresentations to the PTO, finding that Samsung was unable to prove the specific intent to monopolize and the predatory acts in furtherance thereof, which are required to maintain a Sherman

182. 7 Trade Reg. Rep. (CCH) ¶ 72,166 (E.D. Va. Mar. 20, 1998).

183. 382 U.S. 172 (1965).

184. *Semiconductor Energy Lab. Co.*, 7 Trade Reg. Rep. at 82,069.

185. See N.J. STAT. ANN. §§ 56:9-1 to -18 (West 1989 & Supp. 1998).

186. See CAL. BUS. & PROF. CODE §§ 16600-17365 (West 1997 & Supp. 1998).

187. See *Semiconductor Energy Lab. Co.*, 7 Trade Reg. Rep. at 82,073.

188. See *id.* at 82,070 (citing *Walker Process Equip.*, 382 U.S. at 177).

189. See *Walker Process Equip.*, 382 U.S. at 177.

190. See *Semiconductor Energy Lab.*, 7 Trade Reg. Rep. at 82,070.

Act attempted monopolization claim.¹⁹¹ An attempted monopolization claim under the Sherman Act has the following three elements: (i) a specific intent to monopolize the relevant market; (ii) predatory or anticompetitive actions in furtherance of such an intent; and (iii) a dangerous probability of success.¹⁹²

Samsung charged attempted monopolization in connection with three alleged relevant product markets: (i) products using amorphous silicon with low impurity levels; (ii) technology for production of the same; and (iii) innovation involving the same. The court employed the 1995 joint guidelines for licensing of intellectual property to further define the latter two relevant product markets.¹⁹³ The guidelines define a technology market as "the intellectual property that is licensed . . . and its close substitutes."¹⁹⁴ An innovation market is defined as "the research and development directed to particular new or improved goods or processes, and the close substitutes for that research and development."¹⁹⁵

The court first noted that because SEL licensed its patent to at least two other manufacturers and continued to seek other licensing agreements, no reasonable trier of fact could find that SEL employed methods, means, and practices that would accomplish monopolization or create a dangerous probability of it.¹⁹⁶ The court held as well that "[a]ttempting to enforce an unenforceable patent, without more, also does not support a finding of a method, means, or practice which creates a dangerous probability of monopolization."¹⁹⁷

As to the alleged technology market, the district court concluded that SEL's licensing efforts were not indicative of a specific intent to monopolize and noted that although specific intent may be inferred from anticompetitive acts,¹⁹⁸ "SEL's

191. See *id.* at 82,071.

192. See *id.* (discussing the standard applied in *M & M Medical Supplies and Services Inc. v. Pleasant Valley Hospital, Inc.*, 981 F.2d 160, 166 (4th Cir. 1992) (en banc)).

193. See ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY, reprinted in ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS, app. E 1483 (4th ed. 1997) [hereinafter GUIDELINES].

194. *Id.* at § 3.2.2.

195. *Id.*

196. See *Semiconductor Energy Lab.*, 7 Trade Reg. Rep. at 82,071.

197. *Id.*

198. See *M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp. Inc.*, 981

granting licenses to at least two companies in the market defeats the inference.¹⁹⁹ The court also found that Samsung offered no evidence of a licensing scheme that would give SEL monopoly power in the broad technology market.²⁰⁰

The court likewise found that Samsung did not prove that SEL possessed a dangerous probability of successfully monopolizing the innovation market by virtue of its efforts to enforce its patent.²⁰¹ Moreover, the court found that SEL did not have a share of the product market and, thus, could not be found to possess the requisite probability of monopolizing any market.²⁰²

Furthermore, the court noted that Samsung's claim of injury, consisting of expenses incurred in defending itself and in designing substitutes for the patented products, were not compensable under the antitrust laws.²⁰³ The court stated that those laws were designed to protect competition, not individual competitors.²⁰⁴

Samsung's second basis for liability focused upon the rule articulated in *Nobelpharma AB v. Implant Innovation, Inc.*²⁰⁵ Samsung asserted that the infringement suit initiated by SEL was a "sham" aimed at covering up efforts to interfere with the business dealings of a market competitor.²⁰⁶ Upon examining the record, the court found that SEL provided reasonable defenses to the counterclaim asserted by Samsung.²⁰⁷ The court noted that in light of the explanations that SEL offered for its conduct before the PTO, a jury could not reasonably find that the patent infringement suit initiated by SEL was objectively baseless.²⁰⁸ Finally, the court dismissed antitrust claims under

F.2d 160, 166 (4th Cir. 1992) (en banc).

199. *Semiconductor Energy Lab.*, 7 Trade Reg. Rep. at 82,071.

200. *See id.*

201. *See id.*

202. *See id.*

203. *See id.* at 82,072.

204. *See id.* (citing *Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924, 931 (4th Cir. 1990)).

205. 129 F.3d 1463 (Fed. Cir. 1997).

206. *See Semiconductor Energy Lab.*, 7 Trade Reg. Rep. at 82,070 (quoting *Nobelpharma*, 129 F.3d at 1470).

207. *See id.* at 82,072.

208. *See id.*

California's Cartwright Act and New Jersey's Antitrust Law, concluding that Samsung had not properly plead a Cartwright Act violation and that the rationale for dismissing the Sherman Act claim applied to both state statutes.²⁰⁹

IV. SIGNIFICANT FRANCHISING LITIGATION CONTINUES

Most recently, on August 19, 1998, the Fourth Circuit decided *Broussard v. Meineke Discount Muffler Shops, Inc.*²¹⁰ The protracted and complex franchising battle between franchisees and the franchisor of the Meineke Discount Muffler Shops resulted in a \$390 million judgment against Meineke in the Western District of North Carolina for breach of contract, breach of fiduciary duty, negligence and unjust enrichment.²¹¹ The suit originated from complaints by ten franchisees against franchisor Meineke, Meineke's in-house advertising agency, officers of Meineke and two of Meineke's corporate parents. The plaintiffs claimed that Meineke mishandled franchise advertising in contravention of the franchise contract and that they purported to represent a nationwide class of current and former Meineke dealers. On appeal, Meineke contended that the district court improperly certified the class, in violation of Federal Rule of Civil Procedure 23(a). The Fourth Circuit agreed, reversing and remanding the case for further action at the district level.²¹²

Addressing the class deficiencies seriatim, the court noted that "[t]he first obstacle to class treatment of this suit is the conflict of interest between different groups of franchisees with respect to the appropriate relief," which the United States Supreme Court clearly has held precludes certification.²¹³ The court noted that those plaintiffs who were former franchise owners only had an interest in maximizing the damages Meineke would have to pay, whereas the different groups of present franchise owners had a vested interest in the ongoing health of their franchises.²¹⁴ The present franchise owners al-

209. *See id.* at 82,072-73.

210. Nos. 97-1808 & 97-1848, 1998 WL 512926, at *1 (4th Cir. Aug. 19, 1998).

211. *See id.* at *1.

212. *See id.*

213. *Id.* at *5.

214. *See id.*

so could be harmed financially and by poor future relations with Meineke.²¹⁵ The court noted that this conflict was manifest in the initial tension between those members of the “non-opt-out” plaintiff class who wished to put the dispute behind them and those who wished to pursue maximum financial relief.²¹⁶ In addition, members of the class who, by virtue of having signed releases as part of their agreements with Meineke, were precluded from pursuing anything other than restitutionary relief were prejudiced by plaintiffs’ express waiver of any restitutionary claim.²¹⁷

In addition to the above conflicts, the Fourth Circuit also noted the failings of the class to meet the commonality and typicality requirements of Rule 23(a)(2) and (3) as a barrier to certification.²¹⁸ For example, the Meineke franchise agreements varied significantly from year to year and from franchise to franchise, thereby eliminating a single collective breach of contract claim.²¹⁹ Furthermore, plaintiffs’ claims of breach of fiduciary duty, fraud and negligent misrepresentation were predicated on individualized representations to each franchisee, as offered by plaintiffs through audiotapes of final review sessions between the putative franchisees and Meineke.²²⁰ These claims also were predicated on individualized determinations of reliance by the franchisees²²¹ and on statute of limitations analyses.²²² Finally, the court examined the peculiarly individualized analysis required to determine lost profits alleged by each member of the class as an unavoidable barrier to certification.²²³

Based upon these factors, the Fourth Circuit easily concluded that the class the district court certified was “no more than a hodgepodge of factually as well as legally different plaintiffs,” thereby warranting reversal of the certification ruling of the district court.²²⁴ The court thereafter concluded that reversal

215. *See id.*

216. *See id.* at *6.

217. *See id.* at *7.

218. *See id.*

219. *See id.* at *8.

220. *See id.* at *9.

221. *See id.* at *10.

222. *See id.* at *11.

223. *See id.* at *12.

224. *Id.* at *13 (quoting *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 632 (3d

of the judgment below also was warranted because the certification issue and ruling necessarily impacted every stage of the trial proceeding, thereby allowing plaintiffs to present a "perfect plaintiff" pieced together for litigation."²²⁵ With instructions to dismiss plaintiffs' claims against two of Meineke's corporate parents, the court remanded the case for further proceedings at the district level.²²⁶

V. FEDERAL REGULATORY, ADMINISTRATIVE AND ENFORCEMENT EFFORTS

A. Criminal Enforcement Efforts

Bringing closure to two individual prosecutions from a two-year investigation performed by the Department of Justice Antitrust Division that resulted in the convictions of twelve individuals and a corporation, the Fourth Circuit in *United States v. Romer*,²²⁷ affirmed the convictions of two real estate speculators for bid-rigging activities associated with real estate foreclosure auctions. Mija Romer and Khem Batra were tried and convicted by a jury for violating section 1 of the Sherman Act by rigging bids at various real estate foreclosure auctions in Fairfax, Virginia.²²⁸

Romer and Batra were real estate speculators who conspired with others to depress prices of auctioned properties by agreeing not to enter bids in opposition to one another at specified auctions, which allowed the properties to be purchased at artificially low, non-competitive prices. Following the rigged public auctions, private auctions would be held among the conspirators during which each would bid competitively for the properties, with the high bidder taking the property. The money saved by insulating the group's bids from other competition was their

Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997)).

225. *Id.* at *13-14.

226. *See id.* at *20-25 (finding no basis for piercing the corporate veil or for imposing direct liability on the parents).

227. 148 F.3d 359 (4th Cir. 1998).

228. *See id.* at 363.

illicit profit, which would be paid out to all of the members of the group.²²⁹

Following their convictions, both individuals unsuccessfully appealed the district court's denial of a judgment of acquittal, contending that "the Government failed to demonstrate that the conspiracy's bid rigging activities involved 'commerce among the several states,' as required by § 1."²³⁰ The Fourth Circuit concluded otherwise.²³¹

Section 1 of the Sherman Act reads, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal."²³² The Fourth Circuit maintained that "the Sherman Act is conspicuous for its breadth," noting that Congress intended the Act to reach the constitutional limits of the commerce power.²³³ Relying upon the standard espoused by the Supreme Court in *McLain v. Real Estate Board of New Orleans, Inc.*,²³⁴ the court held that, in order to meet its burden, the Government must, "demonstrate by submission of evidence beyond the pleadings either (1) that the defendants' activity is itself in interstate commerce or, (2) if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce."²³⁵ The court noted that the second prong of this standard allows for a finding that "a defendant's conduct, although 'wholly local in nature,' falls within the ambit of the Sherman Act when, 'as a matter of practical economics,' the activities 'have a not insubstantial effect on the interstate commerce involved."²³⁶

Defendants argued that a sufficient nexus did not exist between their bid-rigging activities and interstate commerce, given the fact that all of the auctions took place within Virginia, that all real estate was located in Virginia, and that all par-

229. *See id.*

230. *Id.* at 364.

231. *See id.* at 365.

232. 15 U.S.C. § 1 (1994).

233. *Romer*, 148 F.3d at 364.

234. 444 U.S. 232 (1980).

235. *Romer*, 148 F.3d at 365 (quoting *McLain*, 444 U.S. at 242).

236. *Id.* (quoting *McClain*, 444 U.S. at 241, 246 (citations omitted)).

ticipants were Virginia residents.²³⁷ The court rejected this "purely local" argument, stating:

Determining whether anti-competitive activities are within the reach of the Sherman Act is a practical inquiry, one which requires us to consider the substance of the transaction at issue. In conducting [the Sherman Act] inquiry, we look beneath the surface of the transaction, with an eye toward assessing its interstate features. We consider not only the location of the transaction and the immediate parties, but all other conceivable links with interstate commerce, including the interests of secondary parties and the passage across state lines of goods and services related to the transaction.²³⁸

The court connected defendants' conspiracy to interstate commerce because each auction was initiated by an out-of-state lender who directed the terms of the auctions and received across state lines some portion of their interest in the various foreclosed properties.²³⁹

Defendants, relying on *United States v. Lopez*,²⁴⁰ also challenged the constitutionality of the Sherman Act, asserting that the "Act exceeds Congress' power to regulate pursuant to the Commerce Clause, because it grants federal jurisdiction over local activity with only a *de minimis* . . . connection to interstate commerce."²⁴¹ The court rejected this argument, finding that *Lopez* requires the statute in question to contain a jurisdictional element which allows for a thorough case-by-case analysis of whether or not the activity in question affects interstate commerce.²⁴² Having made such an analysis, the Fourth Circuit upheld the lower court's denial of judgment for acquittal.²⁴³

237. *See id.*

238. *Id.*

239. *See id.* at 365-66.

240. 514 U.S. 549 (1995).

241. *Romer*, 148 F.3d at 366.

242. *See id.*

243. *See id.*

VI. CONCLUSION

While the century old antitrust statutes are broadly worded, over the years the courts have added a substantial gloss which subjects antitrust plaintiffs to rigorous requirements of proof, both legal and economic. While the treble damage stakes are high, these cases are difficult to plead and prove, as evidenced by the uniform resolution of those cases decided over the past year.

Recognizing the burden and expense of antitrust litigation, courts are scrutinizing cases to determine whether sufficient allegations of an actionable conspiracy exist, whether antitrust injury is present, and whether the claim simply makes economic sense. The absence of proof concerning these and other factors has resulted in these cases seldom coming before a jury, much less resulting in the successful prosecution of any civil antitrust case. Indeed, the recent history, as set forth in this article, indicates that only when the Antitrust Division of the United States Department of Justice gets involved has there been any judgment for an antitrust plaintiff.

