

1999

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

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### Recommended Citation

Michael F. Urbanski & James R. Creekmore, *Annual Survey of Virginia Law: Antitrust and Trade Regulation*, 33 U. Rich. L. Rev. 769 (1999).

Available at: <http://scholarship.richmond.edu/lawreview/vol33/iss3/4>

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# ANTITRUST AND TRADE REGULATION LAW

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## I. INTRODUCTION

During the past year, the United States Supreme Court, in two decisions of significance, refused to summarily censure conduct having legitimate, procompetitive benefits.<sup>1</sup> In similar fashion, the United States Court of Appeals for the Fourth Circuit continued to scrutinize antitrust claims, rejecting those failing to measure up to pleading and proof requirements,<sup>2</sup> while also reaffirming the vitality of the state action immunity doctrine as a bar to those that did.<sup>3</sup> Meanwhile, Virginia's federal district courts grappled with time worn conspiracy challenges to medical staff privileging decisions,<sup>4</sup> while simultaneously forging new ground in one of the first cases to

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The authors wish to express their gratitude to Humes J. Franklin, III, William & Mary School of Law, Class of 2001, for his assistance in the creation of this article.

1. See *California Dental Ass'n v. FTC*, 119 S. Ct. 1604 (1999); *NYNEX Corp. v. Discon, Inc.*, 119 S. Ct. 493 (1998); see also *infra* text accompanying notes 8-43.

2. See *Omega World Travel, Inc. v. Airlines Reporting Corp.*, 172 F.3d 863 (4th Cir. 1999) (unpublished table decision) (full text available in Westlaw, No. 98-1033, 1999 WL 46756, at \*1 (4th Cir. Feb. 3, 1999)); *Levine v. McLesky*, 164 F.3d 210 (4th Cir. 1998); see also *infra* text accompanying notes 85-114.

3. See *Carolina Water Serv., Inc. v. City of Winston-Salem*, 161 F.3d 1 (4th Cir. 1998) (unpublished table decision) (full text available in LEXIS, No. 97-2586, 1998 U.S. App. LEXIS 22130, at \*1 (4th Cir. Sept. 10, 1998)); *American Int'l Security Specialists, Inc. v. Roberts*, 161 F.3d 1 (4th Cir. 1998) (unpublished table decision) (full text available in LEXIS, No. 97-2089, 1998 U.S. App. LEXIS 22128, at \*1 (4th Cir. Sept. 10, 1998)); see also *infra* text accompanying notes 64-84.

4. See *Wuchenich v. Shenandoah Mem'l Hosp.*, No. 98-0041-H (W.D. Va. Jan. 29, 1999); see also *infra* text accompanying notes 199-221.

consider market definition in the realm of electronic commerce over the Internet.<sup>5</sup>

This article addresses antitrust decisions of the United States Supreme Court, the United States Court of Appeals for the Fourth Circuit, and state and federal courts of Virginia over the past year. This article also provides an extensive analysis of the Virginia Business Conspiracy Act,<sup>6</sup> and the judicial treatment of claims under the Act in recent years.

## II. UNITED STATES SUPREME COURT DECISIONS

In 1998, in contrast to the rather controversial vertical price-fixing decision handed down two years ago,<sup>7</sup> the Supreme Court reached a rather predictable result in *NYNEX Corp. v. Discon, Inc.*<sup>8</sup> The Court held that the per se prohibition against group boycotts did not apply to a single buyer's decision to purchase goods or services from one seller rather than another.<sup>9</sup> Discon brought an action against NYNEX, Materiel Enterprises ("Materiel"), and New York Telephone Company, alleging that the defendants engaged in fraudulent and anticompetitive business practices, causing consumers to pay higher prices for the removal of obsolete telephone equipment.<sup>10</sup> Discon claimed that Materiel, a purchaser of these services, selected another provider over Discon because the other provider agreed to charge higher rates and rebate a portion of the price increase back to Materiel.<sup>11</sup>

The federal district court dismissed the complaint for failure to state a claim. The Second Circuit affirmed<sup>12</sup> with one notable exception: the appellate court found that some of Discon's allegations stated both a Sherman Act section 1 claim,<sup>13</sup> as well as a

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5. See *America Online, Inc. v. GreatDeals.Net*, 49 F. Supp. 2d 851 (E.D. Va. 1999); see also *infra* text accompanying notes 115-45.

6. VA. CODE ANN. §§ 18.2-499 to -501 (Repl. Vol. 1996 & Cum. Supp. 1999); see *infra* text accompanying notes 146-221.

7. See *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968)).

8. 119 S. Ct. 493 (1998).

9. See *id.* at 495.

10. See *id.* at 496.

11. See *id.*

12. See *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055 (2d Cir. 1996).

13. See *id.* at 1059. Section 1 of the Sherman Act states:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be

conspiracy to monopolize claim under section 2 of the Sherman Act.<sup>14</sup> In so holding, the Second Circuit reasoned that because the complaint alleged that Materiel's buying decision was anticompetitive, and no procompetitive rationale for discriminating in favor of one supplier over another was advanced, the complaint stated a claim under the rule of reason, if not under the per se rule as applied to group boycotts.<sup>15</sup> Due to the uncertainty among the courts of appeals regarding whether or when the per se group boycott rule applied to a purchaser's decision to favor one supplier over another, the Supreme Court granted certiorari.<sup>16</sup>

Writing for a unanimous Court, Justice Breyer overturned the Second Circuit decision, holding that the per se group boycott rule does not apply where a single buyer favors one seller over another, even for an improper reason.<sup>17</sup> The prohibition against group boycotts was originally set forth in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*<sup>18</sup> In *Klor's*, the Court held that a conspiracy by numerous household appliance manufacturers and their distributors to sell to a single purchaser at higher prices was "not to be tolerated merely because the victim is just one merchant."<sup>19</sup> Unlike the facts in *Klor's*, however, the conspiracy alleged by the plaintiff Discon in *NYNEX* did not involve a horizontal agreement between direct competitors.<sup>20</sup>

Continuing the increasingly narrow treatment accorded the per se rule in recent years, the Court indicated that its precedent limited the per se rule in the boycott context to cases involving

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deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1994).

14. See *Discon*, 93 F.3d at 1062. Section 2 of the Sherman Act states:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 (1994).

15. See *Discon*, 93 F.3d at 1062.

16. See *NYNEX*, 119 S. Ct. at 496-97.

17. See *id.* at 498.

18. 359 U.S. 207, 212 (1959).

19. *Id.* at 213.

20. See *NYNEX*, 119 S. Ct. at 498.

horizontal agreements among direct competitors.<sup>21</sup> The Court rationalized its holding with that of *Klor's* by noting that "Although *Klor's* involved a threat made by a *single* powerful firm, it also involved a horizontal agreement among those threatened, namely, the appliance suppliers, to hurt a competitor of the retailer who made the threat."<sup>22</sup> Because none of the participants in the alleged boycott of Discon were competitors, the Court correctly declined to apply the per se rule.<sup>23</sup> Reasoning that the "freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage," and that such business practices are not condemned by the antitrust laws, the Court recognized that remedies exist under business tort or regulatory laws for a party aggrieved by such actions.<sup>24</sup>

More recently, in *California Dental Ass'n v. Federal Trade Commission*,<sup>25</sup> the Court again demonstrated marked restraint in refusing to condemn a nonprofit dental association's rules restricting price and quality advertising as anticompetitive under the "quick look" rule of reason approach employed by the Federal Trade Commission ("FTC").<sup>26</sup> Although all nine justices agreed that the FTC had jurisdiction over the nonprofit California Dental Association ("CDA") due to the substantial economic benefits the CDA provided to its for-profit members,<sup>27</sup> in a five to four majority opinion written by Justice Souter, the Court held that the rule of reason required a more thorough analysis of anticompetitive measures when the effects of such measures were not "intuitively obvious."<sup>28</sup>

CDA is a group comprised of local dental societies to which approximately 75% of California's dentists belong.<sup>29</sup> As a condition

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21. *See id.*

22. *Id.* at 498.

23. *See id.*

24. *Id.* at 499. The Court also reversed the Second Circuit's finding that the complaint stated a conspiracy to monopolize claim under section 2 of the Sherman Act because there was no allegation that the purchasing practices harmed the competitive process, rather than a single competitor. *See id.* at 500.

25. 119 S. Ct. 1604 (1999).

26. *See id.* at 1612.

27. *See id.* at 1607, 1611. In this regard, the Court distinguished the activities and benefits of the CDA, which has for-profit subsidiaries that provide "advantageous insurance and preferential financing arrangements" and "lobbying, litigation, marketing and public relations for the benefit of its members' interest," from those of a nonprofit organization that go no farther than merely providing professional education, the latter of which arguably may lie outside the FTC's jurisdiction. *Id.* at 1611.

28. *Id.* at 1607.

29. *See id.*

of membership, CDA members agree to abide by a Code of Ethics, which includes a prohibition against advertising or soliciting patients in any way that is false or misleading.<sup>30</sup> In an administrative complaint, the FTC charged that CDA applied this prohibition so as to restrict even truthful and nondeceptive advertising, particularly with respect to advertising related to discount pricing and quality of services, violating section 5 of the FTC Act.<sup>31</sup> The FTC determined that the restrictions on price and quality advertising were illegal per se under an abbreviated or "quick look" rule of reason analysis.<sup>32</sup> The Ninth Circuit Court of Appeals agreed with the Commission's result, if not its methodology, finding that although the per se analysis was improper for the price advertising restriction, the abbreviated or "quick look" rule of reason analysis was appropriate to invalidate the restrictions.<sup>33</sup>

Writing for the majority, Justice Souter disagreed with the Ninth Circuit's view—which Justice Breyer adopted for the dissent<sup>34</sup>—that the instant restrictions presented a situation where the anti-competitive effects of the arrangements in question were obvious.<sup>35</sup> Justice Souter observed that the Court previously applied the "quick look" rule of reason analysis only in those cases where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."<sup>36</sup> The Court declined to endorse such an analysis in this situation, stating, "the case before us, however, fails to present a situation in which the likelihood of anticompetitive effects is comparably obvious."<sup>37</sup> The majority therefore envisioned occasions where "CDA's advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition," thereby requiring more than the cursory analysis afforded by either the FTC or the Ninth Circuit.<sup>38</sup> Hence, the Court vacated the Ninth Circuit's judgment

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30. *See id.* at 1608.

31. *See id.* at 1608-09 (citing 15 U.S.C. § 45 (1994)). Section 45 of title 15 states that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C. § 45(a)(1) (1994).

32. *See California Dental Ass'n*, 119 S. Ct. at 1609.

33. *See California Dental Ass'n v. FTC*, 128 F.3d 720, 726-27 (9th Cir. 1997).

34. *See California Dental Ass'n*, 119 S. Ct. at 1618 (Breyer, J., dissenting).

35. *See id.* at 1610.

36. *Id.* at 1612.

37. *Id.* at 1613.

38. *Id.*

and remanded the case for a more comprehensive analysis under the principles spelled out by the majority.<sup>39</sup>

The dissent, on the other hand, though agreeing that the "quality of proof required" under a rule of reason approach "should vary with the circumstances,"<sup>40</sup> suggested that the four-pronged approach utilized by the FTC and Ninth Circuit should adequately determine the result.<sup>41</sup> Specifically, the dissent offered "four classical, subsidiary antitrust questions" that must be addressed: "(1) What is the specific restraint at issue? (2) What are its likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? (4) Do the parties have sufficient market power to make a difference?"<sup>42</sup> Finding an adequate evidentiary foundation in the record against the CDA on each of these issues, the dissent would have refrained from disturbing the judgment of the Court of Appeals.<sup>43</sup>

Finally, of interest to practitioners in the field, the Supreme Court declined to hear a decision from the Court of Appeals for the Fourth Circuit that reinstated a Sherman Act section 1 suit dismissed by the lower court.<sup>44</sup> In *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.*,<sup>45</sup> the Fourth Circuit reversed the dismissal of a Sherman Act section 1 claim.<sup>46</sup> Virginia Vermiculite, Ltd. ("VVL") alleged that the defendants conspired to constrain its operations and, ultimately, its ability to compete with the defendant W.R. Grace & Co. ("Grace"), the only other domestic producer of vermiculite, when the defendants removed large quantities of vermiculite reserves in Louisa County through non-mining agreements.<sup>47</sup> Contrary to the findings of Judge Michael in the Western District of Virginia, the Fourth Circuit found an adequate basis for a colorable section 1 claim in the business transaction between the defendants.<sup>48</sup>

Grace donated to Historic Green Springs, Inc. ("HGSI"), a nonprofit land conservation organization, 1400 acres of land comprising over forty percent of the known vermiculite deposits in

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39. *See id.* at 1618.

40. *Id.* (Breyer, J., dissenting).

41. *See id.* (Breyer, J., dissenting).

42. *Id.* (Breyer, J., dissenting).

43. *See id.* at 1619-22 (Breyer, J., dissenting).

44. *See Virginia Vermiculite, Ltd. v. W.R. Grace & Co.*, 156 F.3d 535 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 1458 (1999).

45. *Id.*

46. *See id.* at 542.

47. *See id.* at 538.

48. *See id.* at 539-42.

the United States.<sup>49</sup> The court noted that not only might the land have been mined absent the non-mining agreements, but, "Absent its transaction with HGSI [the nonprofit organization], 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."<sup>50</sup> Thus, the court concluded that plaintiffs satisfied their burden of making only a "colorable" showing that it was 'reasonably probable' that the behavior in question caused their injury.<sup>51</sup>

The Fourth Circuit also disagreed with Judge Michael's decision to dismiss plaintiff's section 1 claims on the ground that HGSI, a nonprofit organization, was exempt from the antitrust laws.<sup>52</sup> The Fourth Circuit reinstated VVL's section 1 claims against HGSI, rejecting the lower court's rationale by which other circuits have found nonprofit organizations exempt.<sup>53</sup> Instead, the court relied on the clear and unambiguous application of section 1 to *every* person who acts in restraint of trade or commerce and the Supreme Court's refusal to recognize a per se exemption for nonprofit organizations.<sup>54</sup> Lest there be any question, however, of the existence of such an exemption, the Fourth Circuit explicitly delineated two bases that removed HGSI from the protective umbrella of any such exemption.<sup>55</sup> First, the transaction that HGSI participated in with Grace was "essentially commercial"; and second, HGSI conspired with a nonexempt party with knowledge of the anticompetitive effects of such conduct.<sup>56</sup>

The result obtained at the Fourth Circuit as regards HGSI compares favorably with the Supreme Court's recent holding in *California Dental Ass'n v. Federal Trade Commission*,<sup>57</sup> where the Court concluded that the FTC Act gives the Commission authority over nonprofit entities such as the CDA.<sup>58</sup> The Court recognized that, in determining the extent of the FTC's jurisdiction into the

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49. *See id.*

50. *Id.* at 539.

51. *Id.* (citing *Advanced Health-Care Servs., Inc. v. Radford Community Hosp.*, 910 F.2d 139, 149 (4th Cir. 1990)).

52. *See id.* at 538-39.

53. *See id.* at 540, 542.

54. *See id.* at 540.

55. *See id.* at 541.

56. *See id.*

57. 119 S. Ct. 1604 (1999). *See supra* text accompanying notes 25-43.

58. *See id.* at 1611.



nonprofit arena, a "proximate relation to lucre must appear."<sup>59</sup> Hence, nonprofit organizations engaged in commercial conduct designed to contribute to their members' bottom lines could, in fact, trigger the FTC's jurisdiction under the Act.<sup>60</sup> Reconciling a conflict among the circuits on this point, the Court recognized that application of the Act to nonprofits such as the CDA comports with the power of the Commission to prevent "unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce,"<sup>61</sup> all of which may be seized upon just as readily by nonprofit organizations organized on behalf of for-profit entities as by for-profit organizations themselves.<sup>62</sup> This holding and rationale reinforces the Fourth Circuit's conclusion that the "essentially commercial" nature of HGSI's transaction, together with the fact of its combination with a for-profit entity in the business operation at issue, brought HGSI within the scope of coverage of the Sherman Act.<sup>63</sup>

### III. CIVIL ANTITRUST SUITS

#### A. *State Action Immunity*

In *Carolina Water Service, Inc. v. City of Winston-Salem*,<sup>64</sup> the Fourth Circuit affirmed a district court decision exonerating the City of Winston-Salem from charges of unlawful monopoly leveraging<sup>65</sup> by "forcing" twenty-two residents of neighboring Forsyth County to connect to a new public water service system.<sup>66</sup> Carolina Water Service alleged violations by the City of sections 1 and 2 of the Sherman Act, resulting from the City's notice to residents of a Forsyth County subdivision that they had one month to hook up to the City's water service, or they would lose sewage service.<sup>67</sup>

59. *Id.*

60. *See id.* at 1611.

61. *Id.* (quoting 15 U.S.C. § 45(a)(2) (1994)).

62. *See id.* at 1611-12.

63. *See Virginia Vermiculite, Ltd. v. W.R. Grace & Co.*, 156 F.3d 535, 538-39 (4th Cir. 1998).

64. 161 F.3d 1 (4th Cir. 1998) (unpublished table decision) (full text available in LEXIS, No. 97-2586, 1998 U.S. App. LEXIS 22130, at \*1 (4th Cir. Sept. 10, 1998)).

65. In recent years, the Fourth Circuit has assumed the existence of, but has yet to recognize, a monopoly leveraging claim. *See Advanced Health-Care Servs., Inc. v. Radford Community Hosp.*, 910 F.2d 139, 149-50 & n.17 (4th Cir. 1990).

66. *See Carolina Water Serv.*, 1998 U.S. App. LEXIS 22130, at \*1.

67. *See id.* at \*4-5.

In response, the City of Winston-Salem claimed immunity under the state action doctrine.<sup>68</sup> “Because the Sherman Act does not apply to the conduct of a state acting through its legislature, states enjoy full immunity from federal antitrust liability.”<sup>69</sup> This state immunity is not afforded to municipalities, however, unless “the municipality ‘demonstrates that [its] anticompetitive activities were authorized by the State “pursuant to state policy to displace competition with regulation or monopoly public service.”’<sup>70</sup> Counties and cities in North Carolina are granted broad authority by the North Carolina legislature to operate and regulate “public enterprises,”<sup>71</sup> thus satisfying the requirement for municipalities set forth in *Town of Hallie v. City of Eau Claire*.<sup>72</sup>

Carolina Water Service also argued that the City lacked jurisdiction in this instance to act under color of state authority because the

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68. *See id.* The doctrine of state action immunity was first enunciated by the Supreme Court in *Parker v. Brown*, 317 U.S. 341, 351 (1943), where the Court held that the Sherman Act was not intended to prohibit states from imposing restraints on competition. “Although *Parker* involved an action against a state official, the Court’s reasoning extends to suits against private parties.” *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 (1985). The circumstances under which the state action doctrine immunizes private conduct were refined in *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). The Court’s opinion in *Midcal* establishes a two-prong test for determining whether state regulation of private parties invokes state action immunity. *See id.* at 105. “First, the challenged restraint must be ‘one clearly articulated and affirmatively expressed as state policy’; second, the policy must be ‘actively supervised’ by the State itself.” *Id.* (citing *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978)); *see also Southern Motor Carriers*, 471 U.S. 48, 57 (1985); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). The *Hallie* Court applied the “clearly articulated state policy” test to municipalities but held that active state supervision is not required to immunize their conduct from the antitrust laws. *See Hallie*, 471 U.S. at 47.

The Court in *Southern Motor Carriers* took the *Midcal* analysis one step further and addressed whether state compulsion is required to immunize the actions of private parties. *See Southern Motor Carriers*, 471 U.S. at 462-65. Discounting reliance on *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), for the establishment of a compulsion requirement, the Court held that state compulsion is not a prerequisite to a finding of state action immunity:

A private party acting pursuant to an anti-competitive regulatory program need not “point to a specific, detailed legislative authorization” for its challenged conduct. As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied.

*Southern Motor Carriers*, 471 U.S. at 64 (citation omitted).

69. *Carolina Water Serv.*, 1998 U.S. App. LEXIS 22130, at \*5 (citing *Hallie*, 471 U.S. at 34-38).

70. *Id.* at \*5 (alteration in original) (quoting *Hallie*, 471 U.S. at 39).

71. *Id.* at \*7 (citing N.C. GEN. STAT. §§ 153A-274, -275, -284 (Michie 1994 & Supp. 1997) (counties); *id.* §§ 160A-311, -312, -317 (Michie 1994 & Supp. 1997) (cities)).

72. *See Hallie*, 471 U.S. at 39.

affected subdivision was located in neighboring Forsyth County.<sup>73</sup> The City of Winston-Salem and Forsyth County, however, entered into an interlocal agreement in 1976 to consolidate their water and sewage systems.<sup>74</sup> The Fourth Circuit noted that "the North Carolina Supreme Court has stated that when a local governmental unit—pursuant to an interlocal cooperative agreement—operates a water and sewage system for another local governmental unit, the operating unit can exercise all of the rights for both local units with respect to that system."<sup>75</sup> The court therefore held that state action immunity extended to protect the City's conduct.<sup>76</sup>

Similarly, the Fourth Circuit also employed the state action doctrine to affirm the dismissal of an antitrust challenge to the use by a private security firm of off-duty Virginia police officers and sheriff's deputies.<sup>77</sup> At issue in *American International Security Specialists, Inc. v. Roberts*<sup>78</sup> was competition for privately contracted security services between a private security provider and off-duty deputies and officers, the latter of whom utilized state and locally supplied uniforms, badges, weapons, and other equipment during their off-duty employment.<sup>79</sup>

Applying the first prong of the state action test, the Fourth Circuit held that Virginia Code section 15.2-1712, which authorizes municipalities to adopt ordinances permitting law enforcement officers and deputy sheriffs to engage in off-duty employment that may require use of their police powers, constituted a clearly articulated state policy.<sup>80</sup> The court noted that the statute made it foreseeable that Virginia officers and deputies might engage in off-duty security work utilizing state supplied equipment, and that result could clearly be foreseen to be anticompetitive.<sup>81</sup> On this basis, the court found that the state actors' activities were protected by the state action immunity doctrine.<sup>82</sup> This decision was consistent with that in *Command Force Security, Inc. v. City of Portsmouth*,<sup>83</sup>

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73. See *Carolina Water Serv.*, 1998 U.S. App. LEXIS 22130, at \*2.

74. See *id.*

75. *Id.* at \*8 (citing *McNeill v. Harnett County*, 398 S.E.2d 475 (N.C. 1990)).

76. See *id.* at \*10.

77. See *American Int'l Security Specialists, Inc. v. Roberts*, 161 F.3d 1 (4th Cir. 1998) (unpublished table decision) (full text available in LEXIS, No. 97-2089, 1998 U.S. App. LEXIS 22128, at \*1 (4th Cir. Sept. 10, 1998)).

78. *Id.*

79. See *id.* at \*2.

80. See *id.* at \*5 (citing VA. CODE ANN. § 15.2-1712 (Repl. Vol. 1997)).

81. See *id.*

82. See *id.*

83. 968 F. Supp. 1069 (E.D. Va. 1997).

a similar case decided a year earlier in the Eastern District of Virginia.<sup>84</sup>

### B. Conspiracy Issues

In *Omega World Travel, Inc. v. Airlines Reporting Corp.*,<sup>85</sup> the Fourth Circuit Court of Appeals declined to infer the existence of an antitrust conspiracy between the airlines and Airlines Reporting Corp. ("ARC"), a clearinghouse through which airlines and travel agents communicate.<sup>86</sup> Plaintiff Omega World Travel ("Omega"), a large national travel agency, sued ARC claiming ARC entered into a conspiracy with the other airlines to control the market for the sale of airline tickets.<sup>87</sup> Omega claimed that there was an industry-wide agreement to use ARC and, thus, a conspiracy to restrain competition.<sup>88</sup> The court was unpersuaded, however, and affirmed the district court's grant of summary judgment because of Omega's failure to produce sufficient evidence to demonstrate the existence of a conspiracy.<sup>89</sup> "[O]n summary judgment motions in antitrust cases, the Supreme Court has instructed that when there is evidence of conduct that is consistent with both legitimate competition and an illegal conspiracy, courts may not infer that an illegal conspiracy has occurred without other evidence."<sup>90</sup>

Citing *Estate Construction Co. v. Miller & Smith Holding Co.*,<sup>91</sup> the court stated that "[i]t is not enough merely to state that a conspiracy has taken place.' The appellant must show details of the time, place and effect of the conspiracy."<sup>92</sup> The court found that Omega produced only argument and speculation, and presented no details of the time, place, and effect of the conspiracy:

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84. For a thorough discussion of the court's decision in *Command Force*, see Michael F. Urbanski & James R. Creekmore, *Antitrust and Trade Regulation Law*, 32 U. RICH. L. REV. 973, 979-82 (1998).

85. 172 F.3d 863 (4th Cir. 1999) (unpublished table decision) (full text available in Westlaw, No. 98-1033, 1999 WL 46756, at \*1 (4th Cir. Feb. 3, 1999)).

86. See *Omega World Travel*, 1999 WL 46756, at \*3.

87. See *id.* at \*1.

88. See *id.*

89. See *id.* at \*3.

90. *Id.* at \*1 (citing *Thompson Everett, Inc. v. National Cable Adver.*, 57 F.3d 1317, 1323 (4th Cir. 1995) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986))).

91. 14 F.3d 213 (4th Cir. 1994).

92. *Omega World Travel*, 1999 WL 46756, at \*1 (quoting *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213 (4th Cir. 1994)).

No evidence has been presented showing communications, meetings or other methods through which a knowing participation in a scheme might be inferred. In short, Appellant's case is based upon hypotheticals and inference. And, although permissible inferences from the facts should be drawn in the light most favorable to the non-moving party, those inferences must "fall within the range of reasonable probability and may not be so tenuous as to amount to speculation or conjecture."<sup>93</sup>

ARC produced substantial evidence that travel agencies elected to use the ARC system, instead of dealing individually with the airlines, because it was more efficient and financially advantageous.<sup>94</sup> The Fourth Circuit also noted that Omega failed to present any evidence inconsistent with legitimate conduct, which also weighed against the inference of conspiracy.<sup>95</sup>

In *Levine v. McLeskey*,<sup>96</sup> the Fourth Circuit Court of Appeals affirmed the district court's dismissal of a Noerr-Pennington sham exception claim<sup>97</sup> and held that the doctrine of collateral estoppel did not bar litigation of conspiracy claims under the Sherman Antitrust Act,<sup>98</sup> the Virginia Antitrust Act,<sup>99</sup> and the Virginia Business Conspiracy Act.<sup>100</sup>

Levine developed Marina Shores, a Virginia Beach Marina complex providing dry boat storage, wet slips, stores, and a restaurant.<sup>101</sup> Marina Shores directly competed with Lynnhaven Dry Storage Marina, the region's principal dry storage marina owned by McLeskey.<sup>102</sup> Levine hired Norman Cohn to open and manage the

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93. *Id.* at \*3 (citations omitted) (quoting *Thompson Everett*, 57 F.3d at 1323).

94. *See id.* at \*2.

95. *See id.* at \*3 (quoting *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 706 (4th Cir. 1991)).

96. 164 F.3d 210 (4th Cir. 1998).

97. The Noerr-Pennington doctrine exempts from antitrust liability efforts to petition the government. *See United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Under this doctrine, joint lobbying and other "efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." *Pennington*, 381 U.S. at 670. Noerr-Pennington immunity has been expanded beyond efforts to influence legislation to include activity directed at courts and administrative agencies. *See City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991). In *City of Columbia*, the Court distinguished situations in which persons use the *process* of government as an anticompetitive weapon, from those which use the *outcome* of the governmental process, ruling that whereas the "sham" exception encompasses the former, it does not apply to the latter. *See id.* at 382.

98. 15 U.S.C. § 1 (1994).

99. VA. CODE ANN. § 59.1-9.5 (Repl. Vol. 1998).

100. VA. CODE ANN. § 18.2-499 (Repl. Vol. 1996 & Cum. Supp. 1999).

101. *See Levine*, 164 F.3d at 212.

102. *See id.*

restaurant at Marina Shores.<sup>103</sup> Cohn formed Cohn-Phillips to lease and manage the restaurant, and Levine advanced funds for start-up costs and equipment.<sup>104</sup> When Levine called in the loan following construction, Cohn approached McLeskey, who then purchased a one-half interest in Cohn-Phillips.<sup>105</sup> Cohn-Phillips subsequently failed to pay rent on time, and Marina Shores filed an unlawful detainer, seeking possession and damages for mismanagement.<sup>106</sup> Cohn-Phillips counterclaimed for breach of the lease, tortious interference, and conspiracy to injure Cohn-Phillips's business.<sup>107</sup>

Cohn-Phillips prevailed at trial in the Virginia Beach Circuit Court,<sup>108</sup> but the Supreme Court of Virginia reversed on the grounds that Cohn-Phillips's failure to pay rent constituted a breach of the lease.<sup>109</sup> Levine then initiated a federal court antitrust claim asserting that the Cohn-Phillips state court counterclaims were actionable as sham litigation under that exception to the Noerr-Pennington doctrine.<sup>110</sup>

The Fourth Circuit agreed with McLeskey that the Cohn-Phillips counterclaims were not "objectively baseless" and thus not actionable as sham litigation,<sup>111</sup> but rejected the assertion that the doctrine of collateral estoppel barred the plaintiff from asserting its breach of lease and conspiracy claims.<sup>112</sup> The court held that collateral estoppel did not apply because the final judgment in the state court action was not based on fact finding favorable to Cohn-Phillips.<sup>113</sup> Thus, the federal and state antitrust conspiracy claims were not precluded by collateral estoppel.<sup>114</sup>

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103. *See id.*

104. *See id.*

105. *See id.*

106. *See id.*

107. *See id.*

108. *See id.*

109. *See id.*

110. *See id.*

111. *See id.* at 213; *see also* Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., 508 U.S. 49, 57 (1993) ("[A]n objectively reasonable effort to litigate cannot be a sham regardless of subjective intent.").

112. *See Levine*, 164 F.3d at 213.

113. *See id.*

114. *See id.*

### C. Monopolization, Market Definition, and the Internet

In one of the first cases to consider market definition of electronic commerce, Judge Lee of the United States District Court for the Eastern District of Virginia rejected a counterclaim that America Online, Inc. ("AOL") monopolized and attempted to monopolize the market for e-mail advertising of AOL subscribers in *America Online, Inc. v. GreatDeals.Net*.<sup>115</sup>

AOL initiated the action against Martindale Empowerment ("Martindale")<sup>116</sup> seeking damages and an injunction to prohibit Martindale's practice of sending unsolicited bulk e-mail to AOL subscribers.<sup>117</sup> Martindale filed counterclaims complaining of AOL's attempt to block its transmissions, claiming inter alia, that AOL engaged in monopolization, attempted monopolization, and interfered with Martindale's business.<sup>118</sup>

"To prevail on a monopolization claim, a party must show: (1) possession of monopoly power in a relevant market; (2) willful acquisition or maintenance of that power in an exclusionary manner; and (3) causal antitrust inquiry."<sup>119</sup> The district court first held that Martindale failed to adequately define the relevant market as simply "e-mail advertising," with AOL's subscribers comprising a "distinct submarket."<sup>120</sup> The court noted that "In defining the relevant product or service market, the court finds that there are reasonable substitutes for advertising through AOL."<sup>121</sup> The court rejected Martindale's attempt to restrict the market to e-mail advertising, finding that

There are numerous substitutes for e-mail advertising, some of which are less expensive, including use of the World Wide Web, direct mail, billboards, television, newspapers, radio and leaflets, to name a few. Even if the Court restricted the market to e-mail advertising, interchangeable substitutes

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115. 49 F. Supp. 2d 851 (E.D. Va. 1999).

116. "GreatDeals.Net" is an Internet domain name belonging to Martindale Empowerment, which also owns the trade name GreatDeals. See *id.* at 853. Martindale's business included sending commercial electronic advertising over the Internet marketing computers and computer-related equipment. See *id.* at 853-54.

117. See *id.*

118. See *id.* at 854.

119. *Id.* at 857 (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 n.19 (1985)).

120. *Id.* The court stated that "[a] relevant market has two dimensions: (1) the relevant product market, which identifies the products or services that compete with each other, and (2) the relevant geographic area within which competition takes place." *Id.*

121. *Id.* at 858.

include other paid e-mail subscription services such as Microsoft Network or Prodigy, or free e-mail services like Hotmail and Yahoo.<sup>122</sup>

The court recognized that AOL subscribers could have chosen another e-mail service and that such interchangeable services are part of the relevant product.<sup>123</sup> The court considered it improper to define a market simply by identifying a group of consumers who have purchased a given product,<sup>124</sup> thereby distinguishing the Supreme Court's recent opinion in *Eastman Kodak Co. v. Image Technical Services, Inc.*,<sup>125</sup> which stated

This is not a case like *Eastman Kodak* where a single brand of product or service constitutes a relevant market because it is unique. In this case, there are other e-mail services that provide the same type of service as AOL. Defendants could have advertised through another e-mail service and still reached the Internet-accessing public. With respect to the relevant geographic market in which competition takes place, the Court finds that the Internet cannot be defined with outer boundaries. It is not a place or location: it is infinite.<sup>126</sup>

The court noted that Martindale ignored the fact that it had multiple means of advertising its business to the Internet accessing public.<sup>127</sup> "The geographic market may not be restricted to AOL subscribers not only because there are other persons with access to the Internet, but also because there are other means of advertising to those persons and to AOL subscribers."<sup>128</sup> While noting that market definition often is a factual inquiry into the commercial realities faced by consumers,<sup>129</sup> the court held that where the alleged relevant market does not allege all interchangeable substitute products, the alleged market is legally insufficient.<sup>130</sup>

Not only was the relevant market alleged by Martindale legally insufficient, the court held that it failed to adequately demonstrate that AOL willfully acquired or maintained its alleged monopoly

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122. *Id.*

123. *See id.*

124. *See id.*

125. 504 U.S. 451 (1992).

126. *America Online*, 49 F. Supp. 2d at 858.

127. *See id.*

128. *Id.*

129. *See id.* (citing *Eastman Kodak*, 504 U.S. at 482).

130. *See id.* (quoting *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 347 n.23 (N.D. Ill. 1997) (holding that a proposed market definition was legally insufficient because it defined the market in terms of a single class of customers)).



power in an exclusionary manner.<sup>131</sup> The court noted that Martindale made no showing of predatory conduct by AOL.<sup>132</sup> "Exploiting competitive advantage that is legitimately available, however, does not amount to predatory conduct, even for a firm with monopoly power."<sup>133</sup>

The district court also considered insufficient Martindale's claim of antitrust injury, which consisted of the allegation that AOL's actions put the plaintiff out of business.<sup>134</sup> Following *Advanced Health-Care Services, Inc. v. Radford Community Hospital*,<sup>135</sup> the court rejected the claim of antitrust injury for three reasons: (1) the lack of anticompetitive intent; (2) the lack of competition between Martindale and AOL; and (3) the absence of any causal connection between AOL's conduct and the alleged loss of business.<sup>136</sup>

The Court likewise dismissed Martindale's charge of attempted monopolization.<sup>137</sup> "To establish attempted monopolization, a party must show: (1) specific intent to monopolize the market; (2) antitrust or predatory conduct designed to further that intent; and (3) a dangerous probability of success."<sup>138</sup> The court noted that Martindale failed to allege any conduct that would support an inference of AOL's specific intent to monopolize.<sup>139</sup> At most, Martindale alleged that AOL threatened others with lack of access to AOL if they continued dealing with Martindale.<sup>140</sup> Rather than being suggestive of an antitrust violation, the court considered these efforts by AOL, to vigorously protect its subscribers from transmission of unsolicited bulk e-mail, to be insufficient to support an inference of specific intent.<sup>141</sup>

Recognizing the virtually limitless expanse of the Internet, the court found that AOL did not possess a dangerous probability of successfully monopolizing the information services market, conceding that it was

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131. *See id.*

132. *See id.* at 859.

133. *Id.*

134. *See id.*

135. 910 F.2d 139 (4th Cir. 1990).

136. *See America Online*, 49 F. Supp. 2d at 860.

137. *See id.* at 861.

138. *Id.* at 860 (citing *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993); *Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924, 926 (4th Cir. 1990)).

139. *See id.* at 861.

140. *See id.*

141. *See id.*

unable to measure AOL's market share because the market in which AOL participates is not defined. The Internet is not regulated and an entrant's ability to participate in the market and offer services like that offered by AOL is without boundary. Thus, even if the Court determined AOL's market share to be relatively high, there is no dangerous probability of successful monopolization where there are not substantial barriers to entry and there are other factors that make the exercise of monopoly power unlikely.<sup>142</sup>

Finally, Martindale also alleged that AOL denied it access to an essential facility.<sup>143</sup> The court recognized an "essential facility" as "one which is not merely helpful but vital to the claimant's competitive viability."<sup>144</sup> While the court conceded that plaintiff sufficiently alleged that AOL controls an essential facility for access to all AOL subscribers, it rejected application of the doctrine because Martindale and AOL were not competitors, holding the essential facilities doctrine to be inapplicable where the alleged monopolist and the claimant do not compete.<sup>145</sup>

#### D. Virginia Business Conspiracy Issues

The statutory basis for business conspiracy actions is found in sections 18.2-499 and 18.2-500 of the Virginia Code.<sup>146</sup> The first statute, criminal in nature, provides that "Any two or more persons who combine, associate, agree, mutually undertake or concert together for the purpose of . . . willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever . . . shall be guilty of a Class 1 misdemeanor."<sup>147</sup> Section 18.2-500 provides a civil remedy for anyone who believes he or she has been "injured in his reputation, business or profession by reason of a violation of [section] 18.2-499."<sup>148</sup> If such a lawsuit is

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142. *Id.*

143. *See id.* at 862. The court stated that

To plead monopolization through the "essential facilities" doctrine, [Martindale] must allege (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility to competitors.

*Id.* (citing *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 544 (4th Cir. 1991)).

144. *Id.*

145. *See id.* at 862-63.

146. VA. CODE ANN. §§ 18.2-499, -500 (Repl. Vol. 1996 & Cum. Supp. 1999).

147. *Id.* § 18.2-499(A) (Repl. Vol. 1996 & Cum. Supp. 1999).

148. *Id.* § 18.2-500(a) (Repl. Vol. 1996 & Cum. Supp. 1999).

successful, the plaintiff may recover treble damages plus the costs of the suit.<sup>149</sup>

The starting point for any interpretation of the Business Conspiracy Act ("BCA")<sup>150</sup> must be the definition of conspiracy itself. At common law, a conspiracy was "an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful and harmful towards another person."<sup>151</sup> In a criminal case, a conspiracy is simply an agreement to commit a crime.<sup>152</sup> The object of the conspiracy must be unlawful; it is impossible to conspire to do what the law allows.<sup>153</sup>

The elements of a claim under the BCA are relatively straightforward. According to the Supreme Court of Virginia, the two elements are "(1) a combination of two or more persons for the purpose of willfully and maliciously injuring plaintiff in his business, and (2) resulting damage to plaintiff."<sup>154</sup> Courts have considered certain aspects of these elements as follows.

### 1. A Combination of Two or More Persons

In Virginia, the doctrine of intra-corporate immunity has had an important effect on the type and number of entities that can be accused of forming a conspiracy to harm a business. Both state and federal courts have repeatedly held that various legal entities are incapable of forming conspiracies in and of themselves.<sup>155</sup> First, it is clear that "By definition, a single entity cannot conspire with

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149. *See id.*

150. VA. CODE ANN. §§ 18.2-499 to -501 (Repl. Vol. 1996 & Cum. Supp. 1999).

151. *Werth v. Fire Cos.' Adjustment Bureau*, 160 Va. 845, 854, 171 S.E. 255, 258 (1933).

152. *See Wright v. Commonwealth*, 224 Va. 502, 505, 297 S.E.2d 711, 713 (1982).

153. *See Leonard v. J.C. Pro Wear, Inc.*, 64 F.3d 657 (4th Cir. 1995) (unpublished table decision) (full text available in Westlaw, No. 94-1498, 1995 WL 508894, at \*6 (4th Cir. Aug. 29, 1995)); *Baxter Research Med., Inc. v. KOL Bio-Med. Instruments, Inc.*, No. 97-1117-A, 1998 U.S. Dist. LEXIS 4056, at \*19-21 (E.D. Va. Mar. 2, 1998) (unreported decision); *Meadow Ltd. Partnership v. Heritage Sav. & Loan Ass'n*, 639 F. Supp. 643, 653 (E.D. Va. 1986); *Hechler Chevrolet, Inc. v. General Motors Corp.*, 230 Va. 396, 402, 337 S.E.2d 744, 748 (1985) (citing *Werth*, 160 Va. at 855, 171 S.E. at 259). *But see Reston Pressure Seal, Inc. v. Northern Virginia Waterproofing, Inc.*, 19 Va. Cir. 545, 546 (Fairfax County 1988) (stating that phrase "by any means whatever" eliminates requirement that a crime be committed in order to obtain a civil remedy).

154. *Allen Realty Corp. v. Holbert*, 227 Va. 441, 449, 318 S.E.2d 592, 596 (1984); *accord Saliba v. Exxon Corp.*, 865 F. Supp. 306, 313 (W.D. Va. 1994), *aff'd*, 52 F.3d 322 (4th Cir. 1995) (unpublished table decision); *Meadow*, 639 F. Supp. at 652.

155. *See, e.g., Sunsport, Inc. v. Barclay Leisure Ltd.*, 984 F. Supp. 418, 423-24 (E.D. Va. 1997).

itself."<sup>156</sup> Because of the intra-corporate immunity doctrine, employees acting within the scope of their employment are agents of the employer and cannot conspire.<sup>157</sup> The Fourth Circuit has recognized a limited exception to the intra-corporate immunity doctrine when the agents have an independent, personal stake that is separate and apart from their involvement as agents of their employer.<sup>158</sup> While this exception remains recognized, several decisions have limited it in order to ensure that the rule is not swallowed by the exception.<sup>159</sup>

A corporation cannot conspire with its wholly-owned subsidiary.<sup>160</sup> Further, two wholly-owned subsidiaries are incapable of conspiring with each other.<sup>161</sup> However, if the corporate veil is pierced, a conspiracy can then be established between members of the corporation.<sup>162</sup> Finally, the concept of intra-corporate immunity has been applied to state agencies and their workers.<sup>163</sup>

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156. *Fox v. Deese*, 234 Va. 412, 428, 362 S.E.2d 699, 708 (1987); *see also Selman v. American Sports Underwriters, Inc.*, 697 F. Supp. 225, 238 (W.D. Va. 1988) (stating that a corporation cannot conspire with itself); *Charles E. Brauer Co. v. Nationsbank of Virginia, N.A.*, 251 Va. 28, 36, 466 S.E.2d 382, 387 (1996) (stating that a principal and an agent cannot conspire).

157. *See Fox*, 234 Va. at 428, 362 S.E.2d at 708; *see also Detrick v. Panalpina, Inc.*, 108 F.3d 529, 544 (4th Cir. 1997); *Marmott v. Maryland Lumber Co.*, 807 F.2d 1180, 1184 (4th Cir. 1986); *Saliba*, 865 F. Supp. at 313; *Selman*, 697 F. Supp. at 238; *Reasor v. City of Norfolk*, 606 F. Supp. 788, 797 (E.D. Va. 1984); *Charles E. Brauer Co.*, 251 Va. at 36, 466 S.E.2d at 387.

158. *See Detrick*, 108 F.3d at 544; *see also Greenville Publ'g Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974); *Levine v. McLeskey*, 881 F. Supp. 1030, 1059 (E.D. Va. 1995), *aff'd in part, rev'd on other grounds*, 164 F.3d 210 (4th Cir. 1998). The Supreme Court of Virginia has not specifically recognized this exception. *See Little Professor Book Co. of Reston v. Reston N. Point Village, L.P.*, 41 Va. Cir. 73, 79 (Fairfax County 1996).

159. *See General Nutrition Corp. v. United States Fire Ins. Co.*, No. 3:97cv490, 1998 U.S. Dist. LEXIS 4899, at \*9 (E.D. Va. Jan. 12, 1998) (unreported decision); *see also Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 705 (4th Cir. 1991); *Selman*, 697 F. Supp. at 239 (explaining that the exception should not be interpreted so broadly as to permit the "independent personal stake" to be merely an interest in the health and profitability of the corporation).

160. *See Saliba*, 865 F. Supp. at 313. The same holds true for partnerships; general partners within a partnership are unable to conspire within the scope of their activities for the partnership. *See id.*

161. *See Advanced Health-Care Serv., Inc. v. Radford Community Hosp.*, 910 F.2d 139, 146 (4th Cir. 1990) (holding that two subsidiaries wholly owned by same parent corporation are legally incapable of conspiring under Sherman Act). *But see In re Ray Dobbins Lincoln-Mercury, Inc.*, 604 F. Supp. 203, 205 (W.D. Va. 1984) (holding intra-enterprise conspiracy doctrine did not preclude a finding of conspiracy between two subsidiaries of the same parent corporation in violation of Virginia Code section 18.2-500), *aff'd*, 813 F.2d 402 (4th Cir. 1985) (unpublished table decision).

162. *See Nedrich v. Jones*, 245 Va. 465, 472-73, 429 S.E.2d 201, 205 (1993).

163. *See Becker v. Russek*, 518 F. Supp. 1040, 1045 (W.D. Va. 1981) (applying the doctrine of intra-corporate immunity to the investigative/administrative arms of the State Board of Medicine), *aff'd*, 679 F.2d 876 (4th Cir. 1982) (unpublished table decision); *Fowler v.*

## 2. For the Purpose of Willfully and Maliciously Injuring Plaintiff

Once an initial showing of a conspiracy between at least two entities is made, the next test is whether the conspiracy existed for some unlawful purpose. A conspiracy must be formed "to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means."<sup>164</sup> It is not necessary that every conspirator act with legal malice. "[T]he statute simply requires that one party, acting with legal malice, conspire with another party to injure the plaintiff."<sup>165</sup> For many years, Virginia's courts applied a "primary and overriding purpose"<sup>166</sup> test to the malice element, but more recent decisions require only a showing of legal malice.<sup>167</sup> The restrictive construction historically placed on the malice element by Virginia's courts was done with good reason—the expansive treble damages remedy should be available only in the most egregious cases of deliberate, wrongful conduct intended to injure another's business.

## 3. In Its Business

Courts have repeatedly held that the focus of the BCA is on injuries to business; other types of injuries are outside the scope of the BCA.<sup>168</sup> A right of action under sections 18.2-499 and 18.2-500 arises "only when malicious conduct is directed at [a plaintiff's] business, not against one's person."<sup>169</sup> The conduct must be directly aimed at damaging the business, including injuries to one's property

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Department of Educ., 472 F. Supp. 121, 122-23 (E.D. Va. 1978) (applying the doctrine to officials of Department of Education). *But see* Monk v. Department of Transp., 34 Va. Cir. 374, 376-77 (Russell County 1994) (stating that Virginia Department of Transportation and its employees are not "persons" under the statute).

164. *Hechler Chevrolet, Inc. v. General Motors Corp.*, 230 Va. 396, 402, 337 S.E.2d 744, 748 (1985); *see also* Potomac Valve & Fitting, Inc. v. Crawford Fitting Co., 829 F.2d 1280, 1284 (4th Cir. 1987); *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.*, 965 F. Supp. 802, 829 (W.D. Va. 1997), *rev'd on other grounds*, 156 F.3d 535 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 1458 (1999).

165. *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 108 F.3d 522, 527 (4th Cir. 1997).

166. *See* Greenspan v. Osheroff, 232 Va. 388, 398-99, 351 S.E.2d 28, 35-36 (1986).

167. *See* Commercial Bus. Sys., Inc. v. BellSouth Servs., Inc., 249 Va. 39, 47, 453 S.E.2d 261, 266-67 (1995).

168. *See, e.g.*, *Peterson v. Cooley*, 142 F.3d 181, 187-88 (4th Cir. 1998).

169. *Buschi v. Kirven*, 775 F.2d 1240, 1259 (4th Cir. 1985); *see also* *Peterson*, 142 F.3d at 187-88; *Ward v. Connor*, 495 F. Supp. 434, 439 (E.D. Va. 1980), *rev'd on other grounds*, 657 F.2d 45 (4th Cir. 1981); *Moore v. Allied Chem. Corp.*, 480 F. Supp. 364, 375 (E.D. Va. 1979).

interest.<sup>170</sup> The damages cannot simply be the “result or secondary effect of an action taken for mere personal gain.”<sup>171</sup> Virginia federal courts have consistently resisted attempts to apply the Act to conspiracies directed at one’s employment interest.<sup>172</sup> The existence of a business is an issue for trial.<sup>173</sup>

#### 4. Resulting in Damage to the Plaintiff’s Business

Virginia is one of a minority of states that does not require, in standard conspiracy cases, proof of an overt act in order to convict a defendant of conspiracy. “In law the offense is the *combination for the purpose*, and no overt act is necessary to constitute it.”<sup>174</sup> Under the BCA, defendants can be guilty of either conspiracy or attempting to conspire,<sup>175</sup> however, the agreement or even an attempted

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170. See *Picture Lake Campground, Inc. v. Holiday Inns, Inc.*, 497 F. Supp. 858, 863-64 (E.D. Va. 1980).

171. *Nationwide Mut. Fire Ins. Co. v. Jones*, 577 F. Supp. 968, 970 (1984); see also *Petra Int’l Banking Corp. v. First Am. Bank of Va.*, 758 F. Supp. 1120, 1142 (E.D. Va. 1991) (stating that there is no injury if harm is the secondary or consequential result of parties’ attempt to protect themselves), *aff’d sub nom. Petra Int’l Banking Corp. v. Dameron Int’l, Inc.*, 953 F.2d 1383 (4th Cir. 1992) (unpublished table decision).

172. See *Clegg v. Powers*, No. 97-0006-H, 1997 U.S. Dist. LEXIS 17189, at \*23 (W.D. Va. Aug. 8, 1997) (unreported decision); see also *Jordan v. Hudson*, 690 F. Supp. 502, 507 (E.D. Va. 1988), *aff’d*, 879 F.2d 98 (4th Cir. 1989); *Campbell v. Board of Supervisors*, 553 F. Supp. 644, 645 (E.D. Va. 1982). *But see Holden v. Crippen*, 32 Va. Cir. 67, 68-69 (Fairfax County 1993) (stating that law and medicine are professions, not employment, and thus injuries thereto are actionable under the statute); *Johnson v. Plaisance*, 25 Va. Cir. 264, 267 (Charlottesville City 1991) (noting Virginia Supreme Court has not limited statutes as narrowly as federal courts).

173. See *Luckett v. Jennings*, 246 Va. 303, 308, 435 S.E.2d 400, 402 (1993) (holding that demurrer was improperly granted when factual questions existed to determine if the plaintiff had a distinct business, separate from the corporation he formed with the defendants, and whether there was an injury to that business distinguishable from the injury to the corporation formed with the defendants).

174. *Crump v. Commonwealth*, 84 Va. 927, 941-42, 6 S.E. 620, 628 (1888); see also *Stevens v. Commonwealth*, 14 Va. App. 238, 241, 415 S.E.2d 881, 883 (Ct. App. 1992) (“A crime is ‘committed when the agreement to commit the offense is complete’ and no overt act in furtherance of the underlying crime is necessary.”); *Ramsey v. Commonwealth*, 2 Va. App. 265, 270, 343 S.E.2d 465, 469 (Ct. App. 1986) (“A conspiracy is committed when the agreement to commit the offense is complete regardless whether any overt act in furtherance of commission of the substantive offense is initiated.”); VIRGINIA MODEL JURY INSTRUCTIONS: CRIMINAL, *Conspiracy* p. I-321, at I-322 (1998 Repl. Ed.).

175. See *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 108 F.3d 522, 527 (4th Cir. 1997) (rejecting defendant’s argument that a party cannot be liable for attempting to conspire, holding that “the plain language of § 18.2-499(B) contemplates that a party can be liable for attempting to conspire”); see also VA. CODE ANN. § 18.2-499(B) (Repl. Vol. 1996 & Cum. Supp. 1999) (“Any person who attempts to procure the participation . . . of any one or more persons to enter into a [conspiracy] . . . shall be guilty of a violation of this section . . .”).

agreement is not sufficient to impose liability; there must be proof that some act was carried out that actually harmed plaintiff's business.<sup>176</sup> "The gist of a civil action of conspiracy is the damage caused by the acts committed in pursuance of the formed conspiracy and not the mere combination of two or more persons to accomplish an unlawful purpose or use other unlawful means."<sup>177</sup> This is important not only in terms of establishing a case for conspiring to damage a business, but for purposes of establishing when the cause of action accrues. The Supreme Court of Virginia has stated that "A right of action accrues when any damage, however slight, is sustained."<sup>178</sup>

Finally, although the Supreme Court of Virginia has not directly addressed the issue, the Fourth Circuit recently determined that if a conspiracy to harm a business is alleged in a civil case, proof of the conspiracy must be shown by clear and convincing evidence.<sup>179</sup>

In *Peterson v. Cooley*,<sup>180</sup> the Fourth Circuit affirmed the grant of summary judgment to defendants on a BCA claim, noting that "[w]e need not pause long on this argument."<sup>181</sup> The court recognized that while "a plaintiff need not prove personal spite"<sup>182</sup> . . . the alleged conduct must at least be aimed at damaging another's business."<sup>183</sup> The court explained:

The Petersons have produced no evidence that Cooley or Central Fidelity acted out of a desire to injure the Petersons in their business. Indeed, any

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176. See *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 28, 431 S.E.2d 277, 281-82 (1993).

177. *Id.*

178. *Eshbaugh v. Amoco Oil Co.*, 234 Va. 74, 77, 360 S.E.2d 350, 351 (1987). Federal courts have held that because the statutes relate to the plaintiff's business – a property interest – the five-year statute of limitations applies. See *Marmott v. Maryland Lumber Co.*, 807 F.2d 1180, 1185 (4th Cir. 1986) (stating that the district court wrongly applied a one-year limitation period to section 18.2-499); see also *Federated Graphics Co. v. Napotnik*, 424 F. Supp. 291, 293-94 (E.D. Va. 1976) (applying five-year period). The Supreme Court of Virginia has not expressly addressed this question, but has applied the five-year limitation period when the trial court and parties agreed that period was proper. See *Eshbaugh*, 234 Va. at 76-77, 360 S.E.2d at 351. *But see* *Mickey v. Sears, Roebuck & Co.*, 16 Va. Cir. 478, 479 (Alexandria City 1979) (citing *Federated Graphics*, but holding that allegation of malicious prosecution involves wrongful conduct directed at a person, while statute addresses only conduct directed at property; thus, conspiracy count was governed by one-year limitations period).

179. See *Peterson v. Cooley*, 142 F.3d 181, 188 (4th Cir. 1998).

180. 142 F.3d 181 (4th Cir. 1998).

181. *Id.* at 188.

182. *Id.* (citing *Commercial Bus. Sys., Inc. v. BellSouth Servs., Inc.*, 249 Va. 39, 47, 453 S.E.2d 261, 267 (1995)).

183. *Id.* (citing *Nationwide Mut. Fire Ins. Co. v. Jones*, 577 F. Supp. 968, 970 (W.D. Va. 1984)).

damage to the Petersons' business would only prejudice Cooley and Central Fidelity's ability to recover as creditors. Moreover, Cooley acted for the legitimate business purpose of protecting his RTC judgment against Barrie Peterson. More generally, Cooley acted out of a legitimate business desire to profit by the purchase of loans. Were we to allow the Petersons' suit to proceed, we would subject every sale of debt to a potential conspiracy charge by the disgruntled debtor.<sup>184</sup>

The Fourth Circuit's treatment of the business conspiracy allegations in *Peterson* is consistent with the manner in which federal courts have considered conspiracy allegations under the Sherman Act over the last decade, and follows the teaching of the Supreme Court in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*<sup>185</sup> In *Matsushita*, the Court required proof in an antitrust conspiracy case "that tends to exclude the possibility" that the alleged conspirators acted independently. [A plaintiff], in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [it].<sup>186</sup> The *Matsushita* Court identified two separate inquiries that are relevant to this issue: (1) whether the defendant had "any rational motive" to join the alleged conspiracy, and (2) whether the defendant's conduct "was consistent with the defendant's independent interest."<sup>187</sup> Thus, the Court stated that "if [the plaintiff] had no rational economic motive to conspire, and if [its] conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy."<sup>188</sup> Moreover, where a conspiracy is economically implausible, the antitrust plaintiff "must come forward with more persuasive evidence to support [its] claim than would otherwise be necessary."<sup>189</sup>

Recently, the Supreme Court of Virginia affirmed a trial court's finding of a violation of the BCA, but did so without any substantial

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184. *Id.*

185. 475 U.S. 574 (1986).

186. *Id.* at 588 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984)).

187. *Id.* at 587.

188. *Id.* at 596-97.

189. *Id.* at 587. The Fourth Circuit has consistently indicated that conspiracies may not be inferred where the defendant can articulate a rational business purpose for the challenged conduct. *See Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 543 (4th Cir. 1993) ("[Plaintiffs] must bring forward evidence that excludes the possibility that the alleged co-conspirators acted independently or based upon a legitimate business purpose.") (emphasis added).



discussion of the motive element.<sup>190</sup> In *Advanced Marine Enterprises, Inc. v. PRC, Inc.*,<sup>191</sup> PRC filed suit in equity against Advanced Marine Enterprises (“AME”) under the conspiracy statute when a number of PRC’s marine engineering employees left PRC and moved to a competitor, AME.<sup>192</sup> PRC informed the employees that due to the loss of some of PRC’s marine engineering contracts, they should look for other employment.<sup>193</sup> The chancellor, however, ruling in favor of PRC, focused on the fact that AME and the PRC engineering employees developed a covert plan to move to AME without regard to the obviously permissible motivation of self-preservation for those faced with losing their jobs.<sup>194</sup>

AME appealed the chancellor’s finding on the ground that under *Greenspan v. Osheroft*,<sup>195</sup> the chancellor was required to find, when evidence of mixed motivations existed, that AME and the employees acted with the primary purpose of injuring PRC.<sup>196</sup> While the supreme court rejected this argument, it did not address the issue of mixed motives. Rather, it relied on *Commercial Business Systems, Inc. v. BellSouth Services, Inc.*<sup>197</sup> for the proposition that “Code §§ 18.2-499 and -500 do not require a plaintiff to prove that a conspirator’s primary and overriding purpose is to injure another in his trade or business.”<sup>198</sup> Whereas *Commercial Business Systems* seemingly recognized the continuing vitality of the primary and overriding purpose requirement of *Greenspan*—albeit limited to cases where the defendants had mixed motivations for their actions—the court in *Advanced Marine* did not address this important distinction. Because, like the Sherman Act, the BCA contains such extreme remedies—recovery of treble damages and attorney’s fees—its use should be confined to cases where evidence of conspiracy and motive to harm the plaintiff is clear. Indeed, like the federal antitrust standard, plaintiffs in such cases should be required to produce evidence that tends to exclude the possibility of independent action.

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190. See *Advanced Marine Enters., Inc. v. PRC, Inc.*, 256 Va. 106, 116-17, 501 S.E.2d 151, 154 (1998).

191. *Id.*

192. See *id.* at 114, 501 S.E.2d at 152.

193. See *id.* at 111, 501 S.E.2d at 151.

194. See *id.* at 115, 501 S.E.2d at 153, 155.

195. 232 Va. 388, 351 S.E.2d 28 (1986).

196. See *PRC*, 256 Va. at 116-17, 501 S.E.2d at 154.

197. 249 Va. 39, 453 S.E.2d 261 (1995).

198. See *PRC*, 256 Va. at 117, 501 S.E.2d at 154 (citing *Commercial Bus. Sys.*, 249 Va. at 47, 453 S.E.2d at 267).

Such an approach appears to have been taken by the United States District Court for the Western District of Virginia in *Wuchenich v. Shenandoah Memorial Hospital*,<sup>199</sup> where the court, consistent with the strict scrutiny applied to other physician conspiracy cases in recent years, dismissed a claim brought against Shenandoah Memorial Hospital ("SMH") and members of its medical staff alleging common law conspiracy and statutory conspiracy in violation of the BCA.<sup>200</sup> Plaintiff Wuchenich, a California anesthesiologist, claimed he was recruited by SMH and joined its staff in 1995.<sup>201</sup> Wuchenich alleged that once he began practicing at SMH, other doctors felt threatened by the competition posed by him and his sister, also a new physician to SMH practicing in the fields of obstetrics and gynecology.<sup>202</sup> Wuchenich claimed that as a result of this perceived threat, the other doctors at SMH conspired and agreed not to request his services.<sup>203</sup> Twice when Wuchenich's services were used he became the subject of the medical staff peer review process at the request of Dr. Karmy, another obstetrics and gynecology practitioner.<sup>204</sup>

Regarding the BCA allegations, the district court adopted Magistrate Judge Crigler's recommendation of Rule 12(b)(6) dismissal.<sup>205</sup> The court noted that "The first element of any civil conspiracy, whether common law or statutory, is that there was agreement among co-conspirators."<sup>206</sup> Therefore, the court held that the plaintiff must allege facts that show that the defendants shared a unity of purpose or common design to injure the plaintiff,<sup>207</sup> and that "Independent acts by several individuals do not necessarily constitute a conspiracy without showing such a meeting of the minds."<sup>208</sup>

The court found this necessary element lacking, holding that Wuchenich produced only "a bare, conclusory allegation" of conspiracy.<sup>209</sup> The court noted that two of the alleged co-conspirators were

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199. No. 98-0041-H (W.D. Va. Jan. 29, 1999).

200. *See id.*; *see also* VA. CODE ANN. §§ 18.2-499, -500 (Repl. Vol. 1996 & Cum. Supp. 1999).

201. *See Wuchenich*, No. 98-0041-H, slip op. at 2.

202. *See id.*, slip op. at 3.

203. *See id.*

204. *See id.*

205. *See id.*, slip op. at 1-2.

206. *Id.*, slip op. at 10.

207. *See id.* (citing *Brown v. Angelone*, 938 F. Supp. 340, 346 (W.D. Va. 1996)).

208. *Id.* (citing *Murdaugh Volkswagen, Inc. v. First Nat'l Bank of S.C.*, 639 F.2d 1073 (4th Cir. 1981)).

209. *Id.*

not even members of the hospital staff at the same time for more than a month.<sup>210</sup> The plaintiff did produce evidence that a member of the hospital administration and an alleged conspiring doctor held a conversation about “getting rid” of the plaintiff because he would not work with them.<sup>211</sup> However, the court found that this evidence did not support the existence of any conspiracy because the alleged conspiring doctor shared that information with the plaintiff.<sup>212</sup> Further, the court found that the plaintiff’s allegation that Dr. Karmy’s alleged motivation against the plaintiff—the perceived competitive threat posed by his sister – suggested “an independent reason for Dr. Karmy to strive to undermine plaintiff, rather than any unity with the other alleged co-conspirators.”<sup>213</sup>

The court’s treatment of the plaintiff’s conclusory BCA allegations and willingness to consider issues of motive at the pleading stage suggest that the Supreme Court of Virginia’s 1998 opinion in *Advanced Marine Enterprises, Inc. v. PRC, Inc.*<sup>214</sup> may not alter the restrictive manner in which courts have analyzed claims under this treble damages statute. Indeed, given the extreme remedy created by the BCA for treble damages and attorney’s fees, it is appropriate for courts to subject such claims to strict scrutiny and only allow them to proceed upon the existence of allegations and evidence establishing a conspiracy to injure another. As the *Wuchenich* case demonstrates, allegations that do not establish a meeting of the minds are insufficient to give rise to an actionable conspiracy claim, and allegations that do not clearly demonstrate the motive to injure another should be dismissed as failing to state a claim. This latter notion finds support in a footnote in the *Wuchenich* opinion, in which the court suggested that another reason for dismissal of the BCA claim was that the plaintiff failed to allege an unlawful purpose or unlawful methods.<sup>215</sup>

The *Wuchenich* court also based its conclusion—that the conspiracy claim alleged by the plaintiff physician was not actionable—on

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210. *See id.*

211. *See id.*

212. *See id.*, slip op. at 11.

213. *Id.*

214. 256 Va. 106, 501 S.E.2d 148 (1998). *See supra* text accompanying notes 190-98.

215. *See Wuchenich*, No. 98-0041-H, slip op. at 12 n.2 (citing *Hechler Chevrolet, Inc. v. General Motors Corp.*, 230 Va. 396, 402, 337 S.E.2d 744, 748 (1985)). The court noted that the acts allegedly undertaken by defendants in conducting a peer review and reporting the results were not unlawful. *See id.*; *see also Werth v. Fire Cos.’ Adjustment Bureau, Inc.*, 160 Va. 845, 855, 171 S.E. 255, 258 (1933) (“[T]here can be no conspiracy to do a legitimate act, an act which the law allows, nor malice therein. To give action there must not only be a conspiracy, but a conspiracy to do a wrongful act.”).

the basis of the intra-corporate conspiracy doctrine.<sup>216</sup> Under this doctrine, a conspiracy between a corporation and its agents acting as employees is a "legal impossibility."<sup>217</sup> While noting the existence of the independent personal stake exception,<sup>218</sup> the court declined plaintiff's suggestion to apply that exception to this case.<sup>219</sup> Indeed, following the Fourth Circuit's decision in *Oksanen v. Page Memorial Hospital*,<sup>220</sup> the *Wuchenich* court held that the reasoning in *Oksanen* applied directly to the facts alleged in plaintiff's complaint by stating that "Even a doctor in direct competition with plaintiff cannot be deemed to have a personal financial interest in disciplining that doctor because the medical staff does not have enough control over the hospital to 'cause a restraint to be imposed.'"<sup>221</sup>

*E. Practice and Procedure: Subpoenas Issued to Nonparties in Antitrust Litigation Calling for Production of Confidential Business Records*

In two recent antitrust cases Virginia federal courts wrestled with the conflicting interests of the need for party litigants to develop their cases and the potential harm to nonparties from disclosure of their confidential business records. In each case, the subpoena was met with resistance from the nonparty. In *United States v. Motorola, Inc.*,<sup>222</sup> Nextel, one of the codefendants, subpoenaed documents from nonparty Ericsson, Inc., of Lynchburg, Virginia, requesting a wide

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216. See *Wuchenich*, No. 98-0041-H, slip op. at 11.

217. *Id.* (citing *Selman v. American Sports Underwriters, Inc.*, 697 F. Supp. 225, 238 (W.D. Va. 1988)).

218. See *id.*; see also *Greenville Publ'g Co. v. Daily Reflector, Inc.*, 496 F.2d 391 (4th Cir. 1974). In *Greenville Publishing*, the publisher of a free newspaper comprised almost completely of advertising brought an antitrust action against a competitor and its officers who were also the publishers of the regular local newspaper. See *id.* at 393-94. In regards to the conspiracy claim, the court recognized that a corporation cannot be guilty of conspiring with its officers or agents. See *id.* at 399. The court made an exception to the general rule, however, because the officer of the competitor had "an independent personal stake in achieving the corporation's illegal objective." *Id.* (citing *America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc.*, 347 F. Supp. 328, 332 (N.D. Ind. 1972)).

219. See *Wuchenich*, No. 98-0041-H, slip op. at 12.

220. 945 F.2d 696, 706 (4th Cir 1991) (holding that the personal stake exception did not extend to members of a medical staff who were in competition with a doctor who was subjected to the peer review process).

221. *Wuchenich*, No. 98-0041-H, slip op. at 12 (quoting *Oksanen*, 945 F.2d at 705). "Because the challenged decision was subject to review by the hospital and because decisionmaking authority in [plaintiff's] case was dispersed among a number of individuals, the personal stake exception is inapplicable." *Id.* (quoting *Oksanen*, 945 F.2d at 706).

222. No. 1:94-CV-02331 (W.D. Va. May 19, 1999).

swath of information involving Ericsson's products, its future business plans, and its competition with plaintiff Nextel.<sup>223</sup> The discovery dispute arose out of Nextel's petition to modify an antitrust consent decree with the United States and Nextel's contention that it needed information regarding Ericsson's products and marketing plans to demonstrate that competitive circumstances had changed, thus warranting relief from the decree.<sup>224</sup> Ericsson filed a motion to quash the subpoena, contending that it was overbroad, unduly burdensome, and that production of the requested documents would disclose confidential and proprietary business information.<sup>225</sup> In responding to the subpoena, Ericsson took the position that production of its confidential business records was not necessary as the trade press already contained sufficient information regarding its new products sufficient to satisfy Nextel's litigation needs.<sup>226</sup> For its part, Nextel took the position that the requested discovery should be allowed because of the existence of a protective order in place in the case pending in the district court in Washington, D.C.<sup>227</sup>

Judge Moon of the United States District Court for the Western District of Virginia resolved the dispute by placing strict limits on the information Ericsson was required to produce.<sup>228</sup> Judge Moon required Ericsson to produce a witness to authenticate the press releases and public documents that Ericsson previously produced to Nextel.<sup>229</sup> Ericsson was also required to produce certain documents expressly referring to Nextel, although the court gave Ericsson the ability to redact any information or documents that disclosed strategic business plans or information directly related to Ericsson's plans to deal with Nextel as a competitor.<sup>230</sup> The court declined to require Ericsson to produce any other information, particularly the future business and marketing plans requested by Nextel.<sup>231</sup>

*In re Motorsports Merchandise Antitrust Litigation*<sup>232</sup> similarly juxtaposed competing interests of parties and bystanders in distant antitrust litigation. Plaintiffs in that case brought a class action

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223. See *id.*, slip op. at 1.

224. See *id.*

225. See *id.*

226. See *id.*

227. See *id.*

228. See *id.*, slip op. at 2.

229. See *id.*

230. See *id.*

231. See *id.*

232. 186 F.R.D. 344 (W.D. Va. 1999).

ostensibly on behalf of automobile racing fans alleging a conspiracy to fix the prices of racing souvenirs at NASCAR Winston Cup races.<sup>233</sup> The price fixing suit, pending in the United States District Court for the Northern District of Georgia, charged that licensed vendors at NASCAR Winston Cup races fixed the prices of souvenirs between January 1, 1991 and the present.<sup>234</sup>

Plaintiffs subpoenaed nonparty Buck Fever Racing, Inc. ("Buck Fever"), a Southwest Virginia retailer of NASCAR merchandise at locations other than Winston Cup races, to produce virtually all of its records dating from January 1, 1991.<sup>235</sup> Plaintiffs sought production from Buck Fever ostensibly because it was a "benchmark" firm against which its expert witnesses could evaluate whether the market for sale of NASCAR souvenirs was impacted by the alleged price fixing conspiracy.<sup>236</sup> The Buck Fever records were especially vital to the plaintiffs because, although approximately twenty such businesses were subpoenaed, Buck Fever was one of the only such businesses that had sold NASCAR merchandise continuously since 1991.<sup>237</sup>

The court was reluctant to grant plaintiff's motion to compel, calling the subpoena "broad on its face" and noting that compliance would result in a "great effort of time and expense" for Buck Fever.<sup>238</sup> Nevertheless, the court recognized that the plaintiffs demonstrated substantial need for the records and obviously were concerned by Buck Fever's three month delay in retaining counsel and responding to the subpoena.<sup>239</sup> As a consequence, and despite the breadth of the subpoena, the court found "little justification for quashing the subpoena in its entirety."<sup>240</sup> Instead, the court deferred production of any documents in response to the subpoena until after the Georgia district court ruled on the motion for class certification.<sup>241</sup> The court resolved the concerns over the cost associated with the production by requiring plaintiffs to reimburse Buck Fever for all reasonable costs incurred in the production of the

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233. *See id.* at 346.

234. *See id.*

235. *See id.*

236. *See id.* at 347.

237. *See id.* at 348.

238. *Id.* at 349.

239. *See id.* at 350.

240. *Id.*

241. *See id.*

requested documents.<sup>242</sup> Further, the court indicated that the protective order in place in the Georgia litigation was adequate to address the concerns of Buck Fever regarding disclosure of sensitive, confidential financial information.<sup>243</sup>

In each of these cases, the court expressed concern over the cost and burden imposed on nonparties to antitrust litigation, while simultaneously striving to ensure that litigants obtain sufficient information to try their cases in distant forums.

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

The Department of Justice continues to advance its investigation and prosecution of foreclosure auction bid rigging in Northern Virginia, resulting in two more indictments—those against Kenneth R. Arnold and Alan Shams.<sup>244</sup> The indictments charge Arnold and Shams with conspiring with a group of real estate speculators who agreed not to bid against each other at real estate foreclosure auctions, thereby allowing the group to purchase real estate for depressed, noncompetitive prices.<sup>245</sup>

The indictments allege that the conspirators would suppress bidding at public auctions, allowing a designated bidder to purchase property.<sup>246</sup> Later, they would meet at a second, secret auction where each conspirator would bid an amount above the public auction price, and the highest bidder would win the property.<sup>247</sup> The difference between the public auction price and the secret auction price would be divided among the conspirators as payoffs.<sup>248</sup> Arnold is also charged with mail fraud in connection with mailing a payoff in the furtherance of the bid-rigging scheme.<sup>249</sup>

Eight other individuals have pled guilty or have been convicted as a result of the ongoing investigation.<sup>250</sup> The Antitrust Division is conducting its investigation with the assistance of the FBI.<sup>251</sup>

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242. *See id.*

243. *See id.*

244. *See* United States v. Arnold, No. 98-305-A (E.D. Va. Aug. 13, 1998).

245. *See Price Fixing: Northern Virginia Real Estate Speculators are Cited for Bid Rigging,*

75 Antitrust & Trade Reg. Rep. (BNA) No. 1874, at 216 (Aug. 20, 1998).

246. *See id.*

247. *See id.*

248. *See id.*

249. *See id.*

250. *See id.*

251. *See id.*

The Supreme Court declined to review a Fourth Circuit decision that sustained the convictions of Mija S. Romer and Khem C. Batra for violating the Sherman Act.<sup>252</sup> Romer was also convicted of conspiracy to defraud the IRS and bank fraud.<sup>253</sup> The convictions arose from a conspiracy to rig bids on nine properties sold at public auction and conspiracy to evade the payment of federal taxes.<sup>254</sup> The Fourth Circuit affirmed the district court's denial of judgments of acquittal and affirmed the judgments against each.<sup>255</sup>

The FTC achieved consent decrees as settlements to three cases that were filed in the United States District Court for the Eastern District of Virginia, Alexandria Division.<sup>256</sup> The decrees were a result of "Operation Mousetrap," which targeted firms that sold fraudulent invention promotion services.<sup>257</sup> The first consent decree dictates that six corporate defendants contribute to a redress fund of \$250,000 that will be used to redress those consumers who purchased the fraudulent promotion services.<sup>258</sup> The decree also stipulates that the defendants are forbidden to make false claims as to the likelihood of success of their programs, past program success, and amount of royalties received by the defendants' customers.<sup>259</sup> All three settlements were approved by the court on November 17, 1998.<sup>260</sup>

Finally, Virginia participated with seven other states and the FTC in a settlement with United Industries Corp., a manufacturer of a termite bait system.<sup>261</sup> The manufacturer was charged with misrepresenting the effectiveness of its product.<sup>262</sup> As part of the

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252. See *United States v. Romer*, 148 F.3d 359 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 1032 (1999).

253. See *id.* at 363.

254. See *id.*

255. See *id.* at 372. For a more complete discussion of the Fourth Circuit's decision, see Michael F. Urbanski & James R. Creekmore, *Antitrust and Trade Regulation Law*, 32 U. RICH. L. REV. 973, 1004-06 (1998).

256. The cases that led to the settlement were *FTC v. American Invention Associates, Inc.*, No. 97-1114-A (E.D. Va. Nov. 19, 1998); *FTC v. Dornan*, No. 97-1114-A (E.D. Va. Nov. 19, 1998); and *FTC v. Waxman*, No. 97-1114-A (E.D. Va. Nov. 19, 1998).

257. See Brenda Mack, *Invention Promotion Firms Agree to Settle FTC Charges and Pay \$250,000 in Consumer Redress* (last modified Nov. 19, 1998) <<http://www.ftc.gov/opa/1998/9811/aia.htm>>.

258. See *id.*

259. See *id.*

260. See *id.*

261. See *Deceptive Practices: Termite Bait System Marketer Settles FTC, State Charges of Deception*, 76 *Antitrust & Trade Reg. Rep.* (BNA) No. 1902, at 298 (Mar. 25, 1999).

262. See *id.*



settlement, the company must refrain from making claims regarding the effectiveness of its product in the absence of reliable scientific information.<sup>263</sup>

## V. LEGISLATION

On October 27, 1998, President Clinton signed into law the Curt Flood Act of 1998.<sup>264</sup> The law substantially limits professional baseball's judicially-created antitrust exemption by allowing for antitrust actions by professional baseball players against the league.<sup>265</sup> The law does not apply to the minor leagues or to team relocations.<sup>266</sup> The law is named for the first baseball player to take his challenge against baseball's reserve clause to the U.S. Supreme Court.<sup>267</sup> The reserve clause bound players to certain teams for the length of their professional careers.<sup>268</sup>

## VI. CONCLUSION

Virginia's courts remain steadfast in their reluctance to allow antitrust claims of questionable validity to proceed to trial. Courts remain skeptical of contrived conspiracy claims, and it would appear that market participants are left to thrive or die in Darwinian fashion on the competitive playing field. Moreover, as the market shifts from defined physical and geographic boundaries to the limitless expanse of the Internet, competition from all sources can be expected to intensify, thereby giving rise to more challenges by those ill-equipped to compete in a high-tech society. It also can be expected that FTC regulation and prosecution of Internet activity may increase. Whether the Supreme Court, the Fourth Circuit, or the Virginia courts will give credence to such claims and prosecutions remains to be seen.

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263. *See id.*

264. 15 U.S.C.A. § 27a (Cum. Supp. 1999).

265. *See id.*

266. *See id.*

267. *See Flood v. Kuhn*, 407 U.S. 258 (1972).

268. *See id.* at 259-60.