

13

ANTITRUST LAW

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13-1 APPLICABILITY OF ANTITRUST LAW TO LOCAL GOVERNMENTS

13-1.01 Scope

Congress and the federal courts have created exemptions from the antitrust laws in areas where federal, state, or local governments have adopted economic or social policies that conflict with free and open competition. In the specific context of state action, the Supreme Court of the United States has permitted state governments and certain types of private actors to demonstrate that a state regulatory scheme precludes antitrust liability. Given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, however, state-action immunity is disfavored. *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 133 S. Ct. 1003 (2013).

The foundation for the state action doctrine is *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307 (1943). In *Parker*, the Supreme Court upheld a California statute against an antitrust challenge, and held that the federal antitrust laws “did not undertake to prohibit” a California program that regulated the marketing of raisins. *Id.* Basing its rationale in principles of federalism, the Court went on to explain: “In a dual system of government, in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.” *Id.* While the state action doctrine thus offers a defendant an affirmative defense against an antitrust claim, the application of the state action doctrine to local governments is less clear.

Following *Parker*, in a close decision, the Supreme Court signaled that the state action immunity doctrine did not automatically apply to local governments. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S. Ct. 1123 (1978) (5-4). Four years later, the Court made clear that local governments could be held liable for anticompetitive conduct under the antitrust laws. *Cnty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 102 S. Ct. 835 (1982).

The Supreme Court’s decision in *City of Boulder* spawned a vigorous debate about whether the antitrust laws were intended to or should apply to local governments. In response to the lobbying efforts of local governments, Congress enacted the Local Government Antitrust Act on October 17, 1984. The scope of this legislation is not as extensive as its proponents sought. Rather, the legislation limits the remedies that are available in actions against local governments—defined as “a city, county, parish, town, township, village or any other general function governmental unit”—and local government employees and officials acting in an official

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capacity. Special function units of local government, such as school boards or airport commissions, would also be eligible for the protection provided by the Act.

Because the Local Government Antitrust Act does not completely exempt local government activities from the antitrust laws, local governments along with their officials and employees must remain cognizant of the requirements of the antitrust laws and the scope of state action immunity. Familiarity with antitrust law is also important for local government attorneys in view of the many cases in which municipalities have been antitrust plaintiffs. This chapter is designed to assist local government attorneys in dealing with antitrust issues. The chapter first presents an overview of the principal antitrust statutes and how the courts have interpreted them. Next, the chapter reviews the application of the antitrust laws to local governments. This chapter does not purport to describe every possible antitrust claim and defense. Rather, it attempts to identify the principal areas that have been of concern to local governments.

13-1.02 Historical Objectives of the Antitrust Laws

Antitrust legislation dates from the latter half of the nineteenth century. As the United States developed into an industrialized nation, industry-wide monopolies began to emerge. These monopolies typically were the result of “trusts” or holding companies formed by former competitors to inhibit or prevent further competition.

Several states enacted the first of the so-called “antitrust” statutes. Affecting only *intrastate* trusts, these statutes failed to reach the more important, larger monopolies doing business on an *interstate* basis. Congress responded by enacting the Sherman Act in 1890. Subsequently, in 1914, Congress enacted the Clayton and Federal Trade Commission Acts. The Clayton Act has been amended on several occasions, most notably in 1936 by the Robinson-Patman Act and in 1976 by the Hart-Scott-Rodino Antitrust Improvements Act.

These statutes are collectively referred to as the antitrust laws. As the Supreme Court has observed:

Antitrust laws in general and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.

United States v. Topco Assocs., Inc., 405 U.S. 596, 92 S. Ct. 1126 (1972).

13-2 SECTION ONE OF THE SHERMAN ACT

13-2.01 Overview

From the standpoint of local government liability, probably the most important antitrust statute is Section 1 of the Sherman Act, which provides in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. § 1.

13-2.02 Jurisdictional Requirement

To establish jurisdiction under § 1 of the Sherman Act, the anticompetitive restraint must either: (1) occur in the flow of interstate commerce; or (2) have a substantial effect on interstate commerce. The requisite effect is established if it can be shown that: (a) there is a nexus between the restraint and interstate commerce; and (b) a not insubstantial volume of commerce is affected by the restraint. *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 100 S. Ct. 502 (1980); *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 96 S. Ct. 1848 (1976); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 95 S. Ct. 2004 (1975).

The plaintiff alleging a conspiracy in violation of § 1 need not allege an actual effect on interstate commerce flowing from the conspiracy itself. Rather, jurisdiction can be based on “a general evaluation of the impact of the restraint on other participants and potential participants in the market,” had the conspiracy succeeded. *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 111 S. Ct. 1842 (1991). See also *Va. Vermiculite, Ltd. v. W.R. Grace & Co.*, 156 F.3d 535 (4th Cir. 1998) (Sherman Act § 1 claim stated because sufficient causal connection alleged between injury and violation); *United States v. Romer*, 148 F.3d 359 (4th Cir. 1998) (even though all activity was local, sufficient interstate nexus when out-of-state financial interests involved).

13-2.03 Requirement of “Contract, Combination . . . or Conspiracy”

Only joint anticompetitive conduct by two or more persons or entities comes within the scope of § 1. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S. Ct. 503 (1960). Section 1 does not reach strictly unilateral restraints of trade. *United States v. Colgate & Co.*, 250 U.S. 300, 39 S. Ct. 465 (1919). See also *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980) (“Unilateral action, no matter what its motivation, cannot violate § 1”). However, members of a legally single entity can violate § 1 when the entity is controlled by a group of competitors and serves, in essence, as a vehicle for ongoing concerted activity. *Am. Needle, Inc. v. National Football League*, 560 U.S. 183, 130 S. Ct. 2201 (2010) (joint venture of NFL teams for product licensing purposes is concerted action); *Robertson v. Sea Pines Real Estate*, 679 F.3d 278 (4th Cir. 2012) (joint venture of brokerage firms could exercise concerted action).

The required concerted action means more than just joint activity. In *Virginia Vermiculite v. Historic Green Springs, Inc.*, 307 F.3d 277 (4th Cir. 2002), the court held that concerted activity susceptible to sanction by Section 1 is activity in which multiple parties join their resources, rights, or economic power together to achieve an outcome that, but for the concert, would naturally be frustrated by their competing interests. Thus, the unilateral donation of land did not violate § 1 even though the donation had the effect of restricting commerce. A single, general conspiracy is not established, however, when various defendants enter into separate agreements with a common defendant, but where the various defendants have no connection with one another other than the common defendant’s involvement in each transaction. *Dickson v. Microsoft Corp.*, 309 F.3d 193 (4th Cir. 2002) (rejecting the hub-and-spoke or rimless wheel conspiracy approach, but finding plaintiffs pled sufficient allegations to establish two separate vertical conspiracies in violation of Section 1).

Note that the “contract, combination . . . or conspiracy” element of a § 1 violation likely does not encompass an agreement between two government officials who work for the same entity. In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731 (1984), the Supreme Court cited with approval a long line of lower court decisions rejecting the notion that an agreement involving only an organization and its officers, employees, and agents can constitute an illegal conspiracy under the antitrust laws. The implication of this decision is that a local government is legally incapable of conspiring in violation of the antitrust laws with local government officials acting in an official capacity or with local government employees acting within the scope of their employment. See *TFWS, Inc. v. Schaefer*, 242 F.3d 198 (4th Cir. 2001) (restraint imposed unilaterally by government not concerted action within the meaning of the

Sherman Act simply because of coercive effect on parties who must obey the law; however, governmentally imposed trade restraint that enforces private pricing decisions is a “hybrid restraint” that is concerted action), *holding reaffirmed in TFWS, Inc. v. Franchot*, 572 F.3d 186 (4th Cir. 2009); *see also Advanced HealthCare Services, Inc. v. Radford Community Hosp.*, 910 F.2d 139 (4th Cir. 1990) (“[T]wo subsidiaries wholly owned by the same parent corporation are legally incapable of conspiring with one another for purposes of § 1 of the Sherman Act.”) Of course, an illegal conspiracy could still be found if local government officials or employees acted outside the scope of their authority or if a third party were involved.

The anticompetitive agreement or understanding pursuant to which those persons or entities act need not be express; it may be implied or inferred from the circumstances of the case. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 104 S. Ct. 1464 (1984); *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 74 S. Ct. 257 (1954); *De Long Equip. Co. v. Wash. Mills Abrasive Co.*, 887 F.2d 1499 (11th Cir. 1989). Moreover, the combination or conspiracy element of a Section 1 violation is not negated by the fact that one or more of the co-conspirators acted unwillingly, reluctantly, or only in response to coercion. *Dickson v. Microsoft Corp.*, 309 F.3d 193 (4th Cir. 2002).

To survive a Rule 12(b)(6) motion, a complaint must make more than vague and conclusory allegations of unreasonable restraint of trade. The complaint must allege factual details showing, if possible, the time, place, and effect of the conspiracy so that each element of the alleged antitrust violation can be identified. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007); *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213 (4th Cir. 1994). *See also SD3, LLC v. Black & Decker Inc.*, 801 F.3d 412 (4th Cir. 2015) (*Twombly's* requirement to plead something “more” than parallel conduct does not impose a probability standard at the motion-to-dismiss stage).

13-2.04 Unlawful Restraints of Trade: Per Se Violations

Section 1 of the Sherman Act, if read literally, prohibits all concerted action in restraint of trade. The Supreme Court, however, has read § 1 to prohibit only unreasonable restraints of trade. *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S. Ct. 502 (1911). In determining whether a restraint of trade is unreasonable under § 1, courts apply two forms of analysis. The restraint is either (1) per se illegal or (2) subject to analysis under the “rule of reason.” Some restraints are considered so inherently anticompetitive that they are presumed to be unreasonable and thus illegal without further inquiry into their purpose or effect on competition. *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 99 S. Ct. 1551 (1979). These per se violations of the Sherman Act include “horizontal” (i.e., among or between competitors) price fixing, horizontal division of markets, certain tying arrangements, group boycotts, and reciprocal dealing.

13-2.04(a) Price fixing

Most arrangements among horizontal competitors that fix, stabilize, or otherwise interfere with the prices of products or services are unreasonable and considered per se unlawful. *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 68 S. Ct. 996 (1948) (buyer conspiracy); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S. Ct. 811 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 47 S. Ct. 377 (1927). In *Leegin Creative Leather Products v. PSKS, Inc.*, 551 U.S. 877, 127 S. Ct. 2705 (2007), *overruling Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373, 31 S. Ct. 376 (1911), the Supreme Court determined that vertical *minimum* resale price agreements are not per se illegal, but are to be evaluated under the rule of reason. Vertical *maximum* price fixing is also to be evaluated under the rule of reason. *State Oil Co. v. Khan*, 522 U.S. 3, 118 S. Ct. 275 (1997), *overruling Albrecht v. Herald Co.*, 390 U.S. 145, 88 S. Ct. 869 (1968). *See also TFWS, Inc. v. Franchot*, 572 F.3d 186 (4th Cir. 2009) (construing *Leegin* and holding Maryland’s wine and liquor regulations are horizontal price fixing and a per se violation); *In re Zetia (Ezetimibe) Antitrust Litig.*, 400 F.

Supp. 3d 418 (E.D. Va. 2019) (agreement by one drug company not to compete with a competitor by launching an authorized generic version of its drug is not a price-fixing agreement or other per se violation).

13-2.04(b) Division of markets

Any agreement among competitors to divide markets—regardless of whether territories, customers, or product markets are involved—is per se unlawful. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 92 S. Ct. 1126 (1972); *United States v. Sealy, Inc.*, 388 U.S. 350, 87 S. Ct. 1847 (1967). In contrast to the per se illegality of horizontal market allocation, a vertical division of markets (i.e., between a supplier and its customers) will be analyzed under the rule of reason. Vertical nonprice restraints are generally lawful in the absence of market power or a purpose to suppress competition. *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S. Ct. 2549 (1977). See also *Thompson Everett, Inc. v. National Cable Advertising*, 57 F.3d 1317 (4th Cir. 1995) (exclusive representative contracts for the sale of cable advertising time are legal vertical nonprice constraints that serve legitimate business interests).

13-2.04(c) Tying arrangements

A seller of a product or service who conditions the availability of that product or service (the “tying product”) on the purchase by the customer of a distinct product or service (the “tied product”) has created a “tying arrangement” which violates § 1 of the Sherman Act if: (1) the seller has substantial economic power in the market for the tying product to be able to restrain free competition in the market for the tied product; and (2) a not insubstantial volume of commerce is affected in the market for the tied product. See *Ill. Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 126 S. Ct. 1281 (2006) (lengthy discussion of Court’s approach to tying arrangements); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 104 S. Ct. 1551 (1984); *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 97 S. Ct. 861 (1977); *N. Pac. Ry. v. United States*, 356 U.S. 1, 78 S. Ct. 514 (1958); *Int’l Salt Co. v. United States*, 332 U.S. 392, 68 S. Ct. 12 (1947); *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033 (4th Cir. 1987).

Eastman Kodak Co. v. Image Technical Services, 504 U.S. 451, 112 S. Ct. 2072 (1992), involved the tying of parts with repair service for certain primary equipment (e.g., copiers) sold by Kodak. The service required the use of unique replacement parts available only from Kodak or its original equipment manufacturers. After Kodak began losing service business to independent service organizations (ISOs), Kodak took a number of successful steps to restrict the ISOs’ access to replacement parts. Many ISOs were driven out of the market for servicing Kodak equipment—or driven out of business altogether.

The Supreme Court determined that the ISOs were entitled to have a jury decide whether Kodak possessed sufficient market power to violate Section 1 and sufficient monopoly power to violate Section 2 of the Sherman Act. What is remarkable about the decision is that—for purposes of both Section 1 and Section 2—the Court allowed the relevant product market to be defined in terms of Kodak’s own brand of copiers (rather than all brands of copiers). Justice Scalia’s dissent asserted that such a market definition was contrary to the Supreme Court’s decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S. Ct. 2549 (1977), that the principal concern of antitrust laws is interbrand competition (among sellers of various brands of products) rather than intrabrand competition (among sellers of the same brand of products). The *Continental T.V.* decision stated that interbrand competition provides a significant check on the exploitation of intrabrand competition because of the ability of consumers to substitute a different brand of the same product. In *Kodak*, however, the Court held that lack of market power in the primary equipment market, as a matter of law, did not preclude the possibility of sufficient market power in the “aftermarket” of repair of Kodak equipment. Plaintiffs were entitled to get to the jury on the theory that once purchasers invested

in a Kodak brand copier, they were “locked in” and thus vulnerable to exploitation by Kodak in the aftermarket for parts and service. *Cf. State Oil Co. v. Khan*, 522 U.S. 3, 118 S. Ct. 275 (1997) (“primary purpose of the antitrust laws is to protect interbrand competition”). See also *Advanced Computer Servs. v. MAI Sys. Corp.*, 845 F. Supp. 356 (E.D. Va. 1994) (distinguishing *Kodak*) (must show explicit or implicit agreement conditioning the purchase of tying product to tied product for finding of per se violation).

13-2.04(c)(1) Elements of Tying

The elements of an illegal tying arrangement are as follows:

1. Separate Products. Two or more distinct products (or services) in commerce. See, e.g., *Southern Pines Chrysler-Plymouth, Inc. v. Chrysler Corp.*, 826 F.2d 1360 (4th Cir. 1987); *Principe v. McDonald’s Corp.*, 631 F.2d 303 (4th Cir. 1980); *Wash. Gas Light Co. v. Va. Elec. & Power Co.*, 438 F.2d 248 (4th Cir. 1971).
2. Market Power. The requisite degree of market power in the tying product (or service) market. See, e.g., *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98 (4th Cir. 1987) (affirming summary dismissal of tying claim where defendant had insufficient power in the tying market). Factors include: (a) the seller’s share of the relevant market, *Int’l Salt Co. v. United States*, 332 U.S. 392, 68 S. Ct. 12 (1947); and (b) other unique attributes of the tying article, such as land, see, e.g., *N. Pac. Ry. v. United States*, 356 U.S. 1, 78 S. Ct. 514 (1958). The Supreme Court, however, has held that market power will not be inferred when the defendant has only a 30 percent market share. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 104 S. Ct. 1551 (1984).
3. Effect on Commerce. The requisite “not insubstantial” effect on commerce must be demonstrated. See, e.g., *United States v. Loew’s, Inc.*, 371 U.S. 38, 83 S. Ct. 97 (1962) (\$60,800); *Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d 1407 (11th Cir. 1987). “We have refused to condemn tying arrangements unless a substantial volume of commerce is foreclosed thereby.” *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 104 S. Ct. 1551 (1984) (O’Connor, J., concurring).

13-2.04(c)(2) Justifications

Although tying arrangements generally have been held to be illegal per se, courts have considered possible justifications for such arrangements in some cases. Tying arrangements may be justified as necessary to enter a new industry or market. *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff’d per curiam*, 365 U.S. 567 (1961). Moreover, tying arrangements may serve to ensure product performance and thereby protect the goodwill of the supplier. *Advance Bus. Sys. & Supply Co. v. SCM Corp.*, 287 F. Supp. 143 (D. Md. 1968), *aff’d*, 415 F.2d 55 (4th Cir. 1969). Similarly, tying arrangements may serve to protect quality and trademark validity. *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348 (9th Cir. 1982).

The Fourth Circuit emphasizes the necessity for a coercive element in the tying arrangement. If a buyer is free to decline the tied product or services, or to purchase the two products or services separately, then by definition there is no unlawful tying. While evidence that there are some separate purchases will not negate a finding of illegal tying, separate sales above 10 percent may be a minimum benchmark sufficient to rebut any inference of tying. *It’s My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676 (4th Cir. 2016).

13-2.04(d) Group boycotts

A “group boycott” is any concerted refusal by two or more persons or entities to deal with another for the purpose of restraining competition. *See, e.g., FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 110 S. Ct. 768 (1990) (holding group boycott by lawyers seeking increase in court-appointed counsel fees from city government per se illegal); *United States v. Gen. Motors Corp.*, 384 U.S. 127, 86 S. Ct. 1321 (1966) (regarding conspiracy among dealers, manufacturers, and dealer associations to prevent certain dealers from selling to discount houses); *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S. Ct. 705 (1959) (involving conspiracy of retailer and suppliers not to deal with competing retailer).

The Supreme Court held in *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 119 S. Ct. 493 (1998), that the per se illegality rule of group boycotts applies only to horizontal agreements, not vertical agreements or vertical restraints. Thus, a single business decision to buy from one seller rather than another, even for an improper reason (e.g., regulatory fraud), is not per se illegal. The plaintiff must prove harm to the competitive process, not just to a single competitor.

Representative local government cases include: *Corey v. Look*, 641 F.2d 32 (1st Cir. 1981) (involving alleged conspiracy between town and public steamship authority to deprive competing parking lot operator of access to parking lot space); *Duke & Co. v. Foerster*, 521 F.2d 1277 (3d Cir. 1975) (involving alleged conspiracy of private concessionaires and municipal official to boycott plaintiffs’ beverages in municipal facilities); and *Pinehurst Airlines, Inc. v. Resort Air Servs., Inc.*, 476 F. Supp. 543 (M.D.N.C. 1979) (alleged conspiracy involving county commissioners, county airport authority, and private airline to prevent another airline from obtaining Fixed Based Operator status at county airport).

13-2.04(e) Reciprocity

Reciprocity is the practice by which a firm conditions its purchases of an article of commerce upon the seller’s buying from it. *United States v. Griffith*, 334 U.S. 100, 68 S. Ct. 941 (1948). *Cf. FTC v. Consol. Foods Corp.*, 380 U.S. 592, 85 S. Ct. 1220 (1965). Courts analogize reciprocal dealing to tying arrangements and appear to require that a not insubstantial amount of commerce be affected. *See Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419 (5th Cir. 1978); *United States v. Gen. Dynamics Corp.*, 258 F. Supp. 36 (S.D.N.Y. 1966).

13-2.05 Unlawful Restraints of Trade: Rule of Reason

If the conduct does not fall within one of the per se categories, its lawfulness is determined by application of the rule of reason. The central inquiry is whether any anticompetitive effects of the restraint are outweighed by its procompetitive consequences. *Oksanen v. Page Mem’l Hosp.*, 945 F.2d 696 (4th Cir. 1991) (en banc). Analysis under the rule of reason requires delineation of the relevant product and geographic markets, examination of the competitive effects, and evaluation of the business and economic justifications for the conduct at issue. *See generally Ohio v. Am. Express Co.*, 585 U.S. ___, 138 S. Ct. 2274 (2018); *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 127 S. Ct. 2705 (2007), overruling *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373, 31 S. Ct. 376 (1911); *State Oil Co. v. Khan*, 522 U.S. 3, 118 S. Ct. 275 (1997), overruling *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S. Ct. 869 (1968); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 98 S. Ct. 1355 (1978); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 38 S. Ct. 242 (1918); *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus., Inc.*, 889 F.2d 524 (4th Cir. 1989).

In *California Dental Ass’n v. FTC*, 526 U.S. 756, 119 S. Ct. 1604 (1999), the Supreme Court addressed the circumstances under which a court may appropriately engage in an abbreviated (or “quick look”) rule of reason analysis. By a 5-4 majority, the Court held that because the anticompetitive effects of a dental association’s membership rules were “far from intuitively obvious,” the rule of reason demanded a thorough inquiry rather than a “quick look”

into the nature of the restraints imposed on members. See also *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499 (4th Cir. 2002) (rejecting “quick look” form of rule of reason analysis). The *California Dental* case was also noteworthy for its holding that the Federal Trade Commission had jurisdiction over the nonprofit dental association. Virginia, among other states, filed an amicus brief in support of the FTC’s claim to jurisdiction—arguing that state governments needed the FTC’s assistance in enforcing antitrust laws in matters involving professional groups.

For other rule of reason cases, see *Dickson v. Microsoft Corp.*, 309 F.3d 193 (4th Cir. 2002) (failure to sufficiently allege market power); *Thompson Everett, Inc. v. National Cable Advertising*, 57 F.3d 1317 (4th Cir. 1995) (rule of reason applies to non-price vertical restrictions); *Levine v. McLeskey*, 881 F. Supp. 1030 (E.D. Va. 1995) (if no market power; no § 1 violation), *aff’d in part and vacated on other grounds*, 164 F.3d 210 (4th Cir. 1998); *Petrie v. Va. Bd. of Med.*, 648 Fed. Appx. 352 (4th Cir. 2016) (unpubl.) (elimination of single competitor insufficient to establish antitrust injury); *Advanced Health-Care Servs. v. Giles Mem’l Hosp.*, 846 F. Supp. 488 (W.D. Va. 1994) (joint venture contract to provide medical equipment not anticompetitive under rule of reason).

13-3 SECTION TWO OF THE SHERMAN ACT

13-3.01 Overview

Section 2 of the Sherman Act prohibits these offenses: (1) monopolization; (2) attempts to monopolize; and (3) conspiracy to monopolize. Section 2 provides in pertinent part:

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

15 U.S.C. § 2. Section 2 has the same jurisdictional requirement of interstate commerce as § 1.

13-3.02 Monopolization

The offense of monopolization under § 2 has two elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident. *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S. Ct. 1698 (1966); *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139 (4th Cir. 1990).

13-3.02(a) Market definition

Defining the “relevant market” is a necessary predicate to any § 2 analysis. *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 86 S. Ct. 347 (1965). Every relevant market has both a product and a geographic dimension. See *Consul Ltd. v. Transco Energy Co.*, 805 F.2d 490 (4th Cir. 1986).

13-3.02(a)(1) Product market

In general, market definition presents “a fact question heavily dependent upon the special characteristics of the industry involved.” *Sulmeyer v. Coca-Cola Co.*, 515 F.2d 835 (5th Cir. 1975); *accord Eastman Kodak Co. v. Image Technical Servs.* 504 U.S. 451, 112 S. Ct. 2072 (1992). Products and substitutes that are “reasonably interchangeable” are to be considered together. *Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S. Ct. 1502 (1962). “Reasonable interchangeability” is identified in terms of use, price, and physical characteristics. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 76 S. Ct. 994 (1956) (relevant market

included in all “flexible packaging material” such as cellophane and waxed paper); *It's My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676 (4th Cir. 2016) (cross-elasticity of demand must be considered); *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673 (6th Cir. 1986). Single “brands” generally cannot constitute a product market. See *Int'l Logistics Grp., Ltd. v. Chrysler Corp.*, 884 F.2d 904 (6th Cir. 1989); *Key Fin. Planning Corp. v. ITT Life Ins. Corp.*, 828 F.2d 635 (10th Cir. 1987); see also *Am. Online, Inc. v. Greatdeals.net*, 49 F. Supp. 2d 851 (E.D. Va. 1999) (distinguishing *Kodak* and adopting a broad product market definition).

13-3.02(a)(2) Geographic market

The relevant geographic market may be the area in which: (1) the seller operates and to which the purchaser can practicably turn for supplies, *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 83 S. Ct. 1715 (1963); *It's My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676 (4th Cir. 2016); *E. I. du Pont de Nemours & Co. v. Kolon Indus.*, 637 F.3d 435 (4th Cir. 2011); (2) the producer operates and is willing to compete for customer potential, *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S. Ct. 1698 (1966) (national market); *United States v. Columbia Steel Co.*, 334 U.S. 495, 68 S. Ct. 1107 (1948) (regional market); or (3) a product is produced or processed, *Woods Exploration & Producing Co. v. Aluminum Co. of Am.*, 438 F.2d 1286 (5th Cir. 1971).

13-3.02(b) Existence of Monopoly Power

Monopoly power is “the power to control prices or exclude competition.” *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S. Ct. 1698 (1966). See also *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 76 S. Ct. 994 (1956). The key factor is whether “power exists to raise prices or to exclude competition when it is desired to do so.” *Am. Tobacco Co. v. United States*, 328 U.S. 781, 66 S. Ct. 1125 (1946). Monopoly power may be inferred from a predominant share of the relevant market. *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S. Ct. 1698 (1966) (inferring monopoly power where the defendant held 87 percent of the relevant market). Where monopoly power has been found, defendants have generally had a market share of 70 percent or more. *Kolon Indus. v. E.I. du Pont de Nemours & Co.*, 748 F.3d 160 (4th Cir. 2014) (maximum market share of 59 percent does not establish monopoly power). See also *Weiss v. York Hosp.*, 745 F.2d 786 (3d Cir. 1984) (80 percent share with power to exclude competition and raise prices supported finding of monopoly power); *United Air Lines, Inc. v. Austin Travel Corp.*, 867 F.2d 737 (2d Cir. 1989) (10 percent or 31 percent insufficient); *White Bag Co. v. Int'l Paper Co.*, 579 F.2d 1384 (4th Cir. 1974) (9 percent share not sufficient). A market share of 50 percent or more may be sufficient, however. See *M & M Med. Supplies v. Pleasant Valley Hosp.*, 981 F.2d 160 (4th Cir. 1992) (en banc); *Advanced Health Care Servs. v. Giles Memorial Hosp.*, 846 F. Supp. 488 (W.D. Va. 1994). But see *Levine v. McLeskey*, 881 F. Supp. 1030 (E.D. Va. 1995) (detailed inquiry into other market characteristics not required to determine monopoly power even though the defendant's market share fell within the 50-70 percent range), *aff'd in part, vacated on other grounds*, 164 F.3d 210 (4th Cir. 1998).

Nonetheless, the existence of monopoly power depends on the facts of each case, and it is well settled that market share does not alone determine the presence or absence of monopoly power. See, e.g., *United States v. Syufy Enters.*, 903 F.2d 659 (9th Cir. 1990) (high market share not controlling, especially where barriers to entry are low); see generally 2 J. Von Kalinowski, *Antitrust Laws and Trade Regulation* § 8.02 (1991).

13-3.02(c) Unlawful Exercise of Monopoly Power

In addition to proof of monopoly power, the offense of monopolization requires proof of “exclusionary” or “predatory” conduct. Mere possession of monopoly power does not give rise to liability. See, e.g., *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370 (7th Cir. 1986). In the landmark decision in *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945), Judge Learned Hand held that Alcoa's program of expanding production capacity

in anticipation of increased demand was exclusionary in violation of § 2. The *Alcoa* decision, however, has been criticized for condemning conduct that appeared to be nothing more than a competitive response to changing market conditions. See, e.g., Phillip Areeda and Herbert Hovenkamp, *Antitrust Law*, ¶ 611d (Rev. 1996). Some courts have held that conduct is “exclusionary” or “predatory” within the meaning of § 2 only if the conduct would not be considered economically rational in a non-monopoly context. See, e.g., *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield*, 883 F.2d 1101 (1st Cir. 1989) (a monopolist may engage in a competitive course of conduct, so long as it does so for legitimate business reasons rather than in order to smother competition); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979); *Telex Corp. v. Int’l Bus. Mach. Corp.*, 510 F.2d 894 (10th Cir. 1975); *In re E. I. du Pont de Nemours & Co.*, 96 F.T.C. 653 (1980).

In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 124 S. Ct. 872 (2004), the Supreme Court held that a purchaser of local telephone services failed to state a § 2 claim against local telephone monopolist Verizon, whom the plaintiff alleged had limited market entry by denying to its rivals interconnection services required by the Telecommunications Act of 1996. The Court concluded that Verizon’s alleged failures to fulfill its duties to its rivals under the 1996 Act did not constitute anticompetitive conduct. According to the Court, “Verizon’s alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court’s existing refusal-to-deal precedents,” and neither the 1996 Act nor “traditional antitrust principles” justified “adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors.” *Id.*

Although the Fourth Circuit has declined so far to decide the issue,² a federal district court has held that “monopoly leveraging,” i.e., the use of monopoly power in one market to gain an unfair competitive advantage in another market, is not a § 2 violation. *Advanced Health-Care Servs. v. Giles Memorial Hosp.*, 846 F. Supp. 488 (W.D. Va. 1994); see also *Bepco, Inc. v. Allied-Signal, Inc.*, 106 F. Supp. 2d 814 (M.D.N.C. 2000) (collecting cases and concluding that Fourth Circuit likely would not recognize monopoly leveraging as independent violation of antitrust laws).

13-3.02(d) Intent

Specific intent to monopolize need not be demonstrated. *United States v. Griffith*, 334 U.S. 100, 68 S. Ct. 941 (1948). General intent to engage in the practices that have maintained or extended market power, sometimes called “deliberateness,” is enough. *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S. Ct. 1698 (1966); *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

13-3.02(e) Aspen

In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S. Ct. 2847 (1985), the owner of a major ski area had participated in a joint marketing scheme with a smaller rival for many years. When the owner ended this joint marketing effort, the Court found unlawful monopolization because no valid business reasons justified the refusal. The applicability of *Aspen* may be limited due to the peculiar facts in that case, and lower court decisions on the issue are mixed. See *Gen. Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795 (8th Cir. 1987) (dealer who terminated distributor engaged in monopolization since no legitimate business reasons justified the termination); *Drinkwine v. Federated Publ’ns, Inc.*, 780 F.2d 735 (9th Cir. 1985) (defendant’s proffered business reasons-need to control quality of product and pursuit of greater profits-justified termination); *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370 (7th Cir. 1986) (monopolist in telex terminal market did not engage in an unlawful

² In *Sun Microsystems, Inc. v. Microsoft Corp.*, 333 F.3d 517 (4th Cir. 2003), the Fourth Circuit strongly indicated that it did not find the “monopoly leveraging” theory sound.

refusal to deal when it ceased to promote a rival's telex terminals). The Supreme Court gave some indication that *Aspen* will be applied narrowly in the future. In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 124 S. Ct. 872 (2004), the Court described *Aspen* as a "limited exception" from the general rule that a refusal to deal with one's competitors does not violate § 2. The Court also noted that "*Aspen Skiing* is at or near the outer boundary of § 2 liability." *Id.*

13-3.02(f) Essential facilities

A monopolist who controls an "essential facility"—a device, natural resource, or other facility that is "essential" for competition in a market—may be found liable for monopolization if it refuses to deal with a competitor that utilizes the facility. *See, e.g., MCI Communications Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983). The essential facilities doctrine developed in the lower courts out of the Supreme Court's decision in *United States v. Terminal R. R. Ass'n of St. Louis*, 224 U.S. 383, 32 S. Ct. 507 (1912), in which the Court required the cooperative of railroads that owned the rail terminal in St. Louis (through which intercontinental rail traffic had to pass) to allow nondiscriminatory access to competing railroads. *See generally Areeda, Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L. J. 841 (1989). The Supreme Court, however, has not itself recognized the essential facilities doctrine. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 124 S. Ct. 872 (2004) ("We have never recognized such a doctrine, and we find no need either to recognize it or to repudiate it here.")

Elements necessary to establish liability under an essential facility theory are: control of an essential facility by a monopolist; the competitor's practical or reasonable inability to duplicate the essential facility; the denial of a competitor's use of the facility; and the feasibility of providing the facility. *See, e.g., N.C. Elec. Membership Corp. v. Carolina Power & Light Co.*, 995 F.2d 1063 (4th Cir. 1993) (unpubl.); *Laurel Sand & Gravel, Inc. v. CSX Transp.*, 924 F.2d 539 (4th Cir. 1991); *Advanced Health Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139 (4th Cir. 1990); *City of Malden v. Union Elec. Co.*, 887 F.2d 157 (8th Cir. 1989). It has also been held that a plaintiff is required to show "severe handicap" from denial of the essential facility. *Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566 (2d Cir. 1990); *see also Advanced Health-Care Servs. v. Giles Mem'l Hosp.*, 846 F. Supp. 488 (W.D. Va. 1994) (must show denial imposed a "severe handicap").

13-3.03 Attempt to Monopolize

The elements of attempted monopolization are (1) the specific intent to monopolize; (2) a relevant market; and (3) a "dangerous probability" of success. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 113 S. Ct. 884 (1993). *See Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924 (4th Cir. 1990); *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989); *Am. Football League v. National Football League*, 323 F.2d 124 (4th Cir. 1963); *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332 (4th Cir. 1959).

13-3.03(a) Specific intent to monopolize

"[A] specific intent to destroy competition or build monopoly is essential" before one can be found liable for attempted monopolization. *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 73 S. Ct. 872 (1953). *See also United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 97 S. Ct. 861 (1977) (specific intent is more than merely a desire to increase market share). The intent that must be shown is an intent to harm competition, not merely an intent to harm a competitor. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S. Ct. 2847 (1985); *see also Va. Vermiculite, Ltd. v. W.R. Grace & Co.*, 144 F. Supp. 2d 558 (W.D. Va. 2001) (noting that an intent to monopolize is distinct from an intent to injure a competitor's business), *aff'd on other grounds, Va. Vermiculite v. Historic Green Springs, Inc.*, 307 F.3d 277 (4th Cir. 2002).

Specific intent may be inferred from business conduct, statements, and the like. Such an inference may not be permissible where there are valid business justifications for the defendant's conduct. See *Gen. Indus. v. Hartz Mountain Corp.*, 810 F.2d 795 (8th Cir. 1987); *United States v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976). Evidence of unfair or tied pricing may be sufficient to infer specific intent to monopolize. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 113 S. Ct. 884 (1993).

13-3.03(b) “Dangerous probability” of success

A plaintiff must show that the attempt to acquire or maintain a monopoly had a “dangerous probability” of success. *Swift & Co. v. United States*, 196 U.S. 375, 25 S. Ct. 276 (1905). In most circuits, proof of a dangerous probability of success requires proof of market power. See, e.g., *H.L. Hayden Co. v. Siemens Medical Sys., Inc.*, 879 F.2d 1005 (2d Cir. 1989) (holding that 20 percent market share in a widely diversified and competitive market did not establish a dangerous probability of success); *Shoppin’ Bag of Pueblo, Inc. v. Dillon Cos.*, 783 F.2d 159 (10th Cir. 1986); *C.E. Servs., Inc. v. Control Data Corp.*, 759 F.2d 1241 (5th Cir. 1985) (holding that proof of the relevant market is a way of measuring market power and is an essential prerequisite to proof of a dangerous probability of success); *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818 (6th Cir. 1982) (“The greater a firm’s market power the greater the probability of successful monopolization.”).

In *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 113 S. Ct. 884 (1993), the Court held that while evidence of unfair or tied pricing may be sufficient to infer specific intent to monopolize, it is not sufficient to infer a dangerous probability of success. The latter element requires evidence of the relevant product and geographic market and the defendant’s economic power in that market.

Just prior to the Supreme Court’s decision in *Spectrum Sports*, the Fourth Circuit decided *M & M Medical Supplies v. Pleasant Valley Hospital*, 981 F.2d 160 (4th Cir. 1992) (en banc). The appellate court held that compelling evidence of an intent to monopolize or of anticompetitive conduct reduces the level of market share that need be shown. Although *Medical Supplies* is not in direct conflict with *Spectrum Sports*, the Supreme Court’s decision casts some doubt on the Fourth Circuit’s opinion that “dangerous probability of success,” in effect, can be partially inferred from the evidence of intent. See *Va. Vermiculite, Ltd. v. W.R. Grace & Co.*, 108 F. Supp. 2d 549 (W.D. Va. 2000) (following *Spectrum*), *aff’d on other grounds*, *Va. Vermiculite v. Historic Green Springs, Inc.*, 307 F.3d 277 (4th Cir. 2002).

13-3.03(c) Other factors

In determining whether there is a dangerous probability of success, courts analyze several factors in addition to market power: concentration of relevant market, barriers to entry, consumer demand for the product, and trend of market consolidation. See *C.A.T. Indus. Disposal, Inc. v. Browning-Ferris Indus., Inc.*, 884 F.2d 209 (5th Cir. 1989) (affirming grant of summary judgment for a defendant who had 10 percent market share, while the plaintiffs share was 80-90 percent, because there was no dangerous probability of success based on an evaluation of market concentration, entry barriers, consumer demand, and market consolidation); *Metro Mobile CTS, Inc. v. NewVector Commc’ns, Inc.*, 892 F.2d 62 (9th Cir. 1989) (barriers to entry were low, so it was virtually impossible for the defendant to exercise control over price for an extended period of time); *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487 (11th Cir. 1988) (holding that high barriers to entry—trade secrets, patents, licenses, capital outlays required to start a new business, existence of excess capacity by existing sellers, pricing elasticity, and difficulties which buyers may have in changing suppliers—defeated defendant’s motion for summary judgment); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480 (5th Cir. 1984) (following factors can support an attempted monopolization claim where the defendant’s market share was substantially below 50 percent: concentration of the

market, high barriers to entry, consumer demand, strength of competition and consolidation trends in the market).

13-3.04 Combination or conspiracy to monopolize

Section 2 also prohibits combinations or conspiracies “to monopolize any part of . . . trade or commerce.” The elements of the offense are: (1) the existence of a combination or conspiracy; (2) an overt act in furtherance of the conspiracy; (3) an appreciable amount of commerce affected; and (4) specific intent to monopolize. *See, e.g., Volvo N. Am. Corp. v. Men’s Int’l Prof’l Tennis Council*, 857 F.2d 55 (2d Cir. 1988); *Great Escape, Inc. v. Union City Body Co.*, 791 F.2d 532 (7th Cir. 1986); *Safecard Services, Inc. v. Dow Jones & Co.*, 537 F. Supp. 1137 (E.D. Va. 1982), *aff’d mem.*, 705 F.2d 445 (4th Cir. 1983).

13-4 SECTION 3 OF THE CLAYTON ACT

13-4.01 Overview

Section 3 of the Clayton Act prohibits exclusive dealing arrangements (including requirements and supply contracts) and tying arrangements that have, or are likely to have, a substantial and adverse effect on competition. Section 3 provides in pertinent part:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. § 14.

13-4.02 Exclusive Dealing Arrangements

The elements of exclusive dealing arrangements prohibited by § 3 of the Clayton Act are (1) the seller must be engaged in interstate commerce and the commodity must be “in the flow” of interstate commerce, *Chatham Condominium Ass’n v. Century Village, Inc.*, 597 F.2d 1002 (5th Cir. 1979); (2) there must be a lease, sale, or contract for sale, *FTC v. Curtis Publishing Co.*, 260 U.S. 568, 43 S. Ct. 210 (1923); (3) the agreement must be concerned with goods, wares, merchandise, machinery, supplies, or other commodities, *United States v. Investors Diversified Services, Inc.*, 102 F. Supp. 645 (D. Minn. 1951); (4) there must be a commitment by the purchaser to deal only in the goods of the supplier, *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332 (4th Cir. 1959); and (5) most importantly, the arrangement must have the proscribed effect on competition. Anticompetitive effect is determined with reference to the relevant product and geographic markets. Two tests have been employed by the courts in measuring injury to competition: First, the “quantitative substantiality” test determines that an exclusive dealing agreement is unlawful solely on the basis of quantitative measures, such as the percentage of total sales foreclosed by the agreement. *Standard Oil Co. v. United States*, 337 U.S. 293, 69 S. Ct. 1051 (1949) (6.7 percent foreclosure was unlawful). Second, the “qualitative substantiality” test requires an analysis of the probable impact of the exclusive dealing agreement in the context of the relevant market, taking into account all relevant economic and business factors. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 81 S. Ct. 623 (1961); *Am. Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975). Application of the qualitative substantiality test closely resembles the rule-of-reason analysis under the Sherman Act.

13-4.03 Tying Arrangements

Tying arrangements involving commodities are vulnerable to antitrust attack under § 3 of the Clayton Act as well as under § 1 of the Sherman Act. Tying arrangements are illegal under § 3 of the Clayton Act where (1) a substantial volume of commerce in the tied product market is foreclosed, or (2) the seller possesses economic power in the tying product market and a not insubstantial volume of commerce in the tied market is foreclosed. Section 1 tying violations require that both conditions be present. *See generally* 3 J. Von Kalinowski, *Antitrust Laws and Trade Regulation* § 12.06 (1991).

13-4.04 Other Antitrust Provisions

Several other statutory provisions are likely to arise in government antitrust litigation. These statutes are discussed below.

13-4.04(a) Section 7 of the Clayton Act

This statute prohibits the acquisition of stock or assets by any person engaged in commerce or in any activities affecting commerce “where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18. Traditionally, § 7 has been applied to corporate mergers, although its literal prohibition encompasses transactions other than conventional mergers.

13-4.04(b) Robinson-Patman Act

Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a)-(f), generally prohibits price discrimination, discriminatory brokerage payments, and the discriminatory provision of services and allowances between competing purchasers. Section 2(f), moreover, prohibits purchasers from knowingly including or receiving an illegal discriminatory price. *See generally* *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 126 S. Ct. 860 (2006); *Brooke Grp. LTD. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 113 S. Ct. 2578 (1993); *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 110 S. Ct. 2535 (1990); *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 99 S. Ct. 925 (1979). *See also* *Hoover Color Corp. v. Bayer Corp.*, 199 F.3d 160 (4th Cir. 1999) (concluding that seller failed to establish that price discounts for large volume purchases constituted good faith attempt to meet competitive prices).

13-4.04(b)(1) Governmental bodies

The Non-Profit Institutions Act, 15 U.S.C. § 13C, expressly allows discriminatory pricing to charitable institutions and governmental bodies, provided the goods are for their own use. *See Abbott Labs. v. Portland Retail Druggists Ass’n*, 425 U.S. 1, 96 S. Ct. 1305 (1976).

13-4.04(c) Federal Trade Commission Act

Section 5 of the Federal Trade Commission Act prohibits “[u]nfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45. Conduct that violates the Sherman and Clayton Acts also violates § 5 of the Federal Trade Commission Act. *Times-Picayune Publ’g Co. v. United States*, 345 U.S. 594, 73 S. Ct. 872 (1953). Section 5 also reaches conduct that, although not technically in violation of the Sherman or Clayton Acts, contravenes the policy of those laws. *FTC v. Brown Shoe Co.*, 384 U.S. 316, 86 S. Ct. 1501 (1966). The FTC, however, has no authority to declare an act or practice unlawful unless it causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, 108 Stat. 1691, 1695 (1994). Section 5 confers no private right of action; it is enforced exclusively by the Federal Trade Commission. *See Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 119 S. Ct. 1604 (1999), discussed in section [13-2.05](#).

13-5 PRIVATE ANTITRUST SUITS

13-5.01 Overview

Private antitrust plaintiffs ordinarily have two remedies: damages and injunctive relief. The Local Government Antitrust Act of 1984, discussed in section 13-9, prohibits the recovery of damages, costs or attorneys' fees from any local government, or official or employee acting in an official capacity, or any private person based on any official action directed by a local government. The Act does not, however, prohibit suits against these parties for injunctive relief.

13-5.02 Section 4 of the Clayton Act: Damages

Section 4 of the Clayton Act creates a private cause of action for damages for violations of the Sherman and Clayton Acts. The statute provides in pertinent part:

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15.

13-5.02(a) Standing to sue

In order to recover damages under the Clayton Act, a plaintiff must establish "antitrust standing." The following elements must be addressed:

13-5.02(a)(1) "By reason of"

An antitrust plaintiff must sustain injury to its business or property "by reason of" defendant's unlawful conduct. The courts have used two standards for interpreting the phrase "by reason of": (1) the "target area" test requires that the injury must fall squarely within the area of congressional concern; see, e.g., *Blue Shield of Va. v. McCready*, 457 U.S. 465, 102 S. Ct. 2540 (1982); *Omega Homes, Inc. v. Citicorp Acceptance Co.*, 656 F. Supp. 393 (W.D. Va. 1987); *S.C. Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414 (4th Cir. 1966); (2) the "direct result" test requires that the injury must be a "direct" result of defendant's unlawful conduct, rather than a "remote" or "merely consequential" one. See, e.g., *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977); *Windham v. Am. Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977).

- a. *Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 103 S. Ct. 897 (1983). In this case, the Supreme Court assembled from prior decisions several factors affecting whether a plaintiff has antitrust standing, including:
 - i. whether there is a causal connection between the violation and the injury alleged;
 - ii. whether the defendant acted with improper motive;
 - iii. whether the injury was direct or indirect;
 - iv. whether damages are speculative; and
 - v. whether granting standing would increase the risk of multiple recovery or require complex apportionment of damages.

For applications of these criteria, see, e.g., *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211 (4th Cir. 1987); *Sw. Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374 (7th Cir. 1987).

- b. *Illinois Brick*. The so-called "Illinois Brick Doctrine" denies standing to indirect purchasers—even if the direct purchaser passes on 100 percent of the alleged

overcharge to the indirect purchaser—unless the plaintiff purchased items from a direct purchaser pursuant to a pre-existing, fixed quantity, cost-plus contract. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061 (1977). See also *Apple Inc. v. Pepper*, 587 U.S. ___, 139 S. Ct. 1514 (2019) (finding, regarding whether iPhone owners are direct purchasers who may sue, that “[t]he absence of an intermediary [in the distribution chain] is dispositive”); *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 110 S. Ct. 2807 (1990). The *Illinois Brick* rule applies even if the direct purchaser is a co-conspirator. *Dickson v. Microsoft Corp.*, 309 F.3d 193 (4th Cir. 2002) (stating in dicta that to the extent the Fourth Circuit may recognize a “co-conspirator exception” to the *Illinois Brick* Rule, such recognition should be limited to price fixing conspiracies where the “intermediaries immediately upstream” from the purchaser are part of the conspiracy, see, e.g., *Dee-K Enters., Inc. v. Heveafil SDN*, 982 F. Supp. 1138 (E.D. Va. 1997)).

13-5.02(a)(2) “Antitrust injury”

In addition, the plaintiff must suffer “antitrust injury,” i.e., the kind of injury prohibited by the antitrust laws. In other words, a plaintiff cannot complain of damages that result from increased competition even if those damages are causally related to the defendant’s violation of the Sherman Act. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S. Ct. 690 (1977) (plaintiff injured by the increased competitiveness of a company allegedly acquired in violation of § 7 of the Clayton Act could not recover); *Atl. Richfield Co. v. U.S.A. Petroleum Co.*, 495 U.S. 328, 110 S. Ct. 1884 (1990) (antitrust injury does not result from non-predatory maximum resale price maintenance); *Thompson Everett, Inc. v. Nat’l Cable Advert.*, 57 F.3d 1317 (4th Cir. 1995) (plaintiff who was not a competitor in the market cannot suffer antitrust injury from alleged unlawful exclusive distributorship agreement).

13-5.02(b) Treble damages

Section 4 of the Clayton Act expressly provides that actual damages are to be trebled, and that the prevailing plaintiff is entitled to recover costs and attorneys’ fees. While the Supreme Court reserved the question of whether treble damages were an appropriate remedy for local government antitrust violations prior to 1984, see *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 102 S. Ct. 835 (1982), the Local Government Antitrust Act of 1984 precludes awards of damages, interest on damages, costs, or attorneys’ fees for antitrust violations against local governments. The LGAA also shields local government employees and officials acting in an “official capacity” and persons whose actions are “directed by a local government, or official or employee thereof.”

13-5.02(c) Statute of limitations

The statute of limitations for private antitrust suits is four years. 15 U.S.C. § 15b. A cause of action generally accrues when a defendant commits an act that causes economic harm to a plaintiff. *GO Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170 (4th Cir. 2007). The statute may be tolled by the fraudulent concealment of the conspiracy. *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119 (4th Cir. 1995). The plaintiff need not show fraudulent concealment by acts separate and independent from the acts that constitute the antitrust conspiracy claim. The correct test is the “affirmative acts” test: the plaintiff must prove affirmative acts of concealment, but such proof may include acts of concealment involving the antitrust conspiracy itself. *Id.* Where a plaintiff knows of a pattern of particular actions that a defendant has taken against him, though the pattern’s precise scope might be unclear and its exact legal ramifications uncertain, the plaintiff is on inquiry notice of the claim and the claim has accrued. *GO Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170 (4th Cir. 2007). See also *SD3 II LLC v. Black & Decker Inc.*, 888 F.3d 98 (4th Cir. 2018) (contrasting inquiry notice with actual notice).

13-5.03 Section 16 of the Clayton Act: Injunctive Relief

The right to injunctive relief arises under § 16 of the Clayton Act, which provides in relevant part:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings

15 U.S.C. § 26. A plaintiff seeking injunctive relief does not face the same standing hurdles that await those seeking damages under § 4 of the Clayton Act. Unlike a plaintiff in a § 4 action, a plaintiff seeking injunctive relief need not establish that it has been injured in its “business or property.” *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 92 S. Ct. 885 (1972). Those seeking injunctive relief need not establish “fact of injury”; threatened injury is sufficient, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 89 S. Ct. 1562 (1969), but the threat must be significant, *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 345 F. Supp. 614 (E.D. Va. 2018) (plaintiff must demonstrate “a significant threat of injury from an impending violation of the antitrust laws”) (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969)). The plaintiff seeking injunctive relief must also establish that the threatened injury is causally related to the defendant’s pending antitrust violation, and that the violation would cause irreparable injury. See *Paschall v. Kansas City Star Co.*, 605 F.2d 403 (8th Cir. 1979) *Steves & Sons, supra*; see also *Jeffrey v. Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975). “Unclean hands” is not a defense to injunctive relief. *Higgins v. Med. Coll.*, 849 F. Supp. 1113 (E.D. Va. 1994).

13-6 VIRGINIA ANTITRUST LAW

13-6.01 Similarities to Federal Law

Enacted in 1974, the Virginia Antitrust Act, Va. Code § 59.1-9.1 et seq., is patterned after the federal antitrust statutes and provides that it “shall be applied and construed to effectuate its general purposes in harmony with judicial interpretation of comparable federal statutory provisions.” Va. Code § 59.1-9.17. Federal cases are explicitly recognized as precedent in construing the Virginia statute. Va. Code § 59.1-9.12. See *Va. Vermiculite, Ltd. v. W.R. Grace & Co.*, 144 F. Supp. 2d 558 (W.D. Va. 2001) (noting the Virginia Antitrust Act provides the “same standard” as the Sherman Act), *aff’d on other grounds, Va. Vermiculite, Ltd. v. Historic Green Springs, Inc.*, 307 F.3d 277 (4th Cir. 2002). However, in *Fairfax County Water Authority v. City of Falls Church*, 78 Va. Cir. 177 (Fairfax Cnty. 2009), a circuit court declined to apply the state action immunity doctrine (see section 13-7) to claims raised under state antitrust laws.

Virginia Code § 59.1-9.5 is Virginia’s counterpart to § 1 of the Sherman Act. For a rare case analyzing this provision, see *Integrity Auto Specialists, Inc. v. Meyer*, 83 Va. Cir. 119 (City of Chesapeake 2011) (post-employment restrictive covenants do not violate this section). Virginia Code § 59.1-9.6 is Virginia’s counterpart to § 2 of the Sherman Act. Virginia Code § 59.1-9.7 is Virginia’s counterpart to the Robinson-Patman Act. Although the federal act is limited to price discrimination in connection with the sale of commodities, Virginia’s price discrimination law applies to services as well.

13-6.02 Differences from Federal Law

13-6.02(a) No Clayton Act Section 3 or 7 counterparts

Virginia has no statutory counterparts to either § 3 or § 7 of the Clayton Act.

13-6.02(b) Statutory exemptions

The Virginia act provides for certain statutory exemptions from the state antitrust laws. Va. Code § 59.1-9.4. Some, such as the labor and agricultural exemption, have a federal analogue. Others, such as the nonprofit religious or charitable organization exemption, are applicable in federal law only in the context of the Robinson-Patman Act. The circuit court in *Fairfax County Water Authority v. City of Falls Church*, 78 Va. Cir. 177 (Fairfax Cnty. 2009), held that Va. Code §§ 15.2-2109 and 15.2-2111, which address the operation of waterworks, do not constitute authority for a city to operate a waterworks outside its limits.

13-6.02(c) Exemption

Virginia Code § 59.1-9.4 exempts certain activities from the provisions of the Virginia Antitrust Act, including certain activities of labor or professional organizations and nonprofit and charitable organizations, as well as activities authorized by other provisions of state or federal law.

13-6.03 Remedies and Penalties**13-6.03(a) Private litigants**

Private litigants can only recover damages, costs, and attorney's fees for violation of the Virginia Antitrust Act, unless they can provide that the violation was "willful or flagrant." If the violation is found to be willful or flagrant, the damages "may" be increased to an amount not to exceed treble damages. Va. Code § 59.1-9.12.

13-6.03(b) Attorney General suits

The Attorney General on behalf of the Commonwealth, or the Commonwealth's Attorney or county attorney on behalf of a county, or the city attorney on behalf of a city, or the town attorney on behalf of a town, may institute actions for injunctive relief, civil damages, and civil penalties of up to \$100,000. Va. Code §§ 59.1-9.11 and 59.1-9.15.

13-6.03(c) Parens patriae actions

In addition, the Attorney General may maintain a parens patriae action to recover damages for injuries to the general economy of the Commonwealth. Va. Code § 59.1-9.15.

13-6.03(d) Bid-rigging: Class 6 felony

Any combination, conspiracy, or agreement to intentionally rig, alter, or otherwise manipulate any bid submitted to the Commonwealth or any governmental subdivision for the purpose of allocating sales or fixing prices can be prosecuted by the Attorney General or the Commonwealth's Attorney as a class 6 felony. Va. Code §§ 59.1-68.7 and 59.1-68.8. A class 6 felony is punishable by imprisonment of not less than one year nor more than five, or, in the discretion of the court or jury, confinement in jail for not more than twelve months and a fine of not more than \$1,000.

13-6.04 Virginia's Criminal Conspiracy Statute

Virginia's criminal conspiracy statute is without federal counterpart. Virginia Code § 18.2-499 classifies as a misdemeanor concerted action with the willful and malicious purpose of injuring another in his reputation, trade, business, or profession. Virginia law also provides a civil cause of action for violations of § 18.2-499; those persons who prove a business injury may recover treble damages and the costs of suit, including attorney's fees. Va. Code § 18.2-500. *But see Chertoff Capital, LLC v. Syversen*, 468 F. Supp. 3d 713 (E.D. Va. 2020) (prevailing defendant in § 18.2-500 civil action not entitled to attorney's fees). A conspiracy merely to breach a contract is insufficient to state a claim under the business conspiracy statutes. *Station #2, LLC v. Lynch*, 280 Va. 166, 695 S.E.2d 537 (2010). Because they are intentional torts predicated on common law duties, however, breach of fiduciary duty, tortious interference with a contract, and tortious interference with business expectancy each constitutes the requisite unlawful act

to proceed on a business conspiracy claim. *Id.*; *Infinity Tech., LLC v. Burney*, No. 1:19-CV-01507 (E.D. Va. June 4, 2020); *Dunlap v. Cottman Transmissions Sys.*, 287 Va. 207, 754 S.E.2d 313 (2014).

If there has been no injury, there can be no recovery under this statute. *Va. Vermiculite, Ltd. v. Historic Green Springs, Inc.*, 307 F.3d 277 (4th Cir. 2002). See also *Andrews v. Ring*, 266 Va. 311, 585 S.E.2d 780 (2003) (statute does not apply to injury to personal reputation or employment interests); *Bane v. Bane*, 82 Va. Cir. 238 (Roanoke Cnty. 2011) (if there was no business property right affected, criminal and civil conspiracy statutes, which altered and replaced common law, do not apply). See *Bowers v. City of Richmond*, 79 Va. Cir. 168 (City of Richmond 2009) (underlying torts of interference and defamation must be proved before conspiracy statute applicable).

In *Brubaker v. City of Richmond*, 943 F.2d 1363 (4th Cir. 1991), the Fourth Circuit stated that Virginia law was not clear as to whether a city is subject to liability under Virginia's criminal conspiracy statute, claiming the opinion of the Virginia Supreme Court in *Fox v. Deese*, 234 Va. 412, 362 S.E.2d 699 (1987), left the issue open. See *Bowers v. City of Richmond*, 79 Va. Cir. 168 (City of Richmond 2009) (mayor acting in official capacity immune from suit).

See also *Va. Vermiculite, Ltd. v. W.R. Grace & Co.*, 156 F.3d 535 (4th Cir. 1998) (allegation of bad faith in exercise of discretionary clause of a contract states a claim under Va. Code § 18.2-499); *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 108 F.3d 522 (4th Cir. 1997) (addressing legal malice); *Lilly v. Sisk*, No. 99-0023-C (W.D. Va. Apr. 9, 1999) (ruling on preliminary injunction motion and finding plaintiffs likely to succeed on claim that defendants violated Virginia Conspiracy Act by willfully and maliciously seeking to injure plaintiffs in their trucking business).

13-7 STATE ACTION IMMUNITY DOCTRINE

13-7.01 Overview

In appropriate circumstances, local governments are immune from the federal antitrust laws by reason of the "state action" doctrine. The development of the state action doctrine and its application to specific local government activities are outlined below.

13-7.02 Constitutional Basis for State Action Immunity

The state action doctrine is grounded on principles of federalism. The seminal case is *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307 (1943), an action to enjoin enforcement of an agricultural marketing program which had been established by the California legislature to stabilize raisin prices. In holding the program immune from attack under the antitrust laws, the Supreme Court ruled that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* In excluding state action from coverage of the antitrust laws, the Court held:

In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly attributed to Congress.

Id.

In the wake of *Parker*, some lower courts went as far as to equate local government conduct with state action and thus held local government entities exempt from antitrust scrutiny by virtue of their status. See generally *E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth.*,

362 F.2d 52 (1st Cir. 1966); *Murdock v. City of Jacksonville*, 361 F. Supp. 1083 (M.D. Fla. 1973).

13-7.03 Development of the State Action Doctrine

In the late 1970's, the U.S. Supreme Court elaborated upon the state action doctrine in a series of cases involving the conduct of private parties or state (as opposed to local) agencies. While these decisions are not a model of clarity, the common thread running throughout them is that to qualify as state action, conduct must be undertaken pursuant to a clearly articulated state policy and be actively supervised by the state. This two-prong test is commonly referred to as the "Midcal test," which takes its name from *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S. Ct. 937 (1980) ("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"). Important cases from this period include: *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 99 S. Ct. 403 (1978) (state regulation of locations of new automobile dealerships was immune from antitrust attack since Automobile Franchise Act clearly required manufacturers to obtain site approval from state board and board actively enforced that requirement); *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691 (1977) (state action doctrine precluded antitrust claims against Arizona State Bar for its ban on lawyer advertising since the ban was mandated and actively supervised by the Arizona Supreme Court); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S. Ct. 3110 (1976) (electric utility's "free" light bulb plan, although approved by Michigan Public Service Commission, was subject to antitrust attack in the absence of a statute expressly authorizing the light bulb program); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004 (1975) (minimum fee schedule enforced by Virginia State Bar was not "compelled" by direction of the Virginia Supreme Court and thus did not qualify for the state action immunity).

In *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S. 494, 135 S. Ct. 1101 (2015), the Supreme Court clarified what constitutes "active supervision." The inquiry regarding active supervision is flexible and context-dependent. Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the state's review mechanisms must provide realistic assurance that a nonsovereign actor's anticompetitive conduct promotes state policy, rather than merely the party's individual interests. The Court identified four "constants" of active supervision:

1. the supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it;
2. the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy;
3. the mere potential for state supervision is not an adequate substitute for a decision by the state; and
4. the state supervisor may not itself be an active market participant.

Other than these constants, the adequacy of supervision will depend on all the circumstances of a case.

13-7.04 Application of the State Action Doctrine to Municipalities—Key Supreme Court Cases

The current application of the state action doctrine to municipalities developed in a series of cases. While the Court rejected the notion that municipalities should share the same broad immunity from antitrust scrutiny as states themselves, municipalities could nonetheless claim

state action immunity more easily than private defendants.

13-7.04(a) *City of Lafayette*

In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S. Ct. 1123 (1978) the Court rejected the concept that local governments are exempt from antitrust scrutiny by virtue of their “status.” The Court held that a private electric utility could maintain an antitrust counterclaim against its local government competitors if the alleged local government misconduct was not undertaken “pursuant to state policy to displace competition with regulation or monopoly public service.” *Id.* The Court held, however, that “a political subdivision [need not] point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense.” *Id.* Under *City of Lafayette*, immunity would be available to a political subdivision of the state if the anticompetitive activity engaged in or sanctioned by that subdivision was either expressly authorized by statute or “contemplated” by the legislature in enacting the statute.

13-7.04(b) *City of Boulder*

In *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 102 S. Ct. 835 (1982), a cable television company challenged an ordinance prohibiting cable television expansion within the City of Boulder for a period of three months. The specific issue in *City of Boulder* was the status of “home rule” cities—cities with wide latitude to determine policy—under the state action doctrine. Boulder argued that under “home rule” it had effectively displaced the state with respect to local regulation, and that its ordinance was therefore the equivalent of an act of the state. The Court held that “home rule” status did not, by itself, entitle Boulder to state action immunity. The Court held that the general grant of home rule authority did not permit the inference that specific anticompetitive conduct was “contemplated”:

But plainly the requirement of ‘clear articulation and affirmative expression’ is not satisfied when the State’s position is one of mere *neutrality* respecting the anticompetitive.

Id. (citations omitted; emphasis in original). Thus, absent a clearly articulated and affirmatively expressed *state* policy regarding the regulation of cable television, Boulder’s moratorium ordinance was subject to antitrust attack.

13-7.04(c) *Town of Hallie*

In *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S. Ct. 1713 (1985), a unanimous Court addressed two crucial aspects of state action immunity for municipalities in the context of allegations that the City of Eau Claire, Wisconsin, had monopolized the market for sewer treatment services and transportation. First, the Court clarified the “clear articulation” requirement, holding that a state statute need not explicitly provide that a city may engage in anticompetitive conduct so long as such conduct is “a foreseeable result” of a grant of power. Second, the Court held that the *Midcal* requirement of active state supervision should not be applied where the actor is a municipality. The Court reasoned that the requirement need not be met because, in the case of a municipality, there is less danger of a defendant “acting to further his own interests, rather than the governmental interests of the State.” This holding was reaffirmed in *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S. 494, 135 S. Ct. 1101 (2015).

13-7.04(d) *City of Columbia*

The Court again addressed the application of state action immunity to municipalities in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 111 S. Ct. 1344 (1991). In *City of Columbia*, an outdoor advertising company claimed that city officials had conspired with a rival company to use zoning laws to exclude it from the market. Reversing a decision by the Fourth Circuit, the Court rejected the notion of a “conspiracy” exception to the state action doctrine,

which had been accepted by some courts. The Court further held that procedural irregularities in the municipal action, including allegations of bribery, do not affect the state action immunity. Other laws may deal with political corruption but they do not affect the antitrust inquiry; all that must be shown is that the action taken was within the municipality's authority. *Id.* The Court noted in dictum, however, that state action immunity may be inapplicable to *commercial* actions of the governmental unit.

In *Forest Ambulance Service Inc. v. Mercy Ambulance, Inc.*, 952 F. Supp. 296 (E.D. Va. 1997), the district court noted that although the Fourth Circuit has not decided the issue, several courts of appeals have refused to read *City of Columbia* as authority for a "commercial participant" (or "proprietary interest") exception to municipal immunity. Assuming arguendo that such an exception existed, the *Forest Ambulance* court held the city had not sufficiently participated in the market at issue.

13-7.04(d)(1) Note on Noerr-Pennington Doctrine

City of Columbia also addressed the application of the "Noerr-Pennington Doctrine," which protects concerted actions taken for the purpose of influencing legislative, executive, or judicial action from antitrust scrutiny on a First Amendment rationale. See *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585 (1965). The doctrine is important for municipalities due to the protection it provides for parties seeking municipal action. The Virginia Supreme Court held the doctrine's protection is not limited to antitrust causes of action. *Titan Am. v. Riverton Inv. Corp.*, 264 Va. 292, 569 S.E.2d 57 (2002) (doctrine applies to causes of action for tortious interference with business expectancy and conspiracy).

The doctrine provides wide latitude for private parties seeking governmental action (but not action by private groups, such as trade associations), so long as lobbying or litigation is not a "sham," undertaken solely to use the legislative or judicial process (as opposed to its outcome) for the purpose of harassment. See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S. Ct. 1931 (1988); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609 (1972). See also *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 113 S. Ct. 1920 (1993) (unless the litigation is objectively baseless, it is not a "sham" regardless of the intent); *Titan Am. v. Riverton Inv. Corp.*, 264 Va. 292, 569 S.E.2d 57 (2002) (same); *Baltimore Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394 (4th Cir. 2001) (entity with no standing who surreptitiously funded litigation entitled to protection of doctrine); *Titan Am. v. Riverton Inv. Corp.*, 264 Va. 292, 569 S.E.2d 57 (2002) (same); *Levine v. McLeskey*, 881 F. Supp. 1030 (E.D. Va. 1995) (a winning lawsuit, even if overturned on appeal, is by definition not a sham), *aff'd in part and vacated on other grounds*, 164 F.3d 210 (4th Cir. 1998).

The doctrine also applies to adjudicatory proceedings before administrative agencies. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609 (1972). In *City of Columbia*, the Court rejected a "conspiracy" exception to *Noerr-Pennington*. The doctrine also does not apply to cases in which the government entity is acting as a market participant under the "commercial activities exception." *Lockheed Info. Mgmt. Sys., Co. v. Maximus, Inc.*, 259 Va. 92, 524 S.E.2d 420 (2000) (procurement).

13-7.04(e) Phoebe Putney Health System, Inc.

The Court tightened up the application of state action immunity to local governments in *FTC v. Phoebe Putney Health System, Inc.*, 568 U.S. 216, 133 S. Ct. 1003 (2013). The state of Georgia had authorized the creation of hospital authorities. Under the auspices of such an authority, hospitals in a rural county were merged resulting in a monopoly in the county over acute-care services. The Eleventh Circuit held that state action immunity insulated the merger from

antitrust inquiry, relying on *Hallie* and *Columbia* in concluding that harm to competition was the “foreseeable result” of the state legislature’s program of setting up proxies to run hospitals, with the power to acquire other hospitals. The Supreme Court reversed, holding that the Eleventh Circuit had applied the *Hallie* test “too loosely” and that mere foreseeability “falls well short of clearly articulating” a state policy to let a proxy displace competition. Without specifically stating what suffices to indicate implicit endorsement, the Court held that a “state must have foreseen and implicitly endorsed the anti-competitive effects as consistent with its policy goals.”

13-7.05 Summary of State Action Requirements

Under current law as it has developed in the Supreme Court’s cases, the elements of a state action defense vary depending on the identity of the defendant, as discussed below.

13-7.05(a) Actions of the State itself

The actions of a state government itself are immune from antitrust liability as state action. *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307 (1943). The actions of a state supreme court taken in a legislative, rather than a judicial capacity in the court’s role as supervisor of the state bar, are considered actions of the state itself. *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691 (1977). Certain agents of the state may share this immunity when they act directly on behalf of the state’s supreme court. See *Hoover v. Ronwin*, 466 U.S. 558, 104 S. Ct. 1989 (1984).

13-7.05(b) State agencies

The state action status of state agencies is not entirely clear. Like municipalities, for purposes of state-action immunity state agencies are not sovereign actors simply by their governmental character. If a controlling number of decisionmakers of a state agency are active market participants in the occupation the agency regulates, then the agency must satisfy *Midcal*’s active supervision requirement in order to invoke state-action antitrust immunity. *N.C. State Bd. of Dental Exam’rs v. FTC*, 574 U.S. 494, 135 S. Ct. 1101 (2015). See fuller discussion in section 13-7.03. The Court also suggested that “prototypical agencies” with general regulatory powers and no private price-fixing agenda might not be subject to the active supervision requirement. In *Turner v. Virginia Department of Medical Assistance Services*, 230 F. Supp. 3d 498 (W.D. Va. 2017), the district court discoursed extensively on state action immunity jurisprudence and, rejecting an argument that *Hallie* exempts only electorally accountable municipalities with general regulatory powers and no private price-fixing agenda, held that the state agency was exempt from showing that it was actively supervised by the state and was protected by state action immunity.

13-7.05(c) Municipalities

As discussed above, the Supreme Court’s decisions in *Town of Hallie* and *Phoebe Putney Health* establish that a municipality is immune when it acts pursuant to a “clearly articulated” and “affirmatively expressed” state policy that implicitly endorses the anti-competitive effects as consistent with its policy goals. A municipality need not show that it was “compelled” by state law to engage in anticompetitive activity. It is enough that anticompetitive activity is a “foreseeable result” of the state’s grant of power to the municipality. While Supreme Court cases have not involved counties, the “clear lesson of precedent is that *Midcal*’s active supervision test is an essential prerequisite of *Parker* immunity for any non-sovereign entity—public or private—controlled by active market participants.” *N.C. State Bd. of Dental Exam’rs v. FTC*, 574 U.S. 494, 135 S. Ct. 1101 (2015).

In *Western Star Hospital Authority Inc. v. City of Richmond*, 986 F.3d 354 (4th Cir. 2021), the court held that a city’s activities regulating the ambulance business, pursuant to authority granted by a state statute, were immune from antitrust attack under the state action

immunity doctrine. The court noted that the Virginia legislature has affirmatively conferred broad authority on local governing bodies to engage in anticompetitive conduct in the EMS vehicle services market. The court also held that municipalities are not subject to the active state supervision requirement.

In *Command Force Sec., Inc. v. City of Portsmouth*, 968 F. Supp. 1069 (E.D. Va. 1997), a private security firm brought antitrust claims against a city, a sheriff, and a police chief, complaining of a conspiracy to create a market for security work by police officers and deputy sheriffs. The court held that the city and the police chief (a local government official) were (a) immune from damages claims under the Local Government Antitrust Act, and (b) immune from injunctive claims under the state action immunity doctrine, since their anticompetitive activity was a “foreseeable result” of authorization by the state. The court also held that the sheriff, a state official, was immune from both damage claims and injunctive claims under the state action doctrine. The sheriff and police chief, however, could be sued for acts in their “individual” capacities as the LGAA and state action doctrine protect officials only when they are acting in their “official” capacities. The defendants’ immunity from claims under the state antitrust laws mirrored their federal law immunities.

13-7.05(d) Private parties

In *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 105 S. Ct. 1721 (1985), the Supreme Court reaffirmed the application of the two-prong *Midcal* test to the state action claims of private parties. The challenged action must be (1) undertaken pursuant to clearly articulated and affirmatively expressed state policy; and (2) actively supervised by the state. As with municipalities, private actors need not show that their anticompetitive conduct was “compelled” by the state. *Id.* The court has stringently enforced the “active supervision” requirement in cases involving private parties. See *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 112 S. Ct. 2169 (1992) (state regulatory deference to private price fixing not sufficient supervision); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 107 S. Ct. 720 (1987) (state liquor resale price maintenance statute did not immunize pricing decisions of private actors); *Patrick v. Burget*, 486 U.S. 94, 108 S. Ct. 1658 (1988) (participants in hospital peer review proceedings not immune because state supervision of peer review procedures inadequate).

13-8 APPLICATION TO SPECIFIC GOVERNMENT ACTIVITIES

13-8.01 In General

Local government activity may limit or restrict competition through: (1) regulation (zoning, licensing of professionals, certification of hospitals, licensing of cable television franchises, etc.); (2) services provided by local governments (public utility, garbage disposal, transportation, parks, sports and convention centers, etc.); and (3) procurement activities (bid procedures and specifications, vendor favoritism, vendor preference laws, advisory panels for the selecting of insurance coverage, etc.). Local government defendants have interposed the state action defense in a variety of cases. State action immunity has been sustained in some of these and denied in others. Listed below are representative cases.

13-8.02 Public Utility Services

The U.S. Supreme Court held in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S. Ct. 1123 (1978), that a city’s anticompetitive conduct in operating its electric utility company was not exempt under the state action doctrine. This holding was based on the specific facts involving the state’s policy in that case, however, and state action claims by municipalities in this context must be evaluated on a case-by-case basis.

It should also be noted that cities have been antitrust *plaintiffs* in a number of cases. In these cases, cities attempting to establish their own electric distribution systems have challenged actions of their local electric utilities. See, e.g., *Town of Concord v. Boston Edison*

Co., 915 F.2d 17 (1st Cir. 1990); *City of Malden v. Union Electric Co.*, 887 F.2d 157 (8th Cir. 1989). In some of these cases, utilities have successfully advanced a state action defense against the cities claims based on state regulation of the utilities' activities. See, e.g., *Municipal Utilities Bd. v. Alabama Power Co.*, 934 F.2d 1493 (11th Cir. 1991). In *Municipal Utilities Board*, a group of municipal and public corporations sued rural electric cooperatives for allegedly conspiring amongst themselves and with the Alabama legislature to divide retail electric service areas horizontally via certain legislation regarding service territories. The Eleventh Circuit rejected the challenge on state action grounds, placing prime importance on the fact the state retained active supervision and placed no decision-making authority over restraints on competition in the hands of private parties.

Lower court decisions in the utility area include those discussed below.

13-8.02(a) Electricity and gas

Grason Elec. Co. v. Sacramento Mun. Util. Dist., 770 F.2d 833 (9th Cir. 1985) (upholding municipal utility district's claim of state action immunity on grounds that California had a clearly articulated and affirmatively expressed policy of displacing competition with regulation in the area of electric power and light; municipal district was not required to show active supervision).

Rural Elec. Co. v. Cheyenne Light, Fuel & Power Co., 762 F.2d 847 (10th Cir. 1985) (defendants were immune under the state action doctrine from liability in an antitrust suit brought by a public utility against the City of Cheyenne, the City Council and a competing public utility claiming an anticompetitive conspiracy in issuing the defendant utility a nonexclusive franchise).

City of Kirkwood v. Union Elec. Co., 671 F.2d 1173 (8th Cir. 1982) (state action doctrine did not immunize electric company's wholesale and retail sales from municipality's antitrust challenge where legislative policy did not authorize or encourage the challenged anticompetitive price squeeze and where the challenged interrelation of those rates was not supervised by either federal or state authorities).

13-8.02(b) Water and sewer

Pinehurst Enters., Inc. v. Town of Southern Pines, 690 F. Supp. 444 (M.D.N.C. 1988) (municipal use of zoning power to preclude plaintiff's provision of private sewer service immune from antitrust scrutiny under state action doctrine based on clearly articulated state policy of displacing competition with regulation of monopoly), *aff'd mem.*, 887 F.2d 1080 (4th Cir. 1989).

Unity Ventures v. Cnty. of Lake, 841 F.2d 770 (7th Cir. 1988) (real estate developer's claims against a county for the denial of a sewer hook-up were barred by the state action doctrine since the resulting restraint on competition was a foreseeable result of the authorizing legislation).

Kern-Tulare Water Dist. v. City of Bakersfield, 828 F.2d 514 (9th Cir. 1987) (city's refusal to permit a water district to sell water entitlements to other districts protected from antitrust challenge by the state action doctrine because city's refusal to permit the sale of surplus water was within the contemplation of state statutes).

Auton v. Dade City, 783 F.2d 1009 (11th Cir. 1986) (private water well contractor's suit against the city barred by state action doctrine since city ordinance prohibiting construction of private water wells within city limits was pursuant to clearly articulated state policy that recognized that municipal public works often require anticompetitive practices).

Shrader v. Horton, 471 F. Supp. 1236 (W.D. Va. 1979) (county ordinance requiring hookup to the new public water system immune from antitrust challenge because ordinance was authorized by state statute), *aff'd on other grounds*, 626 F.2d 1163 (4th Cir. 1980).

13-8.02(c) Refuse collection

Hancock Indus. v. Schaeffer, 811 F.2d 225 (3d Cir. 1987) (commercial trash hauler's antitrust challenge to city and county decision to limit dumping at a landfill of trash generated within the county authorized by a "clear state policy," making county officials immune from antitrust liability under the state action doctrine).

Tom Hudson & Assocs., Inc. v. City of Chula Vista, 746 F.2d 1370 (9th Cir. 1984) (state action immunity applied to a city's grant of an exclusive franchise for trash collection and removal where state statutory scheme specifically authorizing the displacement of competition and contemplating the adoption of exclusion franchises).

Hybud Equip. Corp. v. City of Akron, 742 F.2d 949 (6th Cir. 1984) (ordinance requiring all solid waste collected within a city to be brought to its disposal and energy recycling facility exempt from antitrust scrutiny where passed pursuant to an agreement with the state water development agency).

Northside Sanitary Landfill, Inc. v. City of Indianapolis, 1989-2 Trade Cas. ¶68,715 (S.D. Ind. 1989) (city public works board immune under state action doctrine from challenge to its exclusion of landfill from approved list of solid waste disposal sites where restraints on competition were foreseeable result of state policy), *aff'd*, 902 F.2d 521 (7th Cir. 1990).

Savage v. Waste Mgmt., Inc., 623 F. Supp. 1505 (D. S.C. 1985) (county and its council acted pursuant to a clearly articulated state policy in granting an exclusive franchise for the collection and disposal of garbage in a specified area of the county and were thus immune from antitrust liability).

Chambers Dev. Co. v. Monroeville, 617 F. Supp. 820 (W.D. Pa. 1985) (landfill operator's allegations that the municipality of Monroeville, a councilman, a manager, a fire official, and one of plaintiff's competitors conspired to restrain trade covered by state action doctrine where it was foreseeable that municipal authority would result in anti-competitive effects; councilman's attempts to persuade other members how to vote immune under Noerr-Pennington doctrine).

13-8.02(d) 13-8. 02(d) Ambulance services

Western Star Hospital Authority Inc. v. City of Richmond, 986 F.3d 354 (4th Cir. 2021) (state action immunity doctrine applies to city's regulation of ambulance service pursuant to state statute); *Forest Ambulance Serv. Inc. v. Mercy Ambulance, Inc.*, 952 F. Supp. 296 (E.D. Va. 1997) (same).

13-8.03 Public Health Services

FTC v. Phoebe Putney Health System, Inc., 568 U.S. 216, 133 S. Ct. 1003 (2013), discussed in section [13-7.04\(e\)](#), held that for state authorized hospital authorities to be entitled to the protection of state action immunity, the state must have "affirmatively contemplated that hospital authorities would displace competition by consolidating hospital ownership." Under the state's authorizing statutes, hospital authorities were to exercise public and essential governmental functions and were delegated all the powers necessary or convenient to carry out and effectuate the authorizing legislation's purposes. Twenty-seven powers were explicitly conferred upon the authorities, including the power to acquire and operate projects, which are defined to include hospitals and other public health facilities; to construct, improve, and repair

projects; to lease for operation by others any project provided certain conditions were satisfied; and to establish rates and charges for the services and use of the facilities of the authority. The Eleventh Circuit had held that the anti-competitive effect was contemplated as it was naturally foreseeable from the authority's power to acquire hospitals, but the Supreme Court held that grants of general corporate power that allow substate governmental entities to participate in a competitive marketplace should be, can be, and typically are used in ways that raise no federal antitrust concerns. Thus, a state that has delegated such general powers "can hardly be said to have 'contemplated' that they will be used anticompetitively."

As to private parties involved in the provision of health care, a key decision is *Patrick v. Burget*, 486 U.S. 94, 108 S. Ct. 1658 (1988). The Supreme Court held that the state action doctrine did not protect Oregon physicians from federal antitrust liability for their activities on hospital peer-review committees because the "active state supervision" requirement for private parties was not met. There had been no showing that the state health agencies reviewed—or even could review—private decisions regarding hospital privileges to determine whether those decisions comported with state regulatory policy. In the wake of the lower court decisions in *Patrick*, Congress provided protection to participants in the health care peer review process in the Health Care Quality Improvements Act of 1986, 42 U.S.C. §§ 11101 through 11152. If certain requirements are met, the Act provides statutory immunity from claims arising from peer-review activities, including antitrust claims.

Representative state action cases from the health care field include:

Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397 (9th Cir. 1991) (defendant hospital and municipal medical district not immune under state action doctrine because of numerous indications that California policy supported competition in the health care field; while court acknowledged that the local government unit need only show that any anticompetitive actions were the "foreseeable and logical result" of power conveyed by the state, it concluded that California had expressed a policy of enhanced competition in the medical services; where a state's policy is to support competition, a subordinate state entity must do more than merely produce an authorization to "do business" in order to show entitlement to state act immunity).

Todorov v. DCH Healthcare Auth., 921 F.2d 1438 (11th Cir. 1991) (reviewing hospital authority's conduct under Hallie standard; hospital peer entitled to state action immunity for peer review activities because anticompetitive effects of such activities were contemplated by state legislature; court rejected state action immunity claim of individual radiologists).

Coastal Neuro-Psychiatric Assocs. v. Onslow Mem'l Hosp., Inc., 795 F.2d 340 (4th Cir. 1986) (local hospital authority immune from antitrust attack against requirement concerning exclusive use of CAT-SCAN equipment based on North Carolina statutory authorization for municipal hospitals to determine which physicians may practice in them).

Fairfax v. City of Fairfax Hosp. Ass'n, 562 F.2d 280 (4th Cir. 1977) (city and physicians brought an antitrust action against the county industrial development authority and the county hospital association challenging county's acquisition of a private for-profit hospital and subsequent lease to a nonprofit association; initial finding that the conduct was immune under the state action exemption reversed), *vacated and remanded*, 435 U.S. 992 (1978), *on remand*, 598 F.2d 835 (4th Cir. 1978).

Cohn v. Wilkes Gen. Hosp., 767 F. Supp. 111 (W.D.N.C. 1991) (municipal hospital and its board entitled to state action immunity for denial of medical privileges to chiropractor in light of state policy authorizing activities that could restrain competition; court also granted immunity

under Local Government Antitrust Act), *aff'd sub nom. Cohn v. Bond*, 953 F.2d 154 (4th Cir. 1991).

Turner v. Virginia Dep't of Med. Assistance Servs., 301 F. Supp. 3d 637 (E.D. Va. 2018) (dismissing Sherman Act and state antitrust claims by dentist against Department of Medical Assistant Services because Department acted pursuant to clearly articulated state policy in terminating dentist's contract).

13-8.04 Transportation Services

13-8.04(a) Airport services

Allright Colo., Inc. v. City of Denver, 937 F.2d 1502 (10th Cir. 1991) (airport shuttle parking operator's challenge to city regulations governing shuttle services barred by state action doctrine based on Colorado statutes expressing clear intent to displace competition in the operation of municipal airport parking services; fact that city was in some sense a "competitor" of plaintiff did not alter analysis; fact that city's actions may have exceeded statutory authority did not affect state action defense).

Commuter Transp. Sys., Inc. v. Hillsborough Cnty. Aviation Auth., 801 F.2d 1286 (11th Cir. 1986) (antitrust challenge to authority's grant of exclusive concessions and restriction of number of contracts with limousine operators barred by state action doctrine because authorized by the state).

Montauk-Caribbean Airways, Inc. v. Hope, 784 F.2d 91 (2d Cir. 1986) (after determining that the Local Government Antitrust Act precluded the plaintiffs from receiving damages, court addressed whether the defendants were immune from injunctive relief under the state action doctrine; state action doctrine applied since state statute declared a policy that municipal airport operators may enter into exclusive lease arrangements which replace competition with regulation).

Lorrie's Travel & Tours, Inc. v. SFO Airporter, Inc., 753 F.2d 790 (9th Cir. 1985) (antitrust challenge to a ten-year exclusive dealing contract between the City of San Francisco and Airporter, Inc. for the provision of ground transportation services immune from antitrust challenge where legislature authorized municipalities to "manage airport facilities" and to "grant exclusive or limited agreements to displace business competition").

Hillman Flying Serv., Inc. v. City of Roanoke, 652 F. Supp. 1142 (W.D. Va. 1987) (court rejected an antitrust challenge to an award by a city airport authority of exclusive fuel sales rights, citing a general statutory authority for cities to "acquire, construct, maintain, and operate airports and related structures"; court stated: "The state action doctrine realistically anticipates that anti-competitive results are often foreseeable when a political subdivision implements a state grant of general authority to act efficiently and in the best public interest."), *aff'd mem.*, 846 F.2d 71 (4th Cir. 1988).

Pinehurst Airlines, Inc. v. Resort Air Serv., Inc., 476 F. Supp. 543 (M.D.N.C. 1979) (county board of commissioners not immune from charges that it had participated in a conspiracy to prevent an airline from becoming a fixed base operator at the local airport because legislative intent behind the relevant state statute did not direct or authorize the board to grant an exclusive license at the airport for fixed base operations).

13-8.04(b) Mass transit and parking

Campbell v. City of Chicago, 823 F.2d 1182 (7th Cir. 1987) (city taxicab ordinance limiting number of available licenses, permitting current license holders to vote on the granting of additional licenses, awarding new licenses in proportion to the number currently held, and

barring any other procedures for the issuance of new licenses, protected from antitrust challenge since ordinance was passed pursuant to state statutes that authorized cities to regulate the number of cab licenses and the conditions under which the licenses were issued).

Indep. Taxicab Drivers' Emps. v. Greater Houston Transp. Co., 760 F.2d 607 (5th Cir. 1985) (grant of exclusive concession over passenger service at Houston Intercontinental Airport immune from liability in spite of a provision in the Texas Municipal Airport Act which stated that no municipal actions shall be inconsistent with federal law).

Campbell v. City of Chicago, 577 F. Supp. 1166 (N.D. Ill. 1983) (city ordinance which guaranteed that two taxicab companies would share in the issuance of new licenses in proportion to their share of existing licenses not immune from antitrust liability under the state action doctrine; although a state statute authorized municipal control of taxicab licensing, it did not sanction such anticompetitive activity).

13-8.05 Cable Television Regulations

In *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 112 S. Ct. 587 (1982), the Supreme Court rejected a state action defense to an antitrust action involving a city's regulation of cable television. As with other areas of regulation, the availability of a state action defense for municipal action involving cable television will turn on the nature of the state law authority on which the action was based. Representative cases include:

Paragould Cablevision, Inc. v. City of Paragould, 930 F.2d 1310 (8th Cir. 1991) (city light and water commission immune from cable television franchisee's antitrust challenge to cable television regulations because allegedly anticompetitive restraint was a necessary and reasonable consequence of the city's statutorily authorized entry into the cable television business; declining to adopt the "market participant" exception to state action immunity suggested by Supreme Court's 1991 *City of Columbia* dicta).

City Communications, Inc. v. City of Detroit, 888 F.2d 1081 (6th Cir. 1989) (unsuccessful cable franchise bidder's antitrust action against city and successful bidder barred by state action doctrine under *Hallie*).

Best View Cablevision, Inc. v. City of Abbeville, 798 F.2d 1408 (4th Cir. 1986) (unpubl.) (city's order that a cable television company remove its cables and facilities from the city's utility poles was immune from antitrust attack under the state action doctrine; South Carolina statute clearly authorized the city to refuse to renew the company's franchise upon expiration and a necessary concomitant of that exercise of power was the requirement that the company remove its cables).

Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985) (cable television franchising procedures of the City of Los Angeles were immune from antitrust attack because, even though the grant of authority was permissive, the California statute demonstrated a "clear legislative determination to delegate control over cable television to local authorities").

13-8.06 Recreational Facilities

Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975) (Pennsylvania statutes authorizing municipal corporations to operate the Pittsburgh civic arena did not contemplate a boycott of a malt beverage manufacturer; absent a state policy in favor of displacing competition, the municipal corporations were not immune from the antitrust laws).

Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971) (lease agreement between the District of Columbia Armory Board and the Washington Redskins for exclusive use of RFK Stadium not exempt from antitrust scrutiny).

13-8.07 Land Use Regulations

Jacobs, Visconsi & Jacobs Co. v. City of Lawrence, 927 F.2d 1111 (10th Cir. 1991) (planning commission refused to rezone property immunized under state action doctrine; while denial of zoning permit on grounds that development could threaten downtown business district was not specifically authorized by state statute, it was a foreseeable result).

Traweek v. City of San Francisco, 920 F.2d 589 (9th Cir. 1990) (apartment owners' challenge to ordinance restricting conversion of apartment units to condominiums barred by state action doctrine because state statutes contemplated displacement of competition; court rejected any role for the subjective motivation of local officials in state action analysis).

Pendleton Constr. Corp. v. Rockbridge Cnty., 652 F. Supp. 312 (W.D. Va. 1987) (court dismissed an antitrust attack on a Virginia county's refusal to issue a conditional use permit to a quarry because Virginia statutory delegation of general zoning authority to localities was sufficient for purposes of the state action doctrine), *aff'd*, 837 F.2d 178 (4th Cir. 1988).

Racetrac Petroleum, Inc. v. Prince George's Cnty., 601 F. Supp. 892 (D. Md. 1985) (denial of zoning approval for new service station accorded state action immunity under locality's general statutory authority to "adopt and amend zoning ordinances to regulate, inter alia, the location and uses of land and buildings for trade, industry and other purposes," and the power "to regulate the uses of property in each zone"), *aff'd per curiam*, 786 F.2d 202 (4th Cir. 1986).

Cine 42nd St. Theater Corp. v. Nederlander Org., Inc., 790 F.2d 1032 (2d Cir. 1986) (urban development corporation's anticompetitive leasing of theaters as part of an urban development project immune from antitrust attack because it was foreseeable that the awarding of theater leases as part of a project would produce anticompetitive effects in the Broadway theater market).

O'Leary v. Purcell Co., 1984-2 Trade Cas. (CCH) 166,242 (M.D.N.C. 1984) (allegedly concerted action among golf resort owners, a municipality, and others to prevent the construction of resort housing in the area by means of discriminatory enforcement of the zoning laws and other unfair practices was not within the protection of the state action doctrine due to absence of articulated state policy which authorizes it to apply such zoning ordinances in a manner which restrains trade or tends to monopolize).

Reasor v. City of Norfolk, 606 F. Supp. 788 (E.D. Va. 1984) (development authority and other defendants in a suit arising out of the redevelopment of Norfolk were immune from attack under the state action doctrine because anticompetitive conduct was clearly contemplated by legislature and "black out" agreement was a foreseeable means of attracting developers to undertake large projects in blighted areas).

Brontel, Ltd. v. City of New York, 571 F. Supp. 1065 (S.D.N.Y. 1983) (New York City's rent control regulations were exempt from antitrust scrutiny because they were in furtherance or implementation of a clearly articulated and affirmatively expressed state policy), *aff'd mem.*, 742 F.2d 1439 (2d Cir. 1984).

13-8.08 Miscellaneous Enterprises

Buckley Constr., Inc. v. Shawnee Civic & Cultural Dev. Auth., 933 F.2d 853 (10th Cir. 1991)

(disappointed low bidder for municipal construction project could not maintain antitrust action against authority because state's authorization to authority to reject bids authorized anticompetitive action).

13-9 THE LOCAL GOVERNMENT ANTITRUST ACT OF 1984

13-9.01 Overview

Congress enacted the Local Governmental Antitrust Act of 1984, 15 U.S.C. §§ 34 through 36 ("the LGAA"), on October 11, 1984. The LGAA was signed by the President on October 24, 1984, and took effect retroactively on September 24, 1984. The LGAA precludes the recovery of damages, interest on damages, costs, or attorneys' fees for antitrust violations recoverable under sections 4, 4A or 4C of the Clayton Act from local governments, local government employees and officials acting in an "official capacity," and individuals acting at the direction of local governments.

13-9.02 Application of the LGAA to Local Governments

Local governments are immune from damage awards in antitrust actions under the LGAA, 15 U.S.C. § 35. While relatively few LGAA cases have been decided in the Courts of Appeals, the decided cases appear to approve broad immunity for the actions of local governments themselves. *See, e.g., Juster Assocs. v. City of Rutland*, 901 F.2d 266 (2d Cir. 1990) (rejecting shopping mall owner's antitrust claims against competing shopping center and the city; noting in footnote that the city itself was immune from antitrust damages liability under the LGAA); *Monument Builders of Greater Kan. City, Inc. v. Am. Cemetery Assoc.*, 891 F.2d 1473 (10th Cir. 1989) (noting district court's dismissal of grave marker and monument dealers' antitrust action against city-owned cemetery under LGAA); *Forest Ambulance Serv. Inc. v. Mercy Ambulance, Inc.*, 952 F. Supp. 296 (E.D. Va. 1997) (city council's regulation of ambulance service).

13-9.03 Application of the LGAA to Local Government Officials

Local government employees, officials acting in an official capacity, or private parties involved in activities directed by local governments are also protected. *See, e.g., Thatcher Enters. v. Cache Cnty. Corp.*, 902 F.2d 1472 (10th Cir. 1990) (so long as city and county officials were acting in their official capacities when they adopted the zoning ordinance at issue, the officials were immune under the LGAA from damages liability; plaintiff's appeal from the district court's finding of LGAA immunity found frivolous); *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91 (2d Cir. 1986) (members of the Town Board of East Hampton, the town's attorney, the manager of the town's airport, a competitor airline, and that airline's chief executive officer were shielded from treble damages in a claim alleging a conspiracy to restrain trade and create a monopoly in favor of the competitor airline; court rejected argument that town board members were not acting "in an official capacity"); *Martin v. Stites*, 31 F. Supp. 2d 926 (D. Kan. 1998) (noting that damages unavailable so long as government employee objectively acted within official capacity); *Cohn v. Wilkes Gen. Hosp.*, 767 F. Supp. 111 (W.D.N.C. 1991) (municipal hospital, board of trustees, and individual staff members entitled to antitrust immunity under the LGAA), *aff'd sub nom. Cohn v. Bond*, 953 F.2d 154 (4th Cir. 1991).

In an opinion for the Fourth Circuit, retired Justice Powell (the author of *Midcal*, *Hoover*, *324 Liquor Corp.*, *Hallie*, and *Southern Motor Carriers*) has addressed the LGAA's application to local government officials and agents. *See Sandcrest Outpatient Servs. v. Cumberland Cnty. Hosp. Sys., Inc.*, 853 F.2d 1139 (4th Cir. 1988). In this case, a plaintiff whose contract to provide emergency medical room services at a local government-owned hospital had been terminated, sued the hospital's director, chief of staff, and other parties for alleged violations of the Sherman Act. The Fourth Circuit held that the defendants' conduct was immunized from damages liability under the LGAA. Individual defendants should be considered to have acted in

their “official capacity” so long as the action they took could “reasonably be construed” to be within the scope of their duties and consistent with the general responsibilities and objectives of their position. The court analogized individual immunity under the LGAA to the test for private actor state action immunity, as contemplated by the legislative history of the LGAA. Accordingly, the court held that members of the hospital’s ad hoc committee on emergency room services were immune from damages liability under the LGAA because their activities were actively supervised by the local governmental unit. The court further held that an allegation of “conspiracy” between the hospital’s director and chief of staff was not sufficient to overcome the protections of the LGAA, and that the plaintiffs were not entitled to conduct broad-ranging discovery into the defendants’ subjective intent.

13-9.04 Injunctive Relief and Attorneys’ Fees

Injunctive relief can still be obtained against local governments, employees and officials, and those acting at the direction of a local government if it can be shown that they have violated the antitrust laws. The test for state action immunity as articulated by the Supreme Court in *Hallie* must be satisfied, therefore, by a local government in order to defend successfully against an action for injunctive relief. If a plaintiff succeeds and obtains an injunction, he is entitled to attorney’s fees and costs under § 16 of the Clayton Act, 15 U.S.C. § 26, notwithstanding the LGAA’s provision making attorney’s fees otherwise unavailable. See *Command Force Security Inc. v. City of Portsmouth*, 968 F. Supp. 1069 (E.D. Va. 1997) (LGAA does not bar claims for injunctive relief); *Cohn v. Bond*, 953 F.2d 154 (4th Cir. 1991) (actions of municipal hospital, board of trustees, and individual staff members were immune under the state action doctrine, thus precluding injunctive relief); *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397 (9th Cir. 1991).

13-9.05 Retroactive Application

The LGAA does not automatically apply to cases pending against local governments, or officials or employees acting in an official capacity on the effective date of the Act. Instead, the defendant must establish:

in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case.

15 U.S.C. § 35(b). The LGAA cannot, however, be applied retroactively to claims “against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity.” 15 U.S.C. § 36(a).

The issue of retroactivity retains limited significance in view of the time that has passed since the LGAA’s passage. A representative case on the subject is *Opdyke Inv. Co. v. City of Detroit*, 883 F.2d 1265 (6th Cir. 1989). In *Opdyke*, a stadium developer brought an antitrust action against the city of Detroit and a competing developer, alleging § 1 and § 2 violations arising from an agreement to construct a new stadium for the Detroit Redwings. The Court of Appeals held that it would have been “inequitable” not to apply the LGAA to the pending case. The fact that the litigation had proceeded to an advanced stage was a factor counseling against the application of the LGAA. On the other hand, the plaintiff’s failure to press for injunctive relief that might have been available earlier in the litigation weighed in favor of application, as did the fact that the plaintiff had already reached a monetary settlement with another defendant. The court noted that construction and lease of a stadium was a legitimate governmental purpose aimed at enhancing the local economy, that a damages judgment could have an adverse impact on the city, and that the city probably took its actions in reliance on the state of the law prior to the Supreme Court’s decision in *City of Lafayette*. See also *Cnty. of Oakland v. Detroit*, 784 F. Supp. 1275 (E.D. Mich. 1992).