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II. Antitrust Law

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Persons Under the Sherman Act: Rex Systems, Inc. v. Holiday

The Sherman Antitrust Act[1] (Sherman Act) prohibits persons from entering contracts, combinations, and conspiracies that restrain trade and from attempting to monopolize a part of trade.[2] Any person who suffers business or property injury because of a violation of the antitrust laws may sue for treble damages and costs.[3] The Sherman Act defines the term "person" to include corporations and associations.[4] Thus, individuals, corporations, unincorporated associations, labor unions, and cities successfully have sued or have been subject to suit under the Sherman Act.[5] In *Rex Systems, Inc. v. Holiday*,[6] the United States Court of Appeals for the Fourth Circuit considered whether agencies or other instrumentalities of the United States are persons subject to suit under the Sherman Act.[7]

In *Rex Systems* the plaintiff, Rex Systems, Inc. (Rex), competed for a series of contracts to manufacture Model APX-72 Identification Friend or Foe receiver-transmitters (APX-72) for the United States Government.[8] The

1. 15 U.S.C. §§ 1-7 (1982).

2. *Id.* §§ 1-2. Section one of the Sherman Antitrust Act (Sherman Act) specifically prohibits trusts and any other contract, combination, or conspiracy that restrains trade among the states or with foreign nations. *Id.* § 1. Section two of the Sherman Act targets persons who monopolize or attempt to monopolize any part of trade. *Id.* § 2. Both sections one and two of the Sherman Act authorize courts to impose maximum fines of $1,000,000.00 against corporations or $100,000.00 against any other person and maximum prison terms of three years for violations of the Sherman Act. *Id.* §§ 1-2.

3. *See id.* § 15 (providing treble damages remedy for violations of antitrust laws). Although Congress provided for treble damages in the original Sherman Act, the treble damages remedy subsequently appeared in the Clayton Act. *Id.* The Clayton Act provides that treble damages are available to plaintiffs injured through violations of most of the federal antitrust laws, including the Sherman Act. *See id.* § 12(a) (defining term "antitrust laws" in context of Clayton Act to include Sherman Act, Clayton Act, parts of Wilson Tariff Act, and Act amending Wilson Tariff Act). Congress enacted the Clayton Act to supplement the Sherman Act by targeting specific anti-competitive business practices. *See* 16B J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 11 (1987) (discussing development of Clayton Act and relation of Clayton Act to other antitrust laws).

4. 15 U.S.C. § 7 (1982).

5. *See, e.g.*, City of Lafayette, La. v. Louisiana Power & Light Co., 435 U.S. 389, 395 (1978) (defining term "person" under antitrust laws to include cities); United Mine Workers v. Coronado Coal Co., 259 U.S. 344, 392 (1922) (recognizing labor unions as associations within meaning of Sherman Act); United States v. American Airlines, Inc., 743 F.2d 1114, 1121-22 (5th Cir. 1984) (holding corporation liable under Sherman Act for attempted monopolization), *cert. dismissed*, 474 U.S. 1001 (1985); American Fed'n of Tobacco Growers v. Neal, 183 F.2d 869, 870, 874 (4th Cir. 1950) (holding individual members of tobacco association guilty of antitrust violations); United States v. Connecticut Package Stores Ass'n, 205 F. Supp. 789, 793 (D.C. Conn. 1962) (holding local package stores association is person within meaning of Sherman Act).

6. 814 F.2d 994 (4th Cir. 1987).

7. *See* Rex Systems, Inc. v. Holiday, 814 F.2d 994, 997 (finding that neither Navy nor Naval personnel acting in official capacities are amenable to antitrust suits).

8. *See id.* at 995-96 (noting that Rex competed for four contracts to manufacture APX-72's between 1982 and 1985).

government awarded the contracts under a competitive bidding system (solicitation) established and regulated by the federal government.[9] In 1984 the government awarded Rex one of the APX-72 contracts, but later terminated Rex's contract after determining that Rex had defaulted.[10] Rex subsequently filed a complaint with the Armed Services Board of Contract Appeals and claimed that, to discourage Rex from fulfilling its contractual obligations, the government withheld necessary information and materials.[11] Believing that the federal government unfairly had dealt with Rex in several other solicitations, Rex subsequently brought an antitrust suit in the United States District Court for the Eastern District of Virginia against the United States Department of the Navy (Navy), George K. Holiday in his official capacity as Contracting Officer at the United States Navy Aviation Supply Office in Philadelphia, Pennsylvania, John F. Lehman, Jr. in his official capacity as Secretary of the Navy, and Hazeltine Corporation (Hazeltine), a competing military contractor.[12] Rex claimed that the government's conduct demonstrated a conspiracy to create and maintain a monopoly for Hazeltine in the APX-72 market.[13] Rex requested a declaratory judgment

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9. *See id.* (noting that in awarding contracts for APX-72's, Navy employed federal statutory solicitation process). The requirements that heads of government agencies must fulfill in procuring property and services for the United States Armed Forces appear in the federal procurement laws. 10 U.S.C. §§ 2304-2305 (1982). The federal procurement laws provide that whenever possible, heads of government agencies must follow procedures that encourage open competition for defense contracts. *Id.* The federal procurement laws further require heads of agencies to solicit sealed bids whenever appropriate. *Id.*

10. *Rex Systems*, 814 F.2d at 996. In *Rex Systems*, the 1984 contract between Rex and the Navy required the Navy to provide Rex with technical drawings and specifications by contractually specified dates. Brief for Appellant at 6, Rex Systems, Inc. v. Holiday, 814 F.2d 994 (4th Cir. 1987) (No. 86-1008) [hereinafter Appellant's Brief]. Shortly after the Navy awarded the 1984 contract to Rex, a dispute over what particular models the contract required the Navy to provide arose between Rex and the Navy. *Id.* When Rex refused to proceed until the Navy provided accurate models, the Navy determined that Rex had defaulted and, therefore, terminated Rex's contract. *Id.* at 8.

11. *Rex Systems*, 814 F.2d at 996. In *Rex Systems*, Rex regarded the government's termination of Rex's contract to manufacture APX-72's as a breach of contract by the Navy and, therefore, filed a complaint with the Armed Services Board of Contract Appeals. *Id*; *see* 41 U.S.C. § 607 (1982) (enabling executive agencies to establish agency boards to hear contract disputes). Although Rex believed that the government had dealt unfairly in each of the solicitations in which Rex had competed, Rex determined that the difficulty of obtaining evidence of governmental misconduct would preclude Rex from individually challenging each solicitation. *Rex Systems*, 814 F.2d at 996. Rex, therefore, filed a complaint with the Armed Services Board of Contract Appeals only with respect to the government's conduct during the 1984 solicitation. *Id.*

12. *Rex Systems*, 814 F.2d at 995.

13. *Id.* at 996. In *Rex Systems* Rex based its antitrust claim on the Navy's conduct during four solicitations, the first two of which occurred in 1982. *Id.* Rex alleged, first, that during the first solicitation, the Navy permitted Hazeltine to underbid Rex by allowing Hazeltine to alter certain line items on its sealed bid after submitting the bid to the Navy. Appellant's Brief, *supra* note 10, at 4. Rex alleged, second, that during the second solicitation, the Navy wrongfully failed to grant a delay in the opening of bids. *Rex Systems*, 814 F.2d at 996. After the third solicitation in 1984, however, the Navy awarded Rex the contract, but, according to

that the defendants had conspired to violate the antitrust and procurement laws, an award of treble damages, and an injunction prohibiting the defendants from future violations of the antitrust and procurement laws.[14]

At trial the Navy successfully moved for summary judgment against Rex's antitrust claims.[15] The district court determined that the Navy is not a person amenable to suit under the antitrust laws.[16] The district court also held that individuals acting in official capacities are not persons within the meaning of the antitrust laws and, therefore, dismissed Rex's antitrust claims against Contracting Officer Holiday and Secretary Lehman.[17] The district court held, further, that Rex should submit any further claims concerning the solicitation process to the United States Claims Court or the Armed Services Board of Contract Appeals.[18] Rex appealed the district court's rulings to the United States Court of Appeals for the Fourth Circuit.[19]

On appeal Rex argued that the Navy and Naval personnel acting in official capacities properly could be defendants in an antitrust suit.[20] Rex relied primarily on a similar antitrust action in which the United States District Court for the District of South Carolina held that if the plaintiffs could show that the Secretary of Agriculture acted beyond the scope of his statutory authority, the plaintiffs could sue the Secretary of Agriculture in his official capacity for injunctive relief under the antitrust laws.[21] Rex contended, therefore, that sovereign immunity does not protect government officials who have acted outside the scope of their statutory authority.[22]

Rex, wrongfully terminated the contract in 1985. *Id.*; *see supra* note 10 and accompanying text (discussing Rex's dispute with Navy over 1984 contract). Rex alleged, finally, that during a fourth solicitation in 1985, the government wrongfully disclosed Rex's bid to Hazeltine. *Rex Systems*, 814 F.2d at 996.

14. *Rex Systems*, 814 F.2d at 996.

15. *Id.*

16. *See id.* (noting district court's determination that United States Navy is not person within meaning of Sherman Act); *see also* 15 U.S.C. §§ 1-2 (1982) (prohibiting conduct in restraint of trade or in an attempt to monopolize part of trade by persons and allowing persons to recover treble damages); *supra* notes 1-3 and accompanying text (discussing prohibitions under Sherman Act).

17. *See Rex Systems*, 814 F.2d at 996 (noting district court's determination that individuals acting in official, governmental capacities are not persons within meaning of Sherman Act).

18. *See id* (noting district court's instruction that Rex should submit claims concerning solicitation process to United States Claims Court or Armed Services Board of Contract Appeals).

19. *Rex Systems*, 814 F.2d at 996.

20. *See* Appellant's Brief, *supra* note 10, at 13-15 (arguing that district court improperly dismissed Rex's antitrust claim against Navy, Contracting Officer Holiday, and Secretary Lehman).

21. *See id.* at 14 (arguing that courts may enjoin federal officials from engaging in anticompetitive conduct that falls outside officials' statutory authority); Windham v. American Brands, Inc., 68 F.R.D. 641, 646 (D.S.C. 1975) (noting that sovereign immunity protects federal officials only if officials' conduct does not conflict with statutory authority), *rev'd on other grounds*, 539 F.2d 1016 (4th Cir. 1976); *see also infra* notes 37-45 (discussing *Windham*).

22. *See* Appellant's Brief, *supra* note 10, at 15 (claiming that violations of antitrust laws clearly were outside scope of authority of Contracting Officer Holiday and Secretary

The Fourth Circuit in *Rex Systems*, affirmed, however, the district court's dismissal of Rex's claims against Contracting Officer Holiday, Secretary Lehman, and the Navy.[23] The Fourth Circuit reasoned that agencies and other instrumentalities of the United States are not persons subject to suit under the Sherman Act.[24] The Fourth Circuit noted, however, that Congress has not provided any guidance on whether agencies and instrumentalities of the United States are persons amenable to suit under the Sherman Act.[25] In ruling that the Navy and Naval personnel are not persons under the Sherman Act, the Fourth Circuit relied, therefore, on recent circuit court opinions.[26] In holding that the Navy and Navy personnel are not persons under the Sherman Act, the Fourth Circuit in *Rex Systems* primarily focused on *Sea-Land Service, Inc. v. Alaska Railroad*,[27] in which the United States Court of Appeals for the D.C. Circuit held that agencies and instrumentalities of the United States are not persons amenable to suit under the Sherman Act.[28] Persuaded by the D.C. Circuit's reasoning in *Sea-Land*, the Fourth Circuit simply applied the D.C. Circuit's reasoning to the facts of *Rex Systems*.[29] In *Sea-Land* the D.C. Circuit ruled that the plaintiff corporation could not sue the Alaska Railroad, a utility owned and operated by the United States.[30] The D.C. Circuit relied on the United States Supreme

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Lehman); *see also infra* notes 53-57 and accompanying text (discussing Rex's claim that United States Supreme Court has approved antitrust suits against United States government and agencies).

23. *Rex Systems*, 814 F.2d at 998.

24. *Id.* at 997.

25. *Id.*

26. *See id.* (citing other circuit court opinions that rule on whether agencies or instrumentalities of United States are persons under antitrust laws); *see also* Sakamoto v. Duty-Free Shoppers, Ltd., 764 F.2d 1285, 1288-89 (9th Cir. 1985) (holding government of Guam is not amenable to antitrust suits), *cert. denied*, 475 U.S. 1081 (1986); Department of Water and Power v. Bonneville Power Admin., 759 F.2d 684, 693 n.12 (9th Cir. 1985) (noting that agency within Department of Energy is not subject to antitrust laws); Tele-Communications of Key West, Inc. v. United States, 757 F.2d 1330, 1341 (D.C. Cir. 1985) (holding United States Air Force not subject to suit under Sherman Act); Greenwood Utils. Comm'n v. Mississippi Power Co. 751 F.2d 1484, 1504 (5th Cir. 1985) (holding division of Department of Energy is not liable under Sherman Act); Jet Courier Servs., Inc. v. Federal Reserve Bank, 713 F.2d 1221, 1228 (6th Cir. 1983) (holding that Federal Reserve System is not amenable to suit under Sherman Act); Sea-Land Serv., Inc. v. Alaska R.R., 659 F.2d 243, 247 (D.C. Cir. 1981) (holding Alaska Railroad, wholly owned and operated by United States, not subject to suit under Sherman Act), *cert. denied*, 455 U.S. 919 (1982).

27. 659 F.2d 243 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 919 (1982).

28. Sea-Land Serv., Inc. v. Alaska Railroad, 659 F.2d 243, 246 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 919 (1982).

29. *See* Rex Systems, Inc. v. Holiday, 814 F.2d 994, 997 (4th Cir. 1987) (relying heavily on reasoning of D.C. Circuit).

30. *See Sea-Land*, 659 F.2d at 247 (holding that Alaska Railroad is not amenable to suit under antitrust laws). In *Sea-Land* the plaintiff corporation and its wholly owned subsidiary alleged that the Alaska Railroad, an entity of the United States government, conspired with a private corporation to drive out competition and to monopolize the Alaska shipping trade. *Id.* at 244. The United States District Court for the District of Columbia ruled that sovereign

Court's holding in *United States v. Cooper Corporation*[31] that the United States is not a person entitled to sue for treble damages under the Sherman Act.[32] The *Sea-Land* court recognized the Supreme Court's reasoning that if the United States were a person entitled to bring an antitrust action, the United States, similarly, would be a person subject to suit as an antitrust defendant.[33] The D.C. Circuit recognized, further, that Congress reacted to the *Cooper* decision by amending the antitrust laws in 1955 to allow the United States to sue for actual, rather than treble, damages.[34] The *Sea-Land* court noted, however, that the 1955 amendments to the antitrust laws did not declare the United States a person under the Sherman Act or make the United States a potential antitrust defendant.[35] The D.C. Circuit in *Sea-*

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immunity barred the suit against the Alaska Railroad and the officials responsible for the railroad's operation. *See id.* (noting district court's holding in *Sea-land*). The plaintiff corporation appealed to the United States Court of Appeals for the D.C. Circuit. *Id.* The D.C. Circuit affirmed the district court's dismissal, but for different reasons. *Id.*; *see infra* notes 64-68 and accompanying text (discussing D.C. Circuit's reasons in *Sea-Land* for affirming district court's dismissal).

31. 312 U.S. 600 (1940).

32. *See Sea-Land*, 659 F.2d at 245 (noting that only persons may sue or be subject to suit under Sherman Act); *see also* United States v. Cooper Corp., 312 U.S. 600, 614 (1940) (refusing to include United States among persons who are amenable to suit under Sherman Act). In *Cooper* the United States claimed that the Cooper Corporation had conspired to fix prices of goods purchased by the United States. *Id.* at 603-04. The United States sought to recover treble damages under the antitrust laws. *Id* at 604. In holding that the United States is not a person within the meaning of the Sherman Act, the Supreme Court affirmed both the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit. *Id.* at 614. The *Cooper* majority noted that although the United States is a person for purposes of bringing contract suits and suits to defend government property, the Sherman Act creates special rights and remedies available only to those plaintiffs on whom the Act confers them. *Id* at 604. The Supreme Court analyzed judicial decisions, legislative history and supplemental legislation and determined that Congress did not intend to give the United States a civil action for damages under the Sherman Act. *Id.* at 606-14.

33. *See Sea-Land*, 659 F.2d at 245 (noting Supreme Court's refusal to allow United States to become potential antitrust defendant); *see also Cooper*, 312 U.S. at 606 (recognizing that by declaring United States a person under Sherman Act, Supreme Court would subject United States to potential antitrust liability).

34. *See Sea-Land*, 659 F.2d at 245 (noting that Congress amended antitrust laws in 1955 to remedy Supreme Court decision in *Cooper*); *see also* 15 U.S.C. § 15(a) (1982) (amending Clayton Act). In 1955 Congress amended the Clayton Act to authorize the United States to recover damages for governmental business or property injury resulting from violations of the antitrust laws. 15 U.S.C. § 15(a) (1982). The provisions of the 1955 amendment to the Clayton Act are similar to the provisions of the private right of action under the Sherman Act except that the United States may recover only actual damages and the cost of suit. *Id.*; *see* 15 U.S.C. § 15 (1982) (private right of action allowing treble damages to persons suffering injury from violations of antitrust laws).

35. *See Sea-Land*, 659 F.2d at 245 (noting narrow implications of 1955 amendments to Clayton Act). Relying on the legislative history of the 1955 amendments to the Clayton Act, the D.C. Circuit in *Sea-Land* explained that Congress was aware of the Supreme Court's view that the United States was not a person under the Sherman Act. *Id.* at 245 n.4; *see* 101 CONG. REC. 5129 (1955) (Remarks of Rep. Celler) (recognizing Supreme Court's determination in

Land declined, therefore, to subject an entity of the United States government to liability under the Sherman Act.[36]

Although the Fourth Circuit relied exclusively on *Sea-Land*, Rex argued that the Fourth Circuit should apply *Windham v. American Brands, Inc.*,[37] in which the United States District Court for the District of South Carolina held that plaintiffs may sue government officials who have acted outside the scope of their statutory authority.[38] The plaintiff in *Windham* moved for class certification against corporate defendants and the Secretary of Agriculture.[39] The plaintiff alleged that the corporate defendants, with the knowledge and consent of the Secretary of Agriculture, conspired in violation of the Sherman Act to fix and control prices and to monopolize the warehouse auction markets for flue-cured tobacco.[40] The plaintiffs alleged, further, that the corporate defendants and the Secretary of Agriculture conspired to control the amount of flue-cured tobacco that producers could sell per day or per week and to control the availability of inspectors to the different marketing areas.[41] The Secretary of Agriculture moved for either dismissal or summary judgment.[42] The Secretary of Agriculture contended that the complaint failed to state a claim on which the court could grant relief, that, as Secretary, he acted in accordance with statutory authority, and that the court lacked jurisdiction to hear an uncontested action against a federal officer who enjoyed the protection of sovereign immunity.[43] The *Windham* court, however, denied the Secretary's motion for dismissal on grounds of sovereign immunity.[44] The court held that an antitrust violation, if proved, would fall outside the scope of the Secretary's statutory authority and, therefore, the court denied the Secretary the protection of sovereign immunity.[45]

Cooper that United States is not a person under Sherman Act). The D.C. Circuit in *Sea-Land* emphasized, however, that Congress intentionally addressed only the *Cooper* Court's direct holding that the United States could not sue for treble damages under the Sherman Act. *Sea-Land*, 814 F.2d at 245 n.4.; *see also Cooper*, 312 U.S. at 614 (holding United States not entitled to sue under Sherman Act). The D.C. Circuit observed, therefore, that without addressing the status of the United States as a person under the Sherman Act, Congress simply amended the antitrust laws to provide the United States a right of action for damages. *Sea-Land*, 659 F.2d at 245.

36. *See Sea-Land*, 659 F.2d at 247 (refusing to subject United States to liability for violations of Sherman Act).

37. 68 F.R.D. 641 (D.S.C. 1975), *rev'd on other grounds*, 539 F.2d 1016 (4th Cir. 1976).

38. *See* Windham v. American Brands, Inc., 68 F.R.D. 641 (D.S.C. 1975) (noting that government official must act within valid statutory authority to claim sovereign immunity), *rev'd on other grounds*, 539 F.2d 1016 (4th Cir. 1976); Appellant's Brief, *supra* note 10, at 14 (arguing that *Windham* supports antitrust liability for government officials who act outside of statutory authority).

39. *Windham*, 68 F.R.D. at 644.

40. *Id.* at 644-45.

41. *Id.* at 645.

42. *Id.*

43. *Id.*

44. *Id.* at 647.

45. *Id.*

The *Windham* court based its refusal to grant the Secretary of Agriculture's motion for dismissal on the opinion of the United States Supreme Court in *Larson v. Domestic & Foreign Commerce Corporation*.[46] In *Larson* the Supreme Court considered whether, by claiming sovereign immunity, an officer of the War Assets Administration, an entity of the federal government, could bar a suit for injunctive relief in a contract dispute.[47] The *Larson* Court recognized that courts might impose liability for damages on a government officer for his personal actions.[48] The *Larson* Court held, however, that unless the officer's personal actions conflicted with statutory authority, the officer's actions were actions of the sovereign and, consequently, not subject to injunction or court direction.[49] The Supreme Court emphasized, further, that provided the power to make a decision to act is within an officer's statutory authority, actions of a government officer that are based on incorrect interpretations of law or fact do not necessarily fall outside of the officer's statutory authority.[50] The Supreme Court in *Larson* declined, therefore, to eliminate sovereign immunity in every case in which a plaintiff can show that a government official acted wrongfully.[51] The Supreme Court expressly noted that regardless of an official's improprieties, an injunction prohibiting a federal official from engaging in particular conduct constitutes an illegal attempt to enjoin the sovereign unless the

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46. 337 U.S. 682 (1949).

47. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 684 (1949). In *Larson* the plaintiff, a private corporation, alleged that the War Assets Administration sold surplus coal to the plaintiff but later refused to deliver the coal and contracted to sell the coal to another party. *Id.* The plaintiff sued Larson in his official capacity as administrator of the War Assets Administration. *Id.* The plaintiff sought both an injunction that would prohibit Larson from selling or delivering the coal to anyone except the plaintiff and a declaration that the sale to the second party was invalid. *Id.* The United States District Court for the District of Columbia granted, however, Larson's motion to dismiss. *See id.* at 684-85 (noting that district court dismissed suit against government official). The district court reasoned that sovereign immunity barred the suit. *Id.* The plaintiff, however, appealed to the United States Court of Appeals for the D.C. Circuit. Domestic & Foreign Commerce Corp. v. Littlejohn, 165 F.2d 235, 235 (D.C. Cir. 1947). The Court of Appeals held that the court's jurisdiction depended on whether title to the coal had passed and, consequently, reversed the district court. *Id.* at 238. The defendant appealed to the United States Supreme Court. *Larson*, 337 U.S. at 685. On appeal, the Supreme Court considered whether plaintiffs generally could obtain injunctive relief that compels or restrains the conduct of a government official. *Id.* at 688.

48. *See Larson*, 337 U.S. at 687 (noting that plaintiffs may recover damages for government officer's personal actions). The Supreme Court in *Larson* observed that the crucial question in determining whether sovereign immunity bars a suit against a federal official is whether the relief sought affected only the federal officer or the officer and the federal government. *Id.* The *Larson* Court held that sovereign immunity did not bar an action that neither compelled the government to act in a certain manner nor disturbed the government's property. *Id.*

49. *See id.* at 688 (holding that suits restraining conduct of government officer constitute illegal suits against government).

50. *See id.* at 695 (holding that mere allegation of tortious conduct by government officer is insufficient to show that officer acted beyond delegated authority).

51. *See id.* at 693 (noting that mere wrongful act is not necessarily contrary to federal official's statutory authority).

plaintiff can show that the official acted outside of statutory authority.[52]

The *Windham* court incorrectly read *Larson* out of context and, therefore, provided an unsound basis for Rex's attempt to obtain injunctive relief against Secretary Lehman, Contracting Officer Holiday, and the Navy.[53] The *Windham* court failed to distinguish mere wrongful acts from acts outside of an official's statutory authority.[54] The facts of *Rex*, however, demonstrate that both Contracting Officer Holiday and Secretary Lehman had statutory authority to make decisions regarding the solicitation process and, therefore, did not act outside of their statutory authority.[55] According to the *Larson* analysis, therefore, if the actions of Contracting Officer Holiday and Secretary Lehman were within their statutory authority, their actions constituted actions of the sovereign that no court could enjoin even if the actions were wrongful to Rex.[56] The Supreme Court's opinion in *Larson* limits Rex's recourse against Contracting Officer Holiday and Secretary Lehman for antitrust violations to damages that Rex may have been

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52. *See id.* at 701-02 (noting limited circumstances under which plaintiff may sue to restrain conduct of federal official). In *Larson* the Supreme Court stated that in addition to cases in which a government official has acted beyond the scope of statutory authority, if a court finds that a federal official's conduct was unconstitutional, the court may restrain the official's conduct. *Id.*

53. *See* Windham v. American Brands, Inc. 68 F.R.D. 641, 646 (D.S.C. 1975) (noting that doctrine of sovereign immunity does not protect federal officer whose conduct conflicts with statutory authority), *rev'd on other grounds*, 539 F.2d 1016 (4th Cir. 1976). In *Windham* the court cited the Supreme Court's language in *Larson* but failed to address the Supreme Court's distinction between wrongful acts and acts that are outside of an official's statutory authority. *Id.*; *see* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 695 (1949) (distinguishing wrongful acts from acts outside of federal officer's statutory authority). The Supreme Court in *Larson* emphasized that conduct does not fall outside of a federal official's statutory authority merely because the official makes an incorrect decision of law or fact. *Larson*, 337 U.S. at 695. The *Larson* Court's reasoning, therefore, contradicts the *Windham* court's conclusion that a routine decision by the Secretary of Agriculture falls outside of the Secretary's statutory authority simply because the decision violates the antitrust laws. *See id.* (holding that courts may not enjoin or direct actions within federal officer's statutory authority); *Windham*, 68 F.R.D. at 647 (holding that participation in antitrust violation is necessarily beyond Secretary of Agriculture's statutory authority).

54. *See Windham*, 68 F.R.D. at 647 (holding that participation in antitrust violation was necessarily outside scope of Secretary of Agriculture's statutory authority, but failing to consider whether Secretary of Agriculture had statutory authority to make decisions relating to South Carolina tobacco market).

55. *See* Rex Systems, Inc. v. Holiday, 814 F.2d 994, 995-96 (4th Cir. 1987) (noting that in awarding contracts to manufacture APX-72's, government officers followed statutory solicitation process). In *Rex Systems* Rex failed to allege any action or decision by Contracting Officer Holiday or Secretary Lehman that exceeded the scope of their statutory authority. *Id.*; *see supra* note 9 and accompanying text (discussing statutory solicitation process). Rex only alleged that Holiday's and Lehman's decisions on how to proceed under the solicitation process violated the antitrust laws. *Rex Systems*, 814 F.2d at 996; *see Larson*, 337 U.S. at 698 (noting that only actions that are unconstitutional or beyond federal officer's statutory authority are actionable).

56. *See Larson*, 337 U.S at 695 (holding that court may not enjoin or direct actions of sovereign); *see also supra* note 9 and accompanying text (noting that 10 U.S.C. §§ 2304-2305 empowers military officers to make contracting decisions under solicitation process).

able to recover in suits against Contracting Officer Holiday and Secretary Lehman in their individual capacities.[57]

In dismissing Rex's antitrust claims, however, the Fourth Circuit discussed neither *Windham* nor *Larson*.[58] Although the Fourth Circuit in *Rex Systems* primarily relied on *Sea-Land*, at least one commentator has suggested that the D.C. Circuit in *Sea-Land* too rigidly relied on the Supreme Court's interpretation of the term "person" under the Sherman Act.[59] The commentator has suggested that by narrowly interpreting the term "person" under the Sherman Act, the *Sea-Land* court failed to consider circumstances that have arisen since Congress enacted the antitrust laws and that arguably would allow plaintiffs to sue entities of the United States for antitrust violations.[60] One circumstance that might allow courts to hear antitrust suits against governmental entities is that Congress recently amended the Administrative Procedure Act (APA)[61] to eliminate sovereign immunity in equitable actions against the United States except in those actions in which the court perceives an appropriate alternate ground for dismissing.[62] Although the amendments to the APA provided courts with an opportunity to allow antitrust suits against governmental entities, the D.C. Circuit in *Sea-Land* chose to dismiss an equitable antitrust action against a governmental entity on alternate grounds.[63]

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57. *See Larson*, 337 U.S. at 695 (noting that government official may be liable in individual capacity for civil law violations).

58. *See supra* notes 27-36 and accompanying text (discussing case law on which Fourth Circuit based decision to dismiss Rex's claims).

59. *See* Comment, *The Federal Government's Antitrust Immunity— Trade As I Say, Not As I Do*: Sea-Land Service, Inc. v. Alaska Railroad, 56 ST. JOHN'S L. REV. 515, 520-21 (1982) (suggesting that D.C. Circuit in *Sea-Land* incorrectly derived broad legal principle that federal government never may be antitrust defendant). The commentator suggested that by relying solely on the Supreme Court's interpretation in *Cooper* of the term "person," the D.C. Circuit in *Sea-Land* overlooked the thorough analysis of the antitrust laws upon which the Supreme Court based its holding in *Cooper* that the United States was not entitled to bring suits under the Sherman Act. *Id.* at 525. The commentator concluded that the Supreme Court in *Cooper* advocated extensive statutory construction, rather than a strict rule that the United States never can be subject to the antitrust laws. *Id.*

60. *See id.* at 522-33 (discussing judicial precedent, legislative history, and public policy that support bringing United States under antitrust laws); *see also infra* notes 61-62 and accompanying text (discussing recent Congressional amendments to Administrative Procedure Act).

61. Act of Oct. 21, 1976, Pub. L. No. 94-574, § 1, 90 Stat. 2721 (amending 5 U.S.C. § 702 (1982 & Supp. IV 1986)).

62. *See* 5 U.S.C. § 702 (1982) (allowing persons injured through action of government agency to sue agency or responsible federal officer for relief other than money damages, unless court chooses to deny relief on other legal or equitable ground); Comment, *supra* note 59, at 529 (suggesting amendments to Administrative Procedure Act eliminate sovereign immunity as bar to antitrust suits against United States government).

63. *See* Sea-Land Serv., Inc. v. Alaska R.R., 659 F.2d 243, 245 (D.C. Cir. 1981) (finding appropriate ground to dismiss antitrust action against federal entity notwithstanding Administrative Procedure Act amendments), *cert. denied*, 455 U.S. 919 (1982). In *Sea-Land* the D.C. Circuit expressly noted that sovereign immunity alone would not bar an equitable suit against United States' agencies and officials. *Id.*

By dismissing an equitable antitrust action in *Sea-Land*, the D.C. Circuit refused to preempt extensive Congressional legislation in the field of antitrust law by allowing the amended APA to become a means for bringing antitrust suits against the United States and its entities.[64] The *Sea-Land* court appropriately recognized Congress' policy to enhance the ability of the United States government to enforce the antitrust laws.[65] Neither Congress nor the Supreme Court, however, has suggested that the United States and its entities also should be subject to antitrust suits.[66] The Fourth Circuit in *Rex Systems* correctly agreed with the *Sea-Land* court that a clear statement from Congress making the federal government subject to antitrust suits should precede judicial recognition of antitrust actions against the United States and its entities.[67] Both *Rex Systems* and *Sea-Land*, therefore, follow a common judicial policy against altering a field of legislation that Congress clearly and carefully has established.[68]

Neither the Fourth Circuit in *Rex Systems* nor the D.C. Circuit in *Sea-Land*, however, denied the existence of sound policy reasons that favor extending antitrust liability to include the United States and its entities.[69] Both the expanding role of the federal government as a buyer and seller of goods and the longstanding policy of the federal government to eliminate anticompetitive activity from the nation's economy support the argument for bringing the United States within the reach of the antitrust laws.[70] The

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64. *See id.* at 245-47 (refusing to preempt Congressional legislation by allowing antitrust suits against United States and its entities under Administrative Procedure Act amendments). The *Sea-Land* court recognized that when Congress has desired fundamental changes, Congress has amended the antitrust laws. *Id.* The court noted that in 1955 Congress amended the Clayton Act expressly to allow the United States to bring antitrust suits for damages. *See id.* at 247 (noting clear congressional intent to enable United States to sue under antitrust laws); *supra* note 34-35 and accompanying text (discussing 1955 amendment to Clayton Act).

65. *See Sea-Land*, 659 F.2d at 245 (suggesting that Congress, in amending Clayton Act, intended to provide additional governmental weapon against antitrust violations); 101 CONG. REC. 5131 (1955) (remarks of Rep. Rogers) (emphasizing that primary objective of 1955 amendments to antitrust laws was to enable United States to institute suits).

66. *See* Rex Systems, Inc. v. Holiday, 814 F.2d 994, 997 (4th Cir. 1987) (noting that Supreme Court consistently has refused to allow antitrust suits against federal government); *Sea-Land*, 659 F.2d at 246 (refusing to create governmental antitrust liability that Congress has declined to enact).

67. *See Rex Systems*, 814 F.2d at 997 (declining to bring federal government within reach of antitrust laws); *Sea-Land* 659 F.2d at 247 (refusing to preempt Congress from making major changes in antitrust laws).

68. *See* United States v. Cooper Corp., 312 U.S. 600, 605 (1940) (declining to make additions to antitrust laws that Congress could have made). *See generally* 1 SUTHERLAND STATUTORY CONSTRUCTION § 3.26 (4th ed. 1985) (noting modern tendency of courts to allow legislatures to change and modernize existing law).

69. *See* Sea-Land Serv., Inc. v. Alaska R.R., 659 F.2d 243, 246 (D.C. Cir. 1981) (acknowledging but refusing to consider policy reasons favoring extension of antitrust liability to include federal government), *cert. denied*, 455 U.S. 919 (1982).

70. Comment, *supra* note 59, at 530-33 (suggesting that both purpose of Sherman Act to eliminate all anti-competitive activity and role of United States as purchaser and seller of goods favor allowing antitrust suits against United States and agencies). When Congress

Fourth Circuit in *Rex Systems*, like the D.C. Circuit in *Sea-Land*, correctly recognized, however, that in the heavily legislated field of antitrust law, Congress, not the judiciary, should consider the arguments favoring extension of the antitrust laws and fashion any necessary changes.[71] The Fourth Circuit, therefore, properly refused to alter dramatically the federal antitrust laws.[72] The Fourth Circuit, thus, clearly followed *Sea-Land* and its progeny.[73]

In *Rex Systems* the Fourth Circuit held that a military contractor could not bring an antitrust action against the United States Navy, the Secretary of the Navy acting in an official capacity, or the Navy's Contracting Officer acting in an official capacity.[74] Relying primarily on the D.C. Circuit's reasoning in *Sea-Land*, the Fourth Circuit held that the United States and entities of the United States are not persons subject to antitrust suits.[75] Several recent circuit court opinions similarly have disposed of antitrust suits against governmental entities.[76] Like the other circuits, the Fourth Circuit correctly decided to allow Congress to effect fundamental changes in the antitrust laws.[77]

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amended the antitrust laws in 1955, Congress recognized the active role of the United States as a purchaser of goods and services. *See* 101 CONG. REC. 5130 (1955) (remarks of Rep. Keating) (recognizing United States as nation's largest purchaser of goods and services). Congress chose, nevertheless, to alter only the federal government's status as an antitrust plaintiff while refusing to impose antitrust liability. *See* 15 U.S.C. § 15(a) (1982) (authorizing United States to sue alleged violators of antitrust laws).

71. *See* Rex Systems, Inc. v. Holiday, 814 F.2d 994, 997 (4th Cir. 1987) (refusing to ignore judicial precedent that rejects antitrust suits against United States entities and officials); *Sea-Land*, 659 F.2d at 247 (awaiting congressional approval of antitrust suits against entities of United States).

72. *See Rex Systems*, 814 F.2d at 997 (declining to subject entities of United States to antitrust liability).

73. *See id.* (following prior judicial interpretations of Sherman Act); *supra* note 26 and accompanying text (citing other circuit court opinions on whether agencies or instrumentalities of United States are amenable to suit under antitrust laws).

74. *See Rex Systems*, 814 F.2d at 997 (dismissing plaintiff's antitrust suits against all federal defendants); *supra* notes 23-26 and accompanying text (discussing Fourth Circuit's dismissal of antitrust suit against all federal defendants).

75. *See supra* notes 64-73 and accompanying text (discussing Fourth Circuit's agreement in *Rex Systems* with reasoning of D.C. Circuit in *Sea-Land*).

76. *See supra* note 26 and accompanying text (discussing cases that support proposition that United States and entities are not persons within meaning of Sherman Act).

77. *See supra* notes 64-69 and accompanying text (discussing argument for awaiting congressional legislation that allows antitrust suits against United States).