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III. Antitrust

deny bootstrap jurisdiction of a wage claim.

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III. ANTITRUST

A. *Predatory Intent is an Essential Element of a Union's Antitrust Violation*

The collective bargaining process[1] represents a conflict between the policy of the antitrust laws to discourage combinations which restrain competition[2] and a policy of the labor acts to encourage worker organization.[3] The Supreme Court has partially reconciled this conflict in favor of

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[1] Collective bargaining, as contemplated by the National Labor Relations Act (N.L.R.A.), 29 U.S.C. §§ 151-169 (1976), is a procedure for reaching a collective agreement between an employer and a union concerning wages, hours, and other conditions of employment. *See id.* § 157. Both the employer and the employees' representative have an equal obligation to bargain collectively. *Id.* § 158(d). The bargaining parties have a responsibility to deal fairly with each other and to overcome disagreements. N.L.R.B. v. Montgomery Ward & Co., 133 F.2d 676, 684 (9th Cir. 1943). Refusal by either party to bargain collectively and in good faith is an unfair labor practice. 29 U.S.C. §§ 158(a)(5), 158(b)(3) (1976). Unfair labor practices are subject to both injunctive and affirmative relief. *Id.* § 160(c).

[2] Congress has encouraged free competition by prohibiting every contract, combination or conspiracy in restraint of trade. Sherman Act, 15 U.S.C. §§ 1-7 (1976). The Supreme Court also has indicated that the objective of the antitrust laws is to preserve unencumbered competition. *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 57-58 (1911). The Court has narrowly construed the Sherman Act so that only unreasonable restraints of trade are illegal. *Id.* at 59-60. *See generally* Masterson, *Antitrust Law Commentary*, 44 BROOKLYN L. REV. 801 (1978).

[3] The Wagner Act, (National Labor Relations Act), 29 U.S.C. §§ 151-168 (1976), and the Taft-Hartley Act, (Labor Management Relations Act), 29 U.S.C. §§ 141-144, 171-187 (1976), favor collective bargaining as a means of peacefully settling industrial disputes. The Director of the President's Council on Wage and Price Stability has remarked that a competitive labor market is extremely cruel and inhumane, and therefore undesirable. 48 ANTITRUST L.J. 909, 910 (1979). Courts also have reaffirmed congressional support of the collective bargaining process as a legitimate means of promoting both workers' and the public interests. *See, e.g.*, Vaca v. Sipes, 386 U.S. 171, 182 (1967); N.L.R.B. v. Laney & Duke Storage Warehouse Co., 424 F.2d 109, 113 (5th Cir. 1970); Sachs v. Davis & Hemphill, Inc., 295 F. Supp. 142, 149 (D. Md. 1969). *See also* 4 KHEEL, LABOR LAW § 16.01 (rev. ed. 1979).

Although the labor laws aim to eliminate worker competition, the antitrust laws aim to enforce such competition. *See* notes 1 & 2 *supra*. *See also* Mann, Powers & Roberts, *The Accomodation Between Antitrust and Labor Law: The Antitrust Labor Exemption*, 9 SETON HALL L. REV. 744, 745 (1978) [hereinafter cited as Mann]. Congress attempted to reconcile the conflict between the labor and antitrust policies by exempting unilateral labor activities from the antitrust laws. Mann, *supra*, at 745. For example, under the Clayton Act, 15 U.S.C. §§ 12-27 (1976), a person's labor is not a commodity or article of commerce, and therefore, the federal antitrust laws cannot prohibit labor organizations from using effective means to meet their legitimate aims. The Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1976), prohibits judicial interference with labor's exertion of economic force. The Supreme Court limited the exemption of the Norris-LaGuardia Act to situations where the union

labor organization by establishing an antitrust exemption for collective bargaining.[4] A collective bargaining agreement is not exempt from the antitrust laws, however, if a union agrees with an employer to impose the collective bargaining agreement on other employers in the industry.[5] Although such an industry-wide agreement is subject to antitrust provisions, the union will not actually violate the antitrust laws unless the agreement demonstrates predatory intent by the union to eliminate industry competitors.[6] In *Smitty Baker Coal Company, Inc. v. United Mine Workers of America*,[7] the Fourth Circuit reviewed the collective bargaining antitrust exemption in the context of a union's attempt to impose an agreement on an employer who was not a party to the original collective bargaining agreement.

Ralph Baker, operator of Smitty Baker Coal Company, brought an antitrust action against the United Mine Workers (UMW), alleging that the UMW had conspired with the Bituminous Coal Operators Association (BCOA), a multi-employer group, to restrain trade.[8] Baker leased mining lands from a coal company that had signed the UMW—BCOA collective bargaining agreement as a member of the BCOA.[9] The lessor required Baker to sign the same collective bargaining agreement with the

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does not combine with a non-labor group, by means of strikes, boycotts, and picketing. United States v. Hutcheson, 312 U.S. 219, 231-37 (1941). The Court in *Hutcheson* excluded collective bargaining from the statutory exemption because collective bargaining required agreement with a non-labor group. *Id.* at 232; *see* Mann, *supra*, at 748.

[4] Apex Hosiery Co. v. Leader, 310 U.S. 469, 502-03 (1940). The Supreme Court exempted collective bargaining from the antitrust laws by limiting the Sherman Act prohibitions to commercial competition, not wage competition. *Id.* at 503-04. Collective bargaining restricts worker competition over wages and conditions of employment, but does not significantly affect competition in the employer's products market. Without a direct effect on price competition in the products market, the Sherman Act does not apply. *Id.* The Court justified the collective bargaining exemption by noting congressional intent to support labor unions in the Norris-LaGuardia and Wagner Acts. *Id.* at 504 n.24. Collective bargaining is a legitimate union practice in spite of the fact that a bargaining union is no longer acting unilaterally. *See The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 236 & n.13 (1975).

In Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945), the Supreme Court qualified the collective bargaining exemption by holding that a union lost immunity from the antitrust laws by helping businesses control the products market. *Id.* at 809. The Court held that to be exempt, the union must act in its own self interest without aiding nonlabor groups to achieve their own anti-competitive goals. *Id.* at 810.

[5] United Mine Workers v. Pennington, 381 U.S. 657, 665-66 (1965); *see* text accompanying notes 32-40 *infra*.

[6] United Mine Workers v. Pennington, 381 U.S. at 670-72. In *Pennington*, Justice Douglas concluded that no antitrust violation should be found absent an intent to eliminate, destroy or ruin competitors. *Id.* at 673-75 (Douglas, J., concurring); *see* text accompanying notes 38-40 *infra*.

[7] 620 F.2d 416 (4th Cir.), *cert. denied*, 101 S.Ct. 207 (1980).

[8] Smitty Baker Coal Co. v. United Mine Workers, 457 F. Supp. 1123, 1124 (W.D. Va. 1978), *aff'd*, 620 F.2d 416 (4th Cir.), *cert. denied*, 101 S.Ct. 207 (1980).

[9] 620 F.2d at 419.

UMW as a condition for leasing the lands.[10] Prior to 1960, the standard UMW—BCOA contract included a Protective Wage Clause (PWC), which required all employers in the industry to adhere to the contract notwithstanding that some of the employers did not participate in negotiating the contract.[11] The UMW and BCOA expressly rescinded the PWC in 1968, and the PWC was not included in the agreement that Baker signed.[12]

The Smitty Baker mine operated profitably until Baker closed his mine due to a UMW strike following the expiration of the UMW - BCOA agreement.[13] For the period after the agreement expired, Baker had offered to pay retroactively whatever wages the UMW and BCOA agreed upon in the new contract.[14] The UMW refused Baker's offer.[15] Baker subsequently signed a collective bargaining agreement with the Southern Labor Union (SLU), which purported to be the miners' new union representative.[16] The next day, the UMW requested Baker to sign an agreement to the new contract that the UMW had negotiated with BCOA.[17] Baker refused on the basis that his agreement with SLU

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[10] *Id.* The agreement contained a Coal Lands Clause, which required that all signatories agree not to lease out any coal lands as a means of circumventing the collective bargaining agreement. The Clause therefore required the lessor to obtain Baker's signature to the agreement. *Id.* .

[11] United Mine Workers v. Pennington, 381 U.S. 657, 660 (1965). During the 1950's, the UMW agreed with the BCOA not to oppose or restrain mechanization of the coal mining industry, even though mechanization reduced the work force. In return, BCOA agreed to significantly increased wages for the remaining workers, which only the highly mechanized operators could afford. *Id.* The resulting Protective Wage Clause (PWC) was first included in the 1958 collective bargaining agreement between the UMW and BCOA. 620 F.2d at 425. The clause specifically provided that the UMW would not agree to any working conditions with any employer other than the conditions listed in the agreement. *Id.* at 425-26 & n.24.

[12] 624 F.2d at 434. In United Mine Workers v. Pennington, 381 U.S. 657 (1965), the Supreme Court held that enforcement of the PWC is an antitrust violation. *Id.* at 665-66; *see* text accompanying notes 33-40 *infra*. Accordingly, the UMW and BCOA have omitted the PWC from their agreements since 1968. 620 F.2d at 434.

[13] 620 F.2d at 419. Although the collective bargaining agreement between the UMW and BCOA required that the UMW give the employer 60 days notice prior to a strike, the UMW did not notify Baker personally. Since the UMW notified BCOA as the original negotiating party, Baker was informally notified of the strike. *Id.*

[14] *Id.* at 419-20.

[15] *Id.* at 420. The UMW refused to work for Smitty Baker under stipulation without a contract because of the union's policy of "no contract, no work." *Id.*

[16] *Id.* During the UMW strike against Smitty Baker, the Southern Labor Union (SLU) presented Baker with six signatures of Smitty Baker employees to show that SLU was the employee's chosen collective bargaining representative. In the absence of a showing that a majority of the employees regarded SLU as their representative, the UMW remained the bargaining agent. 29 U.S.C. § 159(a) (1976); *see* Terrell Machine Co. v. N.L.R.B., 427 F.2d 1088, 1090 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970).

[17] 620 F.2d at 420. The new UMW - BCOA agreement had been signed and publicized prior to Baker's agreement with SLU. Baker testified, however, that he had no knowledge of the UMW - BCOA agreement until after he signed with SLU. *Id.*

precluded him from contracting with the UMW.[18]

The UMW brought an unfair labor practice charge against Baker and SLU for encroaching upon the UMW's right to represent the employees of Smitty Baker.[19] The UMW dropped the charges after the SLU voided its contract with Smitty Baker.[20] Baker then renewed his interest in the UMW contract.[21] During negotiations, Baker claimed that Smitty Baker could not afford to pay the higher wages in the new contract and proposed reinstituting the old contract.[22] After further unsuccessful negotiations, Baker liquidated Smitty Baker Coal Company and started a new mining operation on a new site with SLU as the miners' representative body.[23]

Baker brought suit in a federal district court[24] under the Sherman Act, claiming that the UMW had conspired with the BCOA to restrain trade by covertly imposing the Protective Wage Clause on the industry.[25] The UMW's antitrust liability depended upon whether there was a conspiracy between the UMW and BCOA, and whether Smitty Baker's injuries resulted from that conspiracy.[26] The district court granted judgment for the defendant UMW notwithstanding a jury verdict for Smitty Baker.[27]

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[18] *Id.*

[19] *Id.* To bargain with a rival union while the certified union is still the presumed bargaining agent may be an unfair labor practice. 29 U.S.C. §§ 158(a)(5) (1976); *see* N.L.R.B. v. Trosch, 321 F.2d 692, 696-97 (4th Cir. 1963), *cert. denied*, 375 U.S. 993 (1964); note 15 *supra*. *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW, ch XX § 1 (1976) [hereinafter cited as GORMAN].

[20] 620 F.2d at 420.

[21] *Id.* at 420-21. As a prerequisite to signing the new contract with the UMW, Baker requested formal notification that the unfair labor practice charges regarding SLU had been dropped. *Id.* at 421.

[22] *Id.* Baker refused to allow the UMW to examine his books to determine whether he could afford the higher wage in the new contract. *Id.* The duty to bargain provision of § 8(d) of the N.L.R.A., 29 U.S.C. § 158(d) (1976), requires an employer to open his books so that the union may bargain on an informed basis. An employer's unreasonable failure to open his books on request is a per se unfair labor practice. *See* GORMAN, *supra* note 19, at 399-401. *See also* N.L.R.B. v. Southland Cork Co., 342 F.2d 702, 705-06 (4th Cir. 1965).

[23] 620 F.2d at 421. During negotiations, the UMW offered to perform maintenance and repair work in the mine, but Baker declined on the basis that the repair work would cost more than he could afford. *Id.*

[24] Smitty Baker Coal Co. v. United Mine Workers, 457 F. Supp. 1123 (W.D. Va. 1978).

[25] *Id.* at 1128-29; *see* notes 10-12 *supra*. Baker also claimed that the UMW's strike in response to the expiration of their contract was illegal because the union did not comply with a contract provision that required the union to give Baker 60 days notice before striking. *Id.* at 1133; *see* note 13 *supra*. Baker also claimed that the UMW's refusal to negotiate indicated that the union was attempting to enforce the PWC. 457 F. Supp. at 1129.

[26] 457 F. Supp. at 1124. For purposes of § 1 of the Sherman Act, agreements which violate the Act may be either express or inferred. *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 240 (1899) (express); American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946) (inferred). In either case, § 1 can only be violated if there are two separate entities acting together. See L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 108 (1977).

[27] 457 F. Supp. at 1130. The court held that a jury could reasonably find that UMW and

On appeal, the Fourth Circuit affirmed the district court's judgment for UMW.[28] The court held that there was no antitrust conspiracy between the UMW and BCOA because Baker had failed to demonstrate that the union had acted with predatory intent.[29] The court also noted that the UMW strike, which had caused Baker's alleged injuries, was a unilateral activity by the union.[30] Since there was no evidence of predatory intent by the union and no evidence of actual collaboration between the UMW and BCOA, the Fourth Circuit concluded that the antitrust laws were inapplicable.[31]

The Fourth Circuit in *Smitty Baker* relied on *United Mine Workers v. Pennington*[32] to determine that no antitrust conspiracy existed between UMW and BCOA. In *Pennington*, the Supreme Court held that the UMW and BCOA violated the antitrust laws by conspiring through the Protective Wage Clause to impose an industry-wide wage rate on all employers, regardless of their ability to pay.[33] Although the *Pennington* Court unanimously agreed that the UMW's imposition of the PWC was an antitrust violation, the majority did not agree on the supporting rationale.[34] The *Pennington* Court reasoned that a union may unilaterally attempt to impose the same wage terms on the industry without antitrust implications because the union is within the statutory exemption for unilateral union activity.[35] If the attempt to impose an industry-wide wage rate is in furtherance of an agreement between the union and some employers, however, the union is subject to the antitrust laws because the union is no longer acting only in its own interest.[36] The Court also noted that the industry-wide wage agreement prevented the union from

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BCOA conspired to restrain trade, but could not reasonably find damages resulting therefrom. *Id.* The district court reasoned that since the PWC of 1958 was ambiguous, the jury could consider the PWC as evidence of a conspiracy. *Id.* The strike and not the conspiracy, however, was a possible proximate cause of the plaintiff's injuries. *Id.* at 1131-34. Baker appealed the judgment n.o.v., and the UMW cross-appealed the finding of a conspiracy. 620 F.2d at 418.

[28] 620 F.2d at 438.

[29] *Id.*; *see* text accompanying notes 41-51 *infra*.

[30] 620 F.2d at 437-38; *see* note 51 *infra*.

[31] 620 F.2d at 437; *see* note 26 *supra*.

[32] 381 U.S. 657 (1965); *see* text accompanying notes 5-7 *supra*.

[33] 381 U.S. at 665; *see* notes 11 & 12 *supra*.

[34] 381 U.S. at 672. The *Pennington* Court split evenly into three groups of three Justices each. Justice White wrote the majority opinion, Justice Douglas authored the concurrence, and Justice Goldberg spoke for a third group that concurred in the result.

[35] *Id.* at 665. Justice White recognized that a legitimate aim of any union is to obtain uniformity of standards regardless of anticompetitive effects. *Id.* at 666, citing *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503 (1940).

[36] 381 U.S. at 665-66. The *Pennington* Court reasoned that employers may not lawfully conspire to eliminate competitors and a union will be liable as a party to that conspiracy if it participates through the collective bargaining agreement. *Id.*

meeting its duty to bargain because it did not freely bargain with each and every employer.[37]

In a concurring opinion in *Pennington*, Justice Douglas interpreted the Court's opinion as a reaffirmation of the doctrine that an activity which would otherwise be an antitrust violation is not exempt merely because labor is involved.[38] Therefore, the antitrust laws apply to a union participating in an industry-wide wage agreement, and the labor exemption will not apply.[39] Justice Douglas emphasized that a union would violate the antitrust laws only if the agreement showed a purpose by the union to eliminate competitors, whereas the majority opinion did not specifically require a showing of predatory intent.[40]

The Fourth Circuit in *Smitty Baker* interpreted *Pennington* to require the plaintiff to show four facts to prove that a union has violated the antitrust laws. According to *Smitty Baker*, the plaintiff must demonstrate that the union and the employer group have established a wage agreement, that the union and the employer group knew that the smaller employer could not afford the wage scale, that the union attempted to impose the wage scale on all employers including those not parties to the original agreement, and that the union intended to eliminate the smaller operators.[41]

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[37] *Id.* The *Pennington* Court reasoned that a union has an obligation to respond to each bargaining situation and must not preclude itself from bargaining by virtue of a prior agreement with other parties. *Id.* Although the Court cited no authority for the unit by unit theory, the NLRA duty to bargain, 29 U.S.C. § 158(a) (1976), may be supportive. *See* note 1 *supra*. Common sense dictates that bargaining has not actually occurred unless the two bargaining parties have engaged in give-and-take negotiation. Prior agreements which set a standard rate preclude any such negotiation. *See* note 22 *supra*.

Commentators have criticized the Court's "unit by unit" theory as the announcement of a new per se rule, *see* note 55 *infra*, which is lacking the requisite finding of pernicious effect. DiCola, *Labor-Antitrust*: Pennington, Jewel Tea *and Subsequent Meandering*, 33 U. PITT. L. REV. 705, 716-17 (1972) [hereinafter cited as DiCola]. DiCola argues that under the unit by unit theory, if a union limits its freedom to bargain according to each individual circumstance, the agreement will violate the antitrust laws regardless of the union's motive, which may have been both legitimate and practical. *Id.*

[38] 381 U.S. at 672 (Douglas, J., concurring). Justice Douglas relied on Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797, 799 (1945) to hold that a union may not lawfully perform anticompetitive activities which exceed its own interest. 381 U.S. at 672; *see* note 4 *supra*.

[39] 381 U.S. at 672-73 (Douglas, J., concurring).

[40] *Id.* at 673 (Douglas, J., concurring). In *Pennington*, Justice Douglas defined what has become known as predatory intent as an agreement made for the purpose of driving some employers out of business. *Id.* Justice Douglas implied that courts may infer a union's predatory intent from the parallelism of a union's wage demands and those of the multiemployer group agreement, so long as those wage demands exceed the financial ability of some employers in the industry. *Id.*; *see* DiCola, *supra* note 37, at 719. The majority opinion noted, however, that unions should not have to lower their wage demands to meet the abilities of the weaker employers. 381 U.S. at 665 n.2. In order to prove that the industry wide collective bargaining agreement violated the antitrust laws, the Court required direct evidence of a conspiracy, rather than allowing an inference to be drawn from parellelism. *Id.* at 665-66.

[41] 620 F.2d at 432. The Fourth Circuit based the requirement of predatory intent to

The Fourth Circuit held that the evidence in *Smitty Baker* did not satisfy the *Pennington* requirements.[42] Considering the first two factors together, the court concluded that the UMW did not intentionally agree with BCOA to a wage scale that Smitty Baker could not afford.[43] The court reasoned that Smitty Baker had operated profitably under the old contract and had not demonstrated that the higher wages in the new contract would end the company's profitability.[44] Smitty Baker also failed to prove that the UMW agreed with BCOA, through the Protective Wage Clause, to impose the wage scale on Smitty Baker.[45] The court noted that the UMW and BCOA had expressly rescinded the PWC several years prior to drafting the current agreement.[46] The court concluded that the union's unilateral attempt to impose a uniform wage scale in the industry is a legitimate union practice under *Pennington*[47] and not a covert continuance of the PWC because the union was willing to make variations from the uniform wage scale if necessary.[48] Consider-

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ruin competitors on other court's interpretations of *Pennington*. The Sixth Circuit, hearing *Pennington* on remand, interpreted the Supreme Court's opinion to require predatory intent. Lewis v. Pennington, 400 F.2d 806, 814 (6th Cir. 1968), *cert. denied*, 393 U.S. 983 (1969). In Ramsey v. UMW, 344 F. Supp. 1029, 1033 (E.D. Tenn. 1972), the district court concluded that *Pennington* did not require a showing of predatory intent, but did require a showing that the wage scale imposed was ruinous to other employers. The Fourth Circuit correctly discounted the difference in nomenclature and concluded that *Ramsey* required predatory intent. 620 F.2d at 431-32. The Sixth Circuit also reconciled *Ramsey* and *Pennington* by overcoming the differences in terminology. South East Coal Co. v. Consolidated Coal Co., 434 F.2d 767, 776-77 (6th Cir. 1970). The Fourth Circuit in *Smitty Baker* also found Tennessee Consolidated Coal Co. v. UMW, 416 F.2d 1192 (6th Cir. 1969) to be consistent with the requirement of predatory intent because the Sixth Circuit had previously required predatory intent and did not abandon the requirement in *Consolidated Coal*. 620 F.2d at 432.

[42] *Id.* at 435.

[43] *Id.* at 433.

[44] *Id.* at 435. The *Smitty Baker* court noted that Smitty Baker would have earned arguably excessive profits had the old contract been reinstituted. *Id.* at 433. The *Smitty Baker* court inferred that Baker could meet the terms of the new contract because Baker refused to open his books to prove otherwise. *Id.* at 434. The duty to collectively bargain in good faith, 29 U.S.C. § 158(d), requires an employer to open his books so that the union may negotiate on an equal basis. *See* notes 1 & 22 *supra*.

[45] 620 F.2d at 434. In all prior cases involving *Pennington*-type claims, the plaintiffs had premised their antitrust claims on the Protective Wage Clause. *See, e.g.*, South East Coal Co. v. Consolidated Coal Co., 434 F.2d 767 (6th Cir. 1970); Tennessee Consolidated Coal Co. v. UMW, 416 F.2d 1192 (6th Cir. 1969); Ramsey v. UMW, 344 F. Supp. 1029 (E.D. Tenn. 1972).

[46] 620 F.2d at 434. In 1968, the UMW and BCOA expressly voided the Protective Wage Clause in order to avoid any new antitrust claims which might arise from its continued existence. *Id.*

[47] *Id.* The *Pennington* Court expressly noted that a union's unilateral maintenance of a uniform wage scale is not an antitrust question. 381 U.S. at 665 & n.2.

[48] 620 F.2d at 484. The union in *Smitty Baker* offered a variety of concessions during the negotiations which indicated a willingness to bargain. *See* text accompanying notes 20-23 *supra*.

ing the final *Pennington* factor, the court concluded that the UMW did not intend to eliminate Smitty Baker because Smitty Baker was financially able to meet the terms which the UMW offered.[49] The Fourth Circuit noted that although Smitty Baker's claims did not amount to a *Pennington*-type antitrust violation,[50] the claims might be interpreted as an unfair labor practice claim due to the union's failure to notify Smitty Baker of the strike.[51]

In *Smitty Baker*, the Fourth Circuit correctly interpreted the *Pennington* doctrine to require a showing of predatory intent in order to prove that an industry-wide collective bargaining agreement violates the antitrust laws.[52] The Fourth Circuit's conclusion is consistent with the Supreme Court's subsequent treatment of *Pennington*[53] as well as with the other circuits that have interpreted *Pennington*.[54] Predatory in-

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[49] 620 F.2d at 435.

[50] *Id.* The Fourth Circuit also considered the Coal Lands Clause in the UMW - BCOA agreement, which prevented the lessor from escaping his obligation to deal with UMW by leasing his lands to another party not a signatory to the contract. *Id.* at 436-47. The court held that the clause did not constitute an antitrust violation under *Pennington*. *Id.* The court indicated that the clause was not an attempt to ruin a competitor because it bound only the signatories to the contract and did not harm the plaintiff's business. *Id.* at 437.

In addition, the Coal Lands Clause is valid under the labor doctrine of successorship. *See generally* 4 KHEEL, LABOR LAW § 17 (1979 ed.). A successor employer like Smitty Baker is bound to bargain with the union of his predecessor's employees unless the union is no longer supported by a majority of the employees. *See* Rohlik, Inc., 145 N.L.R.B. 1236 (1964). In addition, the successor employer may affirmatively assume the obligation to adhere to the predecessor's agreement. *See* Celanese Corp. of Am. 95 N.L.R.B. 664 (1951).

[51] 620 F.2d at 435. Baker may have a claim under § 303 of the Labor Management Relations Act, 29 U.S.C. § 187 (1976), for breach of contract because the union failed to notify him of the strike. Unfair labor practice claims, however, are not within the purview of the antitrust laws unless the disputed activity also restraints competition. Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266, 274 (5th Cir. 1979).

[52] The Fourth Circuit relied on Justice Douglas' concurring opinion in *Pennington* to support the predatory intent requirement. *See* text accompanying notes 32-40 *supra*.

[53] On remand to the district court following the Supreme Court's decision in *Pennington*, the district court judge concluded that predatory intent is a necessary element of an antitrust claim against a labor union. Lewis v. Pennington, 257 F. Supp. 815, 829 (E.D. Tenn. 1966). The district court therefore adhered to Justice Douglas' concurrence in *Pennington*. *See* DiCola, *supra* note 37, at 726 & 739. On a second appeal, the Sixth Circuit affirmed the district court's adoption of Justice Douglas' approach. 400 F.2d 806, 814 (6th Cir. 1968). The Supreme Court apparently agreed that predatory intent is a necessary element because the Court twice refused to rehear the *Pennington* case. Lewis v. Pennington, 400 F.2d 806, *cert. denied*, 393 U.S. 983, *reh. denied*, 393 U.S. 1045 (1969).

[54] The Third, Fifth, Sixth, and Seventh Circuits adopted Justice Douglas' requirement of predatory intent in *Pennington*-type cases. *See, e.g.*, Consolidated Express, Inc. v. N.Y. Shipping Ass'n, 602 F.2d 494, 516 (3d Cir. 1979) (agreements on mandatory subjects of collective bargaining must show predatory intent for antitrust liability); Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc., 504 F.2d 896, 903 (5th Cir. 1974) (nonexemption and liability based on union's purpose to eliminate competitive company of employer); Associated Milk Dealers, Inc. v. Milk Drivers Union Local 753, 422 F.2d 546, 554 (7th Cir. 1970) (most favored nation clauses require predatory purpose to violate antitrust laws).

tent is a necessary element of a union's antitrust violation because without that requirement, industry-wide collective bargaining agreements would be per se violations of the antitrust laws.[55] If courts did not require predatory intent, a union could violate the antitrust laws by demanding a uniform wage rate which incidentally would harm competitors.[56] The Supreme Court has noted that a union should not be forced to lower its demands because an employer has a weak financial position.[57] Without a requirement of predatory intent, a union would risk antitrust liability every time a firm loses money and has the opportunity to blame the loss on the union's attempt to equalize wages in the industry. Since both the Supreme Court and Congress have recognized the redeeming value of labor organizations and collective bargaining and have intervened to protect unions from the unbridled application of the antitrust laws, a per se rule for unions is too stringent.[59]

A per se rule is not only inappropriate for unions in general, but also is inappropriate for the particular anticompetitive activity alleged in *Smitty Baker*. The anticompetitive activity claimed in both *Pennington* and *Smitty Baker* resulted from an agreement that had industry-wide ef-

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Lewis v. Pennington, 400 F.2d 806, 814 (6th Cir. 1968) (predatory intent is necessary element of union's antitrust violation); *see* note 53 *supra*.

In prior Fourth Circuit cases involving *Pennington*, the Fourth Circuit did not discuss predatory intent. *See, e.g.*, Webb v. Bladen, 480 F.2d 306, 308 (4th Cir. 1973) (citing *Pennington* for general labor immunity when union acts alone); Consolidated Coal Co. v. Disabled Miners of S.W. Va., 442 F.2d 1261, 1266 (4th Cir. 1971) (citing *Pennington* for exception to labor exemption when union pursues non-labor goals). *See also* DiCola, *supra* note 37, at 739; Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws*, 32 U. CHI. L. REV. 659, 722 (1965); St. Antoine, Connell: *Antitrust Law At The Expense of Labor Law*, 62 VA. L. REV. 603, 610 (1976).

[55] *See* text accompanying notes 56-59 *infra*. Only those anticompetitive activities which are so pernicious as to have no redeeming value are illegal per se. Northern Pacific Ry. v. United States, 356 U.S. 1, 5 (1958). *See* Sullivan, *Recent Antitrust Developments: Defining the Scope of Exemptions, Expanding Coverage, and Refining the Rule of Reason*, 27 U.C.L.A. L. REV. 265, 266 (1979). A per se violation is unlawful regardless of the defendant's motivation, justification, or any countervailing consideration. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 220-21 (1940) (no economic justification permitted to show reasonableness of price fixing scheme).

[56] *See* text accompanying note 41 *supra*. Lacking a predatory intent requirement, the factors necessary for a *Pennington*-type violation are satisfied if an industry has a uniform rate which smaller employers deem excessive. *Id.*

[57] *See* 381 U.S. at 665 n.2.

[58] *See* note 40 *supra*.

[59] *See* notes 1-4 *supra*. In *Pennington*, Justice Douglas relied on Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945), to conclude that the only activity in the labor realm that is clearly illegal is a business monopoly. 381 U.S. at 674. Activities not so egregious are subject to ambiguous distinctions between permissive and impermissive activities. *Id.* Courts assume that in light of the strong labor policies, these activities must exhibit a union's predatory intent in order to be so unreasonable as to violate the antitrust laws. *See id.*

fects without industry-wide input.[60] Such an agreement is a business conspiracy and is not illegal per se.[61] When an activity is not illegal per se, courts must examine the motives of the defendant and search for predatory intent.[62] Absent an intention to ruin competitors, a conspiracy to restrain competition in violation of the antitrust laws does not exist.[63]

In *Smitty Baker*, the Fourth Circuit held that the UMW and BCOA did not conspire to restrain competition by enforcing an industry-wide wage agreement.[64] The court accurately interpreted the *Pennington* precedent to require that a plaintiff must prove that the agreement is infected with the union's predatory intent to eliminate competitors in the industry.[65] The Fourth Circuit's emphasis on predatory intent as an essential element of a union's antitrust violation preserves the delicate balance between the antitrust and labor policies.[66] By requiring the plaintiff in *Smitty Baker* to demonstrate predatory intent by the union, the Fourth Circuit has established precedent that properly allows unions to pursue legitimate anticompetitive goals without completely removing union activity from antitrust scrutiny.[67]

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[60] The wage agreement itself is, concededly, a price-fixing arrangement, which is ordinarily illegal per se. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 220 (1940) (price fixing inherently unreasonable and per se violation). Nevertheless, price fixing itself is not the alleged anticompetitive activity, nor should it be, because wage fixing is exempt from the antitrust laws as a mandatory subject of collective bargaining. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 473 (1940); note 4 *supra*.

[61] Business conspiracies are those restraints of trade which are not classified as per se violations of the antitrust laws. *See, e.g.*, United States v. Parke-Davis & Co., 362 U.S. 29, 47 (1960) (acquiescence by retailer group to minimum resale prices); Interstate Circuit, Inc. v. United States, 306 U.S. 208, 230 (1939) (conscious parallelism in method of distribution); *see* DiCola, *supra* note 37, at 739.

[62] *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 57-58 (1911). The rule of reason analysis requires a court to investigate the purposes of the anticompetitive activities the economic strength of the parties involved, and the resulting effect on competition. *Id.* at 99 (Harlan, J., concurring & dissenting).

[63] *See* Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221 (1939) (motive an essential element of illegal conspiracy); note 62 *supra*.

[64] 620 F.2d at 438.

[65] *Id.* at 432. *See* text accompanying notes 38-41, 52-54 *supra*.

[66] *See* text accompanying notes 56-59 *supra*. *Smitty Baker* has been cited by two district courts as an accurate explication of *Pennington*, and both courts read *Pennington* as requiring predatory intent. Feather v. UMW, 494 F. Supp. 701, 714 (W.D. Pa. 1980); Theatre Techiniques, Inc. v. United Scenic Artists, No. 76-5417 (S.D. N.Y. June 27, 1980).

[67] *See* notes 2 & 3 *supra*.

B. *The Sherman Act Applies to Physicians Administering Blue Shield Plans*

The Sherman Antitrust Act encourages free competition[1] by prohibiting every contract, combination, or conspiracy in restraint of trade.[2] An extremely broad interpretation of the Act would prohibit almost all business agreements.[3] The Supreme Court, however, has construed the Act narrowly to prohibit only those business agreements which are unreasonable restraints of trade.[4] Congress also has limited the scope of the Act by devising a statutory antitrust exemption for insurance because unrestrained competition in the insurance industry works against the public interest.[5] In *Virginia Academy of Clinical Psycholo-*

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[1] The philosophical basis for free competition is individual liberty. *See generally* Hamilton, *Common Right, Due Process and Antitrust*, 7 LAW & CONTEMP. PROB. 24, 27-28 (1940). The most basic constitutional protection of an individual's freedom is the fourteenth amendment to the Constitution, which states in relevant part that "[n]o state shall deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV § 1.

[2] Sherman Antitrust Act, 15 U.S.C. § 1 (1976). The Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states. . . ." 15 U.S.C. § 1 (1976). The Act is a codification of the common law of antitrust. 21 CONG. REC. 2456 (1890). The common law of antitrust was designed to prevent industrial monopolization, an evil that Americans inherited from the English. *See* Jones, *Historical Development of the Law of Business Competition*, 36 YALE L.J. 42, 55 (1926). Following the Civil War, United States industry grew significantly. The rapid growth concentrated economic power in a smaller number of businesses. The courts were unable to eliminate the ensuing trade restraints because the common law of antitrust lacked uniformity and did not cover interstate transactions. 16 VON KALINOWSKI, BUSINESS ORGANIZATIONS: ANTITRUST LAWS AND TRADE REGULATION §§ 1.02[4] & 2.02[1], [2] (rev. ed. 1979).

In response to the public's demand for effective federal enforcement, Congress enacted the Sherman Act to provide a uniform set of antitrust laws and sanctions. *Id. See also* Note, *Application of the Antitrust Laws to Anticompetitive Activities by Physicians*, 30 RUTGERS L. REV. 991, 991 & n.2 (1977) [hereinafter cited as *Anticompetitive Activities*].

[3] The literal language of § 1 of the Sherman Act makes virtually every business agreement illegal because a business removes itself from competition every time it agrees to deal with one business as opposed to any other. *See Anticompetitive Activities*, *supra* note 2, at 1003 & n.79. The Supreme Court has stated that courts must give content to the Sherman Act by defining its imprecise terms. Apex Hosiery Co. v. Leader, 310 U.S. 469, 472-73 (1940).

[4] *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 57-58 (1911) (Sherman Act follows common law approach that only unreasonable restraints of trade are unlawful); Masterson, *Antitrust Law Commentary*, 44 BROOKLYN L. REV. 801, 805 (1978).

[5] The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1976) provides in relevant part:

> § 1011. Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> § 1012(a). The business of insurance, and every person engaged therein, shall be

gists v. Blue Shield of Virginia,[6] the Fourth Circuit considered the applicability of the insurance exemption to Blue Shield plans which prevent psychologists from competing with physician psychiatrists.[7] By focusing on the physicians who administered the Blue Shield plans, the

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subject to the laws of the several States which relate to the regulation or taxation of such business.

(b). No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . .

§ 1013(b). Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce or intimidate, or act of boycott, coercion, or intimidation.

Until 1944, the Supreme Court consistently held that insurance was not an article of commerce and that therefore insurance practices were not within the scope of federal antitrust laws. *See* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183 (1869). In the absence of federal intervention, the states constructed elaborate regulatory systems for the insurance industry. Under the benign supervision of the states, insurers became accustomed to such overtly anticompetitive practices as setting prices in concert. *See* Sullivan, *Recent Antitrust Developments: Defining the Scope of Exemptions, Expanding Coverage and Refining the Rule of Reason*, 27 U.C.L.A. L. REV. 265, 270 (1979) [hereinafter cited as Sullivan]. In 1944, the Supreme Court reversed its position and held that insurance constitutes an article of commerce and therefore is subject to federal intervention and the antitrust laws. United States v. South Eastern Underwriters' Ass'n, 322 U.S. 533, 553 (1940) (group of insurance companies violate Sherman Act by maintaining arbitrary and noncompetitive premium rates).

Both the states and insurance companies sought a congressional exemption for the insurance industry by arguing that federal regulation usurped the state's role as regulator and is disruptive and unfair to the insurance industry. Insurance companies strongly asserted the need for cooperative action within the industry, regardless of its anticompetitive effects. Insurance firms claimed that they needed to exchange loss data and trends, pool risks, and arrange reinsurance agreements to maintain the accuracy essential to success in the industry. *See* Sullivan, *supra*, at 273.

Congress intended the McCarran Act to preserve the states' authority to regulate and tax the insurance industry. *See* 90 CONG. REC. 8054 (1944). As a consequence of the Act, Congress provided a limited exemption from the federal antitrust laws for the business of insurance. 15 U.S.C. § 1011 (1976).

Other exceptions to the antitrust laws are based on a variety of factors. For example, the disparity of economic power between two competing groups has given rise to exemptions for labor organizations. *See* The Clayton Act, 15 U.S.C. § 17 (1976); Norris-LaGuardia Act, 29 U.S.C. § 101 (1976). *See also* Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965). Industries that are extensively regulated by the federal government are exempt if their anticompetitive activities are authorized by the regulatory agency. *See* Clayton Act, 15 U.S.C. §§ 18, 19 (1976) (exempting conduct ordered by Federal Reserve Board, Interstate Commerce Commission, and Securities and Exchange Commission). In order to maintain constitutionally appropriate federal-state relations, the Supreme Court exempted state government activity from antitrust scrutiny. Parker v. Brown, 317 U.S. 341, 350-51 (1943); *see* notes 13 & 14 *infra*. The Supreme Court also created an exemption to protect the first amendment right to petition when that exercise has incidental adverse effects on competition. UMW v. Pennington, 381 U.S. 657, 669-672 (1965); Eastern R.R. Presidents' Conference v. Noeer Motor Freight, Inc., 365 U.S. 127, 135-136 (1961); *see* notes 13 & 14 *infra*.

[6] 624 F.2d 476 (4th Cir. 1980).

[7] *Id.* at 484.

Fourth Circuit indicated that physicians who enter business must adhere to the court's conception of reasonable competition for the medical industry.[8]

The Virginia Academy of Clinical Psychologists (VACP) and Robert J. Resnick, a practicing psychologist, brought suit in the Eastern District of Virginia against two Virginia Blue Shield plans and the Neuropsychiatric Society of Virginia (NSV) for violation of Section 1 of the Sherman Act.[9] After consultation with various provider groups, including NSV, the two Blue Shield defendants had implemented a policy of refusing to pay psychologists for services rendered unless the services were supervised and billed through a physician.[10] The plaintiffs alleged that the Blue Shield defendants conspired to restrain trade through the indirect payment policy.[11] The district court held that the defendants had not conspired to restrain trade in violation of the Sherman Act.[12] The court concluded that even if Blue Shield's activities violated the Sherman Act, the insurance exemption barred any antitrust action against the defendants.[13]

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[8] *See* text accompanying notes 27-30 *infra.*

[9] 624 F.2d at 478. *See* text accompanying notes 12-13 *infra.* The two Blue Shield defendants were Blue Shield of Virginia [BSV or the Richmond Plan] and Blue Shield of Southwestern Virginia [BSSV or the Roanoke Plan]. The Neuropsychiatric Society of Virginia is the professional organization of Virgina psychiatrists.

[10] 624 F.2d at 478. In addition to the defendant Neuropsychiatric Society of Virginia, Blue Shield consulted the Medical Society of Virginia, the Virginia Psychological Association, the Virginia Institute of Pastoral Care, psychiatric social workers, and nurses on the merits of the indirect payment policy. Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia, 469 F. Supp. 552, 558 (E.D. Va. 1979), *modified*, 624 F.2d 476 (4th Cir. 1980). After these consultations, Blue Shield established a policy that permitted payment to a psychotherapist under the medical plans only when the services were ordered, supervised and billed through a physician. 469 F. Supp. at 556.

Subsequently, the Virginia legislature enacted a Freedom of Choice statute, which requires prepaid medical plans like Blue Shield to make payments directly to psychologists for their services. VA. CODE § 38.1-824 (Repl. Vol. 1978).

[11] 624 F.2d at 478. Virginia's Blue Shield plans traditionally provide coverage for outpatient psychotherapy performed by psychologists or psychiatrists. *Id.* Virginia's clinical psychologists are licensed to perform out-patient psychotherapy in the treatment of mental and nervous disorders, VA. CODE §§ 54-273(10) (Repl. Vol. 1978).

[12] 469 F. Supp. at 558-59. The district court framed the issues as whether the policy was a result of a combination or conspiracy and whether the practice constituted a boycott. *Id.* at 555. As between NSV and Blue Shield, the court found no agreement that would fulfill the Sherman Act requirement of a combination in restraint of trade. *Id.* at 558. As for collusion between the two Blue Shield plans, the court noted that the plans engaged in only two instances of joint suspect activity, both of which were exempt from the antitrust laws. *Id.* at 556-58; *see* note 13 *infra.*

[13] 469 F. Supp. at 563. The court held that although reasonable conditional refusals to deal were proper, unreasonable refusals to deal constituted a boycott. *Id.* The court noted that Blue Shield conditioned the refusal to deal on conditions which were reasonable, and therefore the policy was not a boycott under the McCarran Act. *Id.*; *see* notes 5 *supra* & 20 *infra.*

The district court applied two exemptions in addition to the McCarran exemption to

Although the Fourth Circuit affirmed the district court holding that the relationship between NSV and Blue Shield was not a conspiracy under the Act, the Fourth Circuit held that the Blue Shield plans themselves, as combinations of physicians, were subject to the Act.[14] The court reasoned that the Blue Shield plans were merely agents of the member physicians because physicians dominated the Blue Shield board of directors and controlled the daily operation of the Blue Shield plans.[15]

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protect Blue Shields' activities. The Blue Shield defendants had agreed to challenge the Freedom of Choice statute. 469 F. Supp. at 556-57; *see* note 10 *supra*. A Blue Shield subscriber and her psychologist brought action in state court against the Richmond Blue Shield plan, but the action was later voluntarily non-suited. 624 F.2d at 478. The district court held that Blue Shield's challenge of the statute was protected activity under the first amendment through the *Noerr-Pennington* doctrine. 469 F. Supp. at 557.

The *Noerr-Pennington* doctrine protects anticompetitive activity from the antitrust laws when that activity is covered by the first amendment right to petition. *Id.* The doctrine arose from Supreme Court decisions holding that collaboration in obviously anticompetitive advertising campaigns, lobbying efforts, and litigation is protected by the first amendment and therefore outside the scope of the Sherman Act. *See* UMW v. Pennington, 381 U.S. 657, 669-72 (1965); Eastern R.R. President's Conference v. Noerr Motor Freight, 365 U.S. 127, 135-36 (1961). *See generally* Holzer, *An Analysis for Reconciling the Antitrust Laws With the Right to Petition:* Noerr-Pennington *in Light of* Cantor v. Detroit Edison, 27 EMORY L.J. 673, 674 (1978). *See also* California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972); note 5 *supra*.

The district court in *Virginia Academy* held that the second activity, an anticompetitive agreement between the plans arising out of the administration of national accounts, was protected under the state action exemption because the accounts are subject to state regulation. 469 F. Supp. at 557. The Supreme Court created the state action exemption for activities sufficiently regulated by the state to obviate federal intervention. Parker v. Brown, 317 U.S. 341, 350-51 (1943). The district court noted that state regulation included a state law which divided the state into service areas for the administration of group accounts. 469 F. Supp. at 557; *see* note 5 *supra*. *See generally* Vinyard & Smith, *Status Controls or State Action Immunity: Unattractive Alternatives for Regulating Insurers*, 15 FORUM 406 (1980).

[14] 624 F.2d at 479-80. On the issue of collaboration between the two Blue Shield defendants, the Fourth Circuit disagreed with the district court and held that none of the exemptions applied to the defendant's activities. *Id.* at 482. The Fourth Circuit held that the state action exemption was inapplicable because the state did not compel Blue Shield to deny direct payment to psychologists. *Id.* at 482 & n.10; *see* notes 5 & 13 *supra*; Cantor v. Detroit Edison Co., 428 U.S. 579, 595 (1976). *See also* California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 106 (1980). The Fourth Circuit relied on *Cantor* in holding that the state had not compelled Blue Shield to adopt the plans. 624 F.2d at 479-80. *Accord*, Ballard v. Blue Shield of S.W. Va., Inc., 543 F.2d 1075, 1079 (4th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977). In *Ballard*, the Fourth Circuit reasoned that Blue Shield cannot claim the state action exemption because the state did not require Blue Shield to exclude chiropractors from the plans. 543 F.2d at 1079.

The Fourth Circuit also determined that Blue Shield's activities were not protected under the *Noerr-Pennington* doctrine since people must act upon the first amendment right to petition, not merely assert the right, in order to invoke the *Noerr-Pennington* exemption. 624 F.2d at 482. *See* Feminist women's Health Center, Inc. v. Mohammad, 586 F.2d 530, 542 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979); *see* notes 5 & 13 *supra*.

[15] 624 F.2d at 481. Virginia statutes authorizing Blue Shield plans treat them as agencies of the member physicians. VA. CODE § 38.1-811 (Repl. Vol. 1978). The statute requires

Since Blue Shield was merely an agent of its member physicians and was not an independent competitive entity, the court held that the Act applied to anticompetitive activities of the administering physicians.[16]

After determining that the Blue Shield plans were subject to the antitrust laws, the Fourth Circuit next addressed the issue whether the statutory insurance exemption under the McCarran-Ferguson Act[17] protected the Blue Shield plans from antitrust scrutiny.[18] The McCarran-Ferguson Act exempts certain anticompetitive activities by insurance companies which would otherwise be unreasonable restraints of trade violative of the Sherman Act.[19] The McCarran Act exemption does not cover all insurance company activity. Only those activities which constitute the business of insurance are protected by the exemption.[20] The Supreme Court has narrowly construed the business of insurance requirement by holding that underwriting or the spreading of risk is an indispensable element of the business of insurance.[21] The Supreme Court

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that the majority of the board of directors of Blue Shield consist of health care providers. VA. CODE § 38.1-817 (Repl. Vol. 1978). *Cf.* Blue Cross v. Commonwealth, 211 Va. 180, 189, 176 S.E.2d 439, 445 (1970) (Blue Cross is combination of member hospitals).

[16] 624 F.2d at 481.

[17] 15 U.S.C. §§ 1011-1015 (1976); *see* note 5 *supra.*

[18] 624 F.2d at 483.

[19] *See* note 5 *supra.*

[20] 15 U.S.C. § 1012(a) (1976). Prior to 1969, courts defined the "business of insurance" as all of the activities in which an insurance company might participate. *See, e.g.*, FTC v. National Cas. Co., 357 U.S. 560, 564 (1958) (selling and advertising policies is business of insurance); California League of Independent Insurance Producers v. Aetna Cas. & Surety Co., 175 F. Supp. 857, 860 (N.D. Cal. 1959) (fixing agents' commissions is business of insurance). The Supreme Court narrowed the meaning of the business of insurance in SEC v. National Securities, Inc., 393 U.S. 453, 459-460 (1969), to focus on the relationship between the insurer and the policyholder, so that third party agreements are not the business of insurance. *See* Borsody, *The Antitrust Laws and Health Industry*, 12 AKRON L. REV. 417, 441-42 (1979) [hereinafter cited as Borsody].

The McCarran Act also requires that the state regulate the activity so that federal government supervision in the form of antitrust regulation is superfluous. 15 U.S.C. § 1012(b) (1976). State regulation under the McCarran Act requires no more than statutory authorization to regulate so that legislation permitting the activity was sufficient. Crawford v. American Title Ins. Co., 518 F.2d 217, 220 (5th Cir. 1975).

Under the McCarran Act, the activity must not involve a boycott or an act of coercion or intimidation. 15 U.S.C. § 1013(b) (1976). The boycott exception includes boycotts aimed at policyholders as well as those aimed at competitors. *See* St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 552-555 (1978). Conditional refusals by an insurer to deal with a group of equal providers constitutes a boycott. Proctor v. State Farm Mut. Auto Ins. Co., 561 F.2d 262 (D.C. Cir. 1977), *vacated and remanded on other grounds*, 440 U.S. 942 (1979).

[21] Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 211-15 (1979). In *Royal Drug*, the Supreme Court held that provider agreements between pharmacies and Blue Shield are not the business of insurance. *Id.* at 233. The plaintiffs in *Royal Drug* were pharmacies which did not participate in the agreements to provide discount prescriptions with Blue Shield. The plaintiffs alleged that the parties to the provider agreements fixed retail prices of drugs and that the agreements caused Blue Shield policyholders to boycott the nonparticipating pharmacies. *Id.* at 207. The defendants claimed that the McCarran Act immunized them from antitrust coverage. *Id.*

has also indicated that the exemption should apply only to agreements between the insurer and the insured and not to agreements between the insurer and third parties.[22]

In *Virginia Academy*, the Fourth Circuit concluded that Blue Shield's indirect payment policy was not the business of insurance.[23] The court noted that the indirect payment policy involved no initiation of risk underwriting because Blue Shield had assumed the risk of covering psychological disorders over ten years prior to instituting the policy.[24] The Fourth Circuit also noted that Blue Shield's payment policy was merely tangential to the insurer-insured relationship because the insured patient receiving psychotherapy was unaware of Blue Shield's method of reimbursing the psychologist.[25] Since the payment policy was not the business of insurance, the Fourth Circuit held that the McCarran Act exemption was inapplicable.[26]

After holding that the indirect payment policy was not exempt from antitrust scrutiny, the Fourth Circuit considered whether the payment policy so unreasonably restrained trade as to violate Section 1 of the Sherman Act.[27] The Fourth Circuit concluded that the indirect payment policy was unreasonable because it forced a psychologist either to serve under a physician or to work independently and lose patients covered by Blue Shield.[28] In either case, the psychologist lost his competitive position in the psychotherapy field because he could no longer offer services comparable to those of psychiatrists.[29] The Fourth Circuit concluded that

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The Court reasoned that the McCarran Act exemption applies to the business of insurance, not the business of insurers. *Id.* at 211. *See generally* Nedrow, *The McCarran Controversy: Insurance and the Antitrust Law*, 12 CONN. L. REV. 205, 229 (1980). If an insurer attempts to control a non-insurance market through provider agreements, he has left the business of insurance. 440 U.S. at 232. In SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65, 71-73 (1959), the Supreme Court noted that the business of insurance involves some investment risk taking on the part of the company. *See* Borsody, *supra* note 20, at 442.

[22] 440 U.S. at 216-17. Statutory exemptions from the antitrust laws should be narrowly construed. Abbott Laboratories v. Portland Retail Druggists Ass'n, Inc., 425 U.S. 1, 11-12 (1975). Provider agreements are subject to close scrutiny under the antitrust laws because they are attenuated from the actual business of insuring. *See generally* Havighurst, *Professional Restraints on Innovation in Health Care Financing*, 1978 DUKE L.J. 303, 326-27 (1978).

[23] 624 F.2d at 483-84; *see* notes 20 & 21 *supra*.

[24] 624 F.2d at 484.

[25] *Id.* Provider agreements, such as provisions for psychologists to perform psychotherapy for Blue Shield patients, are third party agreements only tangentially related to the actual business of insurance, notwithstanding that they may be prudent commercial endeavors. *See* note 21 *supra*.

[26] 624 F.2d at 483-84. The Fourth Circuit in *Virginia Academy* did not address the state regulation requirement or the boycott exception to the McCarran Act exemption because the policy was not the business of insurance and the McCarran Act was inapplicable on that basis alone. *See* note 20 *supra*.

[27] 624 F.2d at 484-86.

[28] *Id.* at 485.

[29] *Id.* The Virginia legislature tacitly encourages competition between psychologists

Blue Shield's indirect payment policy was an unreasonable restraint of competition and therefore a violation of Section 1 of the Sherman Act.[30]

Courts addresssing the effects of anticompetitive activity use a rule of reason analysis to consider defenses and mitigating circumstances for those activities which are not illegal per se.[31] The Supreme Court refined the rule of reason for professional activities in *National Society of Professional Engineers v. United States*.[32] In *Professional Engineers*, the Supreme Court held that courts should focus on the challenged practice's impact upon competitive conditions.[33] If the activity unreasonably restraints competition, the activity is illegal notwithstanding the professional group's arguably valid purpose.[34] The *Professional Engineers* rule of reason varies from the traditional rule of reason, which required courts to look for an arguably valid non-commercial purpose behind any professional association's anticompetitive activity without presuming

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and psychiatrists in the field of out-patient psychotherapy through the Freedom of Choice statute. *See* VA. CODE § 38.1-824 (Repl. Vol. 1978); note 10 *supra*.

[30] 624 F.2d at 485-86. The Fourth Circuit remanded the case to the district court for determination of appropriate relief. *Id.* at 486.

[31] The Supreme Court in Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911), first articulated the rule of reason analysis. The rule of reason requires a court to investigate the purpose of the anticompetitive activities, the economic strength of the parties involved, and the resulting effect on competition. *Id.* at 64-65. In United States v. E.I. DuPont deNemours & Co., 351 U.S. 377, 386-87 (1956), the Court noted that the rule of reason should be applied on a case by case basis.

The rule of reason may be applied only when an activity is not illegal per se. In Northern Pacific Ry. v. United States, 356 U.S. 1 (1958), the Court set forth the classic definition of an activity which is per se illegal. Per se violations are those activities which have a pernicious effect on competition without any redeeming virtues. *Id.* at 5; *see, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 212-13 (1940) (price-fixing); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 246 (1899) (horizontal division of markets). *See generally* Sullivan, *supra* note 5, at 266. A per se violation is unlawful regardless of the defendant's motivation, justification, or any countervailing consideration. *See* Socony-Vacuum Oil Co., 310 U.S. 150, 220 (1940) (no economic justification permitted to show reasonableness of price-fixing scheme).

The Fourth Circuit in *Virginia Academy* did not use the per se rule because of the high standards of the medical profession and the need to balance the interests of the profession with antitrust policies. *See* 624 F.2d at 485.

[32] 435 U.S. 679 (1978).

[33] *Id.* at 695-96. In *Professional Engineers*, the Supreme Court held that the association's canon of ethics which prohibits competitive bidding by its members is in violation of the antitrust laws. *Id.* at 696. The court relied on the rule of reason to declare that any unreasonable restraint on competition is unlawful notwithstanding that in particular cases competition itself may be unreasonable. *Id.* at 695-96.

[34] *Id.* The Supreme Court in *Professional Engineers* destroyed the last vestiges of a very vague learned professions exemption. Formerly, professions such as law, medicine, and engineering enjoyed protection from the antitrust laws by virtue of their contributions to public service and higher standards of performance. *See* Sullivan, *supra* note 5, at 308. The Supreme Court's decision in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) heralded the beginning of the end for the learned profession exemption by holding that the exemption has no basis in federal legislation. *Id.* at 785-88; *see* Borsody, *supra* note 20, at 418.

anticompetitive intent.[35] Courts based the traditional rule of reason on the rationale that professional groups should have the right to self-regulate in order to maintain professional standards of practice.[36]

Although the Fourth Circuit in *Virginia Academy* ostensibly relied on *Professional Engineers*, the court's analysis is a return to the traditional rule of reason. *Professional Engineers* requires courts to look solely to the anticompetitive effects of an activity.[37] The Fourth Circuit in *Virginia Academy*, however, also considered whether Blue Shield could justify the indirect payment policy.[38] Although Blue Shield attempted to justify the policy as a prudent medical practice, the court correctly held that Blue Shield's justification was insufficient because the supervising physicians were not trained or licensed to do psychotherapy.[39] By mentioning the possibility of a valid purpose or goal, however, the Fourth Circuit has rejuvenated the old rule of reason which *Professional Engineers* had made irrelevant.[40] In the future, therefore, professional organizations may be able to successfully justify an anticompetitive activity in the Fourth Circuit by demonstrating that the activity has a legitimate purpose.[41]

Even under the traditional rule of reason, however, physicians who dominate Blue Shield plans will be unable to justify their anticompetitive activities. The Fourth Circuit in *Virginia Academy* correctly treated Blue Shield plans as combinations of physicians rather than as quasi-insurance companies combining with one another.[42] The court reasoned that the physicians who dominated the Blue Shield board of directors

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[35] *See* note 31 *supra.*

[36] *See* Note, *The Professions and Noncommercial Purposes: Applicability of Per Se Rules Under the Sherman Act*, 11 U. MICH. J.L. REF. 387, 394 (1978) [hereinafter cited as *Noncommercial Purposes*]. The Supreme Court presumes that professional organizations exist for reasons other than the maximization of profit. United States v. Oregon Medical Soc'y, 343 U.S. 326, 336 (1952).

[37] *See* text accompanying notes 32-34 *supra.*

[38] 624 F.2d at 485. Nevertheless, the *Virginia Academy* court ostensibly relied on the *Professional Engineers* analysis by noting that groups of professionals have no right to determine whether or not competition is ethical or beneficial in their work. *Id.*

[39] *See* Va. Code § 54-273 (Repl. Vol. 1978) (non-psychologists prohibited from performing psychologists' services).

[40] 624 F.2d at 485; *see* text accompanying note 36 *supra.*

[41] The court in *Virginia Academy* expressly suggested that Blue Shield consider other methods of cost or quality control. 624 F.2d at 485.

[42] 624 F.2d at 479-81. Although the Fourth Circuit has previously held that specific Blue Shield plans violate the antitrust laws, all of these decisions involved Blue Shield activities that were in concert with another party. *See* Ballard v. Blue Shield of S.W. Va., Inc., 543 F.2d 1075, 1077 (4th Cir. 1976). *Virginia Academy* is the first case in which the Fourth Circuit has held activity by physician members of Blue Shield to be illegal. Nevertheless, the Supreme Court of Virginia has held that a Blue Cross hospital pre-payment plan violates the antitrust laws. *See* Blue Cross v. Commonwealth, 211 Va. 180, 189, 176 S.E.2d 439, 445 (1970). Courts in other jurisdictions have not dealt with the issue of antitrust combinations within Blue Shield/Cross plans. *See* Havighurst, *supra* note 22, at 307.

were responsible for Blue Shield's anticompetitive policies.[43] By emphasizing the problems arising from physician dominance of the Blue Shield plans, the Fourth Circuit clearly indicated that professionals who benefit from commercial activity must also bear the burden of competition and trade regulation.[44]

The Fourth Circuit also properly decided that Blue Shield's quasi-insurance status would not shield member physician's anticompetitive activities from antitrust liability. Blue Shield plans do not clearly constitute the business of insurance because Congress did not include health care organizations such as Blue Shield within its definition of insurance for the McCarran Act.[45] The Supreme Court has, however, referred to Blue Shield plans as insurance for the purposes of the McCarran Act.[46] The Fourth Circuit in *Virginia Academy* correctly reconciled these views by applying the insurance exemption only to the extent that the Blue Shield plans underwrite risk, which is the essential characteristic of the business of insurance.[47]

Although Congress exempted the business of insurance from antitrust scrutiny, the business of insurance does not include all activity by physicians relating to compensation for health care.[48] Physicians who use their positions as professionals to eliminate competition by engaging in commercial activities that lack the characteristics of the business of insurance are plainly violating the antitrust laws.[49] By holding that Blue Shield may not lawfully refuse to pay psychologists for services rendered, the Fourth Circuit in *Virginia Academy* properly recognized that the payment policy established by Blue Shield's administering physicians was subject to antitrust scrutiny as an unreasonable restraint on competition.[50] *Virginia Academy* therefore appropriately

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[43] *See* 624 F.2d at 479-80.

[44] *See id.* at 481. The Supreme Court has held that the antitrust laws are entirely applicable to professionals and professional organizations that enter commerce. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 791-92 (1975). In addition, the Chairman of the F.T.C. has noted the prospect for applying the Sherman Act to remove professional control of Blue Shield plans. Testimony of FTC Chairman Michael Pertschuk Before the Subcomm. on Oversight & Investigations of the House Comm. on Interstate & Foreign Commerce (Mar. 21, 1978) [hereinafter cited as Pertschuk].

[45] *See* 440 U.S. at 226-27 & n.34. The Supreme Court in *Royal Drug* indicated that Congress intended the term "business of insurance" to have its commonly understood meaning. *Id.* Congress' definition of insurance adhered to the common perception of insurance, which did not include health care organizations such as Blue Shield. *Id.*

[46] *Id.*; *see* Borsody, *supra* note 20, at 440.

[47] *See* text accompanying note 21 *supra.*

[48] *See* text accompanying notes 23-26 *supra.*

[49] *See* text accompanying notes 27-30 *supra.*

[50] *See* Dolan, *Antitrust Law and Physician Dominance of Other Health Practitioners*, 4 J. HEALTH, POL., POL'Y. & L. 675, 676 (1980). Professor Dolan argued that physician dominance of health care organizations results in inefficiency, indifference, and lack of cost-containment because physicians have no desire to reduce costs or preserve competition. *Id.* at 676.