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cessity" standard to permit reimbursement for good medical reasons would increase the number of Medicaid funded abortions.[36]

By refusing to adopt a "medical necessity" standard, the court failed to adjudicate the plaintiff's claim adequately. The Fourth Circuit improperly disregarded the plaintiff's claim that Title XIX required medically necessary abortions to be funded under Virginia's Medicaid program.[37] Under the court's revised standard, the plaintiff's physical and emotional problems might not be a substantial endangerment of health. The Fourth Circuit's adoption of the "substantial endangerment of health" wording has, in effect, left open the possiblity for a Title XIX challenge to the Commonwealth's funding scheme similar to that presented in *Doe v. Kenley*.[38]

CHARLES JUSTER

V. COMMERCIAL LAW

A. *Personal Liability of Directors During Corporate Dissolution*

Many state legislatures have enacted statutes that require domestic corporations to pay annual franchise taxes.[1] To encourage compliance with these statutes,[2] some states provide for corporate dissolution after

[36] *See, e.g.*, 123 CONG. REC. S11,051 (daily ed. June 29, 1977) (remarks of Sen. Brooke) (discussion of medical necessity standard during Senate debates on Hyde Amendment).

[37] Doe v. Kenley, 584 F.2d 1362, 1365 (4th Cir. 1978).

[38] *See Medicaid*, ABORTION L. RPTR. 1.14 (1979) (noting that "issue of Medicaid funding for 'medically necessary' abortions will ultimately be decided by Supreme Court"); note 27 *supra*.

[1] *See, e.g.*, N.C. GEN. STAT. §§ 105-114, 105-122 (1979); S.C. CODE § 12-19-70 (1976); VA. CODE §§ 13.1-122, 58-456 (1978 & Cum. Supp. 1979); W. VA. CODE § 11-12-78 (1974). Franchise taxes, which are also referred to as license or registration fees, typically are calculated on the basis of the amount of a corporation's capital stock. *See* Note, *Dissolution and Suspension as Remedies for Corporate Franchise Tax Delinquency: A Comparative Analysis*, 41 N.Y.U. L. REV. 602, 602 (1966) [hereinafter cited as *Dissolution and Suspension*]; *see, e.g.*, VA. CODE § 58-456 (Cum. Supp. 1979); W. VA. CODE § 11-12-78 (1974). Corporate franchise tax statutes generally require the filing of annual reports in addition to the payment of the franchise taxes. *See* Comment, *Suspension of Corporate Charter for Nonpayment of Franchise Tax*, 48 YALE L.J. 650, 650 (1939) [hereinafter cited as *Suspension of Corporate Charter*]; *see, e.g.*, S.C. CODE § 33-25-10(a) (1976); VA. CODE § 13.1-120 (1978); W. VA. CODE § 11-12-80 (Cum. Supp. 1979). Statutes that require domestic corporations to file annual reports and pay franchise fees have the dual objectives of generating revenue and exercising control over corporate affairs. *Suspension of Corporate Charter*, *supra* at 650-51.

[2] Corporate compliance with state franchise tax statutes is essential because the proceeds from these statutes account for a significant portion of state revenue. *See Dissolution and Suspension*, *supra* note 1, at 602-03.

tax payments become delinquent.[3] Many of these states also have reinstatement statutes which allow dissolved corporations to be revived by payment of the delinquent franchise taxes.[4] Unless a dissolved corporation has been reinstated, franchise tax dissolution statutes typically require that the corporation cease doing business and proceed to liquidate the corporate assets.[5] Whether directors and officers who continue the normal operations of a dissolved corporation may be held personally liable for corporate obligations incurred during the period of dissolution is an issue which occasionally arises.

In *Moore v. Occupational Safety and Health Review Commission*,[6] the Fourth Circuit recently addressed the issue of the personal liability of directors and officers during periods of corporate dissolution. The *Moore* court interpreted the Virginia dissolution statute which does not expressly provide that dissolution for failure to pay corporate franchise taxes will result in the personal liability of officers and directors who continue normal operations after statutory dissolution.[7] The Virginia

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[3] *See, e.g.*, N.C. CODE §§ 55-114(a)(4), 105-230 (1975 & 1979); S.C. CODE § 33-21-110(a)(2) (1976); VA. CODE § 13.1-91 (1978); W. VA. CODE § 11-12-86 (1974). During periods of financial stress, a corporation is likely to delay payment of the franchise tax in favor of other operating obligations. *See Suspension of Corporate Charter, supra* note 1, at 651. *See generally* Swearingen, *Corporations Whose Charters Have Become Void*, 16 MICH. ST. B.J. 149 (1937).

[4] *See, e.g.*, N.C. GEN. STAT. § 105-232 (1979); S.C. CODE § 33-21-120 (1976); VA. CODE § 13.1-92 (1978); W. VA. CODE § 11-12-86 (1974).

[5] *See, e.g.*, TEX. TAX-GEN. ANN. art. 122A, § 12.14(2) (Vernon 1980); VA. CODE § 13.1-91 (1978); WASH. REV. CODE ANN. § 23A.40.075 (Supp. 1978). W. VA. CODE § 11-12-86 (1974) provides that any person attempting to exercise corporate powers after the governor's proclamation of delinquency will be guilty of a misdemeanor. *Id.*

[6] 591 F.2d 991 (4th Cir. 1978).

[7] *See id.* at 994; VA. CODE § 13.1-91 (1978). Although the Virginia dissolution statute provides that the Virginia State Corporation Commission should notify a delinquent corporation of impending dissolution, the statute expressly requires automatic dissolution of a delinquent corporation, regardless of whether such notice is given. *Id.* Most states which provide for corporate dissolution due to franchise tax delinquency, however, effectuate dissolution through administrative action rather than by automatic statutory dissolution. *See* 8 CAVITCH, BUSINESS ORGANIZATIONS § 187.02 (1979) [hereinafter cited as CAVITCH]. Typically, the Secretary of State forfeits the corporate charter by administrative declaration when corporate franchise taxes are overdue. *Id.*; *see, e.g.*, N.C. GEN. STAT. § 105-230 (1979); S.C. CODE § 33-21-110(b) (1976). Forfeiture of the corporate charter and corporate dissolution or suspension are functionally equivalent terms which indicate that an organization's right to do business as a corporation is revoked by the state. *See Dissolution and Suspension, supra* note 1, at 603-05; *Suspension of Corporate Charter, supra* note 1, at 651-52. At common law, dissolution terminates a corporation's legal existence, while forfeiture or suspension does not affect the basic entity because the corporation may be reinstated, instead of reincorporated, upon payment of delinquent taxes. *See Dissolution and Suspension, supra* note 2, at 603-04. Although VA. CODE § 13.1-91 (1978) provides for corporate "dissolution," the result of the statute is suspension of corporate powers because VA. CODE § 13.1-92 (1979) allows for reinstatement. *See Dissolution and Suspension, supra* note 1, at 603-04; *Suspension of Corporate Charter, supra* note 1, at 650-51. In addition to the ability of a "dissolved" corporation in Virginia to be reinstated, state law allows a dissolved corporation to sue in its corporate name. VA. CODE § 13.1-101 (1978).

dissolution statute simply provides that failure to pay franchise taxes for two consecutive years will result in automatic dissolution, with the former directors, as trustees, ordered to liquidate the organization's assets.[8] The Fourth Circuit in *Moore* also interpreted the Virginia reinstatement statute[9] which allows a dissolved corporation to be revived upon payment of the delinquent taxes and penalties.[10] Reinstatement under the Virginia statute causes the corporate existence to relate back to the time of dissolution, except that reinstatement will have no effect on any personal liability of the directors or officers which may have arisen during the period between dissolution and reinstatement.[11]

In *Moore,* a Virginia corporation, Life Science, Inc., was dissolved for failure to pay franchise taxes as required by state law.[12] Although the state gave Life Science notification of dissolution, the appellants, managing officers and directors of the corporation, continued the firm's normal operations.[13] Two months after Life Science was dissolved, the corporation was revived under the reinstatement statute.[14] Pursuant to the Occupational Safety and Health Act of 1970 (OSHA),[15] an inspector from the Department of Labor found safety violations which had occurred at the Life Science manufacturing plant during the period between corporate dissolution and reinstatement.[16] The Secretary of Labor consequently issued a fine payable by both the corporation and the appellants as individuals.[17] The appellants contested their fine before an

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[8] VA. CODE § 13.1-91 (1978). The former directors of a corporation dissolved for failure to pay franchise taxes must discharge the corporation's outstanding liabilities and distribute the remainder of the assets to the shareholders. *Id.*

[9] VA. CODE § 13.1-92 (1978).

[10] 591 F.2d at 995; VA. CODE § 13.1-92 (1978). A Virginia corporation dissolved pursuant to § 13.1-91 may be reinstated within five years after dissolution upon payment of delinquent taxes and penalties. *Id.*

[11] VA. CODE § 13.1-92 (1978).

[12] 591 F.2d at 992.

[13] *Id.* In a letter sent by the State Corporation Commission, the Life Science directors were advised that they could be held personally liable for contracts purportedly made in the name of the corporation. *Id.*

[14] *Id.*

[15] 28 U.S.C.A. §§ 651-678 (1976 & Cum. Supp. 1979). Due to the increasing number of disabling work injuries, Congress passed OSHA which requires employers to prevent unsafe or unhealthy working conditions. *See* Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 444-45 (1977). *See generally* Comment, *The Occupational Safety and Health Act of 1970: An Overview,* 4 CUM.-SAM. L. REV. 525 (1974).

[16] 591 F.2d at 992-93. Life Science, which manufactured the pesticide Kepone, was charged with failure to maintain a place of employment free from recognized hazards. Brief for Appellee at 4, Moore v. Occupational Safety and Health Review Comm'n, 591 F.2d 991 (4th Cir. 1979); *see* 29 U.S.C. 654(a)(1) (1976). *See generally* Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 444-47 (1977) (statement of OSHA enforcement procedures); Moran, *The Legal Process for the Enforcement of the Occupational Safety and Health Act of 1970,* 9 GONZ. L. REV. 349 (1974).

[17] 591 F.2d at 992-93. The appellants conceded the liability of the corporation and con-

administrative law judge.[18] The judge held the corporate officers and directors personally liable, reasoning that during the period that Life Science was dissolved, the appellants continued to operate the business as partners and, therefore, were the employers responsible for the OSHA penalties.[19] The Occupational Safety and Health Review Commission (Commission)[20] subsequently upheld the administrative law judge's imposition of personal liability despite appellants' contention that they had no knowledge of the dissolution.[21]

On appeal from the Commission's decision, the Fourth Circuit ruled that the Virginia dissolution statute imposed personal liability on the appellants because they continued the normal operations of Life Science instead of liquidating the corporation as required by law.[22] The *Moore* court concluded that individual liability must attach directly to corporate officers and directors, reasoning that corporate existence is completely extinguished after dissolution.[23] After finding that the appellants were personally liable under the Virginia dissolution statute for the OSHA penalties, the Fourth Circuit decided that revival of the corporation under Virginia's reinstatement statute did not absolve the appellants of liability for the penalties.[24] While the court noted that the reinstatement statute provides that corporate existence relates back to the date of dissolution, the court applied the statutory provision that reinstatement will not affect any personal liability of the directors or officers arising during the period between dissolution and reinstatement.[25] Thus, the *Moore* court held the appellants personally liable regardless of their alleged ignorance of the dissolution.[26]

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tested only whether the Secretary of Labor could impose personal liability on appellants for the OSHA penalty. *Id.* at 993.

[18] The Occupational Safety and Health Review Commission appoints an administrative law judge to review an OSHA citation which an employer has contested. 29 U.S.C. § 661(i) (Cum. Supp. 1979); *see* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 10 (1976).

[19] 591 F.2d at 993. An "employer" under the Act is defined as a person engaged in business affecting commerce who has employees. 29 U.S.C. § 652(4) (1976). A "person" includes individuals as well as corporations. *Id. See also* Brennan v. Gillen & Cotting, Inc., 504 F.2d 1255, 1261 (4th Cir. 1974) (common law definition of "employer" rejected under OSHA).

[20] The Occupational Safety and Health Review Commission, at its discretion, may review the decision of an administrative law judge regarding an OSHA citation. 29 U.S.C. § 661(i) (Cum. Supp. 1979).

[21] 591 F.2d at 993. Because the Occupational Safety and Health Review Commission could not agree on whether to affirm or reverse the decision of the administration law judge, the Commission decided to affirm the judge's ruling without the precedential value of a Commission decision. *Id.;* Brief for Appellants at 4, Moore v. Occupational Safety & Health Review Comm'n, 591 F.2d 991 (4th Cir. 1974).

[22] 591 F.2d at 995.

[23] *Id., citing* Gusky, *Dissolution, Forfeiture, and Liquidiation of Virginia Corporations,* 12 U. RICH. L. REV. 333, 346 (1978).

[24] 591 F.2d at 995.

[25] *Id.* at 995-96; *see* text accompanying note 11 *supra.*

[26] 591 F.2d at 996.

The Fourth Circuit's decision in *Moore* is consistent with the plain meaning of the Virginia statutory provisions. The Virginia reinstatement statute, which operates in conjunction with the dissolution statute,[27] clearly acknowledges the possibility that corporation dissolution due to failure to pay the annual franchise tax may result in the personal liability of former directors or officers if they continue to operate, rather than liquidate, the corporation.[28] If the Virginia legislature did not intend to impose personal liability on directors and officers after corporate dissolution, the statutory provision that reinstatement will have no effect on personal liability would be surplusage.[29] The *Moore* court also properly rejected the appellants' claim that their ignorance of the dissolution must absolve them of personal liability. Neither the dissolution nor the reinstatement statute exempts from personal liability corporate officials who inadvertently continue the normal operations of a dissolved corporation while unaware of the dissolution.[30]

Although the Fourth Circuit reached the correct result in *Moore*, the reasoning employed by the court is questionable. The Fourth Circuit's rationale of a dissolved corporation being non-existent is consistent with the common law rule that an agent acting on behalf of a non-existent principal is personally liable on any obligations incurred in the name of the principal.[31] Nevertheless, the Fourth Circuit should have viewed the personal liability provision in the reinstatement statute as evidence of a controlling legislative intent that the continuation of normal operations after statutory dissolution would result in the personal liability of the firm's officers and directors.[32] The Fourth Circuit's emphasis on Life

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[27] *See* VA. CODE § 13.1-92 (1978) (specifically referring to § 13.1-91).

[28] *See* CAVITCH, *supra* note 8, § 187.02 n.8 (interpreting Virginia's reinstatement statute as providing retroactive corporate existence to dissolution date in addition to maintaining personal liability of corporate directors and officers). A Delaware court interpreted the Delaware reinstatement statute, DEL. CODE tit. 8, § 312 (1974), as expressly eliminating the personal liability for the president of a corporation that was dissolved and subsequently reinstated. Frederick G. Krapf & Son, Inc. v. Gorson, 243 A.2d 713, 715 (Del. 1968).

[29] *See Ex Parte* the Public Nat'l Bank, 278 U.S. 101, 104 (1928) (provision in statute can not be ignored as superfluous).

[30] *See* VA. CODE §§ 13.1-91 to -92 (1978). The legislative history to § 13.1-92 indicates that the Virginia legislature intended § 13.1-92 to apply in cases of negligent failure to pay the franchise tax. *See* House Document No. 5 at 77, General Assembly of Virginia (1956 Sess.). VA. CODE § 13.1-132 (1978) authorizes the use of House Documents to interpret state statutes.

[31] *See, e.g.*, In re Hare, 205 F. Supp. 881, 883-84 (D. Md. 1962); Norton v. Supreme Fuel Sales Co., 72 F. Supp. 287, 288 (D.N.J. 1947); Jones v. Young, 115 W. Va. 225, 228, 174 S.E. 885, 886 (1934). The *Hare* court acknowledged that a corporation dissolved for failure to pay franchise taxes may be considered as an "existing" corporation when necessary to protect the rights of third persons. 205 F. Supp. at 883. The court, however, denied the protection of the corporation where it would be unconscionable to insulate them from personal liability. *Id.* at 884.

[32] The intent of the legislature must control the interpretation of Virginia statutory law. *See* City of Portsmouth v. Citizens Trust Co., 216 Va. 695, 699, 222 S.E.2d 532, 535

Science's corporate non-existence is also inappropriate because the court's reasoning is inconsistent with an earlier Fourth Circuit decision[33] which ruled that under the reinstatement statute a dissolved corporation has a qualified existence from which the corporation could achieve revival without any new grant from the state.[34] To avoid conceptual confusion, reliance on legislative intent in *Moore* would have been preferable to a decision based on whether a Virginia corporation "exists" after dissolution due to failure to pay franchise taxes.[35]

The *Moore* decision is significant since it interprets Virginia's dissolution and reinstatement statutes as mandating personal liability for managing officers and directors who continue the normal operations of a corporation dissolved due to failure to pay franchise taxes.[36] The *Moore* opinion highlights the need for careful attention to the annual payment of corporate franchise taxes as negligent delinquency may result in personal liability of corporate directors and officers.[37]

JAMES S. MCNIDER, III

B. *The Constitutionality of the Virginia Motor Vehicle Franchise Act*

The vast disparity in bargaining power between automobile manufacturers and their franchise dealers has long been recognized as a matter of grave concern.[1] The concentration of economic power in the automobile manufacturing industry has imposed unfair and inequitable conditions of trade upon franchises.[2] In 1956, Congress passed the Automobile Dealers'

(1976); Board of Super. v. Rowe, 216 Va. 128, 147, 216 S.E.2d 199, 214 (1975).

[33] United States v. Village Corp., 298 F.2d 816 (4th Cir. 1962).

[34] *Id.* at 818. The *Village* court held that a corporation dissolved for failure to pay franchise taxes "existed" under § 13.1-92 and thus was amenable to suit because of the possibility of reinstatement. *Id.* at 818-20.

[35] *See* note 32 *supra.*

[36] *See* text accompanying note 22 *supra.*

[37] *See* text accompanying note 26 *supra.*

[1] *See* S. REP. No. 2073, 84th Cong., 2d Sess. 2 (1956) [hereinafter cited as SENATE REPORT]; H.R. REP. No. 2850, 84th Cong., 2d Sess. 1-2, *reprinted in* [1956] U.S. CODE CONG. & AD. NEWS 4596, 4597 [hereinafter cited as HOUSE REPORT]. *See generally* S. MACAULEY, LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS (1966); Macauley, *Law and Society—Changing a Continuing Relationship Between a Large Corporation and Those Who Deal with It: Automobile Manufacturers, their Dealers and the Legal System*, 1965 WIS. L. REV. 483.

[2] *See* HOUSE REPORT, *supra* note 1, at 4598. Automobile dealers have reported that they have been forced to accept more automobiles for resale than required by consumer demand. Further, the dealers have claimed that the manufacturers have required investments in operating plant and equipment without giving franchisees adequate guarantees that a sufficient supply of merchandise will be available. *Id.* An automobile dealer who invests in a franchise is economically dependent on the automobile manufacturer because of the franchisee's inability to convert the dealership facilities to other uses. SENATE REPORT, *supra*

Day in Court Act[3] which requires that automobile manufacturers deal with their franchised dealers in good faith.[4] Virginia has supplemented the Automobile Dealers' Day in Court Act with the passage of the Motor Vehicle Franchise Act (Franchise Act),[5] which permits a franchised dealer to contest the establishment of an additional, like-kind dealership in the same trade area.[6] The purpose of the Franchise Act is to protect the investment of the franchised dealer and to preserve competition.[7] The Franchise Act provides that the Commissioner of the Division of Motor Vehicles may enjoin the establishment of a new automobile franchise if the Commissioner determines that the market will not support multiple dealerships of the same line-make in a given trade area.[8] In *American Motors Sales Corp. v. Division of Motor Vehicles,*[9] the Virginia Franchise Act was challenged as imposing an unconstitutional burden on interstate commerce.[10]

In *American Motors*, an existing Jeep dealership in Orange, Virginia, requested a hearing under the Franchise Act after receiving notice that American Motors (American) intended to establish an additional Jeep

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note 1, at 2. Unless the dealership can generate a sufficient volume of sales, the franchise will be unable to cover fixed costs. *See generally* B. PASHIGAN, THE DISTRIBUTION OF AUTOMOBILES, AN ECONOMIC ANALYSIS (1960).

[3] 15 U.S.C. §§ 1221-1225 (1976). *See generally* Strand & French, *The Automobile Dealer Franchise Act: Another Experiment in Federal Class Legislation,* 25 G. WASH. L. REV. 667 (1957).

[4] 15 U.S.C. § 1222 (1976). The Automobile Dealers' Day in Court Act provides automobile dealers with a federal cause of action for a manufacturer's failure to act in good faith when performing, terminating, or not renewing the franchise. *See id. See also* Randy's Studebaker Sales, Inc. v. Nissan Motor Corp., 533 F.2d 510, 514 (10th Cir. 1976).

[5] VA. CODE § 46.1-547(d) (Cum. Supp. 1979). Congress has sanctioned state legislation that supplements the Dealers' Day in Court Act unless the state statute directly conflicts with the federal act. *See* 15 U.S.C. § 1225 (1976).

[6] *See* VA. CODE § 46.1-547(d) (Cum. Supp. 1979). Under the Virginia Franchise Act, the existing franchise must protest within thirty days of receiving notification that the manufacturer intends to establish another franchise in the same line-make of the existing dealership. *Id.* Other states have adopted statutes similar to the Virginia Franchise Act. *See, e.g.,* ARIZ. REV. STAT. ANN. § 28-1304.02 (Supp. 1979); COLO. REV. STAT. ANN. § 12-6-120(1) (h) (1973); GA. CODE ANN. §§ 84-6610 (e)(5)-(e)(10) (Supp. 1979); IOWA CODE ANN. § 322A.4 (Supp. 1979); NEB. REV. STAT. § 60-1422 (1974); N.M. STAT. ANN. § 64-37-5(P) (Supp. 1975); N.C. GEN. STAT. § 20-305(5) (1978); R.I. GEN. LAWS § 31-5.1-4(C)(11) (Supp. 1978); S.D. COMPILED LAWS §§ 32-6A-3, 32-6A-4 (1976); TENN. CODE ANN. § 59-1714(C) (20) (Supp. 1979); VT. STAT. ANN. tit. 9, § 4074(c)(9) (Supp. 1978); VA. CODE § 46.1-547(d) (Cum. Supp. 1979). *See generally* Annot., 7 A.L.R.3d 1173 (1966).

[7] *See* American Motors Sales Corp. v. Division of Motor Veh., 592 F.2d 219, 222 (4th Cir.), *cert. denied,* 100 S. Ct. 71 (1979).

[8] VA. CODE § 46.1-547(d) (Cum. Supp. 1979). In a hearing pursuant to the Virginia Franchise Act, the Commissioner of the Department of Motor Vehicles must consider a number of specific factors, including the volume of the existing dealer, the extent of the dealer's investment, the adequacy of the dealer's service facilities and the effect on the community of the proposed prohibition of an additional franchise. *Id.*

[9] 592 F.2d 219 (4th Cir. 1979).

[10] *Id.* at 221.

franchise in Orange.[11] The hearing officer for the Division of Motor Vehicles ruled that the additional franchise was permissible because the existing dealership had not offered sufficient evidence to prove that the Orange trade area could not support two Jeep dealerships.[12] The Commissioner of the Division of Motor Vehicles, however, rejected the conclusion of the hearing officer and prohibited American from granting an additional Jeep franchise.[13]

American subsequently sought a declaratory judgment in federal district court that the Franchise Act violated the commerce clause.[14] American alleged that the company had lost substantial interstate sales of Jeep vehicles as a direct result of the Commissioner's decision.[15] The district court in *American Motors* declared the Virginia Franchise Act unconstitutional, reasoning that the preservation of competition is not a legitimate local purpose under the commerce clause.[16] On appeal, the Fourth Circuit reversed the district court and ruled that the Virginia Franchise Act did not violate the commerce clause.[17] The Fourth Circuit addressed the commerce clause issue by utilizing a three part test.[18] The court first inquired whether the Franchise Act promotes a legitimate local interest.[19] Second the court analyzed whether the Virginia statute treated interstate and intrastate commerce evenhandedly.[20] Lastly, the Fourth Circuit ad-

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[11] *Id.*

[12] *Id.* at 221-22. At the hearing the existing franchised dealer argued that the depressed local economy and the area's slow population growth caused the dealership's sales performance to drop below the minimum sales requirement specified in its franchise contract with American. American Motors Sales Corp. v. Division of Motor Veh., 445 F. Supp. 902, 908 (E.D. Va. 1978). American responded that the existing dealership's minimum sales requirement had been calculated in a manner consistent with that used nationwide. *Id.*

[13] 592 F.2d at 222; *see* note 15 *infra.*

[14] U.S. CONST. art. I, § 8, cl. 3. The commerce clause acts as a limitation on state economic regulation in addition to being an affirmative grant of power to Congress "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." *See id.*; H.P. Hood & Sons v. DuMond, 336 U.S. 525, 534 (1949). *See generally* Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940); Schwartz, COMMERCE, THE STATES AND THE BURGER COURT, 74 NW. L. REV. 409 (1979); Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125.

[15] 445 F. Supp. at 904. American did not contend that the decision of the Commissioner of Motor Vehicles was arbitrary or based on insufficient evidence. 592 F.2d at 222 n.3.

[16] 592 F.2d at 222. Although the district court ruled that the prevention of unfair trade practices was a legitimate local purpose, the court decided that this purpose could be accomplished with a lesser burden on interstate commerce than that imposed by the Franchise Act. 445 F. Supp. at 907-10.

[17] 592 F.2d at 224.

[18] The three part test employed by the *American Motors* court was established in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), as a standard for determining the validity of a state statute challenged under the commerce clause. *See also* Raymond Motor Trans., Inc. v. Rice, 434 U.S. 429, 440-42 (1978); Great Atlantic & Pac. Tea. Co. v. Cottrell, 424 U.S. 366, 371-72 (1976).

[19] 592 F.2d at 222.

[20] *Id.*

dressed whether the burden imposed on interstate commerce appears excessive when balanced against the state's interest in preventing unfair business practices.[21]

The *American Motors* court ruled that the Virginia Franchise Act promotes a legitimate local interest and treats intrastate and interstate commerce in an evenhanded manner.[22] The court relied on the Supreme Court's recent decision in *New Motor Vehicle Board v. Orrin W. Fox Co.*[23] which determined that a California franchise act similar to the Virginia statute was constitutional under due process and Sherman Act challenges.[24] The Fourth Circuit adopted the *Orrin* Court's characterization of the California franchise statute and found that the Virginia Franchise Act also serves the legitimate purpose of protecting automobile dealerships from unfair business practices.[25] Further, the *American Motors* court ruled that the Franchise Act treats intrastate and interstate automobile manufacturers in a non-discriminatory manner, explaining that the Virginia statute does not distinguish between in-state and out-of-state manufacturers.[26] Therefore, the court concluded that the Franchise Act does not discriminate against interstate commerce.[27]

The Fourth Circuit next determined that the Virginia statute does not impose a burden on interstate commerce.[28] The *American Motors* court followed the leading case of *Exxon Corp. v. Governor of Maryland.*[29] In *Exxon*, the Supreme Court held that interstate commerce is not burdened simply because a state statute has the effect of shifting business from one

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[21] *Id.*

[22] *Id.* at 223.

[23] 439 U.S. 96 (1978).

[24] *Id.* at 106, 109-10. In *Orrin*, the appellants alleged that the California Automobile Franchise Act, CAL. VEH. CODE §§ 3062-3063 (West Supp. 1978), violated the due process clause of the Constitution and the Sherman Act. 439 U.S. at 106, 109-10. The claims in *Orrin* were designed to overturn California's statutory scheme whereby the timely protest of an existing franchisee could delay the establishment of a like-kind dealership before a hearing could be held. *Id.* at 104. The appellants, who included General Motors, argued that due process was violated because they could be prohibited from establishing a franchise until a hearing was held. *Id.* The Supreme Court, however, rejected the appellants' argument, holding that the California legislature could enact reasonable business regulation even though the regulation might delay the establishment of a dealership ultimately determined to be legitimate. *Id.* at 106. The *Orrin* Court also rejected appellants' Sherman Act claim, explaining that the California franchise statute was a clearly expressed regulatory scheme that falls under the "state action" exception to the antitrust laws. *Id.* at 109. Many California dealers have admitted privately that protests under the state's automobile franchise statute were filed to gain a competitive advantage and that dealers did not intend to take their protest to the hearing stage. *See* Melican, *State Franchise Law Developments*, 47 ANTITRUST L.J. 929, 936-37 (1978).

[25] 592 F.2d at 222-23.

[26] *Id.* at 223.

[27] *Id.*

[28] *Id.*

[29] 437 U.S. 117 (1978).

interstate supplier to another.[30] The Fourth Circuit thus found the Franchise Act constitutional, reasoning that any lost Jeep sales the statute caused would inure to the benefit of the other out-of-state manufacturers of four-wheel drive vehicles.[31] The *American Motors* court therefore found no burden on interstate commerce because the commerce clause is designed to protect the interstate market, rather than particular interstate corporations.[32]

The Fourth Circuit properly ruled that the Virginia Franchise Act treated intrastate and interstate commerce on an evenhanded basis. The franchise statute is facially non-discriminatory and there was no showing that the act effectively discriminated against interstate commerce.[33] The Fourth Circuit, however, did not need to decide whether the Virginia statute serves a legitimate local interest.[34] A state statute's legitimate purpose need be considered only if the statute burdens interstate commerce; otherwise, the required nexus between the statute and interstate commerce is missing.[35] In *American Motors,* the court did not find that the Franchise Act burdened interstate commerce.[36] Rather, the Fourth Circuit indicated that, while sales may shift from Jeep to its competitors,

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[30] *Id.* at 127. The Maryland statute attacked under the commerce clause in *Exxon* provided that petroleum refiners could not operate retail service stations in the state. *Id.* at 123; MD. ANN. CODE art. 56, § 157E (1979). The Supreme Court rejected discrimination claims because the Maryland statute did not distinguish between out-of-state and in-state firms. *Id.* at 121. The Court also rejected the claim that the effect of the statute would be to unconstitutionally burden interstate commerce. *Id.* at 127. The *Exxon* Court found no evidence that the flow of gasoline into the state would decrease, reasoning that if some suppliers withdrew from the Maryland market, other suppliers arguably would replace the gasoline ordinarily sold by the former sellers. *Id.* at 123 n.10. That a state statute causes a burden on an individual firm's sales is irrelevant so long as the aggregate flow of interstate commerce is not restricted. *Id.* at 127.

[31] 592 F.2d at 223.

[32] *Id.* at 223; *accord* Exxon Corp. v. Governor of Maryland, 437 U.S. at 127-28; *see* note 30 *supra.*

[33] *See* 592 F.2d at 223; VA. CODE 46.1-547(d) (Cum. Supp. 1979). A statute which expressly discriminates against out-of-state firms or which favors local business at the expense of out-of-state business will be found to violate the commerce clause unless a legitimate local interest is furthered by the statute and the means chosen is the least discriminatory alternative. *See* Hunt v. Washington State Apple Ad. Comm'n, 432 U.S. 333, 350-53 (1977); Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 336 (1977); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951); *The Supreme Court, 1977 Term,* 92 HARV. L. REV. 57, 66 (1978). In *Hunt,* the Court struck down a North Carolina law that benefited the state's apple growers to the detriment of Washington state apple growers. 432 U.S. at 350-53.

[34] *See* Detroit Auto. Purch. Services, Inc. v. Lee, 463 F. Supp. 954, 962 (D. Md. 1978); text accompanying note 35 *infra.*

[35] Detroit Auto. Purch. Services, Inc. v. Lee, 463 F. Supp. at 962. The *Lee* court refused to examine the interests protected by a state statute since the plaintiffs had not demonstrated that the statute inhibited the aggregate flow of goods in interstate commerce. 463 F. Supp. at 964 (citing Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 125-29); *see* note 30 *supra.*

[36] 592 F.2d at 223.

there was no evidence presented which established that the Franchise Act restricted the aggregate flow of interstate sales of four-wheel drive vehicles.[37]

The result in *American Motors* is consistent with recent Supreme Court decisions that refuse to invalidate state economic legislation on substantive due process grounds.[38] Absent a violation of a specific constitutional prohibition, the court has presumed that state regulations proscribing undesirable business activity are valid.[39] Thus, a successful attempt to override the Franchise Act on substantive due process grounds seems unlikely.[40]

The Fourth Circuit's opinion in *American Motors* clearly suggests that state automobile franchise statutes comparable to the Virginia act cannot be invalidated under the commerce clause unless there is sufficient evidence to conclude that the Franchise Act restricts the aggregate flow of goods entering a state.[41] Given the complexity of documenting cause and effect in our economy, these franchise statutes may continue to be upheld. Recently, courts in Massachusetts and California have held that franchise acts similar to the Virginia enactment are constitutional under the commerce clause.[42] The Fourth Circuit's decision in *American Motors*

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[37] *See id.*

[38] *See* Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124-25 (1978); Ferguson v. Skrupa, 372 U.S. 726, 729-30 (1963); Williamson v. Lee Optical, Inc., 348 U.S. 483, 487-89 (1955); Preston & Mehlman, *The Due Process Clause as a Limitation on the Reach of State Legislation: An Historical and Analytical Examination of Substantive Due Process*, 8 U. BALT. L. REV. 1, 31 (1978) [hereinafter cited as Preston & Mehlman]. In *Exxon*, the Court rejected a claim that a Maryland statute violated substantive due process, explaining that the due process clause does not allow the Court to sit as a superlegislature to weigh the wisdom of state legislation. 117 U.S. at 124-25. Substantive due process refers to the principle that a statute which deprives an individual of his life, liberty or property is invalid, even though the law does not violate a specific constitutional provision. Perry, *Substantive Due Process Revisited: Reflections On (And Beyond) Recent Cases*, 71 NW. L. REV. 417, 419 (1976).

[39] *See* Preston & Mehlman, *supra* note 38, at 31, 37; Note, *State Economic Substantive Due Process: A Proposed Approach*, 88 YALE L. J. 1487, 1487 n.4 (1979) [hereinafter cited as *A Proposed Approach*]; note 38 *supra*. The Supreme Court has not struck down a state economic regulation on substantive due process grounds since 1937. G. GUNTHER, CONSTITUTIONAL LAW 591 (9th ed. 1975); *A Proposed Approach, supra* at 1487 n.4.

[40] *See* notes 38 & 39 *supra*.

[41] *See* 592 F.2d at 223; note 30 *supra*.

[42] *See* Chrysler Corp. v. New Motor Vehicle Bd., 89 Cal. App. 3d 1034, 153 Cal. Rptr. 135 (Ct. App. 1979); Tober Foreign Motors, Inc. v. Reiter Oldsmobile, Inc., _ Mass. _, 381 N.E.2d 908 (1978). *But see* General GMC Trucks, Inc. v. General Motors Corp., 239 Ga. 373, 237 S.E.2d 194, *cert. denied*, 434 U.S. 996 (1977). Both *Chrysler* and *Tober* relied on *Exxon v. Governor of Maryland*, *see* note 26 *supra*, to reject claims under the commerce clause, explaining that no evidence indicated that the respective franchise statutes would cause a reduction of the aggregate flow of interstate commerce. *See* 89 Cal. App. 3d at 1044, 153 Cal. Rptr. at 140-41; _ Mass. at _, 381 N.E.2d at 914-15; CAL. VEH. CODE §§ 3000-3069 (West Supp. 1980); MASS. GEN. LAWS ANN. ch. 93B, § 4(3)(e)(1) (West Supp. 1979). The *Chrysler* court further explained that any vehicle sales lost by one manufacturer because of the stat-