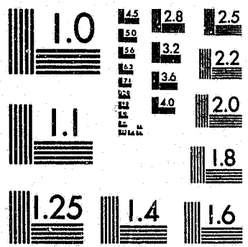

4 ANTITRUST LAW MANUAL FOR
VIRGINIA LAW ENFORCEMENT OFFICIALS

PART I - Jeff Miles

Jeff Miles
Joseph W. Kaestner

Virginia Office of Attorney General
Antitrust Unit

October 17, 1977

Chapter I

Introduction

This manual has been prepared by the Antitrust Unit of the Virginia Office of Attorney General for investigators of the Virginia Department of State Police. Its purpose is to introduce State Police investigators to the antitrust laws and explain how the antitrust laws can aid in the overall criminal law enforcement effort. Upon reading this manual, we think that you will feel, as we do, that use of antitrust remedies can provide worthwhile support to more traditional methods of criminal law enforcement.

The manual is divided into five chapters. The first, an introduction, explains the relevance of antitrust laws to you and your work, and sets forth the staffing of the Attorney General's Antitrust Unit. Chapter II discusses the history and policies behind the antitrust laws. Chapter III explains the more common types of antitrust violations, procedure under the Virginia Antitrust Act, and investigatory powers given the Antitrust Unit. Chapter IV catalogs various Virginia criminal law statutes, the enforcement of which can be aided by application of antitrust principles. Finally, Chapter V discusses Virginia statutes which are relevant to investigatory work.

White-Collar Economic Crime

Violation of the antitrust laws is one type of white-collar economic crime.[1] Although it is difficult to define precisely what constitutes illegal "white-collar" activities, Assistant Attorney General Thornburgh of the United States Department of Justice's Criminal Division has noted that all types have one or more of the following characteristics:

1. The illegal activity is frequently committed by persons of respectability and high social standing;

2. The illegal activity often occurs in connection with and during the course of the defendant's otherwise legitimate occupation; and

3. The illegal activity is normally non-violent in nature and carried out through deceit, concealment or breach of trust.[2]

Based on these characteristics, activities such as commercial and official bribery, price fixing and other antitrust violations, consumer fraud, and securities fraud certainly fall within the scope of illegal white-collar economic activity.

---

1. As is discussed in Chapter II, violation of the federal Sherman Antitrust Act, 15 U.S.C. §§ 1 & 2 (1975) is a federal felony. The Virginia Antitrust Act, Va. Code §§ 59.1-9.1 through -9.17 (Cum. Supp. 1977), however, provides only civil remedies. Civil remedies often are of great aid in pursuing traditionally criminal activities. See the book given you, National Association of Attorneys General, The Use of Civil Remedies in Organized Crime Control (1977).

2. Address by Richard L. Thornburgh, Annual Meeting of the Federal Bar Association, Sept. 16, 1976.

The economic impact of white-collar activities is extremely significant. The United States Chamber of Commerce estimated that in 1974, the cost of such behavior to the nation's citizenry excluding price fixing was almost $42 billion.[3] When price fixing and other antitrust violations are included, these costs becomes astronomical.

Perhaps economic crime has been best described by the National District Attorneys Association:

> "Economic crime can be defined simply. It is lying, cheating and stealing. It is really nothing more and it is rarely anything less. Economic crime is, at times, highly sophisticated and incredibly complex and it is, at times, brutally simple in plan and execution.
>
> "Economic crime is chameleonlike: its variations are infinite. It feeds on avarice and gullibility as well as innocence. Deceit is its hallmark and monetary gain its motive.
>
> "Economic criminals are planners: some are master planners. Economic crime plans can be intricate and artful and its best practitioners are also journeymen in the corollary art of improvisation.
>
> "Economic criminals use the law -- as they use business custom and practice -- to their advantage. The best schemes remain buried deep within an avalanche of ledgers, annual reports and registration statements. These paper trails are difficult to follow, let alone find.
>
> "Economic criminals are frequently 'respectable' citizens and they are adroit in covering their schemes and manipulations beneath that mantle of respectability. They skillfully exploit the talents of the professions, arts and sciences to lend credence and substance to their schemes.
>
> "Economic criminals are often highly motivated and spend their considerable energies pursuing success. To that extent, they are frequently the admired acquaintance of honest citizens.
>
> "Economic criminals are, from time to time, glamorous and charming 'con' artists: more frequently, however, they blend with the general run of mankind and are neither more nor less conspicuous than their fellows.
>
> "Economic criminals are imaginative opportunists, quick to see advantage and fleet in exploiting that advantage; they are mobile and they have learned to use technology for their gain.
>
> "They are these things and more. But first and foremost they are criminals: they are criminals who often give bravura performances in the devious arts of lying, cheating and stealing."[4]

Violations of the antitrust laws are only one type of illegal white-collar economic activity; but it is the type focused on in this manual.

Relevance of Antitrust Laws to the State Police

The General Assembly has provided that the Division of Investigation conduct investigations "into any matter referred to it by the Governor" and, when requested to by other designated state officials, into matters "to determine whether any criminal violations have occurred, are occurring or are about to occur."[5] Violation of the Virginia Antitrust Act

3. 759 Antitrust & Trade Reg. Rep. (BNA) (April 13, 1976).

4. National District Attorneys Association, The Prosecutor's Manual on Economic Crime (1977).

5. Va. Code § 52-8.1 (Cum. Supp. 1977).

leads only to civil sanctions.[6] The question arises, therefore, what part the Division of Investigation can and should play in antitrust enforcement.

It is clear that many practices which are denominated as misdemeanors and felonies in Virginia are also violations of the Virginia Antitrust Act. These practices are discussed in Chapter V. There will be many instances where both criminal prosecution and a civil antitrust suit will be warranted.[7] Moreover, there may be situations where civil sanctions may be the only practical remedy because of an inability to meet the "beyond a reasonable doubt" evidentiary standard, a constitutional law problem, or some other reason.[8]

The Antitrust Unit of the Attoney General's Office, which is funded by a grant from the Law Enforcement Assistance Administration, was established to coordinate Virginia's efforts to use the antitrust laws in attacking traditional forms of white-collar criminal activity. Thus, where a set of operative facts may constitute a violation of Virginia's criminal statutes as well as the antitrust laws, State Police investigation may be

---

6. See Va. Code §§ 59.1-9.8 & -9.11 (Cum. Supp. 1977).

7. A classic example of this is bribery of a public official. Participants in the scheme would be prosecuted criminally under Va. Code § 18.2-449 (Repl. Vol. 1975), and sued for damages, if any, to the state and a civil monetary penalty under Va. Code § 59.1-9.7(c) (Cum. Supp. 1977).

8. Advantages of the civil remedy approach are listed and discussed in Use of Civil Remedies, note 1 supra, at 6-10. Also of interest is National Association of Attorneys General, Constitutional Limitations on the Production of Documentary Evidence in Civil Cases (1977).

warranted. The philosophy of the Antitrust Unit is that there is more than one way to skin a cat. If the criminal case cannot be made out or otherwise provides no effective remedy, the antitrust laws should be used where possible.

The Antitrust Unit

The Antitrust Unit of the Virginia Office of Attorney General presently is part of the Criminal Division and consists of two full-time attorneys and a paralegal. Formed in 1976, the Unit has responsibility for investigating and prosecuting violations of both federal and state antitrust laws, and advising state agencies on trade regulation matters.

At present, one of the Unit's attorneys, with a background in civil procedure, is in charge of traditional civil antitrust enforcement, while the other, with expertise in criminal law, handles novel applications of the antitrust laws to criminal matters. Pursuant to funding from the Antitrust Division, United States Department of Justice, the Unit will add two attorneys and two investigators to its staff within the next year. The Unit anticipates establishing a strong working relationship with the State Police.

Chapter II

A General Background of Antitrust Legislation in The United States

History

The first federal antitrust statute, the Sherman Antitrust Act, was enacted by Congress in 1890, in response to the formation, during the mid and latter portions of the nineteenth century, of "trusts," or what we would today refer to as large corporations. Section 1 of the Sherman Act,[1] which except for penalties has remained virtually unchanged to the present, prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce."[2] Section 2 prohibits monopolization, attempts to monopolize and conspiracies to monopolize. Today, violation of the Sherman Act is a felony, punishable in the case of a corporation by a fine of up to one million dollars, and in the case of an individual, a fine of up to one hundred thousand dollars and up to three years in jail.

The Clayton Antitrust Act was passed by Congress in 1914 to further bolster federal antitrust enforcement. Section 3 of the Clayton Act[3] prevents certain "tie-in" sales; these are

1. 15 U.S.C. § 1 (1975).
2. 15 U.S.C. § 2 (1975).
3. 15 U.S.C. § 14 (1970).

discussed in Chapter III. Section 7[4] prohibits corporate mergers where the effect "may be substantially to lessen competition, or to tend to create a monopoly." The Robinson-Patman Act, an amendment to the Clayton Act enacted in 1936,[5] prohibits anticompetitive "price discrimination," i.e., sales of goods of "like grade and quality" to different purchasers at different prices where the effect may be to substantially lessen competition. Crucial here is section 2(c) of the Robinson-Patman Act, which provides "[t]hat it shall be unlawful for any person . . . to pay . . . or accept, anything of value as a commission . . . except for services rendered in connection with the sale or purchase of goods."[6] Courts have used this provision to hold bribery violative of the antitrust laws.[7]

In addition to federal antitrust laws, most states have their own antitrust laws; in fact, thirteen states had enacted antitrust laws by 1890, when the Sherman Act was passed. In addition, there was then, and still is, a body of common law dealing with conspiracies in restraint of trade.

Federal antitrust laws are applicable only to conduct that is "in" or "substantially affects" interstate commerce.

4. 15 U.S.C. § 18 (1970).
5. 15 U.S.C. § 13(a) (1970).
6. 15 U.S.C. § 13(c) (1970).
7. See, e.g., Rangen, Inc. v. Sterling Nelson & Sons, Inc., 351 F.2d 851 (9th Cir. 1965). Bribery is discussed in Chapters III and IV.

The federal laws are enforced principally by the Antitrust Division of the United States Department of Justice. State antitrust laws may be used to attack conduct which affects either intrastate or interstate commerce. As a practical matter, state antitrust laws are used to terminate anticompetitive practices with relatively localized effects. State antitrust laws are enforced by the various states' attorney general.

Virginia vastly updated and streamlined its antitrust law in 1974.[8] The substantive provisions are virtually identical to sections 1 and 2 of the Sherman Act and the Robinson-Patman Act. The Act provides for civil penalties of up to $100,000 per violation. Substantive and procedural aspects of the Virginia Antitrust Act are discussed in Chapters III and IV. It is important at this juncture to note that the Act is interpreted by applying cases decided under federal antitrust law counterparts.[9] Thus, there is a vast amount of decisional law available which aids in construing our state antitrust laws.

Social Policies Underlying State and Federal Antitrust Laws

"The general objective of the antitrust laws is the promotion of competition in open markets. This policy is

---

8. Va. Code § 59.1-9.1 through -9.17 (Cum. Supp. 1977).

9. Va. Code § 59.1-9.17 (Cum. Supp. 1977).

a primary feature of private enterprise."[10] Perhaps two quotations from two early writers best explain the rationale for the Sherman Act. Section 2, as you remember, prohibits monopolization. In 1524, Martin Luther said of monopolists:

> "They have all commodities under their control and practice without concealment all the tricks that have been mentioned; they raise and lower prices as they please and oppress and ruin all the small merchants, as the pike the little fish in the water, just as though they were lords over God's creatures and free from all the laws of faith and love."[11]

Section 1 of the Sherman Act prohibits contracts, conspiracies and agreements in restraint of trade. In 1776, Adam Smith, the father of modern economic theory said, "People of the same trade seldom meet together even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."[12] Thus, a major social policy underlying the antitrust laws is the deconcentration, or dividing up, of economic power and the promotion of economic competition. Basic economic theory teaches that competition leads to the most optimal allocation of scarce economic resources, the lowest prices, the highest quality goods and services and the greatest material progress.[13]

---

10. The Attorney General's National Committee to Study the Antitrust Laws 1 (1955).

11. 1 T. McCarthy, Trademarks and Unfair Competition § 1.2 p. 6-7 (1973), quoting 4 Works of Martin Luther 34 (A. J. Holman Co. ed.).

12. A. Smith, An Inquiry into the Nature and Causes of the Wealth of Nations (1776).

13. See Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4 (1958).

Another paramount objective of the antitrust laws is the preservation of our democratic political social institutions, an objective which is aided where power is deconcentrated.[14] As one noted economist has said, "The kind of economic organization that provides economic freedom directly, namely, competitive capitalism, also promotes political freedom because it separates economic power from political power and in this way enables the one to offset the other."[15]

Economic Effect of Antitrust Violations

You should be able to see that where a higher than competitive price is charged because of an antitrust violation, the effect is the same as larceny. The violator has taken property, in this case money, which rightfully does not belong to him. The major differences between this kind of "economic larceny" and the more traditional forms of larceny are that economic larceny is much more difficult to detect and that it affects many more persons.

To the extent that white-collar crime or other forms of illegal economic activity result in anticompetitive

14. Id.

15. M. Friedman, Capitalism and Freedom 8-9 (1962).

conduct, the antitrust laws often provide a viable vehicle for attack.[16]

Standards for Testing Practices Under the Antitrust Laws

Although section 1 of the Sherman Act and its Virginia counterpart, section 59.1-9.5, when read literally prohibit "[e]very contract . . . in restraint of trade," decided cases make clear that only unreasonable restraints of trade are illegal.[17] Thus, the basic standard used in judging a practice's legality under the antitrust laws is a "rule of reason." To determine the reasonableness of a challenged practice

> "the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."[18]

16. A number of other legal theories can be used to attack white-collar economic activity where more traditional theories are unavailable for one reason or another. These might include the use of federal laws involving racketeer influenced and corrupt organizations ("RICO"), mail fraud, and obstruction of justice. Both Virginia and the federal government have statutes prohibiting perjury, tax fraud and securities fraud. Finally, in some cases, Virginia's consumer protection statutes and usury law may be helpful.

17. See Standard Oil Co. v. United States, 221 U.S. 1 (1911).

18. Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

This means that to determine legality, the court must conduct a detailed evidentiary inquiry into the practice. A long, drawn-out, complicated case is the result.

On the other hand, there are some practices with which courts have had substantial experience and which are so "manifestly anticompetitive,"[19] that courts have held them to be unreasonable in and of themselves, without the necessity of a complex and minute analysis. Such practices are said to be per se illegal.[20] Obviously, the per se rule is helpful to prosecutors and enforcers. Types of practices which have been declared per se illegal are discussed in Chapter III.

---

19. Continental T.V. Inc. v. GTE Sylvania, Inc., 45 U.S.L.W. 4828, 4831 (U.S. June 23, 1977).

20. Perhaps the most lucid explanation of the per se rule was given in Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5 (1958):

> "[T]here are certain agreements or practices which become of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable -- an inquiry so often wholly fruitless when undertaken."

In Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., [1977-1] Trade Reg. Rep. (CCH) ¶ 61,339 at 71,207 (5th Cir. March 25, 1977), the court explained the practical effect of the per se rule: (Footnote continued)

(Footnote continued)

> "The per se label indicates that a plaintiff need not demonstrate that the effect of the [violation] is unreasonable. Indeed, not only is the plaintiff relieved from establishing that the effects are unreasonable, but in addition the defendant is not free to demonstrate that the effects are reasonable or even affirmatively desirable. The competitive impact of the arrangement simply is not an issue for trial."

Chapter III

Substantive and Procedural Aspects of the Antitrust Laws

With the background given in the preceeding two chapters, we can begin now to examine specific practices which violate the antitrust laws.

Price Fixing

Price fixing occurs in either a "horizontal" or "vertical" form. Because several practices cognizeable under the antitrust law appear in horizontal and vertical varieties, and the legality of the practice may depend on which form is involved, it is necessary that you recognize and understand what these terms mean.

A horizontal agreement is an agreement between entities at the same level in the chain of distribution of goods or services. Thus, an agreement between two manufacturers, or two wholesalers, or two retailers is horizontal. Normally, a horizontal agreement is one between competitors. A vertical agreement, on the other hand, is one between entities at different levels in the chain of distribution. An agreement, for example, between a manufacturer and a distributor that the distributor will sell the manufacturer's good at a certain price is a vertical price fixing agreement.

A horizontal price fixing agreement, the most serious antitrust violation, may be generally defined as any agreement

between competitors which has the purpose or effect of raising, lowering or stablizing the price at which a good or service is sold.[1] Price fixing is per se illegal[2] under both section 1 of the Sherman Act and section 59.1-9.5 of the Virginia Code.

Note that the definition of horizontal price fixing is extremely broad. Many practices of competitors, some of which you might not think of, are deemed to be price fixing:

1. Agreeing on a uniform and inflexible price.[3]

2. Agreements not to grant discounts.[4]

3. Agreements to charge buyers identical freight where goods are purchased on FOB destination basis.[5]

4. Agreements fixing maximum prices.[6]

5. Agreements fixing mark-ups and margins of profit.[7]

6. Agreements to abide by minimum fee schedules.[8]

---

1. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

2. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

3. United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

4. Sugar Institute v. United States, 297 U.S. 553 (1936).

5. FTC v. Cement Institute, 333 U.S. 683 (1948).

6. Albrecht v. Herald Co., 390 U.S. 145 (1968).

7. Food and Grocery Bureau v. United States, 139 F.2d 973 (9th Cir. 1943).

8. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

7. Agreements to adhere to published prices.[9]

8. Agreements to establish list prices, notwithstanding no agreement to follow the prices.[10]

9. Agreements to withhold supplies from the market to raise price.[11]

10. Agreements to limit production.[12]

11. Agreements by manufacturers to limit their demand for an essential input going into their product.[13]

12. Agreements among purchasers to pay no more than a certain amount for a product.[14]

Note that (11) and (12) involve illegal price fixing by buyers rather than sellers. It is important to remember that prohibitions against price fixing are intended to preclude monopsony as well as monopoly.

---

9. Sugar Institute, note 4 supra.

10. Plymouth Dealers' Association v. United States, 279 F.2d 128 (9th Cir. 1960).

11. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

12. United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945).

13. National Macaroni Manufacturers Association v. FTC, 345 F.2d 421 (7th Cir. 1965).

14. Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 344 U.S. 219 (1948).

13. Agreements not to advertise prices.[15]

14. Agreements not to solicit business or engage in competitive bidding.[16]

These are only some examples of horizontal price fixing; there are an infinite number of forms, limited only by human ingenuity.

Vertical price fixing, e.g., an agreement between a manufacturer and distributor or retailer concerning the price at which a product is resold, is also per se illegal under both state and federal antitrust laws.[17] The classic factual situation is where the manufacturer coerces the distributor to resell the manufacturer's product at a specified price and then refuses to sell to the distributor if he fails to abide by the price. Until March 11, 1976, federal and state statutes allowed limited vertical price fixing on goods which were "fair traded."[18] This authorization, however, was repealed. A manufacturer may, however, "suggest" prices at which the distributor or retailer should sell the product; but he cannot enforce them.[19]

---

15. United States v. Gasoline Retailers Association, Inc., 285 F.2d 688 (7th Cir. 1961).

16. United States v. National Society of Professional Engineers, [1977-1] Trade Reg. Rep. (CCH) ¶ 61,317 (D.C. Cir. 1977), cert. granted, 46 U.S.L.W. 3179 (U.S. Oct. 4, 1977).

17. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

18. Act of December 12, 1975, Pub.L. No. 94-145, 89 Stat, 801, amending 15 U.S.C. §§ 1 & 45 (1970).

19. Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993 (1964).

Market Allocations

Market allocations can be either horizontal or vertical. Horizontal market allocations are agreements by which competitors allocate among themselves either geographic areas or types of customers. For example, an agreement between concrete producers that one will serve Richmond customers north of the James River and one will sell only south of the James is a horizontal geographic market allocation. Where two sellers of office equipment agree that one will sell only to governments and the other only to private entities, the result is a horizontal customer allocation. Often, these types of agreemetns are part of a bid rigging scheme. The result of market allocation schemes is that, in the extreme, each competitor is a monopolist with respect to the area or types of customer he serves under the allocation agreement. Horizontal geographic or customer market allocations are per se illegal under both state and federal antitrust laws.[20]

Vertical market allocations can also involve either a geographic area or types of customers. In a vertical geographic market allocation scheme, the manufacturer designates the area in which the distributor or retailer can sell. Where the arrangement is a vertical customer market allocation, the manufacturer specifies the type of customer to whom the distributor

20. United States v. Topco Associates, Inc., 405 U.S. 596 (1972).

or retailer can sell. Vertical market allocations are tested pursuant to the rule of reason, which means that the court will hear detailed evidence concerning the restraint's effect on competition.[21]

Concerted Refusals to Deal

Variously called group boycotts, collective refusals to deal, or concerted refusals to deal, the practice may be generally described as "group action to coerce outside parties, whatever its purpose."[22] The coercion may be either economic or physical. Normally, the conspirators will be at the same level in the chain of distribution, but this is not a necessary element. The classic violation occurs where a group of merchants refuse to sell to or buy from another merchant; and except in very limited circumstances, a concerted refusal to deal is per se illegal.[23]

Examples of concerted refusals to deal would include the following:

1. A by-law provision of a real estate multiple listing service precluding part-time real estate salesmen or brokers from becoming members.

21. See Continental T.V., Inc. v. GTE Sylvania, Inc., 45 U.S.L.W. 4828 (U.S. June 23, 1977).

22. ABA Section on Antitrust Law, Antitrust Law Developments 17 (1975).

23. See, e.g., Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

2. A shopping center lease provision under which tenants, as a group, are given authority to veto entrance of a competitor.

3. An agreement between suppliers not to sell to a certain retailer.

4. An agreement among retailers not to purchase from a certain supplier.

5. An agreement between a supplier and a retailer that the supplier will not sell to retailers who sell at discount prices.

6. An agreement by competitors to injure or destroy the business of another competitor by physical violence, arson, extortion or otherwise.

Those charged with a boycott often attempt to defend their action on the grounds that the subject of the boycott was engaged in illegal or unethical behavior. For example, in one case a group of dressmakers agreed not to sell dresses to retailers who sold dresses made by other manufacturers who had stolen the dressmakers' designs. The defense set forth by the boycotters, that the manufacturers had engaged in illegal conduct by stealing designs was not allowed.[24] The law is clear

24. Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941). The Court said:

> "[T]he combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides for extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute.'"

312 U.S. at 465.

that "laudable objectives" of the boycott is no defense to a concerted refusal to deal charge; private vigilante action is not allowed:

> "It is not the prerogative of private parties to act as self-constituted censors of business ethics, to install themselves as judges and guardians of the public welfare, and to enforce by drastic and restrictive measures their conceptions thus formed."[25]

Thus, where a group "gangs up" against someone else in an attempt to harm the latter's business, a per se violation of the antitrust laws may have occurred.

Bid Rigging

Bid rigging is a generic term which includes numerous practices violative of the antitrust laws, including bribery, concerted refusals to deal, market allocations, and price fixing, and which occur in an environment of competitive bidding. Generally speaking, the purpose of all bid rigging schemes, except those involving bribery, is to divide the total amount of business among the competitors so that over a period of time each gets his "fair share" of the business at a higher than competitive price.[26]

Without doubt, the most well-known bid rigging conspiracy in history concerned the electrical equipment conspiracies of the late '50's and early '60's. There, General Electric, Westinghouse, Allis-Chalmers and many other corporate giants fixed the price at which electrical generation machinery was

25. FTC v. Wallace, 75 F.2d 733, 737 (8th Cir. 1935).

26. See generally National Association of Attorneys General, Government Purchasing and the Antitrust Laws (1977).

sold to utilities. Several methods were used to implement the conspiracy such as the "phase of the moon" procedure, in which each bidder was in a "priority" position, and thus won the job, during different phases of the moon.[27] The state is often a primary target of bid riggers because of the tremendous sums of money it spends based on competitive bids. Obviously, methods to fix prices through bid rigging schemes are limited only by human ingenuity, but some of the more common forms are the following:

1. Bid allocations. Competitors agree among themselves that only one company will bid on the project.[28]

2. "Dummy" or courtesy bids. The bidders agree that all but one will submit unreasonably high bids.[29]

3. Agreement by bidders to prohibit other bidders from viewing specifications.[30]

27. See C. Bane, The Electrical Equipment Conspiracies: The Treble Damage Actions (1973).

28. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

29. United States v. Gamewell Co., [1948-49] Trade Reg. Rep. (CCH) ¶ 62, 236 (D. Mass. 1948) (consent decree).

30. United States v. National Electrical Contractors Association, [1956] Trade Reg. Rep. (CCH) ¶ 68,413 (D.N.J. 1956) (consent decree).

4. Agreement to urge other potential bidders not to bid.[31]

5. Agreement to compare bids before submission.[32]

6. Agreement to influence awarding agency to specify a certain brand in specifications.[33]

7. Agreement by bidders that winning bidder will place up to one percent of bid price in trade association fund to be distributed to losing bidders.[34]

In sum, as one court stated only last month, "Conspiracies between firms to submit collusive, noncompetitive, rigged bids are per se violations of the statute."[35]

If you are called upon to investigate a bid rigging case, you should watch for one or more of the below danger signals:

1. Identical low bids. When identical low bids are encountered, one explanation thereof is that the bidders

31. United States v. Detroit Sheet Metal and Roofing Contractors Association, Inc., [1955] Trade Reg. Rep. (CCH) ¶67, 986 (E.D. Mich. 1955) (consent decree).

32. United States v. Brooker Engineering Co., [1940-43] Trade Reg. Rep. (CCH) ¶ 56,183 (E.D. Mich. 1942) (consent decree).

33. United States v. General Electric Co., [1954] Trade Reg. Rep. (CCH) ¶ 67,714 (D.N.J. 1954) (consent decree).

34. United States v. Lake County Contractors Association, Inc., 4 Trade Reg. Rep. (CCH) ¶ 45,076, 2518 (N.D. Ill. 1976) (consent decree).

35. United States v. Flom, [1977-2] Trade Reg. Rep. (CCH) ¶ 61,618 at 72,584 (5th Cir. Sept. 8, 1977).

have agreed to bid the same price. At first glance, it would seem that such behavior is irrational, since the bidders will not know who will get the contract. If, however, the purchasing agent bases his award of the contract on such factors as past market shares or a lottery, or if he decides to allow the bidders to take turns in winning the contract, the conspiracy will have been successful because the award will rotate on a predictable basis among the bidders. The identical bids will be higher than a competitive price would have been, and the bidders make more money.

2. Identical bids except for one low bid. In this situation, the bidders may have decided to "throw" the bid to a particular bidder. You can bet that the low bid is higher than a winning competitive bid would have been. Such may be part of an unsophisticated bid rotation scheme.

3. Varied total bids with each bidder low on one item. Where the contract is awarded piecemeal, this is an obvious method to divide the award among the bidders, with each bidding a higher than competitive price on his "low" bid.

4. Agreements not to compete. Where one or more of the usual bidders does not bid, suspicions should be aroused. There may be an agreement among competitors that certain bidders will not bid on one contract if others will not bid on the next one.

5. Identical discounts from published prices. All competitors agree to discount an equal amount from their published prices. Thus, the bids will not be identical, but there is still an element of price fixing.

6. Identical transportation charges. In delivered pricing situations and where freight is a relatively large factor in the total price of goods, bidders may seek to stabilize prices by agreeing with each other to quote equal transportation charges. Such schemes are usually referred to as freight equalization, zone delivered pricing, or single or multiple basing point pricing systems. Where equal transportation charges are quoted by bidders located different distances from the buyer, a price fixing conspiracy may be in effect.

7. Adherence to published prices. It is well known that both manufacturers and distributors often have published price lists. Where a bidding distributor consistently adheres to his manufacturer's published price, one conclusion which may be drawn is that there is an illegal vertical agreement between the two. Where distributors have identical price lists and their bids are identical thereto, there may be an illegal agreement to adhere to published prices. Moreover, where price lists are not identical but bids are, a strong presumption of a price fixing agreement arises.

8. Bribery. Where you discover that the purchasing agent was given a gratuity by the supplier who won the job, a bribe has been paid. This is discussed in more detail later. Bribery very often is an integral part of a bid rigging scheme.

9. Indications that bidders have discussed their bids with one another. If you obtain any information which leads you to think that competitors have discussed their prospective bids with one another, your suspicions should be aroused. Except for possible discussions concerning technical specifications, there is little reason for competitors to confer other than to discuss collusive bidding methods. Moreover, evidence of a meeting coupled with a factor such as identical bids often are enough to prove an "agreement."

If you suspect collusive behavior between certain bidders, there are several actions you can take to investigate the problem. The most important of these is to examine past contracts involving the same bidders in an effort to determine if the bidding falls into any pattern, such as rotation of the winning bid among the competitors. Note also the relationship or pattern of relationship between the bids and any published prices. Check to see if there is a pattern of one or more usual bidders refraining from bidding. Moreover, you might be aware of a close relationship between two bidders. Perhaps they are parent-subsidiary, brother-sister or have interlocking

directors or officers. If there is an active trade association, such might be convenient for bid rigging purposes.

It is also important to determine whether a distributor has an "exclusive area" in which he is allowed to sell and whether he is prohibited by a manufacturer from selling in other areas. You should recognize this as a vertical geographic market allocation, discussed above. If the manufacturer does not limit where the distributor sells and if each appears to sell only in one small area, there may be a horizontal geographic market allocation. A copy of the distributor's franchise or distributorship agreement is often helpful. Furthermore, determine whether the bidders are buying from the same source. If they are, it would be expected that bids would be very close to one another, if not identical. If a patented product is involved, until the seventeen year monopoly elapses, bids will tend to be uniform and high. Determine if the manufacturer reviews or approves the bids of his distributors. If so, this is evidence of a price fixing agreement.

Examine the economic structure of the industry of which the bidder is a member. If there are relatively few industry members and the industry exhibits tendencies of oligopoly, more price uniformity is to be expected than if there are numerous competitors.

Most bidders who wish to rig bids are sophisticated enough not to engage in identical bidding. Identical bids raise obvious "red flags" in the minds of investigators and

antitrust enforcers and, therefore, call attention to possible anticompetitive behavior. Thus, you should expect more sophisticated schemes of market division or bid rotation. The factors which combat these most effectively are the retention and periodic examination of past bidding histories to see if a discernible pattern of bid rotation emerges and keeping your eyes and ears open and clearly documenting any factors which come to your attention which might indicate collective action by bidders. Joe Kaestner will explain investigative techniques in more detail later.

Tying

A "tie-in" generally may be defined as an arrangement whereby a seller conditions his sale of a product or service (the "tying product") upon a buyer's purchase of a separate product or service (the "tied product") from the seller or from a third party designated by him.[36] Simple examples of tie-ins are the following:

1. A franchisor, as a condition of granting a franchise, requires the franchisee to purchase all supplies from him.

2. A computer company refuses to sell or rent a computer unless the customer also purchases cards from the company.

36. ABA Section on Antitrust Law, Antitrust Law Developments 38 (1975).

3. A gasoline refiner sells gas to service stations only if the stations also purchase tires, batteries and accessories from the refiner or from a source designated by him.

Thus, the crux of a tie-in is that in order to obtain a product which he desires (the tying product), the purchaser is coerced by the seller to purchase a second product which he may or may not want. Other sellers are foreclosed from selling the tied product not because their product is inferior or more expensive, but because of the seller's market power in the market for the tying product.

Tie-ins are per se illegal if (1) the seller has sufficient economic power in the market for the tying product to control prices or impose other burdensome terms with respect to any appreciable number of buyers, and (2) a not insubstantial dollar volume of commerce in the tied product is affected.[37] This standard is sufficiently nebulous that you should contact an antitrust specialist whenever you encounter a tie-in. In most cases there is no legitimate business justification for their use.[38] If, however, the per se requirements cannot be met, the tie-in still may be illegal under a rule of reason analysis.

37. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969).

38. See Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958).

Monopolization

Section 2 of the Sherman Act and section 59.1-9.6 of the Virginia Code prohibit monopolization, attempts to monopolize and conspiracies to monopolize.

Although, technically, monopoly means one seller, both the economist and the antitrust attorney are more concerned with "monopoly power" in the legal sense, which is the ability of a seller to control market prices or exclude competitors.[39]

From the standpoint of society, monopoly power is harmful for both economic and political reasons. From an economic point of view, theory teaches that a profit maximizing business with monopoly power will be able to, and in fact will be induced to, charge a higher price for its goods and produce a smaller output than would be the case under perfectly competitive conditions. The price of the good will exceed the cost of producing it, and monopoly profits will result. In such a situation, allocation of our scarce resources is not optimal, and economic inefficiency and waste result. Moreover, because economic power often leads to political power, monopoly has a tendency to undermine the democratic policical system under which we presently live. Thus, as explained in Chapter II, we tend to frown upon excessive economic concentration.

The first step in any case involving monopolization is to define the relevant market; obviously, it is impossible

39. See United States v. Grinnell Corp., 384 U.S. 563 (1966).

to ascertain whether someone has a monopoly until you determine what he may have a monopoly over. The relevant market has two aspects: First, the relevant product market must be determined. With respect to what product or service does the defendant have a monopoly.[40] Second, the relevant geographic market must be determined. In what geographic area does the defendant allegedly have a monopoly?[41]

The elements of the monopolization offense were set forth in United States v. Grinnell Corp., as follows: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

In determining whether the possession of monopoly power is present, the plaintiff will attempt to show the defendant's ability to raise prices and exclude competitors. A strong indication of this is the share of the market the alleged monopolist controls. One court has said that 90% of the market "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not."[42]

40. See United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956).

41. See American Football League v. National Football League, 323 F.2d 124 (4th Cir. 1963).

42. 384 U.S. 563, 570-71 (1966).

What evidence meets the second element, willful acquisition of monopoly power, is not clear. Some cases appear to hold that the test is met if the defendant takes advantage of favorable business opportunities[43] or engages in any anticompetitive practice.[44]

An "attempt to monopolize" is proved by showing (1) a specific intent to monopolize; and (2) a dangerous probability that if left unchecked, the attempt would have resulted in actual monopolization.[45] Normally, an attempt to monopolize a case is the result of predatory commercial conduct by the defendant.

Because one element of both a monopolization and an attempt to monopolize a case is an attempt to eliminate competitors, it should be noted here that criminal law violations may be part of a scheme to monopolize. For example, murder of a competitor, arson of his business, fire bombing his trucks, or theft of his property may be part of a plan to drive a competitor out of business. Where this is the case, an antitrust law violation may have occurred.

---

43. United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945).

44. See United States v. United Shoe Machinery Corp., 110 F.Supp. 295 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954).

45. ABA Section on Antitrust Law, Antitrust Law Developments 60 (1975).

Rebates, Kickbacks and Bribes

A rebate is a deduction from a stipulated payment not taken out in advance of payment, but handed back to the payor after he has paid the full stipulated sum.[46] A kickback, closely related to a rebate, is the giving back of a part of money received as a payment or commission, often a result of coercion or a previous understanding.[47] Finally, a bribe is anything given or promised to induce a person to do something which he might otherwise not do.[48] The three are so similar that they will treated identically here and called "bribes."

We can divide bribes into two general categories: Official and commercial. The former involves a public official; the latter, private businesses. Both are crimes in Virginia.[49]

To the extent that a bribe is paid to influence the decision of a purchaser concerning from whom to purchase goods, such constitutes a per se violation of section 2(c) of the federal Robinson-Patman Act[50] and section 59.1-9.7(c)

---

46. United States v. Lehigh Valley R. R. Co., 222 F. 685 (N.Y.).

47. Webster's New World Dictionary of the American Language 803 (Coll. 3d. 1960).

48. Id. at 181.

49. This is discussed in more detail in Chapter IV.

50. 15 U.S.C. § 13(c) (1970).

of the Virginia Code.[51] It also may constitute a "conspiracy in restraint of trade" violative of section 1 of the Sherman Act, although this is not clear at present.[52]

The connection between bribery and antitrust may seem somewhat elusive to you. However, in considering from whom to purchase goods and services, the purchaser or his agent should be interested in two major competitive variables, the price of the good or service and the quality of the good or service offered by each seller. Thus, the amount which a seller may pay a purchasing agent to influence his judgment is an irrelevant competitive variable which should not be allowed to enter the purchasing agent's calculus of decision making. To the extent that such a payment does enter the agent's decision making process and business is given

51. Va. Code § 59.1-9.7(c) (Cum. Supp. 1977) provides as follows:

> "It is unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for and not exceeding the actual cost of such services rendered in connection with the sale or purchase of goods, wares or merchandise."

52. See Sterling Nelson & Sons v. Rangen, Inc., 235 F.Supp. 393 (D. Idaho 1964), aff'd on other grounds, 351 F.2d 851 (9th Cir. 1965). Cf., United States v. Boston & Maine Railroad, 380 U.S. 157 (1964).

based thereon, competing sellers are foreclosed from making sales, not on the basis of having an inferior product or a high price, but on the basis of not "shoving money under the table." This can lead to a substantial effect on competition.

Moreover, a purchasing agent has both a legal and an ethical duty to serve his employer or principal to the best of his ability. Thus, the offer of a bribe places him in an irreconcilable conflict of interest, where it might be financially advantageous for him to look out for the seller's best interest. As long as the agent remains bound to his employer, such a conflict cannot be allowed to exist.

Bribes are particularly devastating when offered to or accepted by government officials. Such officials are in a position of public trust and owe the strongest allegiance possible to the citizenry. Indeed, they are fiduciaries and must act only in the public interest.

A clear application of section 2(c) to classic "commercial bribery"[53] is set forth in Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co.[54] There, the president of an electric

53. The adjective "commercial" as applied to the noun "bribery" probably is used to distinguish between the bribery of businessmen as opposed to public officials. However, in the case of bribing a state purchasing official as in Rangen, Inc. v. Sterling Nelson & Sons, Inc., discussed infra, the distinction becomes blurred.

54. 37 F.Supp. 728 (W.D. Ky. 1941), aff'd sub nom., Fitch v. Kentucky-Tennessee Light & Power Co., 136 F.2d 12 (6th Cir. 1943).

company was bribed to purchase coal for his company from a specific coal company. The bribes were successful as the electric company purchased large amounts of coal at prices far in excess of the then existing market price. The electric company, when appraised of the situation brought suit under section 2(c), and was successful. The court noted that the practice had an adverse effect upon competition because competitors of the coal company were foreclosed from dealing with the electric company.[55]

Perhaps the most cited case for the proposition that commercial bribery may violate section 2(c) is Rangen, Inc, v. Sterling Nelson & Sons, Inc.[56] A supplier of a product sold to the State of Idaho bribed a state purchasing official to influence his decision concerning which product to purchase for the state. A competitor was successful in arguing that such payments were a violation of the antitrust laws.

---

55. The court said,
"Plainly, the payment of the secret commissions to Fitch was an unfair trade practice, and obviously resulted in lessening competition in the sale of coal to the Power Company. It would have been practically impossible for any other company to sell coal to appellee, when the president of the Power Company had such an understanding with the Coal Company."

56. 351 F.2d 851 (9th Cir.), cert. denied, 383 U.S. 936 (1965).

Procedure under the Virginia Antitrust Act

The Virginia Antitrust Act gives circuit courts jurisdiction over the subject matter to hear state antitrust cases.[57] Cases brought under the Act are in chancery; courts may issue temporary restraining orders and injunctions to terminate illegal conduct, and may impose substantial civil penalties in proper cases.[58]

Section 59.1-9.9 provides that venue may be laid in the county or city where any defendant resides, conducts affairs, or has property that may be affected by the suit. If none of the above prerequisites are met, then the case may be brought where the defendant has its registered office, or where the alleged violation occurred.

In any action filed by the Attorney General, Commonwealth's attorney, county attorney or city attorney, the court, in the case of a "willful or flagrant" violation of the law, may award a civil penalty of not more than one hundred thousand dollars per violation.[59] For example, where a company has engaged in a pattern of price fixing or has paid numerous bribes to obtain business, each overt act in furtherance of the conspiracy is a separate violation, and each is subject, therefore, to the one hundred thousand dollar penalty.

---

57. Va. Code § 59.1-9.8 (Cum. Supp. 1977).

58. Id. § 59.1-9.11.

59. Id.

Perhaps of greatest interest to you are the provisions which allow the Attorney General broad powers of pre-complaint discovery.[60] Whenever the Attorney General believes that a violation may have occurred, he may require any person to file with him a statement in writing under oath which states all facts and circumstances relevant to the investigation.[61] Moreover, the Attorney General has power to issue a civil investigative demand.[62] A civil investigative demand, or CID as we call it, is simply a method of compulsory process used to formally investigate alleged violations before suit is filed. It is similar in many ways to a federal grand jury subsoena.

Section 59.1-9.10(b) provides that the Attorney General may issue a CID and thereby compel a witness to appear for deposition, require the production of any books or records that may be relevant to the investigation, and issue written interrogatories to be answered by the CID recipient. It is important to note that CIDs may be served on either potential defendants or third persons who may have information relevant to the antitrust inquiry. The CID must state the section of the Virginia Antitrust Act which may have been violated, the

60. Id. § 59.1-9.10.

61. Id. § 59.1-9.10(a).

62. Id. § 59.1-9.10(b).

subject matter of the investigation,[63] and the date and place at which documentary material must be submitted to the Attorney General.[64]

The recipient must respond to the CID within twenty (20) days after service.[65] If the recipient objects to answering the CID, he may file, within the twenty (20) day period, a petition in, and only in, the Circuit Court for the City of Richmond, asking the Court to either modify or set aside the CID.[66] The petition must be specific with respect to the objections voiced by the recipient. The Unit, thus far, has taken the position that although it is able to extend the time period in which CIDs may be answered, it has no authority to extend the twenty (20) day period in which objections must be filed.

The statute further provides that any recipient responding to a CID will be given use immunity with respect to his responses if any type of criminal action subsequently follows.[67] It is a misdemeanor for the Attoney General to disclose testimony or other evidence gathered through use of a CID.[68]

63. Id. § 59.1-9.10(d)(1).

64. Id. § 59.1-9.10(d)(2).

65. Id.

66. Id. § 59.1-9.10(f).

67. Id. § 59.1-9.10(k).

68. Id. § 59.1-9.10(n).

CID's must be used carefully, especially where the conduct being investigated may be a criminal law violation as well as a violation of the antitrust laws; for in this case, it is clear that the panoply of fourth, fifth and sixth amendment rights are applicable. Thus, the Unit uses extreme caution to coordinate its efforts with those of other law enforcement agencies which may have an interest in the matter to assure that evidence ascertained pursuant to a CID is not subject to exclusion in a subsequent criminal prosecution.

Each of the complaints received by the Antitrust Unit is given serious attention and is investigated at least in a preliminary and informal manner. Normally, this means that we will first determine whether or not the facts, if true, constitute an antitrust violation, or at least reveal a pattern of conduct which may be indicative of a violation. If it is determined that a likelihood of violation exists, we proceed further and began to ascertain the facts. Very often, this can be done by a simple telephone call. In most cases, however, we write individuals who may have knowledge about the matter and ask them to submit relevant documents to us voluntarily; generally library work may be proceeding concurrently in order that we can obtain some background information concerning the industry involved. At the same time, we are attempting to judge the economic effect of the violation on Virginia commerce, and whether or not the violation is one which would be tested by a per se rule. I am not telling you any secrets when I say that

we are always more interested in a per se case than one to which the rule of reason applies and which may turn out to be unduly complicated when compared with any benefits obtained. Normally, per se violations have a direct and immediate restraining effect on commerce.

If we are unsuccessful in obtaining requested information on a voluntary basis, or if it appears that the recipient of the letter may be recalcitrant or inclined to destroy relevant documentation, we serve a civil investigative demand and put the recipient under compulsory process. Normally, it will be impossible for a recipient to properly respond to a CID within the twenty (20) days allotted; therefore, almost as a matter of course, the time in which to respond is extended at the request of the recipient. The response of attorneys representing CID recipients, except for two notable cases, has been commendable. Perhaps this is because of § 59.1-9.10(j), which provides in effect that obstruction of our investigation is a misdemeanor.

When an investigation is complete, a decision must be made concerning what action is warranted. If no violation is found, of course, the answer is simple -- we terminate the matter. If, however, a violation is found, we must determine what form of relief to ask for.

In some cases, we simply obtain a statement of voluntary compliance. In this situation, no suit is filed, and we accept

the promise of the potential defendant that the illegal behavior will cease. We were especially prone to use this method during the formative period of the Antitrust Unit when our main purpose was to educate the public concerning the policies and principles of the antitrust laws. We are much less inclined to use this process now. At present, the voluntary compliance process would be used only in a matter where our case is extremely weak, where we are convinced the violation was inadvertent, and where the economic effect of the violation is minimal. Perhaps we are talking about a problem where only a technical violation occurred, and no harm was done.

The Antitrust Unit has depended in the past, and will no doubt depend in the future, to a great extent on consent decrees, the civil equivalent to a plea of nolo contendere. Where the violation is not willful or flagrant, it will generally behoove the state to use the consent decree mechanism rather than litigating the issues involved. This is because that in a nonflagrant case, the most we can obtain, even if we litigate, is an injunction. We would much rather be allowed to tailor the injunction to the specific factual situation through the consent decree mechanism than risk loss through litigation or gain a Pyrrhic victory, where the court enters an injunction that is not suitable to our particular case.

The ultimate penalty for a violation of the Virginia Antitrust Act is the assessment of a civil penalty, which as I noted previously, will be assessed only in the case of a willful or flagrant violation.[69] Obviously, it is difficult to stereotype those cases which we consider to be flagrant and those cases not. In general, however, I think it safe to say that we will treat as a willful or flagrant violation any noninadvertent per se violation, any non-per se violation where predatory intent is present, and any violation which is also violative of the Commonwealth's criminal laws. It is not our intent to attempt to gain civil penalties from every violator of the Act, but where the violation is per se illegal, we think it fair to assume that the defendant knew that what he was doing was wrong. Moreover, where predatory intent is shown, there is little doubt than an individual knew that what he was doing was wrong. In such a case, we feel it fair to request a monetary penalty.

---

69. Other remedies, not found in the Virginia Antitrust Act, may be warranted. For example, the Unit might seek a writ of quo warranto against a Virginia corporation, which would have the effect of precluding that business from operating in Virginia. The same remedy could be used to revoke the license of an individual licensed by the state such as a realtor or physician. See Va. Code § 8.01-636 (Repl. Vol. 1977). Also, contracts entered into by the state which are the result of a bribe or where bidders rigged their bids can be voided.

Chapter IV

Some Virginia Economic Crime Statutes

The preceeding chapter discussed substantive, procedural and investigatory aspects of antitrust laws. It was noted that the Virginia Antitrust Act provides for civil remedies only, although it was pointed out that so-called "civil penalties" can be substantial.

In this chapter, we discuss briefly Virginia criminal statutes dealing with certain economic crimes. No effort has been made to mention or discuss all Virginia provisions which may constitute an economic crime; rather emphasis is placed on those crimes which may be violative of both a criminal law and the antitrust laws, although other types of violations are mentioned. Moreover, we do not discuss common law crimes which have not been codified.

This manual has emphasized that where certain criminal activity is discovered, it may be proper to attack the conduct under the antitrust laws by reporting the activity to the Attorney General's Antitrust Unit. The converse is obviously true; violations of the antitrust laws may be discovered which also constitute criminal law violations. In some situations, the Commonwealth's criminal laws may provide a more effective remedy. In the vast majority of cases, we expect that both should be used.

Our hope in presenting this seminar is that whenever you encounter a situation involving economic crime, you will auto-

matically ask yourself whether there may be a violation of the antitrust laws. Your thought process should proceed as follows: First, is there more than one person or entity involved? In other words, is there a conspiracy, concert of action, or agreement? If so, one element of a Sherman Act section 1 violation is present. Even, however, if only one entity is involved, do not terminate your analysis; remember, although it takes "two to tango" under section 1, under section 2, which deals with monopolization and attempts to monopolize, one actor is sufficient.[1] Second, consider whether the practice has any effect on competition. Are competitors being harmed or driven out of business? Does the practice have any effect on prices being charged? Remember, any agreement which has the purpose or effect of raising, lowering or stabalizing prices may be a price fixing agreement per se violative of the antitrust laws.[2] You will be surprised that some of the practices discussed later may constitute price fixing.

Combinations to Injure Others in their Reputation, Trade, Business or Profession

A little known and even less used statute is section 18.2-499, which makes a combination to injure another

---

1. Although sections 1 and 2 of the federal Sherman Act are cited, remember that these statutes are virtually identical to the Virginia Antitrust Act, Va. Code §§ 59.1-9.5 & -9.6 (Cum. Supp. 1977).

2. United States v. Socony-Vacuum Co., 310 U.S. 150 (1940).

in his trade or business a class 3 misdemeanor.[3] The statute actually prohibits three practices when carried out pursuant to an agreement:

1. injuring another in his reputation, trade or business by any means;

2. compelling another to do any act against his will; or

3. preventing or hinder a person from doing any lawful act.

You should realize by now that this criminal provision is quite similar to section 1 of the Sherman Act. It, in effect, makes agreements in restraint of trade a criminal offense. The one reported case under this statute[4] recognizes its similarity to the antitrust laws; in fact, (2) constitutes a specific prohibition of many types of concerted refusals to deal, which were discussed in Chapter III.

Note also that private civil suits can be brought under this statute by a person whose business is injured. A successful plaintiff can recover three times his actual damages, plus attorneys fees and costs,[5] just as he can under both federal[6] and state antitrust laws.[7]

3. It is sad that this offense, being a class 3 misdemeanor, carries a penalty of only a five hundred dollar fine. See Va. Code § 18.2-11 (Repl. Vol. 1975). The statute is important, however, because of the social stigma which often attaches to a criminal conviction.

4. Federal Graphics Companies, Inc. v. Napotnik, 424 F. Supp. 291 (W.D. Va. 1976).

5. Va. Code § 18.2-500(a) (Repl. Vol. 1975).

6. 15. U.S.C. § 15 (1970).

7. Va. Code § 59.1-9.12(b) (Cum. Supp. 1977).

Because this statute is, in effect, an antitrust law, the Antitrust Unit intends to make use of it in proper cases. Notwithstanding the small sanction for violation, the threat of criminal prosecution will serve as some deterrent to future antitrust law violators.

Bribery

Antitrust law aspects of rebates, kickbacks and bribes were treated in Chapter III. In general, it was pointed out that "[t]he vice of conduct labeled 'commercial bribery,' as related to unfair trade practices, is the advantage which one competitor secures over his fellow competitors by his secret and corrupt dealing with employees or agents of prospective purchasers."[8]

Bribery may be either "official," where the person bribed is a public servant, or "commercial," where he is an employee of a private business. At common law, only official bribery was recognized as a crime: "Bribery is the corrupt payment or receipt of a price for official action."[9] Thus, official bribery is often referred to as official or political "corruption."

8. American Distilling Co. v. Wisconsin Liquor Co., 104 F.2d 582 (7th Cir. 1939).

9. R. Perkins, Criminal Law 469 (1969) (hereinafter cited as "Perkins").

Corruption consists of the intent to influence official action.[10]

In Virginia today, official bribery is a statutory class 4 felony,[11] and consists of the offering, giving, receiving or soliciting of anything of value with intent to influence the recipient's action as a public official.[12] Statutes prohibit the giving, offering, promising,[13] or accepting[14] of any gift

---

10. Professor Perkins notes:

> "A corrupt intent is essential to guilt of bribery but it is important to keep in mind just what constitutes corruption in this regard. On the part of the briber this requires an intent to subject the official action of the recipient to the influence of personal gain or advantages rather than public welfare. It does not require that the action sought to be induced should benefit the briber or should actually be detrimental to the public. The social interest demands that official action should be free from improper motives of personal advantage, and an intent to subject the action to such motives is a corrupt intent. If money is paid for such a purpose it is immaterial to the guilt of the briber whether the officer's official conduct was actually influenced or not. On the part of the bribee, an intent to use the opportunity to perform a public duty as a means of acquiring an unlawful personal benefit or advantage, is a corrupt intent. Hence it is no defense to a charge of receiving a bribe that the recipient believed the action requested would be for the best interest of the public, or that he had determined upon that course of action before the bribe was offered. An officer who has determined upon a certain course of public action might change his mind if free from corrupting influences. The social interest requires that there should be no such conflict."

Perkins at 478-9.

11. Punishment is imprisonment from 2 to 10 years. Va. Code § 18.2-10 (Cum. Supp. 1977).

12. Ford v. Commonwealth, 177 Va. 889, 15 S.E.2d 50 (1941).

13. Va. Code § 18.2-438 (Repl. Vol. 1975).

14. Id. § 18.2-439.

with intent to influence any "executive, legislative or judicial officer, sheriff or police officer, or to any candidate for such office."[15] Other statutes prohibit bribery of "public servants,"[16] which is defined as any "officer or employee of this State."

Section 18.2-444 is a broad commercial bribery provision. It prohibits an "agent, employee, or servant" from accepting a gratuity, without the knowledge of his "principal, employer or master," in return for "act[ing] in any particular manner as to his . . . employer's business;"[17] the giving of the gratuity is also prohibited.[18] Employees authorized to procure supplies for their employers cannot accept any commission or bonus whether or not the employer is aware of it and whether or not there is a corrupt intent.[19] Thus, the Commonwealth has strong commercial bribery statutes, although violation is only a class 3 misdemeanor.[20]

---

15. Id. §§ 18.2-446 through -450.

16. Id. § 18.2-446(4).

17. Id. § 18.2-444(2).

18. Id. § 18.2-444(1).

19. Id. § 18.2-444(3).

20. There are other bribery provisions: Bribery of jurors or commissioners appointed by a court, section 18.2-441; bribery of participants in sporting events, section 18.2-442; and solicitation or acceptance of bribes by managers, coaches or trainers, section 18.2-443.

Extortion

It is important to realize that extortion can have more than one meaning. For example, "common-law extortion is the corrupt collection of an unlawful fee by an officer under color of office."[21] "Statutory extortion is either (1) the unlawful extortion of money or other value by means of a threat not sufficient for robbery, or (2) a communication for the purpose of such extortion."[22]

You should realize immediately that there is little difference between official bribery and common-law extortion. Where, for example, a state contracts officer accepts money in return for choosing one supplier over another, he is quilty of bribery and extortion, and he has violated the antitrust laws.

Virginia has codified the statutory extortion definition given above:

> "Extorting money, etc., by threats. -- If any person threaten injury to character, person, or property of another person or accuse him of any offense and thereby extort money, property, or pecuniary benefit or any note, bond, or other evidence of debt from him or other persons, he shall be guilty of a Class 5 felony."[23]

Extortion is emphasized in this manual because it is often part of an anticompetitive scheme which may be violative of the antitrust laws. Where, for example, entities threaten a competitor with commercial injury unless he joins a price fixing agreement; or they burn his business; or they boycott a supplier who sells to discount stores, both civil and criminal remedies may be available. This is especially true where the threat is carried out, and the charge becomes homicide, arson or larceny.

21. Perkins at 367.

22. Id. at 372.

23. Va. Code § 18.2-59 (Rep. Vol. 1975). Section 18.2-60 proscribes threats of death or bodily injury to a person or member of his family.

Odometer Tampering

Tampering with an odometer, or "spinning" as it is sometimes called, presents an interesting opportunity to test the breadth of the antitrust laws.[24] Odometer tampering is a crime; the penalty, however, of a fine of up to $500 and up to six months in jail is rather light. Now analyze the problem from an antitrust standpoint with the possibility of civil penalties of up to $100,000 per violation.

The purpose of "spinning" is to increase the price at which an auto will resell. If there is an agreement between the spinner and, for example, a used car lot or, for that matter, the owner of the used car, by which the spinner is "employed," is that not a price fixing agreement violative of the antitrust laws as explained in Chapter III? This is exactly the type of novel antitrust law application which the Antitrust Unit plans to use in attacking different forms of economic crime.

24. Va. Code § 46.1-15.1 (Repl. Vol. 1974).

Consumer Fraud

Virginia has a number of criminal and civil statutes prohibiting consumer fraud, deceptive and misleading advertising and other forms of misrepresentations connected with sales. The lynchpin criminal statute is section 18.2-216, which proscribes untrue, deceptive or misleading advertisements or other fraudulent inducements used to make a sale. Section 18.2-217 prohibits so-called "bait and switch" tactics, i.e., a seller's advertising a product at a low price and then refusing to sell at that price, or attempting to sell higher priced merchandise by disparaging the advertised product.[25]

Earlier this year, the General Assembly enacted the Virginia Consumer Protection Act,[26] which prohibits some fourteen specified "fraudulent acts or practices."[27] A one thousand dollar per violation civil penalty is provided.[28]

Here again, if a consumer fraud or deception is the result of an agreement, and if its effect is to raise prices, as most often will be the case, an antitrust violation may have occurred.

25. Violation of either statute is a class 1 misdemanor.

26. Va. Code §§ 59.1-196 through -207 (Cum. Supp. 1977).

27. Id. § 59.1-200.

28. Id. § 59.1-206.

Securities Fraud

It should be mentioned briefly that Virginia has both criminal and civil provisions prohibiting fraud, deception and misrepresentation in the sale of securities, including corporate stocks and bonds.[29] Violation is a class 4 felony.[30]

Because the definition of what constitute "securities" is extremely broad,[31] the Virginia Securities Act or "Blue Sky Law" as state securities laws are often called,[32] presents a viable vehicle for attacking organized crime businesses in certain circumstances.

Tax Fraud

As every law enforcement official knows, one method of attacking organized crime where a more substantial violation cannot be proved is to charge federal tax evasion or tax fraud.[33] Ill-gotten gains are seldom reported as taxable

29. See generally, the Virginia Securities Act, Va. Code §§ 13.1-501 through -527.3 (Cum. Supp. 1977).

30. Va. Code § 13.1-520 (Cum. Supp. 1977).

31. Id. § 13.1-501(j).

32. State securities laws are often referred to as "Blue Sky Laws" because their purpose was to prohibit the sale of "blue skies" by financial charletans to unsuspecting, gullible widows and orphans.

33. Television watchers know that use of the tax laws against organized crime goes back at least to Eliot Ness and "The Untouchables."

income. Attempting to evade federal taxes,[34] or willfully failing to pay federal taxes,[35] are federal felonies with punishments of up to five years in prison and a fine of up to $10,000. The willful failure to file a return is a misdemeanor.[36]

Unfortunately, Virginia's tax remedies for non-payment are, at best, pathetic. ~~There are no criminal sanctions~~ Misdemeanors; the errant taxpayer is forced only to pay the tax plus interest.[37]

It is a mistake to consider the Virginia tax laws as a potential remedy.

34. Int. Rev. Code of 1954, § 7201.

35. Id. § 7202.

36. Id. § 7203.

37. Va. Code § 58-1160 (Cum. Supp. 1977).

Chapter V

Legislation "Supportive" of Investigations

As you realize from your own experience, investigations are often hampered by uncooperative witnesses, seemingly cooperative witnesses not telling the truth, and the destruction of documents material to the investigation. Therefore, you should be aware of the small number of Virginia laws which may be of some aid to you in your investigatory work.

About a year ago, the Antitrust Division of the United States Department of Justice became quite disturbed that many targets of its criminal investigations were destroying relevant documents or not producing them for examination. The Division, in an effort to terminate this problem, has begun indicting individuals for conspiracy[1] and obstruction of justice[2] under federal statutes.[3]

Although Virginia has no obstruction of justice statute as such, there are several legal theories and statutes which may be of some aid to law enforcement officials.

Perjury

"If any person to whom an oath is lawfully administered on any occasion willfully swear falsely on such occasion

1. 18 U.S.C. § 371 (1970).

2. 18 U.S.C. §§ 2 & 1503 (1970).

3. See, e.g., United States v. Treadway, Cr. No. 3-77-305 (N.D. Tex., filed September 13, 1977).

touching any material matter or thing, . . . he shall be guilty of perjury, punishable as a Class 5 felony."[4]

Perjury sanctions are obviously warranted where an individual willfully lies during a judicial proceeding. Its use during the investigatory stage is more limited because the oath must be required by law before lying can constitute perjury.[5] Thus, where an individual is placed under oath by you during an investigation and then lies, he is not guilty of perjury.[6]

The result may be different with respect to investigations conducted by the Antitrust Unit. Where we have served an individual with a CID, he may "be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing evidence or failing to do so . . . ."[7] Thus, a subject had better not lie to us.

Obstruction of Justice

As was pointed out above, Virginia has no obstruction of justice statutes similar to those found in federal law. However, you should be aware that at common law, obstruction of

4. Va. Code § 18.2-434 (Repl. Vol. 1975).

5. See generally R. Perkins, Criminal Law 457 (1970) (hereinafter cited as Perkins).

6. The subject may, however, be guilty of giving a false report to a police officer.

7. Va. Code § 59.1-10(k) (Cum. Supp. 1977).

justice was a misdemeanor,[8] and that the common law offense has been recognized in this country.[9] A Pennsylvania court said:

> "The common law is sufficiently broad to punish as a misdemeanor, although there may be no exact precedent, any act which directly injures or tends to injure the public to such an extent as to require the state to interfere and punish the wrongdoer, as in the case of acts which injuriously . . . obstruct, or pervert public justice, or the administration of government."[10]

One form of obstructing justice consists of suppressing or destroying evidence, knowing that it is wanted by investigating law enforcement officers.[11] Thus, where you encounter situations where records have been intentionally destroyed after the subject became aware of your investigation, or indeed, if you encounter any situation where a "cover-up" is going on, consider an obstruction of justice charge.

Miscellaneous Provisions

Virginia has several statutory provisions affecting investigations with which you should be familiar. It is a mis-

8. Perkins at 494.

9. See, e.g., Brown v. Commonwealth, 263 S.W.2d 238 (Ky. 1954).

10. Commonwealth v. Mochan, 177 Pa. Super. 454, 458, 110 A.2d 788, 790 (1955).

11. Commonwealth v. Russo, 177 Pa. Super. 470, 111 A.2d 359 (1955).

demeanor to obstruct justice by threats or force.[12] This is much narrower than the common law offense because the statute seems to envision only physical interference.[13] Indeed, the leading Virginia case involves the use of a shotgun to prevent the state police from making an arrest.[14]

It is also a crime for a person to conceal or "compound" an offense,[15] or to refuse to assist an officer "in the execution of his office in a criminal case."[16] Finally, it is a class 1 misdemeanor for any person knowingly to give a false report to any law enforcement official with intent to mislead with respect to the commission of any crime.[17]

Although penalties for violations of these statutes are light, use should be considered, especially for their deterrent and precedential effects. If it is generally known that such cases will be brought, instances of non-cooperation may decrease. More importantly, if numerous cases are detected and prosecuted, the General Assembly may determine that sanctions should be increased.

---

12. Va. Code § 18.2-460 (Repl. Vol. 1975).

13. Jones v. Commonwealth, 141 Va. 471, 126 S.E. 74 (1925).

14. Love v. Commonwealth, 212 Va. 492, 184 S.E.2d 769 (1971).

15. Va. Code § 18.2-462 (Repl. Vol. 1975).

16. Id. § 18.2-463.

17. Id. § 18.2-461.

END