

## Case Comment

### **A Missed Opportunity: Nonprofit Antitrust Liability in *Virginia Vermiculite, Ltd. v. Historic Green Springs, Inc.***

*Virginia Vermiculite, Ltd. v. Historic Green Springs, Inc.*, 307 F.3d 277 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 1900 (2003).

#### I

The antitrust laws are meant to govern and promote competition. But how antitrust law should treat nonprofit organizations, whose objectives lie outside the commercial sphere but whose actions nevertheless have economic consequences, is not settled.<sup>1</sup> The Fourth Circuit recently confronted this issue in *Virginia Vermiculite, Ltd. v. Historic Green Springs, Inc.*, in which Virginia Vermiculite, Ltd. (VVL) sued both a

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1. Nonprofit organizations are not generally exempt from antitrust liability. *See, e.g.*, NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100 n.22 (1984) (“There is no doubt that the sweeping language of § 1 applies to nonprofit entities . . .”). Courts have found, however, that certain nonprofit conduct falls outside the Sherman Act. *See, e.g.*, *Dedication & Everlasting Love to Animals v. Humane Soc’y of the United States, Inc.*, 50 F.3d 710, 714 (9th Cir. 1995) (holding that nonprofit fundraising is not “trade or commerce” under the Sherman Act); *Missouri v. Nat’l Org. for Women*, 620 F.2d 1301, 1302 (8th Cir. 1980) (finding a “politically motivated but economically toolled” boycott beyond the scope of section 1). Commentary on how antitrust law should treat nonprofits abounds. *See, e.g.*, Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 739-40, 742-43 (1991) (noting that the Sherman Act focuses on “financially interested restraints on competition,” and concluding that courts should exempt “financially disinterested restraints,” such as those caused by nonprofits); Note, *Antitrust and Nonprofit Entities*, 94 HARV. L. REV. 802 (1981) (arguing that anticompetitive conduct by nonprofits should be permitted only if necessary to correct market failures); Srikanth Srinivasan, Note, *College Financial Aid and Antitrust: Applying the Sherman Act to Collaborative Nonprofit Activity*, 46 STAN. L. REV. 919 (1994) (arguing that antitrust law fails to account for the potential benefits of cooperation among nonprofits).

competing vermiculite mining company, W.R. Grace & Co. (Grace), and Historic Green Springs, Inc. (HGSI), a nonprofit dedicated to land preservation, under federal and state antitrust and unfair trade laws.<sup>2</sup> Grace had made a series of land donations to HGSI, which VVL claimed had been intended to exclude it from vermiculite reserves in Virginia. In upholding the district court's summary judgment for HGSI, the Fourth Circuit characterized the transactions as unilateral "gift[s]" that HGSI had passively accepted without exercising any "right or economic power."<sup>3</sup>

This Comment argues that the court's approach was mistaken. Although the court may not have wanted to expose a nonprofit to liability, its decision did little to clarify how antitrust law should treat such an entity. Had the court engaged in more complete analysis, rather than focusing on a formal category ("gift"), it would have recognized that Grace's donations constituted concerted action, and not merely a gift. Such analysis would have allowed the court to address more directly whether and how nonprofits may be liable under the antitrust laws. Or, if the court wished to avoid these questions, it should have relied on the facts of the case, which showed that VVL had proven neither anticompetitive effect nor antitrust injury, as required under section 1 of the Sherman Act.<sup>4</sup> Instead, the court's decision both failed to recognize the defendants' concerted action and overlooked the question of competitive effect, thereby missing an opportunity to guide courts and businesses as to the proper scope of the antitrust laws.

## II

Vermiculite is a scarce mineral that has been mined domestically only in Virginia, South Carolina, and Montana.<sup>5</sup> Vermiculite concentrates are used in a variety of agricultural and industrial applications, but numerous substitutes exist, and vermiculite mining rights have "no significance independent" of the concentrates market.<sup>6</sup> At the time of the donations, Grace was the second-largest vermiculite mining company in the world. It owned rights to almost all of the vermiculite reserves in Virginia but mined

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2. 307 F.3d 277 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 1900 (2003). The district court denied motions for summary judgment brought by VVL against Grace and HGSI under section 1 of the Sherman Act, *Va. Vermiculite, Ltd. v. W.R. Grace & Co.*, 108 F. Supp. 2d 549, 584 (W.D. Va. 2000), as well as the monopolization and attempted monopolization provisions of section 2, *id.* at 587-88. Grace subsequently settled. *Va. Vermiculite, Ltd. v. W.R. Grace & Co.*, 144 F. Supp. 2d 558, 561 (W.D. Va. 2001). At trial, the court held for HGSI on the remaining conspiracy to monopolize and state law claims. *Id.* at 600-01. VVL then appealed the section 1 summary judgment.

3. 307 F.3d at 282. The district court held for the defendants on different grounds from the Fourth Circuit. *See infra* note 25 and accompanying text.

4. 108 F. Supp. 2d at 563.

5. *Id.* at 554.

6. *Id.* at 578.

only in South Carolina,<sup>7</sup> finding it unprofitable to set up production facilities in Virginia.<sup>8</sup> VVL was the third-largest player; it operated in Virginia and South Carolina but was exhausting its Virginia reserves.<sup>9</sup>

To keep VVL from acquiring its Virginia reserves, Grace held them dormant, despite receiving no income and incurring various costs as a result.<sup>10</sup> Grace considered selling to VVL, but this was hardly an attractive option since it would have helped a competitor.<sup>11</sup> In the end, Grace donated the land to HGSI, thereby eliminating its costs, locking VVL out of Virginia, improving its public relations,<sup>12</sup> and claiming charitable tax deductions.<sup>13</sup>

Despite HGSI's self-proclaimed preservationist goals, it saw the donations not as a way to prevent vermiculite mining, but rather as a way to exclude VVL from the Virginia reserves. Although prohibitions on mining might have been consistent with preservationist goals, additional details call HGSI's motive into question. For example, HGSI agreed to allow nonvermiculite mining; it also prohibited vermiculite mining "even if restoration methods could . . . avoid problems with preservation"; and it prohibited vermiculite mining outside the area HGSI said it was trying to protect.<sup>14</sup> Perhaps most damning, the district court found that HGSI intended to mine the properties itself and transfer the proceeds to Grace.<sup>15</sup> In sum, the "evidence tend[ed] to exclude the possibility that Grace and HGSI acted independently or based on . . . some . . . potentially legitimate goal."<sup>16</sup> Rather, Grace and HGSI worked toward a joint and illegitimate goal—to exclude VVL from mining vermiculite in Virginia.

They were, however, ultimately unsuccessful. In a related state case,<sup>17</sup> the court rescinded one of the donations to HGSI, "leaving VVL at liberty to mine [additional parcels]."<sup>18</sup> By the time of summary judgment, VVL

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7. *Id.* at 555.

8. *See* 307 F.3d at 279.

9. *Va. Vermiculite, Ltd. v. W.R. Grace & Co.*, 156 F.3d 535, 538 (4th Cir. 1998); 108 F. Supp. 2d at 555.

10. 108 F. Supp. 2d at 569-70. Continuing to hold the land would have cost Grace \$1.1 million, but would have yielded approximately \$1.5 million by forcing VVL to close down in Virginia, thereby increasing Grace's market share and revenues. *Id.* at 569, 599-600.

11. Grace valued a sale to VVL at \$2.2 million, the lowest price it would accept, *id.* at 557, less \$1.5 million from ceding the reserves to VVL, *id.* at 569, 600. Grace negotiated with VVL and even made an offer to sell, but negotiations ultimately failed. *Id.* at 557.

12. HGSI had campaigned against Grace for twenty years. 156 F.3d at 537-38.

13. *Va. Vermiculite, Ltd. v. W.R. Grace & Co.*, 144 F. Supp. 2d 558, 573-74 (W.D. Va. 2001); 108 F. Supp. 2d at 557, 569, 608.

14. 108 F. Supp. 2d at 569.

15. *Id.* at 570.

16. *Id.*

17. *Historic Green Springs, Inc. v. Brandy Farm, Ltd.*, 32 Va. Cir. 98 (Cir. Ct. 1993).

18. 108 F. Supp. 2d at 559. When Grace originally purchased or leased the properties, it agreed to pay the owners royalties if Grace ever mined. *See, e.g., id.* at 556. In the *Brandy Farm* suit, the original owners claimed that Grace had breached its duty of good faith by failing to mine.

had acquired enough Virginia reserves to last until 2012, and substantial additional reserves remained potentially accessible.<sup>19</sup>

### III

Under section 1 of the Sherman Act,<sup>20</sup> a plaintiff must prove (1) concerted action to achieve an illegal objective, (2) unreasonable restraint of trade, and (3) antitrust injury.<sup>21</sup> VVL claimed that Grace's donation to HGSI was meant to suppress the mining rights market,<sup>22</sup> to "stop vermiculite mining [in Virginia],"<sup>23</sup> and ultimately "to monopolize the . . . market of vermiculite concentrates."<sup>24</sup> While the district court found ample evidence of concerted action, it concluded that VVL had failed to prove unreasonable restraint of trade, and thus granted summary judgment to the defendants.<sup>25</sup>

Under the prevailing standard, the Fourth Circuit reviewed the district court's grant of summary judgment de novo and held that VVL had failed to prove concerted action.<sup>26</sup> The decision emphasized section 1's prohibition against concerted activity, "in which multiple parties join their resources, rights, or economic power together in order to achieve an outcome that, but for the concert, would naturally be frustrated by their competing interests (by way of profit-maximizing choices)."<sup>27</sup> The court concluded that "only Grace, not HGSI, exercised any form of right, resource or economic power," and found that HGSI and Grace lacked "naturally competing interests that would otherwise set them at odds."<sup>28</sup> HGSI "contributed nothing to Grace," but merely passively received a gift.<sup>29</sup>

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The state court returned control of some of the parcels to the original owners, some of whom granted VVL mining access. HGSI subsequently abandoned its lease on a key property, realizing that VVL would not leave Virginia. *See id.* at 569.

19. *Id.* at 575.

20. 15 U.S.C. § 1 (2000).

21. *See* 108 F. Supp. 2d at 563. As usual, the Fourth Circuit divided the first prong into two—"concerted action" and "unlawful objective"—but analyzed them together. *See id.* at 563-64.

22. *Id.* at 573.

23. *Id.* at 564 (internal quotation marks omitted).

24. *Id.* at 576.

25. *Id.* at 584. The court based its decision on VVL's inability to establish a relevant market. The court's other findings, however, indicate that VVL would not have met its burden even if it had established a relevant market. *See infra* Part IV (arguing that summary judgment was proper because VVL had failed to produce evidence of restraint of trade or antitrust injury).

26. *Va. Vermiculite, Ltd. v. Historic Green Springs, Inc.*, 307 F.3d 277, 280 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 1900 (2003).

27. *Id.* at 282.

28. *Id.*

29. *Id.* at 283. The court recognized that Grace benefited from the donation, but held that "[t]ax deductions . . . are the result of the government's largesse." *Id.*

The court's conclusions are puzzling. First, the defendants had "competing interests": Grace mined the land, while HGSI sought to preserve it.<sup>30</sup> "But for" their concerted desire to exclude VVL from Virginia, HGSI presumably would have continued campaigning against Grace. In its references to "profit-maximizing" and "market choices" the court also implied another basis for concluding that the two entities did not have "naturally competing" interests: HGSI's nonprofit status.<sup>31</sup> Since a nonprofit does not maximize profit, the court suggested, it could never compete with another entity.

Under this logic, however, all nonprofits would be immune from section 1 liability—a conclusion that contradicts the well-settled principle that nonprofit organizations are not exempt from the antitrust laws.<sup>32</sup> Although nonprofits are exempt when they "perform acts that are the antithesis of commercial activity,"<sup>33</sup> the Fourth Circuit had already decided that "HGSI [was] subject to the antitrust laws in this case because the transaction between HGSI and Grace was essentially commercial."<sup>34</sup>

If HGSI and Grace had "competing interests" and if HGSI was not eligible for a noncommercial exemption, the court would have had to base its finding of no concerted activity on HGSI's failure to exercise any "right, resource, or economic power."<sup>35</sup> Indeed, this is a constant refrain in the decision. But the district court's findings amply demonstrated that HGSI had indeed exercised economic power or utilized economic resources in exchange for the donation.<sup>36</sup> First, HGSI agreed to take on Grace's "substantial carrying costs (such as property taxes, maintenance expenses, and annual rents of advanced royalties)," which Grace estimated at \$1.1 million.<sup>37</sup> HGSI's acceptance of this financial burden required economic resources and was, as the district court later noted, "not . . . common practice" for a preservation group.<sup>38</sup> Second, HGSI ended its negative campaigning, thereby reducing Grace's related reputational costs.<sup>39</sup> Third, HGSI played an active role in constructing the terms of the donations, and

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30. *Va. Vermiculite, Ltd. v. W.R. Grace & Co.*, 156 F.3d 535, 537 (4th Cir. 1998); 108 F. Supp. 2d at 557.

31. *See* 307 F.3d at 283 & n.\*.

32. *See supra* note 1.

33. *United States v. Brown Univ.*, 5 F.3d 658, 665 (3d Cir. 1993).

34. 156 F.3d at 541.

35. *See, e.g.*, 307 F.3d at 282.

36. *See infra* Part IV. The district court's later findings at trial only further confirmed the existence of concerted action. *See, e.g.*, *Va. Vermiculite, Ltd. v. W.R. Grace & Co.*, 144 F. Supp. 2d 558, 574-87, 589-92 (W.D. Va. 2001).

37. *Va. Vermiculite, Ltd. v. W.R. Grace & Co.*, 108 F. Supp. 2d 549, 557 (W.D. Va. 2000); *see also* 144 F. Supp. 2d at 575, 583 (noting that HGSI agreed to assume future lease payments and taxes totaling approximately \$1.1 million); 108 F. Supp. 2d at 600.

38. 144 F. Supp. 2d at 583.

39. *See, e.g.*, 108 F. Supp. 2d at 608 (noting that Grace intended "to . . . gain good will in the community" through the donations).

thus was, arguably, not a passive recipient.<sup>40</sup> Finally, though the Fourth Circuit rejected the argument that charitable tax deductions were an economic resource of HGSI,<sup>41</sup> those deductions were available only if Grace donated to HGSI or another nonprofit.<sup>42</sup> Grace benefited substantially from the deductions, which were a primary factor in Grace's decision to donate rather than sell or hold the land.<sup>43</sup> The Fourth Circuit ignored these facts and instead decided that HGSI had merely received a "gift."<sup>44</sup>

While certain elements of the transaction may have seemed unilateral on Grace's part (e.g., the transfers were "donations" rather than sales), and while HGSI did not directly confer some of the benefits Grace received (e.g., the tax deductions), VVL still provided enough evidence of HGSI's contribution of economic resources to meet its summary judgment burden as to the concerted action prong.<sup>45</sup> The Fourth Circuit's formalistic focus on the transaction's label ("gift") sidestepped harder questions: Did the facts indicate that HGSI had engaged in concerted action, and if they did, should HGSI have been subject to antitrust liability? Although the Fourth Circuit's approach might have been intended to cabin the reach of the antitrust laws in relation to nonprofits, or to avoid penalizing socially valuable activity such as charitable donations, the court's failure to discuss these policy choices (let alone whether courts are the appropriate bodies to make them) hardly helped to clarify the proper scope of antitrust law.

#### IV

By deciding that VVL had failed to prove concerted activity, the court stopped short of recognizing what was meritless about VVL's suit. Had it

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40. *See, e.g., id.* at 559 (noting that both parties "revised the restrictive covenants"); *id.* at 569 (quoting a letter from HGSI to Grace describing their "joint and several goals" and urging Grace to exclude third parties); *see also* 144 F. Supp. 2d at 586 (noting that HGSI suggested specific restrictions to be included in the covenants).

41. *See supra* note 29.

42. Grace does not appear to have considered donating to any other 501(c)(3) organization and thus, for practical purposes, considered the tax deductions available only if it donated to HGSI. *See* 108 F. Supp. 2d at 557 (listing the options Grace considered).

43. *Id.* at 600 ("Grace argues that . . . the after-tax value of VVL's offer would have earned Grace less than the after-tax value of donating the property to HGSI.").

44. The court's conclusion seemingly contradicts its earlier finding that the transaction was "essentially commercial" and had "direct commercial benefits for HGSI." *Va. Vermiculite, Ltd. v. W.R. Grace & Co.*, 156 F.3d 535, 541 (4th Cir. 1998). The Fourth Circuit also strangely focused on HGSI's failure to "impose a covenant" on the deeds. *See Va. Vermiculite, Ltd. v. W.R. Grace & Co.*, 307 F.3d 277, 283 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 1900 (2003). In so doing, the court ignored HGSI's active role in crafting the restrictions, *see supra* note 40, and contradicted the first appeal, in which it had emphasized that "the *entire* transaction . . . comprising both the donation . . . and the nonmining agreements" was relevant, 156 F.3d at 539.

45. *See* 108 F. Supp. 2d at 563-64 (describing the summary judgment standard).

looked more closely, it would have concluded that there was indeed concerted activity, but that VVL had not met its burden under the restraint of trade and antitrust injury prongs.<sup>46</sup> VVL's claim was that Grace, in concert with HGSI, had suppressed competition in the vermiculite mining rights and concentrates markets.<sup>47</sup> But Grace lacked the ability to do this in either market. Because "the upstream [mining rights] market has no significance independent of the downstream vermiculite [concentrates] market,"<sup>48</sup> a competitive concentrates market constrains the price of mining rights. The defendants provided evidence of cross-elasticity of demand between vermiculite concentrates and various substitutes,<sup>49</sup> which necessarily restricted vermiculite's price. Additional reserves in Virginia—not to mention South Carolina, Montana, and potentially other states—also hindered Grace's ability to raise prices.<sup>50</sup> Increased foreign competition and new domestic entrants further limited Grace's alleged market power.<sup>51</sup>

Perhaps more compelling than industry structure was the lack of actual anticompetitive effect or antitrust injury. First, "the price of mining rights in Louisa County ha[d] not risen at all"; it was "not obvious that the restraints had an anticompetitive effect."<sup>52</sup> Second, Grace and HGSI were ultimately unsuccessful at excluding VVL from the Virginia reserves, since events following the donations, including the state court decision, made significant additional reserves available to VVL.<sup>53</sup> Third, even if VVL were unable to access additional Virginia reserves, it had never had any contractual or property right to those reserves,<sup>54</sup> and had in fact entered the Virginia market knowing that Grace held most of the reserves.<sup>55</sup> Finally, VVL's position remained competitive: Both its market share and sales had increased.<sup>56</sup> In short, while VVL claimed that Grace (in concert with HGSI) had attempted to exclude it from the Virginia reserves in an effort to raise

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46. The district court found that VVL had failed to prove "restraint of trade" because it failed to establish a relevant product and geographic market. *See supra* note 25. The court of appeals could have based its decision on this technical deficiency, but it also could have affirmed on the merits, given the district court's findings as to VVL's other claims.

47. *See* 108 F. Supp. 2d at 560.

48. *Id.* at 577-78.

49. *Id.* at 586-87.

50. *See id.* at 560, 582 n.21; *see also id.* at 554 ("Grace . . . asserts that . . . deposits exist in [multiple states], but VVL claims [they] currently are not commercially viable . . .").

51. By 1998, imported vermiculite constituted thirty-three percent of North American sales, and the largest producer in the world was South Africa. *Id.* at 554-55 & n.2. The district court also noted the decrease in demand for vermiculite over the preceding twenty years and concluded that VVL's future lost profits could not be attributed to the donations. *Id.* at 596-97.

52. *Id.* at 574. The price of smaller grades had not increased; mid-size concentrate prices had increased, *id.* at 575, but the increase was not likely due to the donations to HGSI, *id.* at 585-86.

53. *See supra* notes 17-19 and accompanying text.

54. 108 F. Supp. 2d at 574.

55. *Id.* at 584.

56. *Id.* at 555. Grace's market share declined during the same period. *Va. Vermiculite, Ltd. v. W.R. Grace & Co.*, 144 F. Supp. 2d 558, 588 (W.D. Va. 2001); 108 F. Supp. 2d at 555.

its costs and thereby suppress competition in the vermiculite concentrates market,<sup>57</sup> the evidence actually showed that Grace's effort to restrain competition could not have succeeded, and that the attempt to exclude VVL had failed.

The Fourth Circuit thus could have held for the defendants on VVL's section 1 claims by basing its decision on a more thorough review of the economic circumstances of the transaction, rather than by concentrating on that transaction's label. Instead, the Fourth Circuit called the transaction a "gift" and did not recognize what was concerted about the donations, not to mention what was illicit.<sup>58</sup> At the same time, it neglected to point out that VVL could not state a claim under the antitrust laws because it could not show restraint of trade or antitrust injury.<sup>59</sup>

## V

Given the unusual facts of the case, the Fourth Circuit's decision may have been driven less by a desire to narrow the scope of concerted activity, and more by a desire to avoid exposing a nonprofit to antitrust liability: It seems fairly unlikely that the court would have excused the donations as unilateral gifts so blithely had HGSI been a for-profit competitor of VVL. Although the court did not hesitate in the first appeal to characterize the transaction as "fundamentally commercial" or to point out HGSI's financial interests,<sup>60</sup> it may have found the prospect of imposing liability on a nonprofit less palatable once its for-profit codefendant had settled with the plaintiff. But rather than directly address the issue of how competition policy should treat nonprofits, the court construed the transaction formalistically, failing to recognize what was concerted about the agreement between HGSI and Grace. At the same time, the court missed an opportunity to highlight antitrust law's focus on protecting competition, and thereby to deter meritless claims. In neither way did its decision clarify the scope or advance the goals of antitrust.

—*Olivia S. Choe*

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57. For a description of anticompetitive practices that involve raising rivals' costs, see HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 7.10, at 318-23 (2d ed. 1999).

58. See 144 F. Supp. 2d at 570 (concluding that the donations constituted illegal activity).

59. Because VVL offered sufficient proof of Grace and HGSI's illicit objectives but failed to demonstrate anticompetitive effect or antitrust injury, its antitrust claims were groundless. See *id.* at 593 ("[C]ourts should be circumspect in converting ordinary business torts into violations of antitrust laws. To do so would be to create a federal common law of unfair competition which was not the intent of the antitrust laws." (internal quotation marks omitted)); see also *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) ("[A]n act of pure malice by one . . . competitor . . . does not . . . state [an antitrust] claim . . .").

60. See *Va. Vermiculite, Ltd. v. W.R. Grace & Co.*, 156 F.3d 535, 541 (4th Cir. 1998).