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Cooper v. McClure: The Difficulty of Proving Antitrust Violations and the Need for a False Claims Act

IN STATE ex rel. Cooper v. McClure,1 the Superior Court of North Carolina considered whether a group of environmental consultants, by submitting inflated billing information to the state government, participated in a conspiracy in restraint of trade and issued summary judgment against them.2 The court held that there was no issue of material fact as to the defendants’ guilt of conspiracy and restraint of trade.3 Although the defendants undoubtedly participated in collusive and fraudulent acts, the court grounded its decision imposing liability in conspiracy and antitrust law.4 The court appears to have been disoriented by the multitude of evidence presented by the plaintiffs, and failed to notice that material issues existed about the basic elements of conspiracy and restraint of trade.5 In doing so, the court neglected to consider whether there was any practical detriment to the public, and left businesses without the protection of the rule of reason.6 However, given the difficulty of proving actual harm, denying summary judgment would probably have left the wrongdoers here without accountability, illustrating the need for a false claims act in North Carolina to deter procurement fraud against the government.7

I. THE CASE

As a means of regulating environmental cleanup services, the North Carolina General Assembly implemented a plan, that would allow the state to fund cleanup of underground storage tanks.8 Under this framework, “the North Carolina Department of Environmental Natural Resources ("DENR") [would] reimburse tank ow-

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2. Id. at *2–3.
3. Id. at *5.
4. See infra Part III.
5. See infra Part IV.A.
6. See infra Part IV.B.
7. See infra Part IV.C.
ers or operators . . . for the reasonable and necessary costs incurred in clean[ ] up . . . ." To control its reimbursement expenses, DENR set specific rates for environmental services, which were published in its Reasonable Rate Document ("RRD").

The rates published in the RRD were derived from two sources: the typical billing rates of environmental consultants and from bids from environmental contractors on clean up work for un-owned property. The typical billing rates were solicited by the state from engineers, geologists, and other environmental consultants in reasonable rate surveys. The bids solicited for clean up on property for which no owners are known were submitted in documents referred to as requests for proposals ("RFPs"). Rates published in the RRD had a significant impact on marketplace pricing.

A group of environmental consultants, the defendants, formed a nonprofit corporation naming themselves the North Carolina Environmental Services Providers Association ("NCESPA"). In 2001, DENR published proposed revisions to the RRD, setting rates that the defendants viewed as unsatisfactorily low. The state later solicited RFPs from various environmental consultants for cleanup work, which would also have some impact on the final rates published in the RRD. In response to this request, defendants allegedly took two specific actions to induce DENR to raise the rates from those originally proposed. First, the state claimed that NCESPA submitted reasonable rate surveys with inflated billing information. Second, NCESPA was accused of improperly influencing prices submitted by other contractors in RFPs.

DENR and the state claimed that reasonable rate surveys submitted by NCESPA members contained false billing information, intended to raise the rates published in the RRD. Before the incorporation of NCESPA, Darin McClure, a director of the corporation, asked the persons and entities who would be involved to complete a reasonable rate survey. According to the state, McClure simultaneously engaged in an e-mail campaign to encourage these entities to submit artificially inflated information, despite McClure's statement that the responses "should include the true

9. Id. at *2. The source of these funds is general fees charged to tank owners. Thus, under this scheme, tank owners actually do pay for their own cleanup costs. Id.
10. Id.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id. at *3. The group was formed in response to the potential changes in the RRD. Id.
16. Id.
17. Id.
18. Id.; see also infra notes 20–25 and accompanying text.
19. Cooper I, 2007 WL 2570249, at *3; see also infra notes 26–30 and accompanying text.
20. Reasonable rate surveys are consultants' statements of their charging rates, used to help the state determine the rates published in the RRD. Cooper I, 2007 WL 2570249, at *2.
21. Id. at *3.
and reasonable rates of environmental service providers . . . " The targets of McClure’s request then submitted reasonable rate surveys containing inflated rates to DENR. 23 Neither the lower court nor the superior court were able to determine "whether (1) NCESPA falsified these surveys and (2) DENR actually considered the survey in calculating rates . . . " 24 However, during oral arguments, the state conceded that they were aware that the rates on the surveys were false. 25

DENR also claimed that NCESPA inappropriately influenced the prices submitted in RFPs by sending e-mails to various environmental service providers ("ESPs") in advance of the bidding process. 26 These e-mails warned ESPs that the recent solicitation of bids by DENR may violate the Mini-Brooks Act, 27 although the directors had concluded before sending the e-mail that the solicitation was not in violation of the Act. 28 The e-mails also included the "fair market rates" that NCESPA had obtained from their manipulated reasonable rate survey, 29 and encouraged the ESPs to "keep these points in mind," and use the NCESPA rates as a reference when filing their RFPs. 30

The court granted motions to dismiss certain individual defendants based on nonprofit officer and director immunity, dismissed the state’s unfair trade and deceptive practice claims, and dismissed claims for damages against certain defendants. 31 The state then filed a motion for reconsideration, prompting the court to reinstate certain claims against certain defendants under a theory of conspiracy against the government, noting that "conspiracy" encompasses conspiracies in restraint of trade. 32 The state moved for summary judgment, and the court granted the motion on the state’s claim of conspiracy in restraint of trade. 33

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22. Id.
23. Id. Scott Ryals, an employee of DENR, testified that the rates provided "were approximately forty percent (40%) higher than the RRD then in effect," not including the twenty percent markup that NCESPA was requesting be added to the rates provided." Id. at *8.
24. Id. at *3.
25. Id.
26. See id. at *3–4.
27. See N.C. GEN. STAT. § 143-64.31 (1987). The Mini-Brooks Act restricts public works contracts from requiring bids for certain works. Id.
29. Id. at *9.
30. Id. The email also included language suggesting that the ESPs should adhere to the rates provided by NCESPA: "If a NCESPA member firm submits anything less than what we have proposed as reasonable rates, I think it severely undermines our position." Id.
II. LEGAL BACKGROUND

A. Conspiracy in Restraint of Trade

Section 133-28 of the General Statute of North Carolina allows "[a]ny governmental agency entering into a contract which is or has been the subject of a conspiracy . . . a right of action against the participants in the conspiracy to recover damages . . . ."34 Under North Carolina law, a conspiracy is defined as "(1) an agreement between two or more individuals; (2) to do an unlawful act or to do an [sic] lawful act in an unlawful way; (3) resulting in injury to [the] plaintiff inflicted by one or more of the conspirators; and (4) [is] pursuant to a common scheme."35 Essentially, the government must demonstrate that an actual agreement to engage in illegal activity existed, that the orchestrated effort to act was intentional, and that the government was harmed in some way by reason of these actions.36

A claim for conspiracy in restraint of trade alleges that anti-competitive behavior is the requisite unlawful activity, and is prohibited by North Carolina General Statutes section 75-1.37 "Restraint of trade" refers to any suppression of free market competition and encompasses a wide spectrum of activity.38 The federal Sherman Antitrust Act39 helps to guide classification of these behaviors40 and criminalizes "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . ."41 The Sherman Act was initially interpreted to criminalize any contract that restricted trade.42 However, the Supreme Court abandoned this approach in Standard Oil Co. v. United States,43 recognizing that some contracts in restraint of trade are necessary.44 In that case, the Supreme Court found that Standard Oil, which had bought up virtually all oil refining companies and allegedly was using its size and clout to undercut competitors, was in violation of the Sherman Act, but the Court took care to utilize the rule of reason in its holding.45 Standard Oil's actions were found to have exceeded the limits of the rule

37. Cooper I, 2007 WL 2570249, at *5. Section 75-1 states that
   [e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal. Every person or corporation who shall make any such contract expressly or shall knowingly be a party thereto by implication, or who shall engage in any such combination or conspiracy shall be guilty of a Class H felony.
42. 15 U.S.C. § 1 (2006). This language is reflected in North Carolina General Statute section 75-1, a prerequisite for a section 133-28 action.
43. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 312 (1897), overruled by Standard Oil Co. v. United States, 221 U.S. 1 (1911).
44. Id. at 63-68.
45. Id. at 66-67.
of reason because three identifiable consequences resulted: higher prices, reduced output, and reduced quality.\textsuperscript{46} Under the current standard, the primary focus of courts should be on the impact of the conspiracy on the competitive environment and public policy and whether the contracts and actions “unreasonably” restrain trade.\textsuperscript{47}

B. Per Se Rules and the Rule of Reason

The Court has devised two means of determining whether an agreement or scheme is unreasonably anticompetitive and therefore a restraint of trade: (1) \textit{per se} rules and (2) the rule of reason.\textsuperscript{48} \textit{Per se} rules of antitrust are categorical prohibitions on certain types of activities.\textsuperscript{49} For example, an agreement between competitors in an industry to fix prices is an obvious activity in restraint of trade.\textsuperscript{50} This is horizontal price-fixing,\textsuperscript{51} which remains in the shadow of \textit{per se} illegality.\textsuperscript{52} Once federal courts determine horizontal price-fixing has occurred, reasonableness is not a valid defense of a fixed price.\textsuperscript{53} Vertical price-fixing,\textsuperscript{54} in contrast, has been placed outside of the reach of \textit{per se} rules because it often has no detrimental effect on the free market.\textsuperscript{55}

However, North Carolina state courts have taken a slight departure from the Supreme Court’s application of \textit{per se} rules, utilizing the common law rule of reason even where horizontal price-fixing exists.\textsuperscript{56} This rule recognizes that a conspiracy to restrain trade must operate to the prejudice of the public in order to be actionable.\textsuperscript{57} The rule of reason requires the court to consider

\begin{itemize}
\item \textsuperscript{46} Id. at 71–76.
\item \textsuperscript{47} Id. at 63–65; see also Cal. Dental Ass’n v. FTC, 526 U.S. 756, 770–72 (1990). The antitrust issue is whether “the arrangements in question would have an anticompetitive effect on customers and markets.” Id. at 770.
\item \textsuperscript{48} United States v. Topco Assoc., Inc., 405 U.S. 596, 606–08 (1972).
\item \textsuperscript{49} See id. at 610–12 (agreements among businesses to divide markets); Int’l Salt Co. v. United States, 332 U.S. 392, 396 (1947) (tying arrangements); Fashion Originators’ Guild v. FTC, 312 U.S. 457, 467–68 (1941) (group boycotts).
\item \textsuperscript{50} See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940). A scheme that has the effect of “raising, depressing, fixing, pegging, or stabilizing the price of a commodity” is illegal \textit{per se}. Id.
\item \textsuperscript{51} Collusion agreements among competitors to set prices. Horizontal price fixing remains \textit{per se} anticompetitive because of the suppression of competition the activity necessarily entails. See id. at 220–22.
\item \textsuperscript{53} See United States v. Trenton Potteries Co., 273 U.S. 392, 396–97 (1927).
\item \textsuperscript{54} Vertical price-fixing involves agreements between parties in buyer-seller relationships within a product chain to pre-determine a price by which to sell and purchase intermediate products. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2713–15 (2007). These arrangements may exist between a manufacturer, distributor, supplier, or retailer. Id. at 2717–18.
\item \textsuperscript{55} See State Oil v. Khan, 522 U.S. 3, 15 (1997). Vertical price fixing should instead be evaluated by the rule of reason. Id. at 22.
\item \textsuperscript{56} Rose v. Vulcan Materials Co., 194 S.E.2d 521, 531 (N.C. 1973).
\item \textsuperscript{57} Id. at 530–31.
\end{itemize}
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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 its 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.\(^{58}\)

This context-oriented inquiry asks whether the conduct has had an anticompetitive impact on the specific industry at issue.\(^{59}\) Thus, the rule makes it possible for courts to determine that the pro-competitive benefits of restraint outweigh its anti-competitive effects, and pass muster under restraint of trade analysis.

C. The Trend Towards Greater Application of the Rule of Reason

The definition of anti-competitive behavior under antitrust laws is very broad.\(^{60}\) Courts have discretion to put the conduct out of the reach of *per se* rules and analyze the action under the rule of reason. The Supreme Court expressed this sentiment in *Board of Trade v. United States*,\(^ {61}\) where it recognized that every trade agreement restrains trade in some way, and that “[t]he true test of legality is whether the restraint imposed is such as merely regulates . . . or whether it is such as may suppress or even destroy competition.”\(^ {62}\) The Court later illustrated this in *Continental T.V., Inc. v. GTE Sylvania Inc.*,\(^ {63}\) where it rejected application of the *per se* rule to an agreement barring a retailer from selling franchised products from locations other than those specified in the contract.\(^ {64}\) It instead applied the rule of reason standard and recognized that it would be undesirable to prohibit all such restrictions.\(^ {65}\) The Court later expanded on this notion in *Monsanto Co. v. Spray-Rite Service Corp.*,\(^ {66}\) where it drew a distinction between concerted action to set prices and concerted action on non-price restrictions,\(^ {67}\) finding that while the former remains *per se* illegal, the latter is judged under the rule of reason.\(^ {68}\) In analyzing the problem of non-price restrictions, the Court adopted a high evidentiary standard, requiring plaintiffs to “present direct or circumstantial evidence that rea-

59. See id.
60. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (defining price-fixing as setting minimum prices); Plymouth Dealers' Ass'n v. United States, 279 F.2d 128, 132 (9th Cir. 1960) (including negotiable price lists in the definition of price-fixing).
61. 246 U.S. 231.
62. id. at 238.
64. id. at 49–50.
65. id. at 57, 59.
67. An example of a non-price restriction is a requirement that a dealer sell only to customers within a specified geographic market. AM. BAR ASS'N SECTION OF ANTITRUST LAW, INTELLECTUAL PROPERTY AND ANTITRUST HANDBOOK 501 (2007).
68. Monsanto, 465 U.S. at 761.
reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' The legality of the conduct should be judged primarily by its market impact.70

This trend is reflected in North Carolina's use of the rule of reason in price-fixing cases that would traditionally be subjected to per se rules.71 The North Carolina court has increasingly required demonstration of some harm to the public as a prerequisite to finding an illegal conspiracy in restraint of trade.72 For example, in Rose v. Vulcan Materials Co.,73 the court held that a scheme is unlawful only if it is "broad enough to interfere with the interest of the public."74 Rose involved a contract that established Rose's purchase price of stone from Vulcan Materials, Co., but also fixed another, higher, minimum price at which other customers could purchase stone.75 When Vulcan Materials departed from the terms of the contract and charged Rose a higher price than the agreement provided, Rose brought a suit for breach of contract.76 Vulcan Materials defended by claiming the contract was void, arguing that it was illegal in restraint of trade, thereby releasing Vulcan from its terms.77 Holding that price restriction contracts are not illegal per se, the Supreme Court of North Carolina upheld the terms of the contract, finding that Vulcan Materials did not satisfy its burden of proving the contract illegal by reason of the price discrimination it established.78 The court reaffirmed this statement in Pearce v. American Defender Life Insurance Co.,79 when it required the plaintiff to show that it relied to its detriment upon the statements made by the defendant in a section 75-1.1 claim.80 Thus, injury to the public is a necessary ingredient to a finding of conspiracy in restraint of trade.

Federal law provides government agencies with another means of prosecuting behavior that does not quite fit neatly in a restraint of trade scheme. The Federal

69. Id. at 764 (quoting Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980)).
70. See id. at 762.
71. See, e.g., Cole v. Champion Enters., Inc., 496 F. Supp. 2d 613 (M.D.N.C. 2007) (holding that failure to show that agreement not to compete had adverse effect on manufactured housing industry generally precludes claim under North Carolina antitrust statute); United Roasters Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979) (applying the rule of reason to an agreement between soybean products manufacturer and product distributor); Housing, Inc. v. Weaver, 246 S.E.2d 219 (N.C. Ct. App. 1978) (finding no illegal restraint of trade where defendants used their possession of title to land as leverage to refuse to fulfill their contractual obligations).
72. See, e.g., Pearce v. Am. Defender Life Ins. Co., 343 S.E.2d 174 (N.C. 1986) (requiring proof of actual injury as a result of defendant's actions); Rose v. Vulcan Materials Co., 194 S.E.2d 521 (N.C. 1973) (upholding contract that gave plaintiff a price for stone that was lower than market price).
73. 194 S.E.2d 521.
74. Id. at 531.
75. Id. at 524–26.
76. Id. at 526–27.
77. Id. at 527–28.
78. Id. at 532.
79. 343 S.E.2d 174 (N.C. 1986).
80. Id. at 181.
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False Claims Act was enacted in 1863 to combat perceived "widespread procurement fraud in Civil War defense contracts." The federal statute prescribes a civil penalty plus treble damages against any person who presents to the United States Government a false or fraudulent claim for payment or approval or "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." Courts have found that the provision encompasses a wide spectrum of activity, including "progress reports and vouchers, false presentations of compliance with various environmental regulations in a government contract, and redemption of illegally obtained food stamps."

III. THE COURT'S REASONING

In State ex rel. Cooper v. McClure, the court held that the facts provided sufficient evidence of a conspiracy in restraint of trade, in violation of North Carolina state law, and that the defendants had not presented the court with evidence to rebut this conclusion. In reaching this result, the court was persuaded by the multitude of evidence indicating NCESPA's guilt of conspiracy instead of by examination of the actual impact on NCESPA's actions on the industry. The court first concluded that a conspiracy existed among the defendants because they participated in an agreement to use the survey results to present DENR with a set of above the market rates. This conspiracy was evidenced by e-mails sent to ESPs in advance of the bidding process. Based on the content of the e-mails, the court concluded that the intent of the message "was to unite ESPs in an effort to present bids that were driven by the NCESPA survey," rather than by ordinary market forces. In addition, the court found that the drafters of the e-mail possessed the requisite intent to engage in conspiracy. Various statements had been made by directors of NCESPA prior to delivery of the e-mail which suggested that the board had decided to tread carefully to avoid collusio
The court then found that the scheme was a restraint of trade because ESP firms were essentially instructed which rates to submit in their RFPs. In reaching this conclusion, the court was persuaded by the overwhelming evidence of industry behavior after the broadcast of the e-mail. First, NCESPA’s board members’ companies actually submitted the e-mail’s rates. Next, NCESPA’s e-mail was found to have “clearly” influenced the rates submitted by other ESPs. The court decided that these rates were guided by NCESPA rates, rather than their professional judgment. The court determined that the defendants’ actions promoted anti-competitive behavior because if the members of NCESPA and other ESPs had pursued their self-interests as they normally would have in a competitive environment, they would have submitted lower bids in efforts to win the clean-up jobs for themselves. Finally, NCESPA’s desire to discover which firms had submitted which bids in order “to know who is ‘on our team’” contributed to the court’s conclusion that the firms were not “out for themselves,” one of the necessary features of an efficiently functioning market.

Lastly, the court determined that the public was injured as a result of the defendants’ actions. According to the court, the injury here was the state’s deprivation of a competitive bidding process due to the artificially manufactured RRD rates. Although at least one DENR worker stated that the agency was aware of the allegations of inflated market prices, and subsequently removed the collusive bids to obtain their measure of “competitive market data,” the court agreed with DENR’s argument that even the noncollusive bids were skewed upwards because the industry was aware that competition would be blunted due to NCESPA’s effort to inflate rates. The court concluded that DENR had used the allegedly “upwardly skewed numbers to formulate the revised RRD, and was also damaged by the suppression of competitive bidding on the RFP.”

IV. ANALYSIS

Although the multitude of evidence demonstrates that defendants did something wrong, the court relies upon an imperfect theory of conspiracy in restraint of trade

93. Id. at *12.
94. See infra notes 95–99 and accompanying text.
95. Cooper I, 2007 WL 2570249, at *11. In many submissions, the NCESPA rates were further exaggerated, with some firms adding a 20% increase in addition to the already inflated survey results. Id.
96. Id.
97. Id. For example, a director of NCESPA testified that representatives from two firms had called him to verify whether to use the NCESPA rates or the proposed rates plus 20%. Id.
98. Id.
99. Id.
100. Id. at *15.
101. Id. at *14.
102. Id.
103. Id.
104. Id.
to grant summary judgment, resulting in an unjustified decision. Summary judgment under this theory was unwarranted because material issues of fact still exist as to whether defendants' actions resulted in any real injury to the plaintiffs, as required by the restraint of trade rule of reason. In so doing, the court erodes the forward progress made in developing the rule of reason and sets precedent which negates to consider practicable impact. In the court's defense, a stronger theory of prosecution may have been unavailable, and the court may have been forced to rely upon this theory as a last resort. Had the state of North Carolina been able to prosecute under a theory of fraud against the government, it would have secured a more solid ground for NCESPA's liability and left the doctrine of reasonableness intact.

A. No Clear Indication of Prejudice to Public or Restraint of Trade

While there is little doubt that a conspiracy existed here, a claim for conspiracy in restraint is comprised of two parts: (1) conspiracy and (2) restraint of trade. Here, the question of whether NCESPA's action actually restrained trade remains unsatisfactorily unanswered. The court should have utilized the rule of reason to determine whether there was a negative impact on the public as a result of the collusive efforts. Instead, it took for granted that NCESPA's submissions actually influenced the RRD rates and erroneously granted summary judgment. The mark of anticompetitive behavior is its imposition of an adverse effect on market competition, and by extension, on consumers. Any such negative effect is absent, or at least miniscule, in the present case.

The impact of defendant's actions on actual service rates published by the government would be indirect at best. NCESPA's attempt to influence rates provided by government was not proven to be successful. DENR itself testified that it had removed the collusive bids from their calculations because the agency had some knowledge of the NCESPA scheme. The only evidence presented here demon-

105. See infra Parts IV.A.–B.
106. See infra Part IV.A.
107. See infra Part IV.B.
108. Id.
109. See infra Part IV.C.
111. Id. § 75-2.
115. See infra notes 116–37 and accompanying text.
117. Id.
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strating that this attempt had any effect on the published RRD rates was conjecture by the Director of Waste Management of DENR, based on a theory of how the industry would act in response to NCESPA’s e-mail.118 Although decisions involving complex market forces will inevitably be based upon economic theory, here there was room for further evidence gathering to either support or rebut DENR’s argument, which the court failed to allow.119 Moreover, even if DENR’s economic theory was proven true, the RRD rates do not actually set market prices, but merely influence them.120

Second, the evidence did not demonstrate that there was actual harm to the plaintiffs or prejudice to the public, which should have precluded the grant of summary judgment under the rule of reason.121 Here, “[c]ontention exist[ed] as to whether (1) NCESPA falsified these surveys and (2) DENR actually considered the survey in calculating rates that it would pay environmental services providers.”122 DENR’s complaint admits that the agency rejected some of the survey data and instead used an RFP to gather lower numbers.123 The complaint states that DENR became aware of the defendants’ behavior and excluded “at least some” of the defendants’ responses from consideration.124

Moreover, the actual result of NCESPA’s action, instead of harming the public, might have gone the other way to work to the public’s benefit.125 If this occurred, then a key component in finding restraint of trade, prejudice to the public, is missing.126 Here, the goal of the defendants’ collusive action was to increase government funding for clean-up costs, and increased government funding would probably benefit the public because increased funding may provide for better services in the already resource-starved arena of environmental cleanup compliance.127 There is no doubt that a cleaner environment increases societal wealth.128 Although DENR could argue that the public was injured by way of misdirection of tax dollars, this

118. Id. According to DENR, NCESPA’s actions deprived the state of a free market bidding process because the other companies would have submitted lower rates had the organization not encouraged other companies to submit their rates. Id.
119. See supra Part III.
120. Cooper I, 2007 WL 2570249, at *2.
121. See infra notes 122–24 and accompanying text.
123. Complaint at ¶¶ 87–90, Cooper I, 2007 WL 2570249 (No. 03-CVS-005617).
124. Id. at ¶ 136.
125. See infra notes 126–30 and accompanying text.
argument requires the further examination that litigation would provide. Our judicial system demands that the parties be given the opportunity to prove or disprove reliance and impact, and that opportunity was denied here when the court granted summary judgment.

Finally, the evidence did not clearly establish that suppression of market forces, the touchstone of a restraint of trade claim, actually occurred. According to the court, the mark of free market trade is that entities will look out for their best interests. Here, the members of NCESPA were keeping their interests in mind because their reports were an attempt to increase funding, allowing each company to more effectively administer their cleanup services. Since the firms would all have received funding, none would have unfairly gained an advantage over their competitors. The ESPs would be set on equal, albeit higher ground. From there, all principles of competitive markets would apply in the same manner. Any advantage gained by an ESP would not be the result of government funding, but rather as its independent utilization of the additional capital, which is no different than any other normally functioning industry.

Had the court allowed the case to proceed, it would have been able to more fully ascertain whether, and to what extent, the plaintiffs and the public suffered from NCESPA's actions. For example, it could have demanded DENR to support its contention that the RRD rates were in fact influenced by NCESPA's actions with empirical evidence demonstrating that the rates actually experienced a significant

129. For example, NCESPA should have the chance to respond that their actions did not result in misappropriation of government funds, but rather reallocation, which results in no net harm because the funds are still being utilized to benefit public interest—here, environmental cleanup.


131. See infra notes 132–37 and accompanying text.


133. Id. at *7. Presumably, the funds will be directed towards cleanup. Id. at *2. The more money available, the better the cleanup job will be. Id.

134. Id. The government money would be proportionately distributed, and each company would experience a proportionate increase in funding. Id.

135. See id. for description of the North Carolina reimbursement scheme. This illustrates the need for a more concrete theory of prosecution to protect the government against fraud. See infra Part IV.C.


137. See id. In a normally functioning industry, competitors combine resources and capabilities to create distinct capabilities, which create a competitive advantage. Michael E. Porter, Competitive Advantage: Creating and Sustaining Superior Performance 11 (Simon & Schuster 1985) (1985). Competitive advantages can take two forms: cost or differentiation advantage. Id. Cost advantage allows a market player to generate value by maximizing the number of transactions by offering products or services at a low price. Id. at 12. Differentiation advantage, on the other hand, allows a market player to generate value by emphasizing the quality of their products or services, resulting in fewer transactions, but a higher profit margin in each one. Id. at 14.

138. See infra notes 139–40 and accompanying text.
increase after taking into account factors such as inflation and historical trends. However, the court chose to grant summary judgment based not only on its conclusion that the defendants' actions were fraudulent, but also on an economic theory that has yet to be proved.

B. The Court May Have Had No Choice but to Rely on an Imperfect Theory of Conspiracy in Restraint of Trade, but in Doing So, Erased Forward Progress on the Application of the Rule of Reason

Despite the existence of numerous holes in the court's theory, it is difficult to fault the court for wanting to find some way to find the defendants liable. The defendants obviously acted with ill intention. However, the role of the court is not to pass judgment based on its own perceptions of right and wrong, but to determine who should be held responsible under the existing legal framework. Here, the court appears to have been swayed by the multitude of evidence showing the defendants acting wrongly, and utilized the theory of prosecution that most closely resembled the situation. In doing so, the court backtracked on any progress made towards broader application of the rule of reason, and created precedent that allows courts to neglect consideration of prejudice to the public, an essential element of restraint of trade.

The rule of reason ideally inserted a degree of practicality into a decision of whether an action is illegal by asking whether there was actually a deleterious effect on the free market. It offered businesses protection from being found liable for antitrust activity when their actions had no consequences. However, the court's decision here appeared to remove that protection. The result has potentially left

139. DENR could achieve this by tracking historical rates, discounting for inflation, and comparing the most recent rates to those of the past. Any increase could then either be explained away by increases in the cost of business, or, if the increase is too substantial, used to support DENR's allegation that the rates did in fact increase as a result of NCESPA's RFP submissions.

140. Cooper I, 2007 WL 2570249, at *15–16. The court found that the public was injured because the state was deprived of a competitive bidding process and because the rates were inflated, both of which would tend to skew the numbers upward. Id. at *14. However, the court also acknowledged that these numbers were purposefully adjusted downward once DENR became aware of the scheme, which would tend to negate the effects of the conspiracy. Id. It ultimately concluded that this downward adjustment was not sufficient to offset the inflation, but did not provide numerical evidence to support this conclusion. Id. Instead, the court simply took 10% of the value of the contracts awarded to calculate damages, less any settlement money already paid. Id. at *15–16.

141. See id. at *7–15 for the multitude of questionable activities defendants engaged in.

142. See generally Aharon Barak, Foreword: A Judge on Judging: The Role of a Supreme Court in Democracy, 116 Harv. L. Rev. 19 (2002) (discussing the role of the judiciary in society and how judges should strive to maintain the coherence of the legal system).


144. See infra notes 145–49 and accompanying text.

145. See supra notes 60–84 and accompanying text for development and application of the rule of reason.

146. See id.

147. This protection was removed when the court did not truly examine the detrimental effect of the defendants' actions on the public. See Cooper I, 2007 WL 2570249, at *14.
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businesses without the assurance of protection granted by the rule of reason, crippling businesses in the possible actions they can take.\textsuperscript{148} Neglecting the rule of reason leaves us with decisions that will often make little practical sense, and departs from the spirit of antitrust law.\textsuperscript{149}

C. A Proposal for North Carolina False Claims Legislation

While the court's reasoning is flawed, it is obvious that NCESPA did something wrong and should be penalized. It is possible that the court chose to grant summary judgment due to NCESPA's plainly fraudulent actions and the difficulty of proving harm.\textsuperscript{150} However, the court grounded its summary judgment upon a theory of conspiracy and antitrust violation where material issues of fact still exist.\textsuperscript{151} A judgment under a theory of conspiracy to engage in fraud would be less difficult to prove and leave the decision vulnerable to far less criticism.\textsuperscript{152} Therefore, this note proposes a North Carolina False Claims Act modeled after the Federal False Claims Act,\textsuperscript{153} which would allow courts to hold parties responsible in cases like these where harm in antitrust violations is difficult to prove.\textsuperscript{154}

A North Carolina statute similar to the federal statute, which provides for an automatic civil penalty where fraudulent actions have been uncovered, would enable the state government to collect damages where liability under common law or other statutes would be difficult to ascertain.\textsuperscript{155} Under this statutory scheme, the burden upon the prosecution would be far less burdensome than in an antitrust action in cases such as this one.\textsuperscript{156} Instead of placing the burden on the state to prove that DENR actually suffered some detriment when NCESPA submitted inflated rates, the state would merely have to show that NCESPA actually did submit


\textsuperscript{149} See generally Daniel A. Crane, Rules Versus Standards in Antitrust Adjudication, 64 Wash. & Lee L. Rev. 49 (2007) (explaining the transition from rules to standards in antitrust law).

\textsuperscript{150} See supra Part IV.A.

\textsuperscript{151} Id.

\textsuperscript{152} See infra notes 154–60 and accompanying text.


\textsuperscript{155} See 31 U.S.C. § 3729(a) (1863); United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 748–49 (9th Cir. 1993) (holding that a qui tam plaintiff need not suffer an injury to assert a claim).

the false rates. The burden would then fall upon NCESPA to prove that the rates it submitted were truthful.

A false claims statute would also provide additional bonuses. The automatic civil penalty would serve as a deterrent for any fraudulent claims, and would provide the government some form of relief when actual damages are less than certain. Moreover, this statute may help overworked and under-funded state prosecutors who may have less insight into the inner-workings of companies than privately hired corporate lawyers. If nothing else, the statute would provide another route of prosecutorial theory.

V. CONCLUSION

Although the defendants undoubtedly participated in collusive and fraudulent acts, the court grounded NCESPA’s liability in conspiracy and antitrust law. In doing so, the court appears to have been persuaded by the multitude of evidence presented by the plaintiffs, and failed to notice that material issues still existed about the basic elements of conspiracy and restraint of trade. Had the court denied summary judgment, and allowed the plaintiffs to prove that actual harm had been suffered, its decision would be left vulnerable to far less criticism and grounded in more viable precedent. However, the difficulty of proof, despite the stark illegality of the defendant’s actions, may have left the wrongdoers here without accountability, illustrating the need for a false claims act in North Carolina to deter procurement fraud against the government. Had a false claims act been used, the court could have avoided eroding the rule of reason, leaving more space for intelligent and practical analysis of alleged anti-competitive behavior.

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157. Id. at 471 n.35.
158. See generally id. at 470–78 (discussing the operation of the Federal False Claims Act).
159. Id. at 475–78.
160. Id.
161. See supra Part III.
162. See supra Part IV.A.
163. See supra Part IV.B.
164. See supra Part IV.C.
165. Id.