

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33906

**JAMES W. KESSEL, M.D.,
RICHARD M. VAGLIENTI, M.D., and
STANFORD J. HUBER, M.D.,**

Appellants/Plaintiffs Below,

v.

**MONONGALIA COUNTY GENERAL HOSPITAL
COMPANY d/b/a MONONGALIA GENERAL
HOSPITAL, a West Virginia Non-Profit Corporation,
MARK BENNETT, M.D., individually,
BENNETT ANESTHESIA
CONSULTANTS, P.L.L.C. and
PROFESSIONAL ANESTHESIA SERVICES, INC.,**

Appellees/Defendants Below.

**BRIEF OF AMICUS CURIAE WEST VIRGINIA BUSINESS AND
INDUSTRY COUNCIL**

**FOR WEST VIRGINIA BUSINESS AND
INDUSTRY COUNCIL**

Kent J. George (W. Va. Bar No. 4842)

Robinson & McElwee PLLC

P. O. Box 1791

Charleston, WV 25326-1791

(304) 347-8322

***Counsel for Amicus Curiae West Virginia
Business and Industry Council***

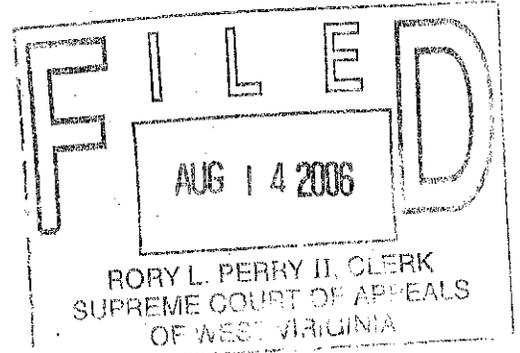


TABLE OF CONTENTS

Table of Authorities ii

I. Introduction and Statement of Interest 1

II. Discussion 2

III. Conclusion 9

Certificate of Service

TABLE OF AUTHORITIES

CASES

| | |
|---|-------|
| <i>Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.</i> , 441 U.S. 1 (1979) | 4 |
| <i>Brown Shoe Co. v. United States</i> , 370 U.S. 294 (1962) | 2 |
| <i>Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.</i> , 429 U.S. 477 (1977) | 2 |
| <i>Car Carriers, Inc. v. Ford Motor Co.</i> , 745 F.2d 1101 (7th Cir. 1984) | 3 |
| <i>ERI Max Entertainment, Inc. v. Streisand</i> , 690 A.2d 1351 (R.I. 1997) | 5,6 |
| <i>Gray v. Marshall County Board of Education</i> , 179 W. Va. 282, 367 S.E.2d 751 (1988) | 2,5,8 |
| <i>Maywood Sportservice, Inc. v. Maywood Park Trotting Association, Inc.</i> , 14 Ill. App. 3d 141, 302 N.E.2d 79 (1973) | 6 |
| <i>Reddy v. Community Health Found. of Man</i> , 171 W. Va. 368, 298 S.E.2d 906 (1982) | 5 |
| <i>United States v. Topco Assocs., Inc.</i> , 405 U.S. 596 (1972) | 3 |
| <i>UXB Sand & Gravel, Inc. v. Rosenfeld Concrete Corp.</i> , 599 A.2d 1033 (R.I. 1991) | 6 |
| <i>White Motor Co. v. United States</i> , 372 U.S. 253 (1963) | 4 |
| <i>Young Refining Corporation v. Pennzoil Company</i> , 46 S.W.3d 380 (Tex. App. 2001) | 6 |

OTHER

| | |
|---|---|
| 1 Julian O. von Kalinowski, Peter Sullivan, <i>et al.</i> , <i>Antitrust Laws & Trade Regulation</i> | 5 |
|---|---|

I. INTRODUCTION AND STATEMENT OF INTEREST

The West Virginia Business and Industry Council (the “Business & Industry Council”) is a non-profit association with over fifty-five member companies and trade associations representing thousands of employees and business jobs in the state of West Virginia, including those listed in Exhibit “A” hereto. The mission of the Business & Industry Council is to create an environment in the state of West Virginia that invites investment and fosters job growth. To that end, the Business & Industry Council is uniquely suited to address significant legal and policy issues that are poised to impact economic development in this state. Such an issue is now before this Court, and the Business & Industry Council writes to voice its strong belief that the unprecedented expansion of *per se* antitrust offenses argued for by Appellants threatens to grind the economy of West Virginia to a halt.

The Business & Industry Council respectfully suggests that the Court should maintain its faithful adherence to the purpose of the West Virginia Antitrust Act, which is to deter anticompetitive conduct, in order to foster economic growth. Further, the Court should learn from the considerable experience of other courts, which uniformly have construed federal (and state) antitrust laws to hold that exclusive contracts such as the ones at issue in this action between a hospital and anesthesiologist groups do not constitute *per se* antitrust law violations. Appellants have offered no reasonable alternative. Therefore, the Court should affirm the judgment of the circuit court granting partial summary judgment to Monongalia General Hospital on Appellants’ state antitrust claims.

II. DISCUSSION

It is axiomatic that the antitrust laws were passed for “the protection of competition, not competitors.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). Accordingly, in *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), the United States Supreme Court held that “[t]he injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.” *Id.* at 489. This statement is equally true whether the antitrust laws at issue were passed by Congress or by the West Virginia Legislature.

This Court recognized the scope of the West Virginia Antitrust Act in *Gray v. Marshall County Board of Education*, 179 W. Va. 282, 367 S.E.2d 751, 757 (1988). In *Gray*, this Court held that “[t]he antitrust laws are not designed to deter all the evils known to modern commercial life; rather, they are designed to deter one specific evil – namely anti-competitive, conspiratorial *economic* behavior.” *Id.* (emphasis in original). The Court rejected the appellant’s argument for expansion of the intra-enterprise conspiracy doctrine “to the point where it becomes a blunt weapon against outrageous conduct injuring another business by any corporate employee.” *Id.*, 367 S.E.2d at 756-57. The Court reasoned that “[i]f this proposition were accepted, simple spite would become actionable under the antitrust laws, which is a result that we find was not intended by the legislature.” *Id.*, 367 S.E.2d at 757.

The antitrust laws of this state, therefore, are aimed at restraining particular adverse economic practices that harm competition. They are not a substitute for tort and contract law. The general requirement that an alleged restraint be shown to harm competition was

not met by Appellants in this case. Accordingly, Appellants seek classification of the contracts as *per se* violations, which do not require proof that the practices unreasonably restrain competition. In simply attaching the *per se* label in this way, Appellants do not cite to decisions of this Court, the courts of other states, or the federal courts. Exclusive contracts simply have not been found by the courts to warrant *per se* treatment, and by re-labeling the contracts as tying or other alleged *per se* violations, Appellants ignore the meaning of the terms they use, and ignore the fundamental purpose of the West Virginia Antitrust Act.

It is only after considerable experience with certain business relationships that courts classify them as *per se* antitrust violations. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607-08 (1972). Accordingly, as the court explained in *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1108 (7th Cir. 1984):

Thus, the *per se* label must be applied with caution and we will expand that class of violations only after the courts have had considerable experience with the type of conduct challenged and application of the Rule of Reason has inevitably resulted in a finding of anticompetitive effects.

Id. at 1101 (citation omitted).

There is no such experience cited to by Appellants in the courts of other states or the federal courts. There are no citations by Appellants to findings of the West Virginia Legislature, or any administrative body or agency, that exclusive contracts are subject to *per se* treatment. Similarly, there is a complete lack of authority for re-classifying exclusive contracts as the *per se* violations of tying, market allocation or price fixing.

The care to be used before expanding the category of *per se* violations was noted by the United States Supreme Court in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979). There, the Court reversed a holding that a blanket license constituted *per se* price fixing because the blanket license was not a “naked restrain[t] of trade with no purpose except stifling of competition[.]” *Id.* at 20 (quoting *White Motor Co. v. United States*, 372 U.S. 253 (1963)). In reaching its conclusion, the Court articulated the following test for determining whether the *per se* rule should apply to the alleged price fixing at issue:

[I]n characterizing . . . conduct under the *per se* rule, our inquiry must focus on whether the effect and, here because it tends to show effect, the purpose of the practice are to threaten the proper operation of our predominantly free-market economy – that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to “increase economic efficiency and render markets more, rather than less competitive.”

Id. at 19-20 (citation omitted).

The Court noted that the scrutiny occasionally required to determine whether the *per se* rule should apply must not merely subsume the burdensome analysis required under the rule of reason, or else the courts should apply the rule of reason from the start. That is the reason the *per se* rule is not employed until after considerable experience with the type of challenged restraint. *Id.* at 19 n. 33.

The devastating effects of the overly expansive use of *per se* violations argued for by Appellants in this action were noted by a leading commentator:

Taken literally, any possible restraint, no matter how insignificant, could conceivably justify labeling conduct as a violation of Section 1 [of the

Sherman Act]. For example, a garden-variety agreement between two partners to set the price of their goods literally restrains trade and might be labeled as price fixing. It is easy to see that a literal interpretation of Section 1 would soon cause the nation's economy to come to a grinding halt.

¹ Julian O. von Kalinowski, Peter Sullivan, *et al.*, *Antitrust Laws & Trade Regulation* § 12.01 (footnotes omitted).

Although there undoubtedly are cases in which a *per se*, rather than a rule of reason, analysis is appropriate under the West Virginia Antitrust Act, to date this Court has not been presented with one. Indeed, this Court has declined the invitation to expand the use of the *per se* category. See *Reddy v. Community Health Found. of Man*, 171 W. Va. 368, 298 S.E.2d 906 (1982) (holding that restrictive covenant or covenant not to compete in employment contract is not *per se* violation of West Virginia Code Section 47-18-3(a)). This caution is consistent with the purpose of the West Virginia Antitrust Act as stated by this Court in *Gray*, to address specific *economic* evils, not merely replace tort law.

Thus, *per se* analysis should be reserved for those cases in which considerable experience has taught that the challenged conduct is a naked restraint of trade with no purpose except stifling of competition.

Other courts have uniformly applied the rule of reason to state law antitrust claims relating to exclusive contracts. For example, in *ERI Max Entertainment, Inc. v. Streisand*, 690 A.2d 1351 (R.I. 1997), the court upheld the dismissal of a case on the grounds that an exclusive dealing agreement, under which a special version of a videotaped concert by Barbara Streisand containing an extra song would be available only at a video chain's stores,

did not violate state or federal antitrust laws. The Rhode Island court relied on the failure of the plaintiff to show harm to competition:

The plaintiff has provided us with no authority for the proposition that the mere existence of an exclusive-dealing contract – without proof of substantial market foreclosure, injury to competition, or a specific intent to fix prices or destroy competition – constitutes a violation of federal or state antitrust laws. Indeed the federal antitrust case law is to the contrary. “The purpose of antitrust laws is to protect competition, not [individua]l competitors.” *UXB Sand & Gravel, Inc. v. Rosenfeld Concrete Corp.*, 599 A.2d 1033, 1035 (R.I. 1991). Clearly, the allegation that Blockbuster has attained a large share of the video market does not by itself state an antitrust violation, even in the event that Blockbuster’s growth was secured at the expense of competitors. The additional fact that Blockbuster has contracted to be the sole supplier of a single videotape does not, without more, change this result.

Id. at 1353 (citations omitted).

In addition, in *Young Refining Corporation v. Pennzoil Company*, 46 S.W.3d 380 (Tex. App. 2001), the court affirmed summary judgment for the defendants under the Mississippi Antitrust Act, holding that, under the “rule of reason,” exclusive dealing contracts are not prohibited by antitrust laws unless there is a resulting foreclosure of market alternatives. The plaintiffs had claimed that “[b]y entering into their contract to sell 100% of Pennzoil’s Baxterville Field production to Southland, knowing that such a deal would jeopardize the existence of Young Refining, the Defendant’s [sic] have entered into an illegal ‘trust and combine.’” *Id.* at 389. In denying the claim, the court reasoned that, although there might be evidence that the plaintiffs were injured by the exclusive contract, there was no evidence that competition in general was damaged by the agreement. *Id.* at 391. See also *Maywood Sportservice, Inc. v. Maywood Park Trotting Association, Inc.*, 14 Ill. App. 3d 141, 302 N.E.2d 79 (1973) (holding under rule of reason analysis that

exclusive contract for concessions was not illegal long term exclusive dealing contract or illegal tie-in contract under Illinois Antitrust Act).

Appellants do not claim that other states treat the contractual arrangements at issue here as exempt from the general requirements that harm to competition be shown. Appellants also do not claim that authority in other states has held such contracts to be *per se* violations under any of the labels that Appellants invoke: tying, market allocation, refusal to deal or price fixing. In essence, Appellants ask this Court to depart from the established rule in other states and distort the antitrust law in this state, even though there has been no judicial experience finding the conduct at issue to be harmful, no legislative finding that conduct such as this is harmful, and no administrative agency proceedings making findings on such conduct.

Appellants' view implicitly changes the meaning of the antitrust terms being used, and would depart from the usage in other states, as well as the federal courts. Such an approach would create enormous uncertainty and cast doubt on widespread commercial practices. In the coal industry, for example, coal supply contracts are commonly exclusive. One coal supplier may commit a particular mine's output exclusively to a particular power plant. Under Appellants' view, this practice would be market allocation and/or tying. Coal suppliers may have negotiated transport rates with carriers, and then sell coal "f.o.b." at the point of delivery. This, in the literal approach of Appellants, would be tying the transportation and coal sales together.

In the data processing industry, it is quite common to bundle sales of hardware and support services - something Appellants would label unlawful tying. In the chemical and

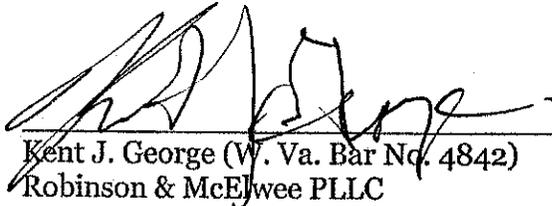
pharmaceutical industries, exclusive supply agreements can be used to assure adequate supply and create price reduction incentives. These common and beneficial practices would fit within Appellants' view of *per se* refusal to deal. Joint marketing arrangements between manufacturers of complementary, but not competing goods (golf bags and golf clubs; sportswear and sports equipment), in which products are sold in discounted bundles for one price, would be subject to challenge as tying and price fixing, if Appellants' view prevails. Industrial purchasers of manufactured goods may mandate the use of certain approved suppliers of components or raw materials, either to assure quality or to take advantage of price discounts the purchaser has arranged with the material or component supplier. Under Appellants' approach, these suddenly become subject to *per se* characterization (as tying, market allocation and/or price fixing).

In sum, Appellants' implicit re-definition of accepted antitrust terms would change West Virginia's antitrust laws from a tool for protecting the public and the competition process, to a tool for disgruntled business competitors. Such a result is contrary to this Court's own admonition that "antitrust laws are not designed to deter all the evils known to modern commercial life." *Gray v. Marshall County Board of Education*, 179 W. Va. 282, 367 S.E.2d 751, 757 (1988).

III. CONCLUSION

For all of the foregoing reasons, this Court should decline to broaden the scope of the West Virginia Antitrust Act beyond its purpose and beyond all recognized antitrust jurisprudence. Accordingly, the Court should affirm the judgment of the circuit court.

Dated this 14th day of August, 2006.



Kent J. George (W. Va. Bar No. 4842)

Robinson & McElwee PLLC

P. O. Box 1791

Charleston, WV 25326-1791

(304) 347-8322

*Counsel for West Virginia Business and Industry
Council*

WEST VIRGINIA BUSINESS & INDUSTRY COUNCIL

MEMBER

| | |
|--|---|
| American Council of Engineering Co's. of WV 2007 Quarrier St. Charleston, WV 25311 | Amy Clendenin – asc@wvengineers.com 345-2828 Fax 345-3214 |
| Asphalt Pavement Assn. of WV 2114 Kanawha Blvd. East Charleston, WV 25311 | Pat Parsons pat@wvexpo.com 342-1166 Fax 342-7469 |
| Builders Supply Assn. of WV 400 Allen Drive, Suite 50 Charleston, WV 25302 | Bonnie Harold bonnie@bsawv.com 342-2450 Fax 342-2511 |
| Charleston Area Chamber of Commerce 1116 Smith Street Charleston, WV 25301 | Jim Sturgeon jim@pcsv.com 342-6000 |
| Contractors Association of WV 2114 Kanawha Blvd. East Charleston, WV 25311 | Mike Clowser mclowser@cawv.org 342-1166 Fax 342-1074 |
| Independent Oil & Gas Assn. of WV 405 Capitol St., Suite 507 Charleston, WV 25301 | Charlie Burd cburd@iogawv.com 344-9867 Fax 344-5836 |
| Morgantown Area Chamber of Commerce P. O. Box 658 Morgantown, WV 26507-0658 304 292-3311 – Fax 296-6619 | F. Scott Rotruck fsrotruck@aol.com (Home 594-3561 – Cell 685-6109 Fax 594-0778) e-mail Scott@morgantownchamber.org |
| Putnam County Chamber of Commerce P. O. Box 553 Teays, WV 25569 | Marty Chapman mchapman@putnamcounty.org 757-6510 – Fax 757-6562 |
| WV Automobile & Truck Dealers Assn. P. O. Box 2028 Charleston, WV 25327 | Ruth Lemmon wvcar@aol.com 343-4158 (Cell 545-4158) Fax 343-8474 |
| West Virginia Broadcasters Assn. 140 Seventh Avenue South Charleston, WV 25303 | Michele Crist mcrist@citynet.net 744-2143 Fax 744-1764 |
| WV Society of CPA's P. O. Box 1673 Charleston, WV 25326 | Patricia A. Moyers pat@wvscpa.org 342-5461 Fax 344-4636 |

EXHIBIT A

| | |
|--|--|
| WV Hospital Association 100 Association Drive Charleston, WV 25311 | Steven Summer ssummer@wvha.org Tony Gregory gregory@wvha.org 344-9744 Fax 344-9745 |
| West Virginia Health Care Association 110 Association Drive Charleston, WV 25311 | Jesse W. Samples - jsamples@wvhca.org 346-4575 Fax 342-0519 |
| WV Consumer Finance 179 Summers St., Suite 717 Charleston, WV 25301-2131 | Jim DeCarlo jim71421@excite.com 346-3951 Fax 346-0108 |
| WV Oil Marketers & Grocers Assn. 2506 Kanawha Blvd. E. Charleston, WV 25311 | Janet Vineyard jan@omegawv.com 343-5500 Fax 343-5810 |
| WV Chamber of Commerce P. O. Box 2789 Charleston, WV 25330 | Steve Roberts sroberts@wvchamber.com Tom Boggs tboggs@wvchamber.com Brenda Harper bharper@wvchamber.com 342-1115 Fax 342-1130 |
| WV Manufacturers Assn. 2001 Quarrier St. Charleston, WV 25311 | Karen Price Karen@wvma.com 342-2123 Fax 342-4552 Tom Dover tom.dover@bayercorpsscience.com |
| WV Coal Association, Inc. P. O. Box 3923 Charleston, WV 25339 | Bill Raney braney@wvcoal.com Chris Hamilton chamilton@wvcoal.com Dan Miller dan@wvcoal.com 342-4153 Fax 342-7651 |
| WV State Medical Association 4307 MacCorkle Ave. Charleston, WV 25304 | Evan Jenkins evan@wvsma.com Amy Tolliver amy@wvsma.com 925-0342 Fax 925-0345 |
| WV Beverage Association 405 Capitol St., Suite 412 Charleston, WV 25301 | Larry Swann larryswann@aol.com 346-9883 Fax 346-5743 |
| WV Cable Telecommunication Assn. 117 Summers Street Charleston, WV 25301-2110 | Mark Polen mpolen@arnoldagency.com 345-2917 Fax 342-1285 |
| West Virginia Retailers Association 2110 Kanawha Blvd. E., #102 Charleston, WV 25311 | Bridget Lambert - wvra@teays.net 342-1183 Fax 342-1471 |

WV Forestry Association
P. O. Box 718
Ripley, WV 25271

Dick Waybright
dwaybright@wvadventures.com
372-1955
Fax 372-1957

WV Oil & Natural Gas Assn.
P. O. Box 3231
Charleston, WV 25332

Corky DeMarco wvonga@charter.net
342-1609
Fax 343-5610

WV Insurance Federation
P. O. Box 273
Charleston, WV 25321

Jill Cranston Bentz
jbentz@spilmanlaw.com
340-3880 Fax 340-3801

West Virginia Association of Realtors
2110 Kanawha Blvd. East
Charleston, WV 25311

Raymond I. Joseph evp@wvrealtors.com
342-7600
Fax 343-5817

West Virginia Racing Association
P. O. Box 7118
Cross Lanes, WV 25356

John Cavacini johncavacini@msn.com
776-1000
Fax 776-1424

WV Self Insures Assn.
P. O. Box 1588
Charleston, WV 25326

Henry C. Bowen
bowenh@steptoe-johnson.com
340-3860
Fax 349-3801

WV Motor Truck Assn.
P. O. Box 5187
Charleston, WV 25361

Robert D. Blankenship wvmta@wvmotortruck.org
345-2800
Fax 345-0308

WV Bankers Association
120 Washington Street East
Charleston, WV 25301

Joe Ellison
343-8838
jellison@wvbankers.org

ASSOCIATE MEMBERS

Acordia Employers Service
426 Leon Sullivan Way
Charleston, WV 25301

Michael Keener - mkeener@acordiaservices.com
549-4960

Allegheny Energy
7 Greenbrier St.
Charleston, WV 25311

Samuel Minardi - 345-4695 - Fax 345-4571
Sminardi@alleghenyenergy.com

Appalachian Power
P. O. Box 1986
Charleston, WV 25327

Mark Dempsey medempsey@aep.com
348-4135
Fax 348-4126

Arch Coal, Inc.
7 Players Club Drive
Charleston, WV 25311

John R. Snider jsnider@archcoal.com
357-5717
Fax 357-5725

Arnold Agency
117 Summers Street
Charleston, WV 25301-2110

Debbie Phillips dphillips@arnoldagency.com
345-2917
Fax 342-1285

Bowles Rice McDavid Graff & Love
1600 Huntington Sq., P.O.Box 1386
Charleston, WV 25325-1386

Sarah E. Smith ssmith@bowlesrice.com
Judy Margolin jmargoli@bowlesrice.com
347-1100 Fax 343-3058

Ceredo River Terminals
P. O. Box 308
Ceredo, WV 25507 (Brenda 526-0712)

LOCAL – Willis J. Perry wjp132@aol.com
223 Morial Way, Charleston, WV 25311
Cell 545-4409

Consol, Inc.
Consol Plaza
Pittsburgh, PA 15241

Stephen Young steveyoung@consolenergy.com
(412) 831-4043

C. I. Walker Machinery
P. O. Box 2427
Belle, WV 25015

Steve Walker swalker@walker-cat.com
949-6400
Fax 949-2376

Charles Ryan Associates Inc.
P. O. Box 2464
Charleston, WV 25329

Joe Gollehon jgollehon@charlesryan.com
Tom Winner twinner@chaesryan.com
TOM W. Direct 556-9139 JOE G. Direct 556-9114
342-0161 Fax 342-1941

Chesapeake Energy
900 Pennsylvania Avenue
Charleston, WV 25302

Steve Warnick
343-5102
swarnick@chkenergy.com

CSX Transportation
935 7th Avenue
Huntington, WV 25701

J. Randolph Cheetham randy_cheetham@csx.com
522-5146
Fax 522-5714

Dominion Resources
P. O. Box 2450
Clarksburg, WV 26302-2450

Bob Orndorff
623-8863
Fax 623-8305

E. I. DuPont
300 Kanawha Blvd. East
Charleston, WV 25301

James Juetten – james.g.juetten@usa.dupont.com
345-7907 - Fax 345-7911

Government Relations Specialists
P. O. Box 5008
Charleston, WV 25361

Thomas J. Stevens stevensgrs@aol.com
344-8466
Fax 344-3130

Georgia-Pacific Corp.
1301 Gervais St., Suite 516
Columbia, SC 29201

Robert E. McNair, Jr. remcnair@gapac.com
(803) 254-7765

WV Location: P. O. Box 511, Mount Hope, WV 25880

Gemini Association Management
P. O. Box 3264
Charleston, WV 25332

Richard A. Kennedy, Jr., Chairman 421-4279
Linda West, President 421-4271
[Gemini @verizon.net](mailto:Gemini@verizon.net)
Phone 344-8448 – Fax 344-5064

David E. Haden
P. O. Box 1428
Charleston, WV 25325

david.haden@verizon.net
926-7407
Fax 926-7428

Jackson & Kelly
P. O. Box 553
Charleston, WV 25301

Louis Southworth lsouthworth@jacksonkelly.com
340-1231
Fax 340-1093

Upper Kanawha Valley Development Corp. John H. Wellford, III
One Wellford Way
Charleston, WV 25311

346-3775
Fax 346-3798

Massey Coal Services, Inc.
P. O. Box 1951
Charleston, WV 25327-1951

Don Blankenship don.Blankenship@masseyenergyco.com
Greg Thomas gregthomaswv@charter.net
304 926-0075 – Fax (304) 343-2003

Norfolk Southern Corp.
800 Princeton Ave.
Bluefield, WV 24701

William G. (Bill) Carper wgcarper@nscorp.com
325-4497
Fax 325-4279

Organization Management Services
P. O. Box 1335
Charleston, WV 25325

Floyd Sayre fmsayre@hotmail.com
342-4441
Fax 345-0308 (FMS)

Peabody Energy
202 Laidley Tower
P. O. Box 1233
Charleston, WV 25324-1233

Kent Hartsog – ehartsog@peabodyenergy.com
340-1839
Fax 340-1834

Robinson & McElwee
P. O. Box 1791
Charleston, WV 25326

Edward J. George eig@ramlaw.com
347-8319 Fax 344-9566

Spilman, Thomas & Battle
Spilman Center
300 Kanawha Blvd. E.

T. Randolph Cox tcov@spillmanlaw.com
Lee F. Feinberg lfeinberg@spilmanlaw.com
340-3800

Charleston, WV 25301

Fax 340-3801

Verizon
1500 MacCorkle Ave., Room 500
Charleston, WV 25314

John Ruddick – Fax 344-6123
Sam Cipoletti – Fax 344-6397
samuel.cipoletti, jr@verizon.com
344-7216

West Virginia American Water Co.
P. O. Box 1906
Charleston, WV 25327

Sammy Gray
sammy.gray@amwater.com
340-2005

CERTIFICATE OF SERVICE

I hereby certify that, on the August 14, 2006, I caused the attached "Brief of Amicus Curiae West Virginia Business and Industry Council" to be served upon all counsel of record by depositing copies of the same, postage prepaid, in the United States mail, to the following counsel of record:

Susan B. Tucker, Esquire
177 Walnut Street
Morgantown, WV 26505

Counsel for Appellants, Richard M. Vaglianti, M.D. and Stanford J. Huber, M.D.

C. Michael Bee, Esquire
HILL, PETERSON, CARPER, BEE &
DEITZLER, P.L.L.C.
500 Tracy Way
Charleston, WV 25311

Counsel for Appellants, Richard M. Vaglianti, M.D. and Stanford J. Huber, M.D.

Anthony J. Majestro, Esquire
POWELL & MAJESTRO, P.L.L.C.
405 Capitol Street, Suite P-1200
Charleston, WV 25301

Counsel for Appellants Richard M. Vaglianti, M.D. and Stanford J. Huber, M.D.

Frank E. Simmerman, Jr., Esquire
SIMMERMAN LAW OFFICE, PLLC
254 East Main Street
Clarksburg, WV 26301

Counsel for Appellant James W. Kessel, M.D.

Charles T. Berry, Esquire
BOWLES, RICE, MCDAVID, GRAFF & LOVE,
P.L.L.C.

7000 Hampton Center, Suite K
Morgantown, WV 26505

Counsel for Appellees, Mark Bennett, M.D., Bennett Anesthesia Consultants, P.L.L.C.

Charles C. Wise, III, Esquire
BOWLES, RICE, MCDAVID, GRAFF & LOVE,
P.L.L.C.

7000 Hampton Center, Suite K
Morgantown, WV 26505

Counsel for Appellee, Professional Anesthesia Services, Inc.

Gordon H. Copland
Amy M. Smith
STEPTOE & JOHNSON PLLC
Chase Tower, Sixth Floor
P. O. Box 2190
Clarksburg, WV 26302-2190

Counsel for Monongalia General Hospital

