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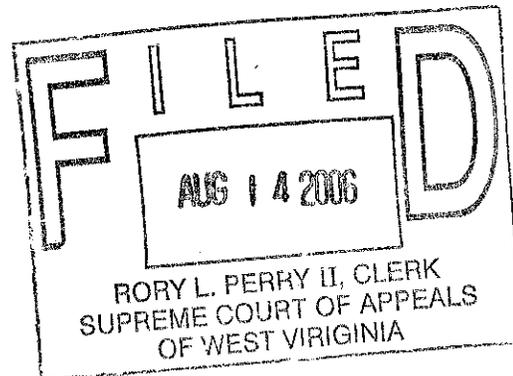
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**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 APPELLEE
MONONGALIA COUNTY GENERAL HOSPITAL COMPANY**

Gordon H. Copland (W. Va. Bar No. 828)
Amy M. Smith (W. Va. Bar No. 6454)

STEPTOE & JOHNSON PLLC
Chase Tower, Sixth Floor
P.O. Box 2190
Clarksburg, W. Va. 26302-2190
(304) 624-8000

John M. Fitzpatrick
LeClair Ryan
Riverfront Plaza, East Tower, 8th Floor
P.O. Box 2499, 951 East Byrd St.
Richmond, VA 23218-2499

*Counsel for Appellee Monongalia County General
Hospital Company d/b/a
Monongalia General Hospital*

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9 PHILLIP E. AREEDA AND HERBERT HOVENKAMP,
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I. INTRODUCTION

The claims in this litigation arose from a decision to replace one anesthesia group, of which Appellants were members, with two different groups, to meet the surgical anesthesia needs of the patients of Monongalia County General Hospital ("the Hospital" or "Monongalia General"). Appellants were asked to provide the services Appellee Bennett Anesthesia Consultants, P.L.L.C. ("BAC") later agreed to provide, and declined. Appellants competed in a "request for proposal" process with Appellee Professional Anesthesia Services, Inc. ("PAS") (and others) and lost to PAS.

Appellants produced no evidence that their loss of status as the sole provider of anesthesia, and the increase in the number of anesthesia providers at the Hospital, harmed competition.

Appellants instead assert that they need not show the contracts were harmful to the public. Borrowing concepts from federal antitrust law, Appellants assert that the contracts can be characterized as "tying" arrangements or other *per se* unlawful restraints of trade. Although Appellants assert that a variety of labels and concepts, developed in federal antitrust law and incorporated into West Virginia's law, are applicable to the contracts, Appellants disregard the well-established meanings of the terms they use ("tying," "price fixing," and "market allocation"). Appellants supply no explanation for their own usage and re-definition of the antitrust concepts they invoke. They cite to no alternative source for the meaning of the terms being used. Instead, Appellants simply assert that particular labels are applicable to the contracts at issue.

Appellants' brief indirectly hints that there is some dichotomy between state and federal law on the antitrust terms, as if there were majority and minority views on the meaning of the terms adopted by West Virginia from federal law. Because there is no such dichotomy, and no alternative source for understanding the antitrust concepts being used, other than the combined experience of the state and federal courts in the antitrust arena, Appellants are making straw man arguments.

They cannot, and do not, cite to cases under other state antitrust statutes holding the conduct at issue here to be a *per se* antitrust violation. This results from the widespread recognition that antitrust laws are enacted to protect competition, not competitors.¹ The central questions, therefore, are whether universally accepted antitrust concepts ought to be given their accepted meaning when found in West Virginia antitrust law, or will commerce in this state be set adrift in a sea of uncertainty.

II. KIND OF PROCEEDING AND NATURE OF RULING BELOW

Previously, in *Kessel v. Monongalia County General Hospital Co.*, 215 W. Va. 609, 600 S.E.2d 321 (2004) (“*Kessel I*”), this Court answered a question certified by the Circuit Court of Monongalia County in this case. The Court answered in the negative the following question:

May a public or quasi-public hospital enter into an exclusive contract with a medical service provider that has the effect of completely excluding physicians who have staff privileges at the hospital from the use of the hospital’s medical facilities.

Id., 600 S.E.2d at 325. Although holding that quasi-public hospitals could not enter into completely exclusive contracts, the Court’s opinion rejected the contract and constitutional claims of Appellants. *Id.*, 600 S.E.2d at 326-27. The certified question did not present, and the Court therefore did not address, the antitrust claims of Appellants. *Id.*, 600 S.E.2d at 326.

Following this Court’s opinion on the certified question and remand to the Circuit Court, the Hospital moved for partial summary judgment on the alleged antitrust violation. By order entered on December 29, 2005, the Circuit Court granted the motion as to all antitrust claims of Appellants (but not their tortious interference claims). Thereafter, on March 30, 2006, the Circuit Court granted Appellants’ motion to modify the December 29 order and certified that the partial summary judgment was final and appealable under W. Va. R. Civ. P. 54(b). This Court granted

¹*See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)

the petition for appeal on May 24, 2006. Trial on the tortious interference claims of the Appellants was stayed by order of the Circuit Court entered on June 21, 2006.

III. STATEMENT OF FACTS

This Court's opinion in *Kessel I* contains a statement of the facts. For purposes of this appeal the following facts, taken from that decision or appearing elsewhere in the record, are particularly relevant.

Monongalia General's initial decision to have separate contracts for separate areas of anesthesia was made in 1987. At that time, Monongalia Anesthesia Associates ("MAA"), a corporation in which Appellants were shareholders and employees, had an exclusive anesthesia contract with the Hospital. *Kessel I*, 600 S.E.2d at 325. The MAA physicians agreed to waive their exclusivity and allow the Hospital to enter into a separate exclusive agreement with West Virginia University Hospitals ("WVUH"), under which the anesthesiologists from WVUH would be the sole providers of anesthesia for open heart procedures. See Letter from Erdogan Tercan, M.D., President, MAA, to Thomas J. Senker, President, CEO, Monongalia General (July 20, 1987)(Exhibit 1B, Tab 5, Monongalia General's "Memorandum of Law In Support of Motion For Partial Summary Judgment," filed Nov. 14, 2000) (the "MGH Motion").

As this Court's prior decision noted, the original 1975 exclusive contract with MAA (Appellants' medical corporation) was terminated in 1990. See *Kessel I*, 600 S.E.2d at 325. In 1999, dissatisfaction with the scope of anesthesia services, which had been a problem throughout the prior period to varying degrees, reached a critical point with the orthopedic surgeons at the Hospital. See Fair Hearing Tr. (March 17, 1999), pp. 162-164 and 50-66, 82-94, *passim* (Exhibit 1A to MGH Motion). The orthopedic surgeons initially requested that MAA provide "dedicated" anesthesia coverage for orthopedic procedures, that is, anesthesia coverage that would

not be subject to being “pulled” and sent to the main operating rooms. *See Id.* Tr. at 81. After MAA declined, the orthopedic surgeons raised the issue with the Hospital and suggested Dr. Mark Bennett as a potential supplier of orthopedic anesthesia. *Id.* at 59. The Hospital entered into negotiations with Dr. Bennett in late fall 1998. On December 30, 1998, the Hospital signed a contract with BAC for the exclusive provision of orthopedic surgical anesthesia. *See Contract between BAC and the Hospital (“BAC-MGH Contract”)* (attached as Exhibit B to “Response of Plaintiffs Vaglianti and Huber to Defendants’ Motion for Partial Summary Judgment on State Antitrust Claims,” filed September 21, 2005) (“Plaintiffs’ Response Brief”).

Monongalia General provided a period of exclusive negotiation with MAA within which to enter into a contract regarding all other surgical anesthesia. *See Fair Hearing Tr.*, pp. 162-165. The Hospital advised that it would be sending out a request for proposal (“RFP”) if it did not reach agreement with MAA by January 19, 1999. *Id.* When the Hospital failed to reach agreement with MAA, it sent out an RFP to a number of providers, including MAA and PAS. *See Letter from Judith Klingensmith, Vice President - Patient Care, to Patrick J. Forte, M.D., President, MAA (Jan. 19, 1999)(MGH Motion, Exhibit 1B, Tab 49).* The proposed contract did not violate the prior agreement with BAC and, therefore, was for the exclusive provision of anesthesia in all other areas of the Hospital, apart from open heart and orthopedic anesthesia.

Under both the BAC and PAS contracts, the anesthesia provider (BAC or PAS) billed for and collected payment for the anesthesia services it provided.² The contract with PAS (offered to MAA) provided that PAS would bill patients for its anesthesia services under a rate schedule PAS would establish, that had to “comply with applicable laws,” and be “reasonable and competitive.”

²In each of the contracts, Sections 5.2-1 and 5.2-2 specified that the anesthesiology group billed for and collected for its services, and that the Hospital billed and collected for its drugs and supplies. BAC-MGH Contract, pp. 23-24; PAS-MGH Contract, p. 27 (attached as Exhibits B and C to Plaintiffs’ Response Brief).

See Contract between PAS and the Hospital ("PAS-MGH Contract") (attached to Plaintiffs' Response Brief as Exhibit C).³ The BAC contract contained slightly more complex provisions, under which BAC was to "establish a schedule of fees, which fees shall be reasonable in light of those fees prevailing." See BAC-MGH Contract, pp. 22-23. The contract provided that the initial fee schedule could be changed only after notice to the Hospital, and provided a mechanism to resolve disputes over proposed increases the Hospital found unreasonable, with each party having the right to terminate the contract on 90 days' notice in the event of disagreement.⁴

³The full text of the relevant contractual provision is as follows:

5.1-1 Schedule(s) of Contractor Charges. Contractor shall establish a schedule of fees representing Contractor's full compensation for professional services rendered by Contractor to patients. Such schedule must, at all times, comply with the applicable laws, rules, regulations, and contractual arrangements with and between Contractor and third party payors. The fees set out therein must, at all times, be reasonable and competitive.

PAS-MGH Contract, p. 21 (attached to Plaintiffs' Response Brief as Exhibit C).

⁴The full text of the relevant provision in the BAC-MGH Contract is as follows:

5.1 Schedule(s) of Contractor Charges. Contractor will establish a schedule of fees, which fees shall be reasonable in light of those fees prevailing in the Hospital's service area, to be charged to all third party payors and patients for Orthopedic Anesthesiology Services to Patients by Contractor. The fees charged by Contractor on the date of this Agreement shall be the initial schedule of fees for Contractor. If at any time during the term of this Agreement Contractor desires to revise its schedule of fees, it shall provide the Hospital with written notice of its proposed schedule of fees, which notice shall specify the date (at least 45 days after the date of delivery of the notice) on which the new fees are to come in to effect. The Hospital shall notify Contractor within 30 days of receipt of such notice whether such schedule of fees is acceptable to Hospital. If the proposed schedule of fees is acceptable to the Hospital, the new schedule of fees shall become effective on the date specified in the notice. If the new schedule of fees is not acceptable to the Hospital, the notice from the Hospital to that effect shall state with reasonable specificity the Hospital's objections to the proposed fee schedule, and representatives of Contractor and Hospital shall meet within 30 days to attempt to negotiate a mutually acceptable schedule of fees. If the parties are unable to agree on a schedule of fees, the proposed schedule of fees shall become the schedule of fees for Services to Patients provided by Contractor (subject to an overriding cap on the increase of any fee of 15% over the fee then in existence) and either party may, within one year of the delivery of the initial notice of a proposed change in the fee schedule and upon no less than 90 days written notice, terminate this Agreement.

BAC-MGH Contract, p. 22-23, (attached to Plaintiffs' Response Brief as Exhibit B).

IV. STATEMENT OF ISSUE

Whether the Circuit Court properly granted summary judgment on the antitrust claims.

V. STANDARD OF REVIEW

This Court reviews a Circuit Court's grant of summary judgment *de novo*. *Armor v. Lantz*, 207 W. Va. 672, 535 S.E.2d 737 (2000). In determining whether a motion for summary judgment is appropriate, the Court will apply the same test that the Circuit Court should have applied initially. *Conrad v. ARA Szabo*, 198 W. Va. 362, 480 S.E.2d 801 (1996).

VI. DISCUSSION

A. Summary of Argument

The West Virginia Antitrust Act ("WVATA"), like that of nearly every state, has a general prohibition on any "contract, combination . . . , or conspiracy in restraint of trade or commerce . . ." W. Va. Code § 47-18-3(a). This prohibition, adopted from the federal Sherman Antitrust Act, 15 U.S.C. § 1, requires proof that challenged conduct harms competition. Appellants make no effort to show that the increase in the number of anesthesiology providers at Monongalia General harmed competition, or that their exclusion, after losing the bidding process, harmed competition.

To excuse their failure to show that the contracts harmed competition, Appellants rely primarily on a novel assertion: a claim that a regulation promulgated by the Attorney General may alter the statutory list of presumed violations set forth in the WVATA. *See* W. Va. Code § 47-18-3(b). Borrowing a term of art from federal law and citing to federal precedent, Appellants assert that the contracts were "tying" arrangements, and that an Attorney General's regulation makes all tying arrangements *per se* violations of the antitrust laws, for which there is no need to prove harm to competition.

As to the passing assertions that two other provisions of subsection (b) of W. Va. Code §47-18-3 were violated, the Circuit Court simply applied the long-established meaning of the terms of art (“price fixing” and “market allocation”) in existence when the statute was adopted. Monongalia General’s decision to award a service contract to two different entities, each meeting one part of the Hospital’s needs, is not “market allocation,” under the long-standing meaning of that term of art. Appellants’ contrary position suggests that the decision of a farmer to sell all his soybeans exclusively to Southern States, and his wheat exclusively to Sunbeam Bakeries, is a *per se* antitrust violation known as “market allocation.”

Similarly, Appellants provide no explanation for their novel use of the term “price fixing,” and no explanation as to how they have standing to complain of price fixing for a service they do not purchase. The minimal and different restraints the Hospital put in its separate contracts with the two anesthesia providers, generally prohibiting the contractors from charging unreasonable prices, did not constitute “price fixing” under the well-settled meaning of that term of art. There was no agreement as to any specific price, and the Hospital does not compete with either BAC or PAS. Appellants’ re-definition of the term of art is not supported by any citation to authority or public policy, and no court of any state has ever found such restrictions *per se* unlawful.

B. The Circuit Court Properly Understood the Consequences of Appellants’ Failure to Show Harm to Competition.

Throughout their brief, Appellants seek to establish a false dichotomy between federal antitrust law and state antitrust law. In the course of their argument, they incorrectly accuse the Circuit Court of applying federal law to interpret “non-comparable” provisions of the WVATA, in accord with federal decisions under the Sherman Act. In fact, the Circuit Court merely followed the mandate of the statute and of this Court to interpret the comparable provisions of the WVATA

The regulation, however, does not apply for three reasons. First, the contracts were not tying arrangements at all, as the very decision relied on by Appellants, *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), shows. Because the Hospital did not sell the supposedly “tied” service – anesthesia – there was no tying. Second, the regulation does not apply to private suits, but only to actions in which the Attorney General sues in federal court as *parens patriae*. Third, the regulation would clearly be invalid and beyond the power of the Attorney General if it were construed as re-writing the statute, which contains an explicit list of actions to be deemed *per se* violations.

This third reason was the basis on which the Circuit Court rejected Appellants’ claims. See “Order Granting Defendant Monongalia County General Hospital’s Motion for Partial Summary Judgment as to All State Antitrust Claims,” of December 29, 2005, p. 7. The Circuit Court, therefore, did not interpret the tying regulation, as Appellants claim, “in accordance with” federal law. See Appellants’ Brief,⁵ p. 13. The Circuit Court instead held that the regulation was invalid as attempting to alter the *per se* violations listed in subsection (b) of W. Va. Code § 47-18-3. Long-settled rules of this Court as to the limits on the delegation of power to agencies, and the requirement that agency rules be authorized by and consistent with the underlying statute, clearly compel the Circuit Court’s conclusion. The very decision on which Appellants rely, *West Virginia Health Care Cost Review Auth. v. Boone Mem’l Hosp.*, 196 W. Va. 326, 472 S.E.2d 411 (1996), confirms the requirements that any legislative rule be within the statutory authority of the issuing agency, and consistent with the authorizing statute.

⁵Appellants have elected to rely upon their Petition for Appeal as their brief on the merits. The references to “Appellants’ Brief” are, thus, to the Petition for Appeal.

in accord with decisions under federal law, and to interpret terms of art adopted from federal law in accord with their established meaning. *See* W. Va. Code § 47-18-16; *Gray v. Marshall County Bd. of Educ.*, 179 W. Va. 282, 367 S.E.2d 751 (1988); *Stephen L.H. v. Sherry L.H.*, 195 W. Va. 384, 465 S.E.2d 841 (1995).

1. **The Structure of the Statute**

Examining the structure of the WVATA is helpful to understanding the claims of Appellants. The substantive prohibitions of the WVATA appear in W. Va. Code § 47-18-3. Subsection (a) contains a general prohibition on restraints of trade: “Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State shall be unlawful.” W. Va. Code § 47-18-3(a). This provision of the statute is almost word-for-word identical to Section 1 of the Sherman Act, which prohibits every “contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . .” 15 U.S.C. §1.

In addition to the general prohibition on restraints of trade, the WVATA contains a list of acts, found in subsection (b) of W. Va. Code § 47-18-3, that are specifically deemed to be “unreasonable restraints of trade.” W. Va. Code § 47-18-3(b). The addition of the term “unreasonable” is derived from Sherman Act jurisprudence. The Sherman Act and subsection (a) of the WVATA literally prohibit any “restraints of trade.” Every contract, in some literal sense, restrains trade – goods sold to A cannot be sold to anyone else. *See Reddy v. Community Health Found.*, 171 W. Va. 368, 298 S.E.2d 906, 909 (1982) (“most contracts are deliberately entered into to restrain trade in some fashion. Franchise agreements, agreements to buy or sell an art or commodity at a specified time or price, employment agreements, agreements between management and unions – all operate as limitations on unrestricted trade without being unlawful restraints.”).

Because of this, it has long been established that only “unreasonable” restraints are prohibited by this language. *See Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911); 6 Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law* §§ 1502 (2d ed. 2003) (explaining development of the rule of reason)

Subsection (b) of the statute adopts that distinction, requiring “unreasonableness,” and prohibits certain specific practices that had come to be condemned under the Sherman Act. As relevant here, subsection (b) provides:

(b) Without limiting the effect of subsection (a) of this section, the following shall be deemed to restrain trade or commerce unreasonably and are unlawful:

(1) A contract, combination or conspiracy between two or more persons:

(A) For the purpose or with the effect of fixing, controlling, or maintaining the market price, rate or fee of any commodity or service; or

....

(C) Allocating or dividing customers or markets, functional or geographic, for any commodity or service.

W. Va. Code § 47-18-3(b)(1). Notably, “tying” is not among the actions in the list of *per se* violations, but that term, as well as “price fixing” and “market allocation,” are terms of art existing in federal law at the time of the WVATA’s adoption.⁶ Even Appellants concede that the WVATA and this Court, have directed that subsection (a) of the statute be construed in accord with federal precedent. W. Va. Code § 47-18-16 (mandating that the statute be construed liberally and in harmony with prevailing judicial interpretation of comparable federal statutes); Syl. Pt. 2, *Gray v.*

⁶Price fixing, for example, had been condemned in *Swift & Co. v. United States*, 196 U.S. 375 (1905). Market allocation had been condemned as long ago as 1899. *See, e.g., White Motor Co. v. United States*, 372 U.S. 253, 263 (1963) (noting the long-standing condemnation of horizontal market allocation as a *per se* violation, and citing, *inter alia*, *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899)).

Marshall County Bd. Of Educ., 179 W. Va., 282, 367 S.E.2d 751 (1988) (“The courts of this state are directed by the legislature . . . to apply federal decisional law interpreting the Sherman Act, 15 U.S.C. § 1, to our own parallel antitrust statute; W. Va. Code § 47-18-3(a).”)

Although subsection (b) of the statute does not have a parallel to the Sherman Act, as stated above, it is a codification of doctrines that grew up in, and were used as terms of art in, the cases under the Sherman Act. The Legislature is presumed to incorporate the prior interpretation of terms of art it chooses to incorporate into statutes: “[b]y borrowing terms of art in which are accumulated the legal tradition and meaning of centuries of practice, the Legislature presumably knows and adopts the cluster of ideas that are attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.” Syl. Pt. 2, *Stephen L.H. v. Sherry L.H.*, 195 W. Va. 384, 465 S.E.2d 841, 842 (1995). Accord, *CB&T Operations Co. Inc. v. Tax Comm’r*, 211 W. Va. 198, 564 S.E.2d 408, 413 (2002). See also *State ex rel Knight v. Public Service Comm’n*, 161 W. Va. 447, 245 S.E.2d 144, 150 n. 5 (1978) (“holding that where a West Virginia statute had a legislative history paralleling . . . the Interstate Commerce Act, federal decisions interpreting that federal provision are persuasive in reviewing the State statute.”); *Larzo v. Swift & Co.* 129 W. Va. 436, 40 S.E.2d 811, 816 (1946) (holding that, in interpreting a West Virginia statute “taken in large part from the General Statutes of Connecticut . . . the application of that statute by the Supreme Court of Errors of that state is of peculiar significance”).

2. The Significance of the Failure To Show Harm to Competition

In antitrust jurisprudence, most actions are judged under a “rule of reason” approach, in which determining whether a particular arrangement is unreasonable requires an inquiry into the actual competitive conditions of the market being affected by the supposed restraint. *United States*

v. Topco Associates, Inc., 405 U.S. 596, 606 (1972) (noting that most alleged restraints are judged under a rule of reason test, which “includes consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption.”). These requirements were well established at the time of the adoption of the WVATA. Equally well established was the basis for these requirements: that antitrust law was adopted to protect *competition*, not individual *competitors*. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (“The antitrust laws, however, were enacted for the protection of competition not competitors.”) (citation omitted). Every competitor that loses a contract, or fails to make a sale is “injured” by the loss, but competition necessarily requires such losers, as well as winners.

At the time of adoption of the WVATA, however, experience had shown certain practices to be so intrinsically harmful to competition, or so likely to harm competition, that federal courts had held it was not necessary to establish proof of harm to competition under the “rule of reason” approach. See *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958) (noting that “certain agreements or practices . . . because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable”). Among these practices not subject to the rule of reason were price fixing and market allocation.⁷ The adoption of *per se* treatment for a commercial practice was not done lightly: “It is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act.” *Topco*, 405 U.S. at 607-08.

⁷See footnote 5, *supra*.

Appellants made no showing of harm to competition. Their economist defined no market and established no competitive harm; his report instead asserted harm should be presumed.⁸ See Expert Disclosure of Patrick Mann, p. 2 (attached as Exhibit E to Plaintiffs' Response Brief). It is well-established that, under the Sherman Act, proof of harm to competition is necessary to establish a claim that exclusive contracts are unreasonable restraints of trade. In *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), the United States Supreme Court rejected claims that exclusive contracts between a hospital and anesthesiologists were *per se* violations of the Sherman Act. The Court noted that exclusive contracts had long been judged under the rule of reason⁹. In that case, the hospital not only had exclusive contracts with an anesthesia group, it also charged patients for anesthesia as a part of its own services, thereby charging the patient for both hospital services and anesthesia service, which created a tying arrangement. The Court further held that its prior cases¹⁰ had established that tying was unlawful *per se* only if a "substantial volume of commerce was foreclosed" from competition because the seller had enough market power to "force" the purchase of the tied product on unwilling consumers. *Id.* at 16. Because the plaintiffs in *Jefferson Parish* had not shown any anti-competitive effect in the relevant market, they had established no antitrust claim.

⁸In the disclosure, Professor Mann expressly stated that relevant market concepts were pertinent to "monopolization, price discrimination, and predatory pricing, but are not relevant for restraint of trade cases where the focus is on the effect of the specific activities on the affected parties." Expert Disclosure of Patrick Mann, p.2 (attached as Exhibit E to Plaintiffs' Response Brief).

⁹The Court cited to *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961) and *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949), as examples of the rule that exclusive contracts were unlawful only if shown to foreclose a substantial portion of the relevant market. *Jefferson Parish*, 466 U.S. at 30, n. 51.

¹⁰The Court cited to several cases long pre-dating the adoption of the WVATA: *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 501-502 (1969); *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 6-7 (1958); *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 608-610 (1953); *Int'l Salt Co. v. United States*, 332 U.S. 392, 396 (1947).

Appellants concede they have shown no anti-competitive effect. Instead, Appellants rely overwhelmingly on a regulation of the Attorney General which, they assert, changes the list of actions presumed to be harmful to competition set forth in subsection (b) of the WVATA's prohibition on restraints of trade. W. Va. Code § 47-18-3(b). The Circuit Court rejected Appellants' position on the ground that the regulation was invalid¹¹ and not, contrary to Appellants' claim, because the Circuit Court "interpreted" the regulation in accordance with federal law.

Appellants' only other arguments to excuse them from compliance with the obligation to show harm to competition are found in the last three pages of their brief, where passing claims are made that the arrangements with BAC and PAS fall within the prohibition of "price fixing" and "market allocation" which are prohibited by subsection (b) of the statute. Those claims, however, ignore that those very terms are taken from federal law, as is discussed in sections E and F *infra*.

C. Monongalia General's Conduct is Not Illegal Tying.

Appellants assert, without explanation, that the exclusive contracts with BAC and PAS constituted a "tying" arrangement. They then assert that the arrangement is established as a *per se* violation of the WVATA by a regulation of the Attorney General, W. Va. C.S.R. § 142-15-3. The exclusive contracts are not "tying" arrangements at all because Monongalia General does not sell physician anesthesia services, and the Hospital therefore does not have the required "tying" product and "tied" product (discussed in subsection 1, *infra*). In addition, the Attorney General's regulation does not apply, because it is limited to cases brought by the Attorney General, in federal court, suing as *parens patriae*. Moreover, as discussed in section D, *infra*, as interpreted by Appellants, the regulation is invalid, because it would then exceed the Attorney General's power, and conflict

¹¹See Summary Judgment Order, p. 7, filed on December 29, 2005.

with the WVATA. This Court, however, need not reach that question, as the regulation does not apply.

1. **The Exclusive Contracts to Administer Anesthesia do not Constitute "Tying".**

Appellants ignore the meaning of "tying." Exclusive contracts are not, as such, tying arrangements, although exclusive agreements can raise their own antitrust concerns under the "rule of reason."¹² Appellants, however, disregard entirely the established law on exclusive dealing arrangements and, instead, characterize the contracts as creating a tying arrangement. Although Appellants criticize the Circuit Court for relying on *Jefferson Parish*, they, in fact, cite that very case in their brief to this Court, asserting that it supports their claim that tying of some type had occurred. *See* Appellants' Brief, p. 16, n. 2 (citing *Jefferson Parish* to support the assertion that the contracts constituted tying). In fact, the contracts at issue here are not tying of any kind, under the established meaning of that term.

"Tying" is not defined in the WVATA or in the Attorney General's regulation. The term of art has long been defined in antitrust law as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product." *Northern Pacific*, 356 U.S. at 5-6. Thus, a tying arrangement can only exist where the supplier of the tying product also sells the tied product or service.¹³

In *Jefferson Parish*, the United States Supreme Court assessed whether an exclusive anesthesia contract resulted in a potentially illegal tying relationship, but as the Court noted, the

¹²*See, e.g., Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961) (holding that exclusive contracts are not *per se* illegal and are permissible unless they foreclose a substantial share of the relevant market).

¹³The leading commentators, Professors Areeda and Hovenkamp, state: "Tying occurs when a seller refuses to sell a product that a buyer desires unless the buyer also agrees to purchase a second product, which the buyer would not otherwise want from this seller on the offered terms. . . . The desired product is called the 'tying' product; the other is the 'tied' product." 9 Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law* §§ 1700a (2d ed. 2003).

“tying” issue did not arise because the contract at issue was exclusive. Instead, the issue arose only because of an important fact not present here. In *Jefferson Parish*, the hospital was the seller of anesthesia services; the hospital, in that case, billed patients not only for surgical services but also for anesthesia services by the contracted anesthesia group, splitting the anesthesia fees with the group. *Id.* at pp. 6, n. 4, 19 (noting that anesthesia fees were billed by the hospital, not the anesthesiologist, and that “[t]he hospital has provided a package that includes a range of facilities and services, . . . [that] includes the services of the anesthesiologist”). But for that fact, the exclusive contract would not have been considered tying at all, and the Court’s sole analysis would have been on the ordinary rule of reason inquiry applicable to exclusive dealing arrangements. *Id.* at 18, n. 28 (noting that it was “essential to differentiate between” the exclusive contract with the anesthesiologists, which “raise[d] only an exclusive dealing question” from the “hospital contract with patients,” which bundled anesthesia and surgery services).

The contracts in this case, however, are lawful not only because they meet the rules governing tying announced in *Jefferson Parish*, but also because they are not tying at all. As the contracts show, it was the anesthesia providers – BAC and PAS – that had the right to bill patients for their services; the Hospital did not. Absent the sale, by the defendant, of two products or services, or an economic interest in the “tied product,” as *Jefferson Parish* and numerous other cases show, there is no “tying” at all.¹⁴ The Attorney General’s regulation does not purport to alter

¹⁴See, e.g., *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 104 (4th Cir. 1987) (“The hospital is not a competitor in the market for the tied product. It receives no part of the fee for interpreting the scans. In this respect the case differs from *Jefferson Parish* where the hospital and the anesthesiologists shared the fees for anesthesiological services.”); *Keener v. Sizzler Family Steak Houses*, 597 F.2d 453, 456 (5th Cir. 1979) (“The fatal defect in this [plaintiff’s] analysis, however, is that the defendant had no financial interest in or connection with the building contractor whom it had designated to erect the new building.”); *Parikh v. Franklin Med. Ctr.*, 940 F. Supp. 395 (D. Mass. 1996) (“If defendants are correct and the tying entity needs no economic interest in the tied product market, then tie-ins as a whole lose their unique characteristic: one entity seeks to achieve monopoly power in two markets.”) (citing *Venzie Corp. v. United States Mineral Prods. Co., Inc.*, 521 F.2d 1309, 1317-18 (3d Cir. 1975)). Because the regulation, even if applicable and valid, requires proof of “tying,” Appellants’ claims were properly dismissed.

the meaning of “tying,” and certainly does not redefine it to mean “exclusive dealing.” Clearly, the regulation does not apply.

2. This Action is Not Within the Scope of the Regulation.

The Attorney General’s regulation also does not apply in this action because it was not brought by the Attorney General as *parens patriae* in federal court for violations of federal antitrust laws. By its terms, the regulation is expressly limited to “any action brought by the Attorney General as *parens patriae* in federal court for violations of the federal antitrust laws under W. Va. Code § 47-18-17.” W. Va. C.S.R. § 142-15-1.1.¹⁵ The regulation, therefore, has no application to an action by private citizens, filed in West Virginia courts. The limitation of the regulation to federal actions in which the Attorney General participates was emphasized in the stated purpose of the regulation: “to define the term ‘federal antitrust laws’ as used within W. Va. Code § 47-18-17.” W. Va. C.S.R. § 142-15-1.5. *See also* W. Va. C.S.R. § 142-15-2 (defining “federal antitrust laws” as used within Section 47-18-17). West Virginia Code Section 47-18-17, which is referred to repeatedly in the regulation, authorizes the Attorney General to bring actions, on behalf of state residents *in federal court*. The rule, on its face, is plain and unambiguous. It is thus to be applied, and not construed as Appellants seek. *See Snider v. Fox*, 218 W. Va. 663, 627 S.E.2d 353, 357

¹⁵The regulation has an additional jurisdictional limitation. In addition to requiring that suit be brought by the Attorney General, the regulation is limited to cases in which the federal action involves actions taken by “any person who engages in trade or commerce in or affecting this State.” The restriction to persons affecting trade or commerce within the state is a jurisdictional limitation. The plain text of Section 47-18-3 limits its jurisdiction to: “Every contract, combination in the form of trust or otherwise, or conspiracy and restraint of trade or commerce *in this State*. . . .” Thus, to establish a claim under the WVATA, a plaintiff must allege a sufficient anti-competitive effect on or restraint of trade in West Virginia. *See In re Terazosin Hydrochloride Antitrust Litig.*, 160 F. Supp. 2d 1365, 1371 (S.D. Fla. 2001) (finding that the WVATA was among those state statutes that do not authorize antitrust actions based on injuries to commerce in another state). *See Anziulewicz v. Bluefield Cmty. Hosp., Inc.*, 531 F. Supp. 49, 51 (S.D. W. Va. 1981) (where plaintiffs carefully crafted their complaint to allege only a conspiracy in restraint of trade *in West Virginia*, complaint stated only a West Virginia cause of action, not a federal one). Thus, the regulation applies to any person who engages in trade or commerce in or affecting West Virginia, not to actions brought by such persons.

(2006) (holding that administrative regulations are governed by the canons of statutory construction and that clear and unambiguous rules are to be applied, not construed).

The limitation of this regulation to cases in which the Attorney General sues as *parens patriae* in federal court was not inadvertent. Other regulations of the Attorney General expressly state they are applicable both to actions brought by the Attorney General *and* to actions brought by private parties. For example, the regulation allowing persons who are indirectly injured by violations of the WVATA to recover damages applies to “any action brought by any person under the provisions of Chapter 47, Article 18, Section 9 of the West Virginia Code, *or* any action brought by the Attorney General as *parens patriae* under the provisions of Chapter 47, Article 18, Section 17 of the Code.” W. Va. C.S.R. § 142-9-1.1 (emphasis added).

In contrast, the regulation on which Appellants rely is expressly and unambiguously limited to cases brought in federal court by the Attorney General, suing as *parens patriae*. See W. Va. C.S.R. §142-15-1.1. The limitation to suits brought by the Attorney General contrasts with other regulations, and is the result of amendments made after the rule was initially proposed. Initially, the proposed rule was to apply to both private civil actions (brought under W. Va. Code § 47-18-3(a)) and to actions by the Attorney General under any portion of the WVATA. The proposed rule, which is attached as Exhibit 1 to Appellants’ Brief, had a stated scope that would have included “any anticompetitive activity under W. Va. Code § 47-18-3(a) . . .” and “any action brought by the Attorney General of the State pursuant to W. Va. Code § 47-18-1 through -23.” Both of these provisions were deleted from the final regulation, and the final regulation applied only to actions brought by the Attorney General under W. Va. Code § 47-18-17 in federal court.

These changes show that the limitation of the regulation is intentional. That conclusion also flows from the maxim “*expressio unius est exclusio alterius*,” under which the express limitation

to suits by the Attorney General precludes any claim that the regulation applies to suits by private parties, such as Appellants. See, e.g. *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710, Syl. Pt. 3 (1984) (“[i]n the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies.”). See also *State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 464 S.E.2d 763, 770 (1995) (“*Expressio unius est exclusio alterius* (express mention of one thing implies exclusion of all others) is a well-accepted canon of statutory construction”). The *expressio unius* maxim is premised upon an assumption that certain omissions are intentional. As the Court explained in *Riffle*, “[i]f the Legislature explicitly limits application of a doctrine or rule to one specific factual situation and omits to apply the doctrine to any other situation, courts should assume the omission was intentional; courts should infer the Legislature intended the limited rule would not apply to any other situation.” *Id.*

This action is therefore beyond the scope of the Attorney General’s regulation because it is (1) not brought by the Attorney General; (2) not brought in federal court; (3) not brought for violations of the federal antitrust laws; and (4) not brought under Section 47-18-17. Therefore, the regulation cannot supply a basis under which Appellants are excused from the usual requirement of a restraint of trade case: proof of anti-competitive conduct.

D. The Regulation is Invalid if Construed as Appellants Do.

As construed by Appellants, the Attorney General’s regulation adds a new category to the statutorily-created list of violations set forth in W. Va. Code § 47-18-3(b). They argue that the addition of the specific tying prohibition – using terms of art from federal decisions – indicates an intent to *repudiate* federal law. As to what details and in what respects federal law is repudiated, they do not explain. In fact, the Summary of Proposed Legislative Rule and Statement of

Circumstances Requiring the Rule soundly refutes Appellants' position. The summary clearly states:

The . . . section, entitled "Prohibited Conduct," identifies "tie-in agreements" and "reciprocity" as two types of *anti-competitive behavior which have been deemed unlawful in the federal system* and are violative of the broad prohibitions of the West Virginia Antitrust Act.

"Proposed Leg. R. Pertaining to Defining the Term "Federal Antitrust Laws and Prohibiting Tying and Reciprocity" (emphasis added) (attached hereto as Ex. A).

Moreover, the Report on Public Hearing, Public Comment Period and Amendments demonstrates a continued adherence to the desire that the regulation conform to federal antitrust law, as well as a candid acknowledgment that the scope of the initial draft was beyond the authority of the Attorney General. The report reads:

The proposed rule was approved as amended pursuant to recommendations for the Attorney General and members of his staff. These *recommendations for amendments were made* for the purpose of clarifying the meaning of the originally proposed rule, *to bring the rule into conformity with federal decisional law, and to delete provisions which were both inconsistent with federal law and beyond the authority of the Attorney General.*

Id. (emphasis added).

If, however, the regulation really was intended to repudiate federal law and to create some new tying category as *per se* unlawful (altering the statutory list), the regulation would be invalid under well-settled principles of administrative law. Appellants respond to the Circuit Court's decision on this point, and to the other validity challenges discussed below, solely by relying on *Health Care Cost Review Auth. v. Boone Mem'l Hosp.*, 196 W. Va. 326, 472 S.E.2d 411 (1996). Appellants incorrectly claim that *Boone Memorial* establishes a rule that any legislatively approved regulation automatically has the "force of law" and can alter or override any prior statute. Appellants assert that legislatively-approved regulations no longer need to be examined by the

courts under traditional principles of administrative law. *Boone Memorial* stands for no such proposition, and in fact expressly reaffirms the requirement that, before a legislative rule may be given “the force of law,” it must be properly promulgated, must be within the statutory authority of the agency, and must be consistent with the statutory scheme. Both the syllabus points from the decision, and the express analysis undertaken by the Court, reaffirm this.

In *Boone Memorial*, this Court considered whether an administrative regulation declaring a particular health service subject to approval by the Health Care Cost Review Authority was within the authority of that agency, which authorized review only of “new institutional health services.” The Court did not, contrary to Appellants’ views, simply determine that the administrative rule had been approved by the Legislature, and end its analysis.

Instead, this Court noted that the ultimate question was whether the underlying statute was “ambiguous or silent with regard to whether the Hospital’s proposal constitutes a ‘new institutional health service’ [and] [i]f the proposal clearly is covered by this statute, *we need not go any further . . .*” 472 S.E.2d at 418 (emphasis added). This direction in *Boone Memorial* recognized the obligation to determine whether a legislative rule was consistent with the statutory scheme, stressing that an agency is not permitted to contradict a point on which the statute had spoken without ambiguity.

In *Boone Memorial*, this Court reaffirmed both that rule, and the rule that the Court determines for itself, without deference to the agency, whether there is a statutory ambiguity which the agency may lawfully fill by regulatory action:

In deciding whether an administrative agency’s position should be sustained, a reviewing court applies the standards set out by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed.2d 694 (1984). *The court first must ask whether the Legislature has directly spoken to the*

precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency's position only can be upheld if it conforms to the Legislature's intent. No deference is due the agency's interpretation at this stage

Syl. Pt. 4, *Boone Memorial*, 472 S.E.2d at 413 (quoting Syl. Pt. 3, *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995)) (emphasis added).

In the *Boone Memorial* decision, this Court found that the underlying statutory phrase (“new institutional health service”) was ambiguous, leaving the Court to make the next determination: whether the regulation was actually within the power of the administrative agency. *Id.*, 472 S.E.2d at 423 (“our next task is to determine the extent of [the agency's power and] . . . whether the legislature has granted [the agency] express or implied authority”). Thus, the *Boone Memorial* decision did nothing more than establish that, after a rule has been determined to be within an agency's authority and consistent with the relevant statutes, it has the force of law. The regulation here, however, fails those tests.

First, any alteration of the statutory list of presumed violations would exceed the rule-making authority granted to the Attorney General. The Attorney General's authority under the WVATA is limited. The only authority to promulgate regulations is the following: “[t]he Attorney General may make and adopt such rules and regulations as may be necessary for the enforcement and administration of this article.” W. Va. Code § 48-18-20. The statutory authority to promulgate regulations necessary for the “enforcement” and “administration” of the antitrust statutes is a logical extension of the concurrent grant of power to the Attorney General to “investigate suspected violations” of the antitrust laws. W. Va. Code § 47-18-6. There is no authority to promulgate new offenses under the statute. That, however, would be the result of construing the statute as Appellants do. Under such a construction, the regulation is invalid: “an administrative agency may

not issue a regulation which is inconsistent with, or which alters or limits its statutory authority.” *Repass v. Workers’ Comp. Div.*, 212 W. Va. 86, 569 S.E.2d 162, 165 (2002) (Syl. Pt. 5, in part). See also *State ex rel. Mountaineer Park, Inc. v. Polan*, 190 W. Va. 276, 281, 438 S.E.2d 308, 312 (1993) (“an administrative agency can only exercise such powers as those granted by the legislature, and if such agency exceeds its statutory authority, its action may be nullified by this Court”).

Second, Appellants’ claim that the cited regulation adds to the statutory list of *per se* violations would improperly conflict with the statute, and be invalid. The continuing requirement to maintain consistency of administrative regulations was confirmed not only in *Boone Memorial*, but also recently in *Repass* where this Court stated that “even when considering a legislative rule . . . when a statute is clear, we owe no deference to the agency’s rule.” *Id.*, 569 S.E.2d at 172, n. 7. The fourth and fifth syllabus points confirmed that “[a]ny rules or regulations drafted by an agency must faithfully reflect the intention of the Legislature, as expressed in the controlling legislation.” *Id.*, 569 S.E.2d at 165 (Syl. Pt. 4) (quoting Syl. Pt. 4, *Maikotter v. University of West Virginia Bd. of Trustees/West Virginia Univ.*, 206 W. Va. 691, 527 S.E.2d 802 (1999)). Relying on these principles, this Court in *Repass* struck down a rule adopted by the Workers’ Compensation Division requiring the use of a particular medical testing methodology. Contrary to the approach urged by Appellants, this Court assessed the validity of the regulation in light of the relevant statutes, rather than adopting a “last in time” approach to resolve the conflict between the regulation and the statute.

In this case, the statute is quite clear on the classes of activities that are to be deemed violations thereof. W. Va. Code § 47-18-3(b) lists a variety of actions (price fixing, market allocation and the like) that are specifically declared unlawful *per se*. There is no ambiguity as to

the actions declared unlawful *per se*. Thus, there is no question that Appellants' claims fail the test of *Boone Memorial* because "the Legislature has spoken to the precise question at issue [and where] the intention of the Legislature is clear, that is the end of the matter . . ." Syl. Pt. 4, *Boone Memorial*, 472 S.E.2d at 413. By specifically listing the activities falling in the *per se* category, the Legislature has excluded other items not listed, as expressed by the well-recognized doctrine of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another).¹⁶ The Appellants' construction thus creates a double conflict with the statute: it alters the substantive list of *per se* violations and it causes the regulation to conflict with the statutory mandate that the statute be construed "in harmony with" federal law. W. Va. Code § 47-18-16.

Third, the theory that the Attorney General has unfettered discretion to alter the statute conflicts with the requirement that a delegation of power by the Legislature be accompanied by reasonable guidelines. The recent decision of this Court in *Fairmont Gen. Hosp. v. United Hosp. Ctr.*, 218 W. Va. 360, 624 S.E.2d 797 (2005), illustrates this point. In that case, this Court *sua sponte* considered the validity of a provision in the State Health Plan, setting a five mile distance limitation for replacement hospitals. *Id.* This Court re-emphasized that "the Legislature cannot grant . . . unbridled authority in the exercise of power conferred upon . . . [an administrative agency]." *Id.*, 624 S.E. 2d at 804. (ellipsis and brackets in original) (quotation omitted). The Court held that the five mile limit was invalid, in part because it "was promulgated by the executive department of state government without clear legislative policy objectives as guidelines." *Id.* at Syl. Pt. 2. This rule applies to any grant of legislative authority, not merely to particular rules.

¹⁶See, e.g. *Burrows v. Nationwide Mut. Ins. Co.*, 215 W. Va. 668, 600 S.E.2d 565 (2004) (citing rule and holding that statute's list of circumstances in which notice of available underinsured coverage was required impliedly excluded requirement to provide notice in other circumstances); *Carroll v. Stump*, 217 W. Va. 748, 619 S.E.2d 261 (2005) (citing rule and holding that statute's mandate that license revocation proceedings begin only upon arrest for DUI impliedly excludes requirement that criminal charges for DUI be pursued).

Thus, not merely rules, but the statutes authorizing them, can be invalid if enacted in violation of this precept. *See, e.g., State ex rel. West Virginia Citizens Action Group v. West Virginia Econ. Dev. Grant Comm.*, 213 W. Va. 255, 580 S.E.2d 869 (2003) (“As a general rule the Legislature, in delegating discretionary power to an administrative agency, such as a board or a commission, must prescribe adequate standards expressed in the statute or inherent in its subject matter and such standards must be sufficient to guide such agency in the exercise of the power conferred upon it”). The claim of Appellants that the decision of this Court in *Fairmont General* is inapplicable, because the administrative regulation at issue there was not a legislatively-approved rule, disregards this fundamental point. The Legislature simply cannot confer the unfettered and standardless authority Appellants assert the Attorney General has.

E. The Prohibition on Abusive Pricing Imposed by Monongalia General is Not “Price Fixing.”

In a single paragraph on page 22 of their brief, Appellants assert – without any analysis whatsoever – that the contracts Monongalia General entered into separately with the two anesthesia providers may properly be labeled “price fixing.” The price fixing theory was not in Appellants’ complaint, nor supported by their economist, and made its first appearance in Appellants’ brief opposing the antitrust summary judgment motion.¹⁷ The absence of analysis and citation to any authority in the brief, to support this recent claim, is not surprising, because the claim will not survive scrutiny.

¹⁷Both complaints, in Count III, set out the antitrust claims, using nearly identical wording. *See* First Amended Complaint of James Kessel, pp. 9-10 (filed March 31, 2001); Complaint of Plaintiffs Vaglianti and Huber, pp. 9-10 (filed April 21, 2001). Neither complaint refers to price fixing (or market allocation or tying). *Id.* Professor Mann, Appellants’ antitrust expert, made no claim in either his expert report or his deposition that price fixing had occurred. The report was Exhibit 1 to the “Memorandum of Law of Monongalia General Hospital In Support of Motion for Partial Summary Judgment in State Antitrust Claim,” filed September 6, 2005. The deposition of Professor Mann was attached as Exhibit A to the “Response of Plaintiffs Vaglianti and Huber to Defendants’ Motion for Partial Summary Judgment on State Antitrust Claims,” filed on September 21, 2005.

Before dealing with the substantive defects of Appellants' claim, Monongalia General notes that "price fixing" is not a claim Appellants have standing to assert. They did not buy the anesthesia services of PAS or BAC with the supposedly "fixed" prices and, therefore, they lack standing. This was the express holding in *Douglas v. Hosp. of St. Raphael*, 33 Conn. Supp. 216, 371 A.2d 396 (1976). In that case, a physician sued a hospital and an association of anesthesiologists for alleged price fixing in violation of the Connecticut Antitrust Act, Conn. Stat. § 35-28(a). The plaintiff had, at one time, been employed by the defendant anesthesiology association, and had been granted privileges to practice anesthesiology at the defendant hospital. Following the termination of his employment by the anesthesiology association, the plaintiff was denied permission to continue practicing anesthesiology at the hospital, due to the hospital's exclusive contract with the anesthesiology association. The court dismissed the price fixing claim because, whatever the effect of the exclusion from the hospital, it was clear that the supposed price fixing could not have harmed the plaintiff doctor; he was not a consumer of those services. The Court noted that, even if patients or the public "can assert [the plaintiff's] price fixing claims, it is clear that the plaintiff . . . has no standing to do so under antitrust law." *Id.*, 371 A.2d at 399.

Under this clear rule, Appellants have no standing. Appellants do not allege that they are consumers of the anesthesiology services offered by PAS and BAC. They are not hurt by the alleged price fixing and the Circuit Court properly granted summary judgment.

Summary judgment was also proper because the restrictions Monongalia General imposed on price gouging do not constitute "price fixing." The minimal "reasonableness" limitations the Hospital imposed on the contracts set no specific price¹⁸ and, in fact, required each of the anesthesia

¹⁸Appellants disingenuously claim that certain "deposition testimony . . . establishes that these provisions constituted agreements between the defendants on the fees that would be charged for professional anesthesia services." Appellants' Brief, p. 4. In fact, the testimony cited by Appellants' Brief establishes no agreement at all between BAC

groups to set their own prices. For PAS the contract required only that the fees to third parties “be reasonable and competitive.” For BAC the contract provided only that the fees be “reasonable in light of those prevailing” in the area, and not changed without notice and a chance for the Hospital to object. *See* PAS-MGH and BAC-MGH Contracts, pp. 26-27 and 22-23, attached as Exhibits B and C to Plaintiffs’ Response Brief. Such “reasonableness” limits imposed by a party that is not a competitor and that has no financial interest in the services at issue simply are not “price fixing.”

The WVATA prohibits any “contract, combination or conspiracy . . . (A) For the purpose or with the effect of fixing, controlling, or maintaining the market price, rate or fee of any commodity or service. . . ” W. Va. Code § 47-18-3(b)(1). There is no explanation in the statute of what it means to fix or control a “market price” and how to distinguish an agreement on price between a buyer and seller, for example, from unlawful price fixing.

The statute, however, was adopted after nearly a century of development of terms of art – including “price fixing” – in federal antitrust cases. The meaning of the term of art in the antitrust field was summarized by the United States Supreme Court as follows:

As generally used in the antitrust field, “price fixing” is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. . . . Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally “price fixing,” but they are not *per se* in violation of the Sherman Act.

and PAS, and no “agreement on price” between either party and the Hospital; the cited testimony also shows nothing beyond the face of the agreements – a general reasonableness limitation. The cited testimony of Dr. McNeil is exclusively about third party (insurance and HMO) billing. Appellants’ counsel asked whether the agreement to participate in such plans meant “you then, in essence, have an agreement regarding what your fees ultimately are going to be; correct?” Dr. McNeil unequivocally responded: “No, not at all. We negotiate individually with the third party payors for our fees. The hospital doesn’t have anything to do with it.” McNeil Dep., p. 66 (attached as Exh. E to Appellants’ Brief). The deposition excerpt of Marsha Boggess is equally off-point. The cited pages (36 and 37) again do nothing more than show that BAC agreed to participate in third party payment programs by insurers and HMO’s. Nothing in the testimony showed the supposed “agreements between the defendants on the fees that could be charged for anesthesia services.” Appellants’ Brief, p. 4, citing to Boggess Dep., Plaintiffs’ Exhibit E, at pp. 36-37.

Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 9 (1979).¹⁹ Thus, “price fixing” might literally include a price agreement between two partners for their product, or a price agreement between buyer and seller, but such agreements are not antitrust “price fixing.” The antitrust term of art has been limited to the narrow class of actions condemned by decades of judicial analysis. Under the established usage, “price fixing” is most classically an agreement among competitors to fix the prices of their products or services. *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). At the time of the WVATA’s adoption, unlawful price fixing also included resale price maintenance, in which the manufacturer conspires with distributors or retailers to fix the price at which its product will be resold. *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). Neither type of price fixing – horizontal price fixing among competitors nor “vertical” resale price maintenance (precluding price competition by distributors or retailers) – exists in this case.

The Legislature is presumed to incorporate the prior interpretation of terms of art it chooses to incorporate into statutes: “[b]y borrowing ‘terms of art in which are accumulated the legal tradition and meaning of centuries of practice, [the Legislature] presumably knows and adopts the cluster of ideas that are attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.’” *Stephen L.H. v. Sherry L.H.*, 195 W. Va. 384, 465 S.E.2d 841, 851 (1995) (quoting *Evans v. United States*, 504 U.S. 255, 259 (1992)). This Court has specifically applied this rule with regard to the WVATA. *Reddy*, 171 W. Va. at 372, 298 S.E.2d at 909. In *Reddy*, the Court rejected a

¹⁹In *Broadcast Music*, the Supreme Court warned against a literal approach to the term “price fixing” and rejected the view that the blanket licenses to huge libraries of musical works, sold by ASCAP and Broadcast Music, Inc., were price fixing violations of the antitrust law. Although competitors (authors and performers of musical works) agreed on the price to charge for blanket access to the library, that was a necessary condition for the “product” to exist, and not the type of “naked” restraint condemned by the prior cases. *Id.*, 441 U. S. at 24.

claim that a restrictive covenant was a restraint of trade under the WVATA. Because such restrictions directly restrain one party from competing in a trade or profession, the plaintiff argued that a “restraint of trade” had necessarily occurred. This Court rejected that position:

This argument fails to recognize that the phrase “in restraint of trade” is a term of art. Most contracts are deliberately entered into to restrain trade in some fashion. Franchise agreements, agreements to buy or sell a certain commodity at a specified time and price, employment agreements, agreements between management and unions – all operate as limitations on unrestricted trade without being unlawful restraints.

Id., 298 S.E.2d at 910.

As a term of art, “price fixing” simply does not apply to the contracts at issue here and the Legislature is presumed to have adopted the established meaning of the term of art. Appellants cite no use of the term “price fixing” in any jurisdiction at any time declaring the term applicable to arrangements such as those at issue here. Appellants thus provide no support for the label they apply to the contracts, and the label clearly does not fit under any accepted view of price fixing as a term of art. Indeed, the absence of any economic interest by the Hospital in the allegedly “fixed” price – physician anesthesia services – is itself a fatal defect. *See, e.g., Satellite Fin. Planning Corp. v. First Nat’l Bank of Wilmington*, 633 F. Supp. 386, 395 (D. Del. 1986) (holding that bank “defendants could not illegally have fixed Earth Station’s warranty resale price because they never sold any warranties to anyone”).

Ignoring the established meaning, as Appellants seek, would disadvantage West Virginia by creating great uncertainty and perceived hostility to commerce. If “price fixing” is not limited to agreements among competitors, or agreements controlling prices at which competitors sell (resale price maintenance), then its reach will be unlimited. This is particularly true as Appellants

cite no alternative source of authority for defining "price fixing." There is no majority and minority view on what constitutes price fixing and no alternative standard to which Appellants cite.

The re-interpretation of *per se* violations for which Appellants argue would outlaw a wide range of clearly pro-competitive activities, because every contract of sale contains a price agreement. If Appellants seek to invent a new definition that would not cover "vertical" buyer-seller agreements, even a narrow re-definition, gerrymandered to fit this case, would ensnare many beneficial practices. For example, the State of West Virginia frequently leases park land or state facilities for the operation of commercial endeavors. Appellants would preclude the State from setting price ceilings or guidelines to prevent the private operators from taking advantage of the public. Certain facilities such as airports have recently sought to attract customers by mandating that stores in the "air mall" must set prices equivalent to those the store operators use in their ordinary retail stores. Even the narrowest re-definition of "price fixing" would render these and many other clearly beneficial practices unlawful.

F. Entering into Separate Contracts, with Two Different Suppliers of Services, is Not "Market Allocation."

"Market allocation" is also a long established term of art. Without acknowledging this, or considering what a "market" might be, Appellants allege in one paragraph²⁰ that the contracts at issue constitute market allocation. Monongalia General's decision, in late 1998 and early 1999, to obtain anesthesia services from two different groups, responsible for two different areas of the Hospital, was not market allocation. Obtaining services from two different suppliers of services is not market allocation because it does not involve any agreement by competitors on how they will or will not compete for business.

²⁰See Appellants' Brief, pp. 22-23.

Market allocation generally requires some agreement *by competitors* to allocate the markets in which each will operate. *Topco*, 405 U.S. at 608 (“One of the classic examples of a *per se* violation of § 1 is an agreement *between competitors at the same level of the market structure* to allocate territories in order to minimize competition This Court has reiterated time and time again that “[h]orizontal territorial limitations . . . are *per se* violations of the Sherman Act”) (citations and internal quotations omitted) (emphasis added). Additionally, market allocation can exist when a manufacturer establishes territorial restrictions on who may distribute its products in which markets, in order to reap a benefit from the increased price its dealers can charge. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (overruling *White Motor Co. v. U. S.*, 372 U.S. 253 (1963)).

Neither horizontal agreements, nor resale restrictions, exist here. When the Hospital entered into exclusive contracts with different anesthesia service providers, the Hospital had no economic interest in the sale of physician anesthesiology services to patients. Monongalia General therefore did not engage in market allocation. Courts routinely recognize that “[t]he essence of a market allocation violation . . . is that *competitors* apportion the market among themselves and cease competing in another’s territory or for another’s customers.” *Anesthesia Advantage, Inc. v. Metz Group*, 759 F. Supp. 638, 646 (D. Colo. 1991) (emphasis added) (quoting *Mid-West Underground Storage, Inc. v. Porter*, 717 F.2d 493, 497-498, n. 2 (10th Cir. 1983)); *see also Jamsports & Entm’t, LLC v. Paradama Prods., Inc.*, 2003 WL 1873563 (N.D. Ill. 2003) (recognizing that “[m]arket allocation schemes involve horizontal agreements between competitors in a market to refrain from competing with each other for consumers within some portion of that market.”). There is no claim that the Hospital agreed with anyone with whom it competes to divide

the markets for its services, nor did it reduce competition in any service or product in which it has an economic stake. Therefore, it did not engage in market allocation.

In general, parties are free to contract for the purchase of goods or services from different suppliers. That is all that happened here. An earlier example occurred in 1987 when MAA, the medical group to which Appellants belonged, expressly agreed with the Hospital that anesthesiologists from WVUH would have the exclusive right to provide operative anesthesia to open heart patients, while MAA retained its exclusive right to provide all other operative anesthesia. MAA was not entering into a market allocation agreement in 1987, nor was the Hospital doing so in 1998.

Appellants argue that a *per se* market allocation can occur without a horizontal element and without proof of restriction on competition for sellers of a manufacturer's goods. They assert that the Legislature would have added the word "horizontal," had it intended to adopt the existing rules. Connecticut, however, has a statutory antitrust scheme similar to the WVATA. The Connecticut law, like the WVATA, prohibits "every contract, combination, or conspiracy in restraint of any part of trade or commerce." Conn. Stat. §35-26. In a later section (Section 35-28) the statute sets out special practices, including market allocation, which will be considered *per se* illegal. Just as with the WVATA (and the Sherman Act), the Connecticut Antitrust Act does not explicitly distinguish between horizontal and vertical agreements. *Id.* Without the word "horizontal" in the statute, and at the time, absent a statutory mandate to construe the Connecticut Antitrust Act consistent with federal decisional law, the Connecticut Supreme Court adopted the federal distinction between vertical and horizontal restraints, reserving *per se* treatment only for horizontal agreements. *See Elida, Inc. v. Harmor Realty Corp.*, 177 Conn. 218, 413 A.2d 1226 (1979).

Under Appellants' theory, which rejects the universal distinction, any agreement to buy less than all services from one supplier, or to sell less than all goods to one buyer, is "market allocation." A coal company could not agree to sell coal from its northern mine to one buyer and coal from its southern mine to a different utility. A farmer would be prohibited from selling soybeans to Southern States and committing his wheat crop to Sunbeam Bakeries. The landlord of office space could not contract with one janitorial service provider for basic cleaning, and a separate supplier for semi-annual deep cleaning.

By adopting a known term of art, the Legislature prevented the statute from the dangerous consequence of being interpreted to condemn innumerable pro-competitive activities. The dramatic re-interpretation of "market allocation" proposed by Appellants is not warranted by the established precedent of this Court nor by any policy consideration.

G. Monongalia General's Conduct is Not an Illegal Refusal to Deal.

In a throw-away claim on page 25 of their brief, Appellants assert that the award of contracts to BAC and PAS, rather than Appellants, was an unlawful "refusal to deal." The WVATA provisions on "refusals to deal" condemn only a refusal to deal "for the purpose of effecting any of the acts described in sub-divisions (1) and (2) of this section." W. Va. Code § 47-18-3 (b)(3). Thus, a refusal to deal is condemned as *per se* unlawful only if it is a means to effectuate a specific listed practice in subsections 1 and 2. The only actions listed in subsections 1 and 2 asserted in Appellants' Brief are price fixing and market allocation.²¹ In this case, of

²¹The text of the relevant part of the statute prohibits:

(1) A contract, combination or conspiracy between two or more persons:

(A) For the purpose or with the effect of fixing, controlling, or maintaining the market price, rate or fee of any commodity or service; or

(B) Fixing, controlling, maintaining, limiting or discontinuing the production, manufacture,

course, Appellants have failed to establish any kind of price fixing, bid rigging or market allocation. A “refusal to deal” is a violation only when done to “effect” one of the foregoing. Failure to establish price fixing or market allocation precludes any claim of a violation under subsection (b) of W. Va. Code § 47-18-3.

In addition to this fatal error, Appellants’ argument ignores the plain meaning of “refusal to deal.” The Hospital awarded one contract to BAC after years of “dealing” with Appellants’ group (MAA), and after lengthy but unsuccessful efforts to reach a new contract with the group. Thereafter, the Hospital continued to deal with MAA and asked it to bid on further contractual arrangements. That MAA was not successful in presenting the most attractive bid does not show any “refusal to deal” on the part of the Hospital.

mining, sale or supply of any commodity, or the sale or supply of any service, for the purpose or with the effect of fixing, controlling or maintaining the market price, rate or fee of the commodity or service; or

(C) Allocating or dividing customers or markets, functional or geographic, for any commodity or service.

(2) A contract, combination or conspiracy between two or more persons whereby, in the letting of any public or private contract:

(A) The price quotation of any bid is fixed or controlled; or

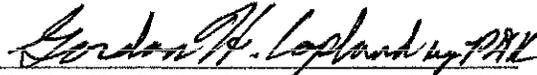
(B) One or more persons submits a bid intending it to be higher than another bid and thus complementary thereto, submits a bid intending it to be substantially identical to another bid, or refrains from the submission of a bid.

W. Va. Code § 47-18-3(b)(1)-(2).

VII. CONCLUSION

For all of the foregoing reasons, this Court should affirm the decision of the Circuit Court of Monongalia County.

Dated this 14th day of August, 2006.



Gordon H. Copland (W. Va. Bar No. 828)

Amy M. Smith (W. Va. Bar No. 6454)

STEPTOE & JOHNSON PLLC

Chase Tower, Sixth Floor

P.O. Box 2190

Clarksburg, WV 26302-2190

(304) 624-8000

John M. Fitzpatrick

LeClair Ryan

Riverfront Plaza, East Tower, 8th Floor

P.O. Box 2499, 951 East Byrd St.

Richmond, VA 23218-2499

*Counsel for Appellee Monongalia County General Hospital
Company d/b/a Monongalia General Hospital*



STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

ROGER W. TOMPKINS
ATTORNEY GENERAL

(304) 348-2021

CONSUMER HOTLINE
(800) 368-8808

August 10, 1990

The Honorable Ken Hechler
Secretary of State
State Capitol
Suite 157-K
Charleston, West Virginia 25305

Re: Filing of agency approved proposed legislative rule pertaining to defining the term "federal antitrust laws" and prohibiting tying and reciprocity; Title 142, Series 15

Dear Mr. Hechler:

By this letter I am informing you that I have filed the above proposed legislative rule with the Legislative Rule-Making Review Committee as an agency approved rule. I am also filing at this time:

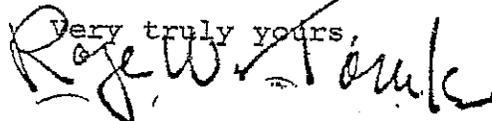
- (1) a copy of the agency approved rule because of a change in the language from the previously filed rule;
- (2) a copy of the notice of agency approval (and the submission) to the Legislative Rule-Making Review Committee;
- (3) a report on public hearing, public comment period and amendments; and
- (4) a summary of proposed legislative rule and statement of circumstances requiring the rule.

A copy of all items received at the public hearing is forthcoming.

EXHIBIT A

Secretary of State
August 10, 1990
Page 2

Please feel free to contact Rob Schulenberg or Donna Quesenberry of my staff at 348-0246 if you have any questions.

Very truly yours


ROGER W. TOMPKINS
ATTORNEY GENERAL

RWS/rm
Enclosures

WEST VIRGINIA
SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #3

DO NOT WRITE IN THIS BOX

FILED
1985 AUG 16

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: ATTORNEY GENERAL TITLE NUMBER: 142

CITE AUTHORITY W. Va. Code § 47-18-20

AMENDMENT TO AN EXISTING RULE: YES ___ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 15

TITLE OF RULE BEING PROPOSED: Proposed legislative rule pertaining to defining the term "federal antitrust laws" and prohibiting tying and reciprocity.

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

Ray W. Tempkins

TITLE 142

PROPOSED LEGISLATIVE RULE
ATTORNEY GENERAL
SERIES 15

Title: Proposed legislative rule pertaining to defining the term "federal antitrust laws" and prohibiting tying and reciprocity.

§ 142-15-1. General.

1.1 Scope - This rule shall apply to any action brought by the Attorney General as parens patriae in federal court for violations of the federal antitrust laws under W. Va. Code § 47-18-17 (1978) and to any person who engages in trade or commerce in or affecting this State.

1.2 Authority - W. Va. Code § 47-18-20 (1978).

1.3 Filing Date -

1.4 Effective Date -

1.5 Purpose - The purpose of this rule is to define the term "federal antitrust laws" as used within W. Va. Code § 47-18-17 (1978) and to prohibit tying and reciprocity in any trade or commerce in or affecting this State.

1.6 Construction - This rule shall be liberally construed to effectuate the beneficial purposes of the West Virginia Antitrust Act.

1.7 Severability - If, for any reason, any section, sentence, clause, phrase, or provision of this rule or the application thereof to any person or circumstances is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect other sections, sentences, clauses, phrases, or provisions or their application to any other person or circumstance, and to this end, each and every section, sentence, clause, phrase, or provision of this rule is hereby declared severable.

Attorney General
Proposed Legislative Rule
§ 142-15-2

§ 142-15-2. Definition of "Federal Antitrust Laws"
As Used in W. Va. Code § 47-18-17 (1978).

The term "federal antitrust laws" as used within W. Va. Code § 47-18-17 (1978) shall include the provisions of 15 U.S.C. §§ 1, 2, 3, 8, 13, 14, 18, 19, and 45(a) as they currently exist or as they may be amended from time to time.

§ 142-15-3. Prohibited Conduct.

3.1 It shall be unlawful under W. Va. Code §§ 47-18-3, 4 (1978) for any person or group of persons to enter into tie-in agreements. Such agreements include, but are not limited to, agreements which condition or have the effect of conditioning the sale of one product or service upon the purchase of another product or service.

3.2 It shall be unlawful under W. Va. Code §§ 47-18-3, 4 (1978) for any person or persons to enter into agreements resulting in reciprocity. Such agreements include, but are not limited to, agreements in which the sale of a product or service is conditioned upon the seller's purchase of products or services produced or performed by the buyer.

TITLE 142
PROPOSED LEGISLATIVE RULE
ATTORNEY GENERAL
SERIES 15

Title: Proposed legislative rule pertaining to defining the term "federal antitrust laws" and prohibiting tying and reciprocity.

SUMMARY OF PROPOSED LEGISLATIVE RULE AND
STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE

The Antitrust Division of the Office of the Attorney General is promulgating a rule designed to define the term "federal antitrust laws," and to define and prohibit certain unlawful activities contemplated in W. Va. Code §47-18-3 (1978).

The rule is divided into three sections. The first section, entitled "General," addresses the scope, authority, filing date, effective date, construction and severability of the rule. The second section, entitled "Definition of 'Federal Antitrust Laws' As Used in W. Va. Code § 47-18-17 (1978)," provides the citations for the body of federal antitrust laws necessary in the enforcement and administration of the state antitrust laws. The third section, entitled "Prohibited Conduct," identifies "tie-in agreements" and "reciprocity" as two types of anticompetitive behavior which have been deemed unlawful in the federal system and are violative of the broad prohibitions of the West Virginia Antitrust Act.

This rule is necessary to define the term "federal antitrust laws" as used within W. Va. Code § 47-18-17 (1978) and to specifically prohibit tying and reciprocity in any trade or commerce in or affecting the State of West Virginia.

For more information, please contact Robert William Schulenberg III, Senior Assistant Attorney General, or Donna S. Quesenberry, Assistant Attorney General, Office of the Attorney General, Antitrust Division, 812 Quarrier Street, Fifth Floor, Charleston, West Virginia 25301.

TITLE 142
PROPOSED LEGISLATIVE RULE
ATTORNEY GENERAL
SERIES 15

Title: Proposed legislative rule pertaining to defining the term "federal antitrust laws" and prohibiting tying and reciprocity.

REPORT ON PUBLIC HEARING, PUBLIC COMMENT PERIOD
AND AMENDMENTS

The Public Comment Period with respect to the above-referenced legislative rule expired at 5:00 p.m., August 6, 1990, and a Public Hearing on the proposed rule was held on that date, all pursuant to notice sent to the Office of the Secretary of State for publication in the State Register on July 6, 1990.

One comment was received in favor of the proposed rule and no one attended the Hearing.

A transcript of the Public Hearing will be forwarded immediately upon receipt from the court reporter.

The proposed rule was approved as amended pursuant to recommendations from the Attorney General and members of his staff. These recommendations for amendments were made for the purpose of clarifying the meaning of the originally proposed rule, to bring the rule into conformity with federal decisional law, and to delete provisions which were both inconsistent with federal law and beyond the authority of the Attorney General.

Report On Public Hearing etc.
Proposed Legislative Rule, 142 C.S.R. Series 15
August 10, 1990
Page 2

For further information, please contact Robert William
Schulenberg, III, Senior Assistant Attorney General, or Donna S.
Quesenberry, Assistant Attorney General, Antitrust Division, 812
Quarrier Street, Fifth Floor, Charleston, West Virginia 25301.

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BEFORE THE WEST VIRGINIA ANTITRUST DIVISION

IN THE MATTER OF
HEARING ON PROPOSED LEGISLATIVE RULE
PERTAINING TO THE ENFORCEMENT AND
ADMINISTRATION OF THE WEST VIRGINIA
ANTITRUST ACT, W. VA. CODE 47-18-1
THROUGH -23, AND AS IT MAY FROM TIME
TO TIME BE AMENDED

L & S Building
812 Quarrier Street
Sixth Floor
Charleston, West Virginia
August 6, 1990

The above-entitled matter came on for hearing at
8:55 a.m. before:

DONNA QUESENBERRY, Hearing Officer

APPEARANCES: No appearances

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I N D E X

<u>Rule Making Exhibits</u>	<u>Marked</u>	<u>Received</u>
No. 1, Sign In Sheet	4	4
No. 2, Letter dated July 27, 1990	4	4

PROCEEDINGS

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HEARING OFFICER QUESENBERY: On the record.

My name is Donna Quesenberry, Assistant Attorney General, Office of the Attorney General, assigned to the Antitrust Division.

Today is August 6, 1990 and the time by my watch is 11:20 a.m.

We are here today for a public hearing on the Attorney General's Proposed Legislative Rule pertaining to the definition of antitrust laws and comparability and activities presumed to be anti-competitive.

The public hearing in this matter was scheduled to commence at 11:00 a.m. today; however, there have been no persons appearing in this matter.

I would like to have attached to the comment record the sign-in sheets, which for the purpose of this rule, of course, are unexecuted as well as a copy of the letter dated July 27, 1990 to Attorney General Roger Tompkins containing favorable comments for this proposed legislative rule. The comments are from former Deputy Attorney General of the Antitrust Division, Daniel N. Huck. The original has been signed by Mr. Huck through Constance R. Tsokanis, Assistant Attorney General.

(WHEREUPON, the sign-in

1 sheet was marked for identification as Rule
2 Making Exhibit No. 1 and was received in
3 evidence.)

4 (WHEREUPON, the letter
5 dated July 27, 1990 was marked for purposes
6 of identification as Rule Making Exhibit
7 No. 2 and was received in evidence.)

8 In addition to these favorable comments from
9 the Attorney General's staff, I would like to point out that
10 the notice for the public hearing and comment period was
11 filed in a timely manner with the Office of the Secretary of
12 State on or about the 6th day of July, 1990.

13 In addition to the copy of the proposed
14 legislative rule, Title 142, Series 15 and the Notice of
15 Public Hearing, a fiscal note for the proposed legislative
16 rule was also filed. We have not, to the best of my
17 knowledge, received any additional written comments to the
18 rule other than those comments that have been placed by the
19 Division's staff.

20 I would also like to note for the record that
21 I am not the original hearing officer assigned to this rule
22 making proceeding. The hearing was originally scheduled to
23 be conducted by Constance R. Tsokanis, Assistant Attorney
24 General. However, because of unforeseen circumstances I was
25 called in as a substitute hearing officer for the purposes

1 of this proceeding. To that extent I will now be
 2 responsible and I assume responsibility for finally
 3 promulgating this rule and delivering the appropriate number
 4 of copies of the rule comments and other matters to the
 5 legislative rule making committee and the Office of
 6 Secretary of State.

7 Right now, those are all the comments I will
 8 make. We will hold the oral comment period open until
 9 approximately 12:00 noon whereupon, if no one attends, the
 10 oral portion of the rule-making record will be closed. The
 11 written portion of the comment period will be closed at
 12 about 5:00 p.m. today to allow persons who have mailed
 13 comments or otherwise communicated in writing to
 14 successfully effectuate delivery of their comments. We
 15 will, therefore, hold this oral comment period open for
 16 approximately another 35 minutes.

17 So, let's take a short recess.

18 (Whereupon, a short recess was taken.)

19 HEARING OFFICER QUESENBERRY: We are back on
 20 the record. I would like to note that there is still no one
 21 in attendance at this public hearing. Therefore, it being
 22 12:00 noon, I declare the oral comment period for this
 23 proposed rule closed. I will declare the written comment
 24 period for the proposed rule to be closed as of 5:00 p.m.
 25 today, August 6, 1990.

N. JOAN THAXTON COURT REPORTERS, INC.
 (304/988-3970)

Thank you.

(WHEREUPON, at 12:00 noon
the hearing was adjourned.)

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N. JOAN THAXTON COURT REPORTERS, INC.
(304/988-3970)

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REPORTER'S CERTIFICATE

HEARING DATE: Monday, August 6, 1990

LOCATION: Charleston, West Virginia

I hereby certify that the proceedings and evidence herein are contained fully and accurately on the tapes and notes reported by me at the hearing in the above entitled matter before DONNA QUESENBERRY, Assistant Attorney General, Hearing Officer, and that this is a true and correct transcript of the case.

Date: August 10, 1990


Official Recorder

SIGN IN SHEET

TITLE 142 - SERIES 15

DEFINING FEDERAL ANTITRUST LAWS;
COMPARABILITY AND ACTIVITIES PRESUMED TO BE
ANTICOMPETITIVE.

Name Address Company

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STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

ROGER W. TOMPKINS
ATTORNEY GENERAL

(304) 348-2021

CONSUMER HOTLINE
(800) 368-8808

July 31, 1990

The Honorable Roger W. Tompkins
Attorney General of the
State of West Virginia
Room E-26, State Capitol
Charleston, West Virginia 25305

Re: Comments on the Proposed Legislative Rules Pertaining to the Enforcement and Administration of the West Virginia Antitrust Act, W. Va. Code §§ 47-18-1 through -23, and as it may from time to time be amended.

Dear Attorney General:

Please accept these comments for filing in support of the proposed legislative rules, which this division has submitted to the Secretary of State. These comments should not be construed as limitations to the proposed rules.

West Virginia Code § 47-18-20 authorizes the Attorney General to engage in rulemaking to aid in the enforcement or administration of the West Virginia Antitrust Act. Any rule proposed by Attorney General must be promulgated in accordance with the Administrative Procedures Act (APA). See W. Va. Code § 29A-3-1 (1986). Rules promulgated through the required rulemaking procedure and done in accordance with the APA have the force of law. See W. Va. Code § 29A-1-2(d)(1) (1986).

In the following comments, each rule will be treated separately. Each series and rule is and should be considered completely severable for the purposes of its adoption and construction.

142 Proposed Legislative Rule 14 §§ 1-3

Section 1 includes the general provisions involving scope, authority, filing date, purpose and construction. It is prefatory in nature, and does not require further comment. This is true of each proposed rule to follow.

Sections 2 and 3 address the question of how the statute of limitations will run with regard to continuing antitrust violations. The rule states that in the instance of a continuing antitrust violation, a cause of action shall be available for four years from the last date upon which the continuing violation took place. The rule also states that an antitrust violation which continues for a period of more than four years shall be deemed a present violation for the purpose of determining the date of accrual of a cause of action.

Actions brought under the Clayton Act must be brought within four years. Clayton Act, Section 4B, 15 U.S.C. § 15b (Law Co-op. 1985). Section 11 of the West Virginia Antitrust Act is analogous in that it addresses the limitation of actions.¹ The West Virginia Antitrust Act is demonstrably more flexible than its federal counterpart with respect to limitations of actions, however, in that it permits causes of action based upon a conspiracy to be brought within four years of the discovery of such conspiracy. It also carves out a clear exception to the four-year rule in the instance of a continuing violation.

The purpose of the proposed rule is to clarify the meaning of the sentence which declares "[f]or the purposes of this section, a cause of action for a continuing violation is deemed to arise at any time during the period of such violation." (Emphasis added.) The proposed rule is a codification of the judicial interpretation of the applicable accrual time for causes of action based on continuing violations in analogous cases outside the area of

¹ The state limitation of action statute, W. Va. Code § 47-18-11 (1986), reads:

Any action brought to enforce the provisions of this article shall be barred unless commenced within four years after the cause of action arose, or if the cause of action is based upon a conspiracy in violation of this article, within four years after the plaintiff discovered, or by the exercise of reasonable diligence should have discovered the facts relied upon for proof of the conspiracy. For the purpose of this section, a cause of action for a continuing violation is deemed to arise at any time during the period of such violation.

(Emphasis added.)

antitrust.² For example, under the West Virginia Human Rights Act, W. Va. Code § 5-11-1(19) (1987 & Supp. 1989), the West Virginia Supreme Court of Appeals has declared that, in an employment discrimination case dealing with compensation disparity, a continuing violation exists so that a violation of the Human Rights Act is deemed present for as long as the disparity existed and, therefore, a complaint based upon allegedly unlawful compensation disparity over a period of time is not barred even if filed within the limitation period after the compensation disparity last occurred. West Virginia Institute of Technology v. West Virginia Human Rights Commission, ___ W. Va. ___, 383 S.E.2d 490 (1988); see also West Virginia Human Rights Commission v. United Transportation Union, Local 655, ___ W. Va. ___, 280 S.E.2d 653 (1981).

The Legislature authorized a distinct treatment with respect to limitation of actions for continuing violations under the West Virginia Antitrust Act. This proposed rule illuminates that distinction in the context of ruling precedent in this State.

142 Proposed Legislative Rule 14 § 4

This rule seeks to clarify the provisions of W. Va. Code §§ 47-18-8 and -18-9 as they relate to the State's recovery of costs in successful antitrust enforcement actions. A state is not generally permitted to recover attorneys' fees unless that is specifically allowed by statute. The West Virginia Antitrust Act makes such a specific allowance. In pertinent part, W. Va. Code § 47-18-8, which allows the Attorney General to seek injunctive relief necessary to restore and preserve competition, declares that "[i]f a permanent injunction is issued at such proceedings, reasonable costs of the action may be awarded the State, including but not limited to expenses of discovery and document reproduction."

The following section, W. Va. Code § 47-18-9 of the Antitrust Act, allows any person who is damaged in his business or property by reason of a violation to recover "reasonable attorneys' fees, filing fees and reasonable costs of the action. Reasonable costs

² As you know, there has been little judicial interpretation of the West Virginia Antitrust Act, so we must look to "comparable" federal law for guidance as to construction. See W. Va. Code § 47-18-16 (1986). Here, there is no "comparable" federal law. In fact, this is an area where the state statute departs from the federal law. In such instances, we must ascertain legislative intent by examining precedent in other areas of law on analogous points.

of the action may include, but shall not be limited to the expenses of discovery and document reproduction." The next paragraph of this provision makes the State a person for the purposes of that section. Therefore, both sections specifically permit the State cost recovery in successful actions. Both sections are broad provisions, which utilize a form of the phrase "includes but is not limited to." It is a well-settled point in West Virginia and in the federal system that phrases such as "includes, but is not limited to" are construed as a phrases of enlargement which do not limit statutory application to the illustrations given in the statute. Human Rights Commission v. Pauley, 212 S.E.2d 77 at 80, citing Pennsylvania Human Relations Commission v. AltoReste Park Cemetery Assoc., 453 Pa. 124, 306 A.2d 881 (1973). See also FPC v. Corporation Commission of the State of Oklahoma 362 F. Supp. 522 (D.C. Okla. 1973). The proposed rule illustrates the types of costs that the Legislature viewed as recoverable when the State expends precious resources to successfully enjoin violative behavior.

142 Proposed Legislative Rule 15 § 2

This proposed rule gives the citations for the body of federal antitrust law. This is necessary in the enforcement and administration of the state laws in that it specifies the federal law relevant to state antitrust enforcement and administration.

142 Proposed Legislative Rule 15 § 3

This proposed rule clarifies the meaning of the term "comparable," as used in W. Va. Code § 47-18-16. It illustrates the principle recently announced by the Supreme Court in California v. ARC America, ___ U.S. ___, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989) that state antitrust provisions which are contrary to or differ from federal antitrust provisions are not preempted by federal law. In that case, Justice White, writing for the majority, declared, "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies." Citing 21 Cong. Rec. 2457 (1890) (Remarks of Sen. Sherman); See also Cantor v. Detroit Edison Co., 428 U.S. 579, 96 S. Ct. 3110, 49 L. Ed. 2d 1141 (1976).

142 Proposed Legislative Rule 15 §§ 4.1 and 4.2

Sections 4.1 and 4.2 specify two types of anticompetitive behavior which have been deemed unlawful in the federal system and are violative of the broad prohibitions of the West Virginia Antitrust Act. The purpose of these proposed rules is to clarify

the Attorney General's position on this point based on a careful reading of the applicable law.

Section 4.1 refers to "tie-in" agreements. Such agreements condition the sale of one product or service upon the purchase of another product or service. The ability to condition the sale of one product upon the purchase of another necessarily implies a market power in the desired product and an attempt to leverage such power in the less desired product's market. Such agreements have been held unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1; Section 3 of the Clayton Act, 15 U.S.C. § 14 (1982); and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (a)(1) (1982).

In Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969), United States Steel tied favorable credit terms for contractors to the purchase of prefab housing. The Court declared that such arrangements, if proven, "generally serve no legitimate business purpose that cannot be achieved in some less restrictive way." Id. at 503. In International Salt Co. v. United States, 332 U.S. 392 (1947), the lease of an innovative salt processor was conditioned upon the purchase of a certain brand of raw salt. Of that arrangement, the Supreme Court held, "it is unreasonable per se to foreclose competitors from any substantial market." Id. at 396.

Since the time of these cases, tying has consistently been regarded as an undesirable and illegal when it unreasonably restricts free trade. See Capra, Inc. v. Ward Foods, Inc., 536 F.2d 39 (5th Cir. 1976); Moore v. Jas. H. Matthews & Co., 550 F.2d 1207 (9th Cir. 1977); Siegel v. Chicken Delight, Inc., 448 F.2d 41 (9th Cir. 1971), cert. den., 405 U.S. 955 (1972). Even recently, as the Supreme Court has been less willing to find tying arrangements unlawful per se, the Fourth Circuit continues to recognize the competitive damage such arrangements can do. In Matrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft, 828 F.2d 1033 (4th Cir. 1987), the court held that "quality control" was not a justification for tying the sale of repair parts to the sale of automobiles when the defendant had already issued specifications for such parts.

Rule 4.2 specifies reciprocity as a per se violation of the West Virginia Antitrust Act. Reciprocity typically occurs when one party buys goods from another only upon the condition that the second party will buy goods from the first. Such agreements have been held per se unlawful under Section 7 of the Clayton Act by the Supreme Court. FTC v. Consolidated Food Corp. 380 U.S. 592 (1965). The Fifth Circuit shed light upon the reason why reciprocal arrangements and tying arrangements were similarly pernicious to

competition in Spartan Grain & Mill Co. v. Ayers 581 F.2d 419, 425 (5th Cir. 1978), cert. den., 444 U.S. 831 (1979):

The two labels [tying and reciprocity] refer to similar phenomena. In each case, one side of a transaction has special power in the market place. It uses this power to force those with whom it deals to make concessions in another market. In tying arrangements, a seller with economic power forces the purchaser to purchase something else to obtain the desired item. In reciprocal dealings, a buyer with economic power forces a seller to buy something from it to sell its goods. In both cases the key is the extension of economic power from one market into another market.

Either type of arrangement is clearly undesirable from an antitrust enforcement perspective. The Legislature signalled its awareness of this by giving the Attorney General broad enforcement powers and by prohibiting in W. Va. Code § 47-18-3(a) "every" contract in restraint of trade. Given this prohibition, these proposed rules are necessarily illustrative of the types of activities contemplated by the Act.

142 Proposed Legislative Rule 16 § 2

In the instance of an antitrust inquiry based upon the Attorney General's probable cause to believe that wrongdoing has occurred, W. Va. Code § 47-18-7(a) permits the Attorney General to "require production of . . . any matter which is relevant to the investigation." The West Virginia Supreme Court of Appeals has declared that the word "any" when used in a statute means any. In Thomas v. Firestone Tire and Rubber Co., ___ W. Va. ___, 266 S.E.2d 905 (1980), the Court stated:

We are impressed that the word 'any' represents a fundamental and irreducible concept. It is a statue wrought from the letters A, N and Y; a monument to an idea; an artistic rendering designed to signify a meaningful unit of the English language. The Court is led to the unavoidable conclusion that the word 'any' when used in a statute should be construed to mean, in a word, any

Id. at 909. Given this clear judicial mandate concerning the construction of the statutory language, the Attorney General would argue that investigative interrogatories are both more desirable

in that they minimize expenditure of resources on both sides³ and perfectly within the contemplation of the statute. The purpose of this rule, then, is to clarify the expressed legislative intent so that an occasionally perceived loop-hole may be resolved in favor of this practical and cost-effective means of investigation.

142 Proposed Legislative Rule 17 § 2

Section 2 of Proposed Legislative Rule 17 addresses itself to clarifying the prohibition articulated in W. Va. Code 47-18-7(d), in which the Attorney General is prevented from making public the name or identity of any person whose acts or conduct he has investigated, but against whom no enforcement proceeding has been brought under the article. Section 2 explicitly states what has always been implicitly true: A court action for mandamus may be brought against the Attorney General in order to ascertain such information. This rule acknowledges that a court of competent jurisdiction may balance, on a case by case basis, a targeted party's right to privacy when no actionable violation has been found with the public right to access to and supervision of the governing process.

142 Proposed Legislative Rule 18 § 2

This proposed rule explicates state action immunity as the Legislature has articulated it in W. Va. Code § 47-18-5(b). The Legislature recognized the need for state action immunity under the West Virginia Antitrust Act. State action immunity has been discussed at length in the federal system. In order for a course of conduct to qualify for state action immunity, it must be affirmatively be shown that: (1) The state expressed a clearly articulated and affirmative policy restricting competition; and (2) the state actively supervised that policy restricting competition. California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). Satisfaction of both the existence of the public policy and active supervision elements must occur. If there is a failure in proof of either element, the test fails and the conduct is not immunized. This proposed rule merely adopts this ruling standard as articulated in Midcal in order to clarify the Legislature's intent in creating the exemption.

³ When taken in lieu of depositions, interrogatories are less disruptive for the target of an investigation, since they would allow the target of an investigation or its employees to answer questions under oath without forcing them to come to Charleston to do so.

Page 8
Roger W. Tompkins, Attorney General
July 31, 1990

142 Proposed Rule 19 §§ 2 and 3

These two sections simply express the means which the Attorney General would employ to compel the compliance of any person contemplated by W. Va. Code § 47-18-21 and the priority with which such action or any action to compel would be heard by the court. They have been proposed in order to articulate available redress the Attorney General has access to in the instance that a contemplated person should fail to cooperate.

Each of these rules is essential to the proper administration and enforcement of the West Virginia Antitrust Act. Therefore, I submit these comments in favor of the proposed legislative rules. Please feel free to contact me if you have any questions.

Sincerely,

Daniel N. Huckbert

DANIEL N. HUCK
DEPUTY ATTORNEY GENERAL
ANTITRUST DIVISION

CERTIFICATE OF SERVICE

I hereby certify that, on the 14th day of August, 2006, I caused to be served the foregoing "Brief of Appellee Monongalia County General Hospital Company" upon all counsel of record by depositing true copies thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

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

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

*Counsel for Plaintiff, James W. Kessel,
M.D.*

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

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

Charles T. Berry, Esquire
Charles C. Wise, III, Esquire
BOWLES, RICE, MCDAVID, GRAFF & LOVE,
P.L.L.C.
7000 Hampton Center, Suite K
Morgantown, WV 26505

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

*Counsel for Defendants, Mark Bennett,
M.D., Bennett Anesthesia
Consultants, P.L.L.C. and Professional
Anesthesia Services, Inc.*

C. Michael Bee, Esquire
Hill, Peterson, Carper, Bee &
Deitzler, P.L.L.C.
500 Tracy Way
Charleston, WV 25311

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

