

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**JAMES S. 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.**

FILED

February 23, 2007

Rory L. Perry II, Clerk  
Supreme Court of Appeals  
of West Virginia

---

**APPEAL FROM THE CIRCUIT COURT OF MONONGALIA  
COUNTY, WEST VIRGINIA, THE HONORABLE RUSSELL M.  
CLAWGES, JR., CIRCUIT JUDGE, NOS. 00-C-131 & 01-C-212**

---

**APPELLANTS' REPLY BRIEF**

---

Anthony J. Majestro  
Powell & Majestro, PLLC  
405 Capitol Street, Suite P-1200  
Charleston, WV 25301  
304-346-2889  
*Counsel for Vaglienti and Huber*

Susan B. Tucker  
177 Walnut Street  
Morgantown, WV 26505-5431  
(304) 292-3000  
*Counsel for Vaglienti and Huber*

C. Michael Bee  
Hill Peterson Carper Bee & Deitzler PLLC  
500 Tracy Way  
Charleston, WV 25311  
(304) 345-5667  
*Counsel for Vaglienti and Huber*

Frank E. Simmerman, Jr.  
Simmerman Law Office, PLLC  
254 East Main Street  
Clarksburg, West Virginia 26301-2170  
(304) 623-4900  
*Counsel for James W. Kessel, M.D.*

## TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS.....	i
STATEMENT OF FACTS .....	1
POINTS AND AUTHORITIES AND DISCUSSION OF THE LAW .....	1
I.    THE CIRCUIT COURT ERRED IN CONCLUDING THAT IT WAS BOUND TO APPLY FEDERAL ANTITRUST PRECEDENT IN INTERPRETING PROVISIONS OF THE WEST VIRGINIA ANTITRUST ACT THAT ARE DIFFERENT FROM THE FEDERAL ACTS.....	1
II.   THE CIRCUIT COURT ERRED IN DETERMINING THAT THE PROVISIONS OF WEST VIRGINIA CODE § 47-18-3(B) WERE “COMPARABLE” TO THE SHERMAN ACT SUCH THAT IT WAS BOUND BY FEDERAL DECISIONS INTERPRETING THE SHERMAN ACT.....	3
III.  THE CIRCUIT COURT ERRED IN DETERMINING THAT THE THE CONTRACTS AT ISSUE DO NOT VIOLATE THE PER SE RESTRICTIONS CONTAINED IN W.VA. CODE § 47-18-3(B) AND W.V.C.S.R. § 142-15-3 .....	5
A.   The Challenged Agreements Constitute Illegal Tying Arrangement in Violation of the Provisions of <i>W.V.C.S.R. § 142-15-3.1</i> .....	5
B.   The Challenged Agreements Constitute Price Fixing, Market Allocation, and Refusal to Deal in Violation of the Per Se Provisions of W.Va. Code § 47-18-3(b).....	10
<i>Price Fixing.</i> .....	11
<i>Market Allocation.</i> .....	12
<i>Refusal to Deal.</i> .....	13
CONCLUSION.....	14
CERTIFICATE OF SERVICE .....	17

## **APPELLANTS' REPLY BRIEF**

Appellants, James S. Kessel, M.D., Richard M. Vaglianti, M.D. and Stanford J. Huber, M.D. (“plaintiffs”), by their undersigned counsel, file this Reply in support of their appeal in this action. For the reasons stated herein and in plaintiffs’ Petition for Appeal, this Court should reverse the Circuit Court’s December 29, 2005 Order granting the defendants summary judgment on plaintiffs’ antitrust claims.

### **STATEMENT OF FACTS**

Plaintiffs incorporate the facts as stated in their Petition for Appeal. Any additional facts will be noted in argument below.

### **POINTS AND AUTHORITIES AND DISCUSSION OF THE LAW**

#### **I. THE CIRCUIT COURT ERRED IN CONCLUDING THAT IT WAS BOUND TO APPLY FEDERAL ANTITRUST PRECEDENT IN INTERPRETING PROVISIONS OF THE WEST VIRGINIA ANTITRUST ACT THAT ARE DIFFERENT FROM THE FEDERAL ACTS.**

The defendants do not dispute the proposition set forth in plaintiffs’ first assignment of error – that rules of interpretation preferring interpretation consistent with federal precedent do not apply to the statutory and administrative provisions of the West Virginia Antitrust Act (“the Act”) that are different from federal provisions. The defendants’ claim that the relevant provisions of the Act should be considered “comparable” to the federal statutes. This argument will be considered below, but first it is necessary to address the contention raised by defendants and their amici that failing to reflexively follow federal precedent will be disastrous.

The response to these contentions is that they in essence seek to persuade this Court to engage in judicial activism and ignore the legislatively enacted distinctions

between state and federal law. As defendants point out, federal antitrust law predated the 1978 adoption of the Act by decades. *See* Response Brief at 10 & n.6 (citing 1899 and 1905 precedent). The adoption of the Act by the Legislature is in itself evidence that the Legislature intended the Act to apply to a broader range of conduct than that covered under federal law. Obviously, federal law still applies in this State. There is simply no need to enact a statute that merely mirrors federal law. Moreover, the inclusion of both the substance of federal law in W.Va. Code § 47-18-3(a) along with additional explicit restrictions found in W.Va. Code § 47-18-3(b) confirms that the legislature intended state antitrust law to be broader in some cases than the restrictions imposed by federal law. Similarly, the legislative adoption of regulations further defining the Act's restrictions provide even more evidence of an intent to go beyond federal law. Finally, the command that the Act be construed both "*liberally and in harmony with ruling judicial interpretations of comparable federal antitrust statutes,*" *id.* at § 16 (emphasis added), is further evidence that differences in the Act and federal law are intended.

The policy arguments for making "legal analysis in this area . . . amount to nothing more than Pavlovian responses to federal decisional law,"<sup>1</sup> were necessarily rejected by the Legislature when it explicitly added additional restrictions not contained in federal law. Respectfully, this Court is not free to ignore these differences in favor of consistency. That is why this Court has recognized that the doctrine of judicial construction of the Act in harmony with federal decisions does not apply when the provision in question does not appear in federal law. *State ex rel. Palumbo v. Graley's Body Shop, Inc.*, 425 S.E.2d 177, 183 (W.Va. 1992) (holding when the Sherman Act

---

<sup>1</sup>*Stone v. St. Joseph's Hosp. of Parkersburg*, 538 S.E.2d 389, 410 (W.Va. 2000) (concurring opinion); *see also Brooks v. Isinghood*, 584 S.E.2d 531 (W.Va. 2003) (quoting *Stone*).

differs from West Virginia enactments, federal decisions “would not be applicable to our state civil antitrust statute”).

**II. THE CIRCUIT COURT ERRED IN DETERMINING THAT THE PROVISIONS OF WEST VIRGINIA CODE § 47-18-3(B) WERE “COMPARABLE” TO THE SHERMAN ACT SUCH THAT IT WAS BOUND BY FEDERAL DECISIONS INTERPRETING THE SHERMAN ACT.**

In this case, the Circuit Court essentially ignored the explicit provisions of Section 3(b) of the Act and its implementing regulations finding them “comparable” to provisions of federal law in spite of the fact the legislative history of the enactment of this subsection discloses quite a different intent. *See SJ Order* at p. 7.

In their response brief, the defendants argue that the Circuit Court correctly found itself bound by federal precedent requiring proof of harm to competition. The defendants recognize that there are two categories of antitrust claims, those decided under the rule of reason test requiring proof of harm to competition and so-called *per se* violations which do not require such proof of harm to competition. *Response* at pp. 11-12. The idea behind *per se* violations is that certain conduct is so likely to have negative market effects that it is not efficient for the parties and the court to litigate the effect on the market of the practice even if, in some instances, a full blown inquiry would prove them to be reasonable. *See Petition for Appeal* at pp. 8-9 (citing *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 342-344 (1982)).

As noted in more detail in plaintiffs’ initial brief, much of federal antitrust law involves the question of whether a particular restriction or type of restriction is subject to a *per se* or a rule of reason analysis. *Petition for Appeal* at pp. 9-10. Indeed, with respect to some restrictions, the decisions evidence uncertainty as *per se* rules were rejected,

adopted and then rejected again. *Id.* What the defendants' analysis ignores is that the adoption of state antitrust acts with explicit *per se* restrictions was a response to this uncertainty over whether certain practices were to be governed under the *per se* or the rule of reason test. *Id.* at pp. 11-12.

Thus, the legislative history of the Illinois Antitrust Act, which appears to be the first state statute explicitly containing the codified *per se* rules similar to the West Virginia Act, establishes that the intent was to make the designated conduct a *per se* violation. *See* 740 ILCS 10/3.1 at Comment (“Section 3(1) proscribes certain of the offenses which under federal law are termed “per se” offenses . . . . The conduct proscribed by Section 3(1) is violative of the Act without regard to, and the courts need not examine, the competitive and economic purposes and consequences of such conduct.”). By codifying these violations, the intent was to make the conduct subject to *per se* rules apart from treatment under federal law. For example, judicial decisions and commentators have confirmed that the specific prohibitions contained in Minn. Stat. § 325D.53 of the Minnesota Act also were designed to “ensure that its enumerated activities will always receive *per se* scrutiny regardless of federal decisions under the Sherman Act.” *State by Humphrey v. Alpine Air Products, Inc.*, 490 N.W.2d 888, 894 (Minn. App. 1992); *see also* Note, *Minnesota Antitrust Law of 1971*, 63 Minn.L.Rev. 907, 935 (1979) (cited in *Alpine, supra*); *cf. id.* at 912 (noting that “Some state statutes, for example, codify certain *per se* violations. . . Thus, as federal courts become more restrictive in defining the reach of the doctrine of *per se* illegality, certain state antitrust laws may become more advantageous to plaintiffs.”).

Given this history, the *explicit* adoption of *per se rules* by the Legislature has to be considered as a rejection of the rule of reason test regardless what federal decisions hold. As such, these provisions are not “comparable” to the federal acts and, instead, this Court must apply the explicit legislative determination that the enumerated practices are *per se* illegal.

**III. THE CIRCUIT COURT ERRED IN DETERMINING THAT THE THE CONTRACTS AT ISSUE DO NOT VIOLATE THE PER SE RESTRICTIONS CONTAINED IN W.VA. CODE § 47-18-3(B) AND W.V.C.S.R. § 142-15-3.**

**A. The Challenged Agreements Constitute Illegal Tying Arrangement in Violation of the Provisions of *W.V.C.S.R. § 142-15-3.1*.**

In 1991, the West Virginia Legislature enacted W.V.C.S.R. § 142-15-3.1 which provides:

It shall be unlawful under W. Va. Code §§ 47-18-3, 4 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.

Plaintiffs’ contention below was that the challenged agreements between the two physician groups and the hospital which made the physicians the exclusive providers of anesthesia services violated this provision.

***The Defendants’ Conduct Constitutes Tying in Violation of the Regulation***

Defendants do not contest the fact that operative services and anesthesia services constitute two separate products.<sup>2</sup> For the first time on appeal, however, defendants argue that federal precedent requires that one defendant sell both of the products or have

---

<sup>2</sup>Indeed, even under federal law, the United States Supreme Court has so held. *See* Petition for Appeal at p. 16, n.6 (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 22-23 (1984)).

an economic interest in both services in order to constitute tying. Once again, the defendants are attempting to graft dissimilar federal law onto explicit state restrictions.

First, the defendants' argument is contrary to the explicit terms of the regulation which restricts "any person or group of persons" from entering into an agreement that has the "effect of conditioning the sale of . . . one service upon the purchase of another . . . service." W.V.C.S.R. § 142-15-3.1. The defendants' argument that the sale must be by one seller is contrary to this broad provision. Second, this alleged requirement has never been accepted by the United States Supreme Court and has been rejected by at least two federal circuits. *See Gonzalez v. St. Margaret's House Housing Development Fund Corp.*, 880 F.2d 1514, 1517 (2d Cir. 1989); *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826 F.2d 712, 719 (7<sup>th</sup> Cir. 1987). Finally, it is clear that the hospital does have an economic interest in the provision of anesthesia as the contracts at issue allow the hospital to bill for some of the components of providing anesthesia services.<sup>3</sup>

#### ***The Regulation Applies to Private Civil Actions***

For the first time on appeal, defendants argue that the provisions of W.V.C.S.R. 142-15-3 only apply to actions brought by the Attorney General as *parens patriae* in federal court for violations of the federal antitrust laws. This nonsensical construction of the regulation is clearly not what was intended by the Legislature when it enacted the regulation.

Defendants base the argument on the provisions of W.V.C.S.R. 142-15-1.1 which states:

---

<sup>3</sup>See Response at p.4, n.2 (noting that hospital billed for and collected anesthesia drugs and supplies). The record regarding these charges is not fully developed as this contention was not raised below.

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 and to any person who engages in trade or commerce in or affecting this State.

In interpreting this provision, this Court should keep in mind the entire section which indicates a clear intent to broadly prohibit tying agreements as illegal conduct. For example, subsection 1.5 explicitly states that “Purpose. -- The purpose of this rule is to define the term “federal antitrust laws” as used within W. Va. Code § 47-18-17 and to prohibit tying and reciprocity in any trade or commerce in or affecting this State.” Clearly, the entire regulation was for two separate purposes 1. defining “federal antitrust actions” for *parens patriae* actions by the Attorney General and 2. making tying agreements illegal with respect to “to any person who engages in trade or commerce in or affecting this State.” Furthermore, subsection 1.6 provides the applicable rule of construction: “This rule shall be liberally construed to effectuate the beneficial purposes of the West Virginia Antitrust Act.” The defendants’ interpretation of subsection 1.1 as applying only to actions brought by the Attorney General in federal court under federal law is clearly contrary to these provisions.

Second, the purported limitation advanced by the defendants would lead to the situation where the provisions of section 142-15-3 would never be relevant. According to the defendants, the tying prohibitions apply rule only to actions action brought by the Attorney General as *parens patriae* in federal court for violations of the federal antitrust laws. Of course, an action brought for violation of the federal antitrust laws must be determined under federal law. The West Virginia Legislature cannot create substantive violations of federal law through state regulations. Defendants offer no reason for making tying agreements illegal under the provisions of the West Virginia Antitrust Act

and then making that prohibition only applicable in federal court in an action for violation of federal law.

Moreover, they offer no explanation for limiting the prohibition to actions brought by the attorney general and further limiting the prohibition to actions brought in federal court. There appears to be no rational reason why the legislature would determine that illegal conduct would only be actionable in federal court.

Clearly, the correct interpretation of the scope provision is that it is intended to apply separately to the two substantive provisions of the regulations. The provisions of subsection 1.1 stating that the 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” are intended to make clear that section 2 applies to actions brought in federal court. The remainder of subsection 1.1 was intended to make it clear that section 3’s trying prohibitions apply broadly “to any person who engages in trade or commerce in or affecting this State.”

In other contexts, the Legislature has used scope provisions to make clear an expansive interpretation of a statute rather than limit the application of a statute to the matters listed in the scope provision. *See Rhoades v. West Virginia Credit Bureau Reporting Services, Inc.*, 96 F.Supp.2d 528 (S.D.W.Va. 2000) (Section 46A-1-104 of West Virginia Consumer Credit and Protection Act (WVCCPA) indicating that WVCCPA applied when resident consumer was induced to enter certain credit transactions involving revolving charge accounts and delivery and payment in-state and to West Virginia civil actions to collect on credit sales and loans consummated in another state did not limit WVCCPA's application only to such transactions; rather, provision

merely clarified coverage for such contacts, which could otherwise create choice-of-law issues); *Polis v. American Liberty Financial, Inc.*, 237 F.Supp.2d 681, 686 (S.D.W.Va. 2002) (“Upon careful consideration, the Court agrees with Plaintiffs. There is no language in § [46A-1-]104 which provides it shall only apply to West Virginia residents or only to the situations covered within the statute. Instead, it merely clarifies what law will control under the circumstances delineated therein.”).

***The Regulation is Valid***

The defendants continue in their argument that the Legislature cannot define new *per se* violations of the Act through the adoption of legislative rules. In their argument they continue to cite irrelevant decisions and precedent and do not acknowledge this Court’s precedent regarding legislatively approved administrative rules.

As noted in the Petition for Appeal, these regulations were submitted to the Legislature and explicitly approved by it as part of a bill that was ultimately signed by the Governor. Indeed, as set forth in the petition, the bill approving these regulations was enacted, signed into law, and reflected in the West Virginia Code in then section 64-9-3(1) (1991). Indeed, the regulations that were ultimately enacted were even amended during the legislative process. Petition for Appeal at pp. 19-20.

This Court’s precedent has made it clear, that regulations following these procedures are considered to have the same status as a statute even if they conflict with the prior statute:

If the language of an enactment is clear and within the constitutional authority of the law-making body which passed it, courts must read the relevant law according to its unvarnished meaning, without any judicial embroidery. Even when there is conflict between the legislative rule and the initial statute, that conflict will be resolved using ordinary canons of interpretation. In this regard, it is a settled principle of statutory

construction that courts presume the Legislature drafts and passes statutes with full knowledge of existing law. Accordingly, when two statutes conflict, the general rule is that the statute last in time prevails as the most recent expression of the legislative will.

*West Virginia Health Care Cost Review Authority v. Boone Memorial Hosp.*, 472 S.E.2d 411, 421 (W.Va. 1996) (citations omitted).

The cases cited by defendants fail to address the distinction between rules and standards adopted by an agency when the Legislature delegates a general power to adopt rules, *see, e.g., Repass v. Workers' Compensation Div.*, 569 S.E.2d 162, 165 (W.Va. 2002); *Fairmont General Hosp., Inc. v. United Hosp. Center, Inc.*, 624 S.E.2d 797 (W.Va. 2005) and when the specific rule promulgated by the agency was legislatively approved. *Boone Memorial Hospital, supra*. When the specific rule is not legislative approved, *Repass* and *Fairmont General Hospital*, the regulation must comply with the underlying act. When, however, the specific rule is legislatively approved, a conflict between the statute and the regulation is judged based on rules of statutory interpretation. *Boone Memorial Hosp., supra*. The regulation at issue here was legislatively enacted. Thus, "it has the force of a statute itself[,] .... and [b]eing an act of the West Virginia Legislature, it is entitled to more than mere deference; it is entitled to controlling weight." *Boone Memorial Hospital, supra*.

**B. The Challenged Agreements Constitute Price Fixing, Market Allocation, and Refusal to Deal in Violation of the Per Se Provisions of W.Va. Code § 47-18-3(b).**

In addition to violating the per se rules against tying set forth above, the contracts at issue in this case also violate the specific per se restrictions in W.Va. Code § 47-18-

3(b). The Circuit Court improperly ignored these provisions based on federal precedent that is not applicable to the specific West Virginia provisions.

### ***Price Fixing***

The defendants' first challenge to the claim of price fixing is to argue that the plaintiffs do not have standing to raise the claim. This is another challenge raised for the first time on appeal. W.Va. Code § 47-18-3(b)(1)(A) makes illegal all contracts for "the purpose or with the effect of fixing, controlling, or maintaining the market price, rate or fee of any . . . service." The sole State intermediate appellate court opinion cited by defendants is contrary to more reasoned authority elsewhere. *See Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 258 (2d Cir.1989) (holding a competitor may have standing to sue on the basis of an unlawful price fixing agreement; "[I]t is hard to imagine an injury to competition more clearly of the type the antitrust laws were designed to prevent . . . than the elimination of a major competitor's power to determine its prices and output."); *Applera Corp. v. MJ Research Inc.*, 2004 WL 2935820, \*5 (D.Conn. 2004) (same).

The defendants next contend that the agreements at issue do not meet the test for price fixing. The agreements, however, give the hospital various rights regarding the prices charged by the physicians. Second, each of the contracts contains agreements regarding the fees and billing policies to be charged by the providers. *See, e.g.*, Plaintiffs' Exhibit B at p. 22-23, §§ 5.1, 5.2 (adopting agreed schedule of charges and requiring hospital agreement to change it and requiring contractor agreement to comply with payment arrangements made by hospital with insurers and governmental payers); Plaintiffs' Exhibit C at p. 26-27, §§ 5.1, 5.2 (setting forth agreement regarding fees and

requiring contractor agreement to comply with payment arrangements made by hospital with insurers and governmental payers). The defendants attempt to argue that these provisions are “reasonable.” However, W.Va. Code § 47-18-3(b)(1)(A) makes these agreements *per se* violations to which reasonability analysis is irrelevant.

Second, the defendants’ analysis assumes that the defendants are not competitors. In this case, there is no actual competition between the defendants only because they have entered into an illegal agreement that gives the physician defendants exclusive rights to supply anesthesia services. This illegal agreement is the only thing that prevents the hospital from competing with the physician defendants in supplying anesthesia services.

### ***Market Allocation***

The market allocation claim in this case is simple and compelling. The hospital and the two physician groups collectively apportioned the markets for surgical anesthesia services. Orthopedic anesthesia services are allocated to BAC while other anesthesia services are allocated to PAS. This is clearly an arrangement to “[a]llocat[e] or divid[e] customers or markets, functional or geographic, for any commodity or service.” As such these contracts and arrangements violate the clear *per se* prohibitions set forth in W.Va. Code § 47-18-3(b)(1)(C).

Defendants argue that there is no agreement among competitors. However, the agreements explicitly exclude services allocated. *See, e.g.*, Plaintiffs Exhibit C at p.7; Plaintiffs’ Exhibit B at p. 6. Looking at the collective agreements, BAC and PAS agreed with the allocation of the orthopedic services to BAC and the other services to PAS.

Defendants next argue that the Legislature did not intend to make vertical market allocations illegal. Defendants ignore the fact that the Legislature explicitly removed the horizontal limitation from the model act before adopting it. *See* Petition for Appeal pp. 23-24. Indeed, given that there was much debate over whether these kinds of restrictions should fall within the *per se* rule,<sup>4</sup> the Legislature's intentional modification of the model act, is clear evidence that it intended that the *per se* rule should apply to vertical restraints.

### ***Refusal to Deal***

To effectuate the *per se* illegal contracts and arrangements set forth above, it was necessary to exclude plaintiffs and any other anesthesia providers. As noted previously, the exclusive provisions in the contracts were enforced and plaintiffs were specifically prohibited from providing orthopedic or general anesthesia services. This exclusion constitutes a separate violation as it is a "contract, combination or conspiracy between two or more persons refusing to deal with any other person or persons for the purpose of effecting any of the acts described in [W.Va. Code § 47-18-3(b)(1).]" W.Va. Code § 47-18-3(b)(3).

In response, defendants argue that it is necessary to establish a refusal to deal for the purposes of effectuating another violation. While the Act does contain such a requirement, it is clear that the refusal to deal was a necessary component of the price fixing and market allocation violations noted above. There is no dispute that the

---

<sup>4</sup>*Compare United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (Court reconsidered the status of exclusive dealer territories and held that, upon the transfer of title to goods to a distributor, a supplier's imposition of territorial restrictions on the distributor was "so obviously destructive of competition" as to constitute *per se* violation of the Sherman Act) *with Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (Court overruled *Schwinn*, and rejected application of *per se* rule in the context of vertical nonprice restrictions).

plaintiffs were excluded from providing surgical anesthesia services. This exclusion was necessary to effectuate the illegal price fixing and market allocations in the contracts between the defendants. If the plaintiffs had been permitted to compete and charge prices determined by them, the illegal exclusive allocation and price fixing provisions would not have been successful.

Defendants next strain credibility by, again for the first time, arguing that plaintiffs were not excluded. The record in this case (as set forth in the Petition for Appeal and the prior appeal) establishes otherwise. Indeed, defendant MGH refused to allow plaintiffs to perform surgical anesthesia services because they would not agree to a contract that terminated their hospital privileges if the contract to provide anesthesia services was terminated. The failure to agree to a contract that this Court ultimately determined was illegal does not negate the refusal to deal that occurred after the defendants entered into the illegal contracts at issue here.

### **CONCLUSION**

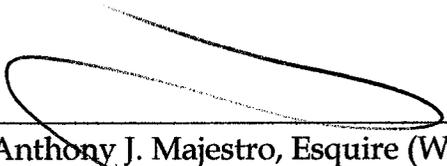
The defendants and their amici devote many pages to making policy arguments that challenge the explicit choices made by the legislature in adopting the Act. The role of this Court is not to base its decision on the wisdom of those decisions. Instead, its role is to apply the Act and the legislatively adopted regulations in accordance with the text and its intent at passage.

Finally, it is important to note that this Court is deciding this case in the context of an agreement that it has already determined is illegal. The facts of this case also distinguish it from the other examples of conduct that would supposedly be made illegal if the defendants are not permitted to enter into the agreement that this Court has

previously determined is illegal. In this case, the distinguishing fact is that plaintiffs continued to hold staff privileges, a grant of access to the hospital's semi-public facilities, which, although not a contract according to this Court, is unique. While the hospital claims privileges were not terminated, it refused to grant plaintiffs access to this public facility. Thus, unlike the general competitor who loses a bid, plaintiffs had an entitlement to continue to compete with any/all other anesthesiologists at the hospital. Notwithstanding this entitlement, the hospital intentionally excluded plaintiffs from the marketplace. This fact also distinguishes this case from those anesthesiologists who apply for, but do not hold, privileges. The unique facts of this case make the application of the rules set forth herein easy.

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

**By Counsel,**



---

Anthony J. Majestro, Esquire (W. Va. Bar No. 5165)  
Powell & Majestro, PLLC  
405 Capitol Street, Suite P-1200  
Charleston, WV 25301  
304-346-2889  
*Counsel for Vaglienti and Huber*

C. Michael Bee, Esquire (W. Va. Bar No. 290)  
Hill Peterson Carper Bee & Deitzler PLLC  
500 Tracy Way  
Charleston, West Virginia 25311-1555  
(304) 345-5667  
*Counsel for Vaglienti and Huber*

Susan B. Tucker, Esquire (W. Va. Bar No. 3813)  
177 Walnut Street  
Morgantown, WV 26505-5431  
(304) 292-3000  
*Counsel for Vaglienti and Huber*

Frank E. Simmerman, Jr. (W.Va. Bar No. 3403)  
Simmerman Law Office, PLLC  
254 East Main Street  
Clarksburg, West Virginia 26301-2170  
(304) 623-4900  
*Counsel for Plaintiff James W. Kessel, M.D.*

**CERTIFICATE OF SERVICE**

I, Anthony J. Majestro, do hereby certify that I served the foregoing APPELLANTS' REPLY BRIEF this 2nd day of October, 2006, by depositing a true and exact copy thereof in the United States mail, postage prepaid, upon the following:

Charles C. Wise, III, Esquire  
Bowles, Rice, McDavid, Graff & Love PLLC  
7000 Hampton Center, Suite K  
Morgantown, WV 26505-1720  
*Counsel for Professional Anesthesia Services, Inc.*

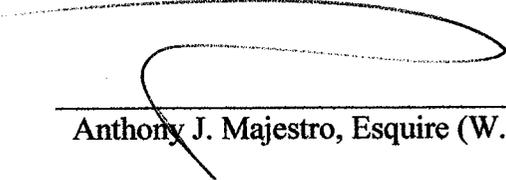
Charles T. Berry, Esquire  
Bowles, Rice, McDavid, Graff & Love PLLC  
7000 Hampton Center, Suite K  
Morgantown, WV 26505-1720  
*Counsel for Mark Bennett, M.D. and Bennett Anesthesia Consultants, PLLC*

Gordon H. Copland  
Steptoe & Johnson  
Post Office Box 2190  
Clarksburg, West Virginia 26302-2190  
*Counsel for Monongalia General Hospital*

C. Michael Bee, Esquire  
Hill Peterson Carper Bee & Deitzler PLLC  
500 Tracy Way  
Charleston, West Virginia 25311-1555  
*Counsel for Vaglianti and Huber*

Susan B. Tucker, Esquire  
177 Walnut Street  
Morgantown, WV 26505-5431  
*Counsel for Vaglianti and Huber*

Frank E. Simmerman, Jr.  
Simmerman Law Office, PLLC  
254 East Main Street  
Clarksburg, West Virginia 26301-2170  
*Counsel for James W. Kessel, M.D.*



---

Anthony J. Majestro, Esquire (W. Va. Bar No. 5165)