IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 34498

ERIE INSURANCE COMPANY,
ERIE INSURANCE PROPERTY AND CASUALTY COMPANY,
ERIE FAMILY LIFE INSURANCE COMPANY,
ERIE INSURANCE EXCHANGE,
ERIE INDEMNITY COMPANY,
CHARLES MICHAEL FLETCHER,
AND CARL OLIAN, II,

Appellants,

PRINCETON INSURANCE AGENCY, INC.,
AND KEVIN WEBB,

Appellees.

BRIEF OF *AMICUS CURIAE*,

INDEPENDENT INSURANCE AGENTS OF WEST VIRGINIA, INC.

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INTRODUCTION

The Independent Insurance Agents of West Virginia files this brief as *amicus curiae* in order to underline the significant public policy issues that are raised by the decision of the Circuit Court of Mercer County in this matter.

Notably, the Circuit Court's decision makes clear that heightened evidence, such as an adverse market effect, should not be deemed a prerequisite to a Plaintiff's ability to recover for damages caused by coercive business practices. Rather, public policy concerns dictate that effective judicial protection should be available to parties in the commercial insurance context *prior* to the point in which coercive activity can be deemed to have risen to a level that constitutes an adverse market effect.

Moreover, encompassed within the Circuit Court's ruling is the implied finding that it is not the contracting process that causes a violation of antitrust laws; rather, it is the restraint of trade from improper actions under the contract that is illegal. This view helps ensure that coercive activity under the guise of "contract enforcement" is not deemed permissible simply because the original contract was properly formed. Simply put, illegal antitrust activity is actionable regardless of contractual rights between private parties.

Furthermore, the Circuit Court's ruling protects the benefits provided to consumers through independent insurance agents. This independent relationship enables consumers to choose to access a one-stop shop for their insurance needs, where they can easily compare and contrast their insurance options from a variety of carriers. In this matter, Erie demanded that the Appellees operate as a de facto captive agency to direct business to Erie, while at the same time maintaining the appearance of an independent agency offering policies from more than one carrier. The negative impact that this coercive activity would have on West Virginia consumers is readily apparent.

Finally, the antitrust claim against Erie in this matter is strong because Erie *threatened* the Appellees with termination of its agency contract, and a threat of such contract termination is coercion with impermissible antitrust consequence. Accordingly, the unique facts of this case implicate statutorily identified policy concerns, and thus, upholding the lower court's decision will not create a precedent whereby all agency contract terminations will be subject to claims for antitrust violations.

For these reasons, and the accompanying material contained herein, the Independent Insurance Agents of West Virginia respectfully urges this Court to affirm the decision of the Circuit Court of Mercer County, West Virginia.

STATEMENT OF INTEREST

Independent Insurance Agents of West Virginia (hereinafter "IIAWV") is this state's oldest and largest insurance trade association. IIAWV is a volunteer organization that provides educational training, resources and advocacy for independent insurance agents. IIAWV strongly supports the ability of independent insurance agents to provide West Virginia consumers unfettered access to affordable insurance products.

IIAWV files this brief in support of the Appellees, Princeton Insurance Agency, Inc. and Kevin Webb, in order to further emphasize the significant public policy issues associated with the Circuit Court's underlying decision. As found by the jury below, the actions of the Erie companies and their representatives in this matter severely limited the freewill of the Appellees, thereby causing direct financial harm to numerous consumers who conducted business with the Appellees. By affirming the Circuit Court's decision, the Court would help ensure that consumers whose insurance needs are serviced by independent insurance agents within West Virginia are able to freely choose the insurance products that best fit their needs and desires, rather than having an insurance company's financial interests improperly restrict consumer choice.

KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

This civil action was initiated on December 29, 2004 through the filing of a Complaint in the Circuit Court of Mercer County, by Plaintiffs Princeton Insurance Agency, Inc. (hereinafter referred to as "the Agency"), Kevin Webb, Frazier Webb, Ramona Webb, and Kenneth Webb against Defendants Erie Insurance Company, Erie Insurance Property and Casualty Company, Erie Family Life Insurance Company, Erie Insurance Exchange, Charles Michael Fletcher, and Carl Olian, II. Subsequently, Erie Indemnity Company was added as a Defendant through Plaintiffs' filing of an Amended Complaint on August 25, 2005. Furthermore, through Plaintiffs' filing of a Second Amended Complaint on May 2, 2007, all Plaintiffs except for the Agency and Kevin Webb were removed.

In this civil action, Plaintiffs alleged various causes of action against Defendants, including a cause of action for violations of public policy based on Defendants' alleged requests and demands for Plaintiffs to supply to Defendants information relating to business affairs and relationships between the Agency and State Auto Insurance Companies, which Plaintiffs deemed private and confidential based on the existence of a fiduciary relationship between the Agency and State Auto Insurance Companies. Plaintiffs further alleged that Plaintiffs' refusal to supply this information led Defendants to terminate agency agreements between Plaintiffs and the Erie corporate defendants. Plaintiffs also alleged that this conduct, which they alleged to be coercive and intimidating in nature, constituted violations of West

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Virginia Code §33-11-4(4), West Virginia Code §33-11-3, and West Virginia Code §33-11-4(12), which are all provisions found in the West Virginia Unfair Trades Practices Act with respect to the insurance industry.

In addition, Plaintiffs alleged that this above-described conduct by Defendants constituted violations of West Virginia Code §33-6F-1 (which governs the disclosure by insurance companies of nonpublic personal information) in that Defendants were attempting to force the disclosure of nonpublic personal information. Further, Plaintiffs alleged a cause of action for violation of West Virginia Code §47-18-1, *et seq.*, the West Virginia Antitrust Act. Plaintiffs alleged that Defendants conspired with one another to refuse to deal with Plaintiffs for the purpose of dividing customers or markets for insurance sales. Plaintiffs also alleged that Defendants' coercive tactics forced Plaintiffs to provide them with a majority of the Plaintiffs' insurance business, which caused both the Agency and State Auto to lose revenues and business.

Finally, Plaintiffs alleged a cause of action for Economic/Business Duress. Plaintiffs alleged that Defendants used their superior economic power to threaten Plaintiffs with termination of the agency contract and relationship should Plaintiffs refuse to supply to Defendants the confidential personal information Defendants requested. For all of these above-described alleged violations, Plaintiffs sought relief in the form of compensatory and punitive damages, pre and post judgment interest, and attorney's fees.

On September 24, 2007 the Jury rendered the following Verdict:

1. Defendants unreasonably restrained trade, in violation of the anti-trust laws, as given in the instructions of the Court.

2. Defendants did not violate the privacy of consumer personal information, under the unfair trade practices laws, as given in the instructions of the Court.

3. Plaintiffs proved that Defendants' wrongful conduct caused them $1,411,209.00 in Compensatory Damages.[1] Further, Plaintiffs are entitled to punitive damages from the Defendants in accordance with the Court's instructions, and the Jury awarded Plaintiffs $1,411,209.00 in punitive damages.[2]

Following the rendering of this Verdict, Defendants filed a Motion for Judgment as a Matter of Law or Alternatively for a New Trial. As set forth in a January 9, 2008 Order of the Court, the Court denied Defendants' Motion. Further, the Court ordered that in addition to the other damages previously awarded to Plaintiffs, Plaintiffs were entitled to $70,749.00 in reasonable attorney's fees, $11,686.79 in filing fees and reasonable costs of litigation, and simple post-judgment interest, but that Plaintiffs were not entitled to prejudgment interest.

Following the entry of this Order, Defendants filed a Petition for Appeal with this Court. In their Appeal, Defendants assigned the following errors to the trial court's rulings:

1. The Trial Court lacked subject matter jurisdiction over Kevin Webb's antitrust claims relating to termination of his agency agreements with the Erie Insurance Group in Virginia since the West Virginia Antitrust Act only regulates conduct affecting commerce in "West Virginia."

2. The Trial Court erred when it held that the Erie companies were sufficiently distinct so as to be capable of conspiring with one another for purposes of liability under the West Virginia Antitrust Act.

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[1] Pursuant to an Order of the Court, this amount of compensatory damages was changed to $4,233,627.00.

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3. The Trial Court erred when it held that the Erie companies could have conspired with the Agency and/or Mr. Webb for purposes of liability under the West Virginia Antitrust Act.

4. The Agency failed to allege or prove any antitrust injuries that were compensable under the West Virginia Antitrust Act.

5. The Trial Court erred when it permitted the Agency to seek compensatory damages from the Erie companies in the form of lost future commissions to be earned on insurance policies not yet written.

The Court granted Defendant's petition on October 29, 2008. Independent Insurance Agents of West Virginia, Inc. now files this brief as *amicus curiae* in support of Appellees, Princeton Insurance Agency, Inc. and Kevin Webb.

STATEMENT OF FACTS

The facts of this action have been set out in great detail in Kevin Webb and Princeton Insurance Agency, Inc.'s ***"Response in Opposition to the Petition for Appeal,"*** previously filed with the Court. Accordingly, it is not necessary to recount the underlying facts of this action again here.

ARGUMENT

I. WHILE THE APPELLEES CAN PROVE THAT ERIE'S ACTIONS RESULTED IN AN ADVERSE EFFECT ON THE INSURANCE MARKET, PUBLIC POLICY CONCERNS SHOULD DICTATE THAT SUCH ACTUAL PROOF IS NOT NECESSARY.

Assuming arguendo that an adverse market effect must be proved to support a valid antitrust claim, which, for the reasons set forth below, it does not, the actions of the Erie insurance companies in this case are clearly the kind of activity that should be deemed to have an

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[2] Pursuant to an Order of the Court, this award of punitive damages was vacated.

adverse market effect. Due to the actions of the Erie insurance companies and their directors, Kevin Webb was forced to either service his loyal consumers by offering them a choice of carriers through which to buy insurance, including State Auto policies which had lower premiums than Eerie, or, in the alternative, disregard the needs of his customers by selling them Erie policies with higher premiums. While most agents, in order to maintain the trust, goodwill, and continued business of their clients would choose the most favorable policy terms, coverages and prices available, Erie's actions of created a situation in which Kevin Webb's freewill was severely limited to the detriment of West Virginia consumers.

Simply put, if Kevin Webb were to disobey the wishes of the representatives of Erie insurance companies, he was likely to lose his agency's contract with the Erie companies. In an unsuccessful attempt to prevent this dire consequence, Kevin Webb, as the evidence illustrates, began to service his customers by offering them higher priced Erie policies. This occurrence, a direct result of the actions taken by and expectations of Erie, clearly resulted in numerous consumers being placed into Erie policies that required the payment of higher premiums than those of Erie's direct competitors in the same local market available through Kevin Webb and the Agency. This result, unquestionably, should be deemed to have had an adverse effect on the portion of the local insurance market and the consumers serviced by Kevin Webb and Princeton Insurance Agency, Inc.

After the agency contract between the Erie and the Agency was terminated, many consumers who had previously been serviced by the Agency and insured through Erie were subsequently denied renewals of their policies. Furthermore, many consumers who, pursuant to their policies, could not be denied renewal by the Erie insurance companies, suddenly, through no action or fault of theirs, became ineligible for a substantial premium discount that is provided to consumers who place their business with an agent Erie deems to be the consumer's "local agent," further compounding the direct, adverse financial effect on consumers. Consumer payments of these higher premiums are unequivocally an adverse market effect.

It is apparent that the effects of the coercive pressure placed on Kevin Webb by Erie, coupled with the costly results for consumers brought on by the subsequent termination of the agency contract, should be deemed to have resulted in an adverse effect on the relevant insurance market. However, for the reasons set forth below, Princeton Insurance Agency, Inc. and Kevin Webb should not be required to prove the occurrence of these effects in order to prevail in this case.

As cited by the appellee in the ***"Response to the Amicus Curiae Brief of the West Virginia Insurance Federation,"*** the United States Supreme Court expressly discussed issues related to the time in which coercive activity, such as Erie's conduct here, becomes actionable. Specifically, the United States Supreme Court stated that, "coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions and may be condemned even *without proof of its actual market effect*". *Associated General Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 (1983); *Klors, Inc. v. Broadway-Hale Stores*, Inc., 359 U.S. 207, 210-214 (1959) (emphasis added). Moreover, the United States Supreme Court has stated that proof of an actual lessoning of competition is not a prerequisite to recovery as "competitors may be able to prove antitrust injury *before* they actually are driven from the market and competition is thereby lessened." *Blue Shield of Va. v. McCready*, 457 U.S. 465, 482 (1982); *citing Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 428 U.S. 477 (1977) (emphasis added). These findings clearly represent the view that, due to public policy concerns, the litigation of issues related to coercive commercial activity should, generally speaking, not require heightened evidentiary requirements, such as proof of an adverse market effect.

Furthermore, West Virginia law supports the position that proactive judicial protection should be provided in this matter. For instance, the West Virginia Antitrust Act states that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in this State *shall* be unlawful." W. Va. Code § 47-18-3(a) (emphasis added). Giving plain meaning to the aforementioned statutory language, there is nothing to suggest that the legislature intended to require proof of heightened evidence, such as an adverse market effect, to constitute a violation of this statutory section. Rather, it appears that the legislature intended the simple existence of a "contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce," even without the presence of heightened evidence, to be deemed "unlawful" under the West Virginia Antitrust Act.

Additionally, the Unfair Trade Practice section of the West Virginia Code states that "no person shall enter into any agreement to commit, or by any concerted action commit, any act of boycott, coercion or intimidation resulting in or *tending to result* in unreasonable restraint of or monopoly in, the business of insurance." W. Va. Code § 33-11-4 (emphasis added). Again, the language of this statutory section, most notably the "tending to result" qualification, clearly falls far short of any suggestion that the legislature intended to require proof of a heightened evidentiary standard prior to permissible recovery by an individual or business harmed by Unfair Trade Practices.

These referenced sections, and numerous others accompanying them, unequivocally demonstrate that evidence of an adverse market effect should not be deemed a prerequisite to recovery by Princeton Insurance Agency and Kevin Webb. Rather, similar to the aforementioned precedents set forth by the United States Supreme Court, the West Virginia statutes encompassing issues such as the ones present in this matter demonstrate that, due to public policy concerns, the litigation of issues related to commercial insurance law, in general, should not be reliant on heightened evidentiary requirements such as an adverse market effect. Rather, these statutory protections should be interpreted in a way which allows West Virginia courts to provide *proactive* judicial protection to harmed parties in matters such as the one present in this case.

This view in favor of proactive protection follows the general regulatory nature of insurance law found within the State of West Virginia. Section 33 of the West Virginia Code sets forth the statutory insurance regulations within West Virginia, and according to the Supreme Court of Appeals of West Virginia, this Chapter "imposes considerable regulation on the sale of insurance in this State." *Shell v. Metropolitan Life Ins. Co.*, 181 W. Va. 16, 23 (1989). In fact, the regulations promulgated pursuant to §33-2-3(a) of the West Virginia Code grant to the Insurance Commissioner "the authority to conduct investigations whenever he or she has cause to believe that a violation..... has been or is being committed." Given the existence of an extensive governmental regulatory presence within the West Virginia insurance industry, it is questionable whether coercive activity focused toward a small agency, such as Princeton Insurance Agency, would actually create a situation in which an adverse market effect could be readily proved. In contrast, if the industry-wide regulations are being successfully utilized to effectively protect West Virginia consumers, which is obviously the legislative intent behind these statutory sections, it is likely that a plaintiff-agent will have severe difficulties demonstrating that an insurance company's coercive activity resulted in a demonstrable adverse market effect. Accordingly, requiring a plaintiff to prove an adverse market effect in an action similar to the one in this matter would likely render potential litigation on such matters to be perceived as futile and a waste of the resources of both the parties and the court; hardly a favorable public policy stance for future harmed litigants within the State of West Virginia. And, it would serve as a significant and possibly insurmountable obstacle to protecting the interests of the very consumers such laws and regulations were adopted to protect. In sum, public policy concerns do not support the notion that a party can only be provided effective judicial protection after substantial harm has resulted from coercive business practices. Given the difficulties associated with adequately proving that coercive business practices have had an actual adverse effect on an insurance market, requiring agents such as Princeton Insurance Agency and Kevin Webb to prove said effect would not only severely limit the ability of plaintiff-agents to recover for coercive business actions, but also embolden insurance companies to further engage in anti-competitive behavior, and result in direct financial harm to consumers. Accordingly, the Court should support the public policy concerns expressed above and hold that effective judicial protection should be offered to parties in the commercial insurance context *prior* to the point in which coercive activity can be deemed to have risen to a level that constitutes an adverse market effect.

II. ANTITRUST CLAIMS SHOULD BE ALLOWED TO PROCEED REGARDLESS OF WHEN THE CONTRACT WAS FORMED, AS LEGAL ARRANGEMENTS CAN HAVE ILLEGAL EFFECTS.

It is perfectly appropriate to apply antitrust principles to the present case even though the contract, when formed, was in compliance with the antitrust laws. This is because it is not the contracting process that causes a violation of antitrust laws; it is the restraint of trade resulting from the contract that is illegal. Thus, it is the actions taken under the contract, not the contract itself, which is of concern. As such, Appellants should not be allowed to escape compliance with the law by claiming that they are merely enforcing their contractual rights.

The applicable provisions of the West Virginia Code clearly demonstrate this conclusion. As previously mentioned, W.Va. Code § 47-18-3(a) states: "Every contract, combination in the form of trust or otherwise, or conspiracy in the restraint of trade or commerce in this State shall be unlawful." The statute does not say that only contracts formed for the purpose of restraining trade are unlawful; the statute says that contracts that actually do restrain trade are unlawful. As such, a contract that is formed for perfectly legal and benign purposes can be used by a party to achieve unlawful anticompetitive results.

The remaining portions of the statute also support this conclusion. Subsection (b), which expressly does not limit the application of subsection (a), provides examples of conduct affirmatively determined to be unreasonable and unlawful restraints of trade:

> (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, 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...

The legislature, in drafting the section, clearly articulated that an antitrust violation could occur when the contract was formed with the purpose of fixing, controlling, or maintaining the market price, rate or fee of any service. But the legislature also clearly articulated that an antitrust violation could occur when the contract's effect was the fixing, controlling, or maintaining the market price, rate or fee of any service. By its very terms, the purpose of subsection (b) is to expressly declare that certain types of activities fall within the general provision in subsection (a). Thus, because an effect in restraint of trade can trigger a violation of subsection (b), logically, subsection (a) is also violated by a contract with the effect of restraining of trade.

The specific acts of the present case demonstrate exactly why the effect of the actions under the contract, rather than the apparent purpose of the contract at the time of contracting, is of concern. If an insurance company can hide behind a termination clause in an initially innocent contract, it could wrongfully force the agent into an illegal tying arrangement. "A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, or at least agree that he or she will not purchase that product from another supplier." 54 Am. Jur. 2d *Monopolies, Restraints of Trade, Unfair Trade Prac. § 90* (citing *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 112 S.Ct. 2072 (1992); *Northern P.R. Co. v. United States*, 356 U.S. 1, 78 S. Ct. 514 (1958)) Notably, "a tying arrangement or condition need not be expressly embodied in a written contract, but may be deduced from a course of conduct." *Id.* (citing *Associated Press v. Taft-Ingalls Corp.*, 582 F.2d 277 (3d Cir. 1978)). Furthermore:

> Where they are successful, tying arrangements inevitably curb competition on the merits with respect to the tied product. Specifically, they deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product at a lower price, but because he or she has sufficient power or leverage in another market.

(*Id.* (citing *Northern P.R. Co.*, 356 U.S. at 1, 78 S. Ct. at 514)).

Erie's conduct in the present case is dangerously close to a tying arrangement. "The [company] violates [antitrust law] when it goes beyond persuasion and coerces or forces its retailer to buy certain tied products in order to obtain the desired tying product. In this regard, coercion occurs when a buyer must accept the tied item and forego possible desirable substitutes." 54 Am. Jur. 2d *Monopolies, Restraints of Trade, Unfair Trade Prac. § 102* (citing *Bob Maxfield, Inc. v. American Motors Corp.*, 637 F.2d 1033 (5th Cir. 1981); *Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.*, 101 Cal. App. 3d 532, 161 Cal. Rptr. 811 (Ct. App. 1980)). In this case, Erie forced the agency to sell insurance products to its customers that they were not otherwise inclined to purchase. Erie threatened the agency with termination of its agency contract unless the agency agreed to forego an alternative offered by another carrier that might better serve the customer's expressed wants and needs.

But in the present case, Erie may not have actually been utilizing a traditional tying arrangement. Erie claims that it was unhappy with the Agency's performance in selling all of its Erie insurance products. Erie claims that the Agency's sales of Erie's products were down dramatically across the board; consumers simply were not buying Erie insurance from the agency. Thus, this is not an instance where there was a desirable product that consumers wanted, with the sale of the desired product conditioned on purchase of undesired products.

Nevertheless, it is easy to demonstrate how an illegal tying arrangement could be effected by Erie's claimed contractual rights. Suppose that, rather than sales of all four Erie insurance products being down, only three are down, and one is very much in demand by consumers. But also suppose that the one Erie insurance product that is in demand by consumers is also the least profitable for Erie. The demanded Erie insurance product may be in demand because it is the least expensive and therefore the least profitable, while the other products, being more expensive, are therefore more profitable and also less in demand, or it could be due to a variety of other conditions in the marketplace. Naturally, Erie would much rather see increased sales of the three highly profitable products. But Erie's method of generating increased sales in such products is what could cause antitrust violations.

If Erie conditioned sales of the in-demand insurance product by forcing the Agency to direct consumers to the not-in-demand insurance products, Erie could be illegally tying the products. The figurative gun Erie could hold to the Agency's head would be termination of the agency contract. If the Agency did not agree to sell more of the not-in-demand insurance products, Erie would terminate the agency contract and prevent the agency from selling any of Erie's insurance products, including the one that consumers actually want. But under Erie's logic, this would be perfectly legal, since they have a termination right in the agency contract. As such, Erie believes that it is allowed to circumvent the law by entering into a contract that was not initially illegal. Erie is no different from any other service producer. It must abide by antitrust laws, regardless of the terms of its agency contracts.

Furthermore, threatening termination, in and of itself, of an otherwise legal distribution contract can trigger antitrust violations. *See Perma Life Mufflers, Inc., v. International Parts Corp.*, 392 U.S. 134, 142; 88 S.Ct. 1891, 1986 (1968). One reason is because the threat can give the company an artificially inflated share of the market while restricting the access of other companies to consumers. In the present case, this is exactly what happened. Erie threatened the Agency with termination of the agency contract unless Kevin Webb caused the Agency's State Auto business to be directed to Erie. As such, State Auto's access to the Mercer County market was restricted, not because State Auto's policies were inferior or prices were not competitive, but because Erie sought to improperly leverage its market power. Erie wanted to hide behind the termination clause in its agency contract as a shield from liability for illegal conduct. This Court should not allow such precedent to be set. Illegal antitrust activity is illegal regardless of whether or not it is undertaken under contracts that are themselves legal agreement between private parties.

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III. INDEPENDENT AGENCY RELATIONSHIPS PROTECT AGAINST ANTITRUST ABUSES, AND THIS COURT SHOULD NOT ALLOW ERIE TO TREAT THE INDEPENDENT AGENCY AS A CAPTIVE AGENCY.

Erie and the Agency entered into an independent agency relationship that this Court should enforce. There are definite and important benefits to consumers by encouraging the use of independent, rather than captive, agencies. First and foremost, consumer choice is of prime concern, especially under the antitrust statutes. However, upholding independent agency relationships and contracts with carriers also is necessary for stability in the insurance industry. Without that stability, agents and insurance companies could not be sure about the terms on which their distribution network is based, which would harm consumers.[3] Thus, this Court should affirm the lower court decision by enforcing the independent agency relationship and contract that was created, rather than allowing Erie to treat the independent agency as a captive agency.

West Virginia law reflects a clear policy preference for agency relationship stability over insurance company control. Under W.Va. Code § 33-12A-3, insurance companies are expressly prohibited from cancelling agency contracts without "good cause" where the agency has existed for at least five years. The statute enumerates exactly what constitutes "good cause":

> (a) Criminal misconduct or gross negligence relating to the business or premises of the insurance agency;
> (b) Fraud or moral turpitude;
> (c) Abandonment or unattendance of the business or premises of the insurance agency for such period of time as may unreasonably interfere with the transacting of business;

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[3] The West Virginia legislature has statutorily expressed this very concern in W.Va. Code § 33-12A-1: "It is hereby found and determined by the Legislature that it is essential to the best interests of the citizens of this state that the contractual relationship between insurance agents and insurance companies be established; and that this article is enacted for the purpose of prohibiting arbitrary and capricious cancellation of such contractual relationships."

> (d) The failure by the agent to pay moneys over to the company for insurance contracts sold by the agency;
> (e) The death or disability of the agent; and
> (f) Upon the company becoming insolvent or discontinuing any line of insurance for any business purpose: Provided, That the Insurance Commissioner shall notify or cause to be notified in writing all agents of such insolvent insurance company that they are no longer entitled to any benefit under their contract with the insolvent company.
> (W.Va. Code § 33-12A-3)

No language in the Code section indicates that the parties may contract out of its provisions. Thus, for insurance agency relationships in existence for five or more years, the insurance company can only terminate the relationship for the above-enumerated reasons.

The statute makes sense. Where an agency has existed for five or more years, it has become sufficiently integrated into the insurance supply network of the community such that improper termination of the agency would disrupt consumer choice. Consumers in this channel do not deal directly with insurance companies; they deal with an agent. They depend on the agent to service and support their insurance needs, and an insurance company cannot pull the rug out from under the consumers' feet because of a disagreement with the agent, especially about how much business the agent directs to the company, particularly when that does not serve the expressed needs and wishes of the consumer. Such a draconian reaction is fundamentally unfair to the consumer. As such, West Virginia law has put statutory measures in place to protect consumer expectations and interests.

Nevertheless, Erie is attempting to circumvent West Virginia law and policy. Erie had a problem with the Agency's sales, with Mercer County consumers being punished by Erie's decision via higher premiums and fewer choices. Such action does not comport with the policy and ideals behind antitrust statutes, which are concerned primarily with protecting free consumer choice and competition in the marketplace. *See National Gerimedical Hospital and*

Gerontology Center v. Blue Cross of Kansas City, et al., 452 U.S. 378, 392; 101 S. Ct. 2415, 2423-24 (1981); *Leegin Creative Leather Products, Inc., v. PSKS, Inc.*, 127 S. Ct. 2705, 2736, (2007) (Breyer, J., dissenting); *Dickson, et al. v. Microsoft Corp., et al.*, 309 F.3d 193, 206 (4th Cir. 2002); *Virginia Academy of Clinical Psychologists, et al., v. Blue Shield of Virginia, et al.*, 624 F.2d 476, 482, (4th Cir. 1980). By unlawfully threatening the Agency with termination unless they caused State Auto business to be diverted to Erie, Erie stymied consumer choice and interfered with competition that serves consumers well.

Furthermore, in this case the agency relationship is an independent agency relationship. As an independent agent, the Agency was allowed to sell insurance from all insurance companies with which it contracted as an agent. Erie acknowledged and appreciated this decision as a part of its business model (Fletcher Dep. #1 88, Oct. 3, 2006). Yet through its actions, Erie attempted to treat the relationship as if it was a captive agency, forcing the agency to direct consumers to Erie products rather than allowing consumers to exercise their free choice based on fair and open competition. Erie's conduct is completely contrary to the ideals and policy of antitrust law.

The benefits of an independent agency relationship are easy to recognize. It enables consumers to access a one-stop shop for their insurance needs, where they can easily compare and contrast their insurance options. This type of relationship is precisely what antitrust law envisions: well-informed consumers freely making choices.

Erie contracted for this relationship with the Agency. When consumers chose one of Erie's competitors, Erie became upset. Erie decided that to recapture the lost share of the market, it should force the choice on consumers by ordering the Agency to direct consumers to Erie products. In effect, Erie transformed what was intended to be a relationship that promoted free consumer choice into one in which Erie was the only choice. While that served Erie, it is totally inconsistent with the choice Erie made to do business with independent agencies and disregarded the interests of consumers. Erie could have competed for the business it sought on the same basis as other carriers – on price and terms of coverage; instead, it competed by threatening the agent it contracted with to be independent.

The wrongfulness of Erie's conduct is evident. By affirming the lower court's decision, this Court will send a powerful message to companies that the State of West Virginia will uphold not only the agency relationships into which they contract, but also consumer freedom. At the end of the day, this respects the sanctity of contracts between business entities and serves to appropriately protect consumers as well.

IV. ERIE'S CONDUCT IN THIS CASE IS UNIQUE, AND AFFIRMING THE JURY'S AWARD WILL NOT CAUSE ALL AGENCY TERMINATIONS TO IMPLICATE ANTITRUST LAW AND POLICY.

Erie's conduct in this case was not a mere contract termination; it was manipulation of the market and restriction of consumer free choice. Erie crossed a line when it forced Kevin Webb to direct his insurance consumers first to Erie before they were allowed to consider choosing a competitor. Such extreme actions by insurance carriers would be extremely rare, thus, upholding the lower court's decision will not create a precedent whereby all agency terminations are subject to review for antitrust violations. This court, in affirming the judgment of the Circuit Court of Mercer County, should tailor its opinion to assure carriers that do not engage in conduct like Erie's here, that they will not be subjected to antitrust claims every time an agency relationship is terminated.

It is obvious that not all conduct in the termination of an insurance agency implicates antitrust law. As discussed above, "The [producer] violates [antitrust law] when it goes beyond persuasion and coerces or forces its retailer to buy certain tied products in order to obtain the desired tying product. In this regard, coercion occurs when a buyer must accept the tied item and forego possible desirable substitutes." 54 Am. Jur. 2d *Monopolies, Restraints of Trade, Unfair Trade Prac.* § *102* (citing *Bob Maxfield, Inc.* 637 F.2d at 1033; *Suburban Mobile Homes, Inc.*, 101 Cal. App. 3d at 532). This illegal conduct is easily contrasted with merely utilizing good salesmanship: "[A producer] may use strong persuasion, encouragement, or cajolery to the point of obnoxiousness to induce its retailer to buy the full line of its products." *Id.* Thus, antitrust law establishes a line between mere persuasion and force or coercion. The former is of no concern; the latter is illegal.

In this case, Erie unequivocally crossed that line. The wrongful conduct by Erie was ordering Kevin Webb to prevent consumers from exercising free choice in their insurance buying decisions. Despite Erie's rationale behind its decision—poor sales and profits—it is the actual conduct it exhibited that constituted the antitrust violation. If Erie had merely terminated the agency without forcing Kevin Webb to direct consumers to Erie products, there would be no antitrust violation Likewise, if Erie had merely persuaded Webb that Erie's products were better, and that all parties would be better served by directing sales to Erie, antitrust principles would not be implicated. But the antitrust case against Erie is strong because they threatened the Agency with agency termination unless customers were diverted from State Auto to Erie, and a threat of agency termination is coercion with antitrust consequences. *See Perma Life Mufflers*, 392 U.S. at 142. This is the critical distinction between this case and other terminations that do not raise antitrust concerns.

Furthermore, the unique facts of this case implicate statutorily identified public policy concerns. Erie and the Agency had an established agency relationship for more than a decade.

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As such, Erie's right to terminate the agency was controlled not only by the contract but also by West Virginia statute. As discussed above, under W.Va. Code § 33-12A-3, insurance companies are expressly <u>prohibited</u> from cancelling an agency contract without "good cause" where the agency has existed for at least five years. Furthermore, the Code section expressly determines all that constitutes good cause:

> (a) Criminal misconduct or gross negligence relating to the business or premises of the insurance agency;
> (b) Fraud or moral turpitude;
> (c) Abandonment or unattendance of the business or premises of the insurance agency for such period of time as may unreasonably interfere with the transacting of business;
> (d) The failure by the agent to pay moneys over to the company for insurance contracts sold by the agency;
> (e) The death or disability of the agent; and
> (f) Upon the company becoming insolvent or discontinuing any line of insurance for any business purpose: Provided, That the Insurance Commissioner shall notify or cause to be notified in writing all agents of such insolvent insurance company that they are no longer entitled to any benefit under their contract with the insolvent company.
> (W.Va. Code § 33-12A-3)

While § 33-12A-3 does not in and of itself deal directly with antitrust concerns, it does raise the same public policy preferences as the antitrust statutes. West Virginia has a clearly delineated policy preference that § 33-12A-3 represents: the existence of insurance agencies is beneficial to the citizenry; i.e. insurance consumers. W.Va. Code § 33-12A-1. Protection of consumers is also the goal of antitrust law. *See National Gerimedical Hospital,* 452 U.S. at 392; *Leegin,* 127 S. Ct. at 2736 (Breyer, J., dissenting); *Dickson,* 309 F.3d at 206; *Virginia Academy of Clinical Psychologists,* 624 F.2d at 482. Thus, the laws have the same goals: consumer protection. The legislature has articulated six instances in which an agency relationship can be terminated. As such, an insurer that terminates a relationship for one of the reasons delineated in § 33-12A-3 does not raise the same antitrust concerns that Erie raises in this case by its disregard for the needs of Mercer County insurance consumers.

CONCLUSION

It is clear from the authority cited above, and the strong public policy concerns underlying such authority, that the verdict from the Circuit Court of Mercer County must be affirmed. By setting forth jurisprudence in favor of the Appellants' positions, this Court would set a strong precedent against not only the ability of agents to freely conduct business, but also the overriding interests of West Virginia's consumers. Finally, this Court should be mindful of the public policy considerations that weigh heavily in favor of refusing to allow an insurance company's coercive activity to become acceptable behavior within the West Virginia judicial system.

PRAYER FOR RELIEF

WHEREFORE, *Amicus Curiae,* Professional Independent Insurance Agents of West Virginia, Inc., based on the argument above, requests this Court to **AFFIRM** the verdict rendered herein.

INDEPENDENT INSURANCE AGENTS OF WEST VIRGINIA, INC.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 34498

ERIE INSURANCE COMPANY,
ERIE INSURANCE PROPERTY AND CASUALTY COMPANY,
ERIE FAMILY LIFE INSURANCE COMPANY,
ERIE INSURANCE EXCHANGE,
ERIE INDEMNITY COMPANY,
CHARLES MICHAEL FLETCHER,
AND CARL OLIAN, II,

Appellants,

PRINCETON INSURANCE AGENCY, INC.,
AND KEVIN WEBB,

Appellees.

CERTIFICATE OF SERVICE

The undersigned attorney certifies that the "Motion of Independent Insurance Agents of West Virginia, Inc. for Leave to File a Brief as *Amicus Curiae*" and "Brief of *Amicus Curiae*, Independent Insurance Agents of West Virginia, Inc." were served upon the following individuals by depositing true copies thereof in the regular manner in the United States mail, postage prepaid, at Huntington, West Virginia, on December 31, 2008 to:

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