NO. 08-____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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,

Petitioners,

V.

PRINCETON INSURANCE AGENCY, INC., AND KEVIN WEBB,

Respondents.

FILED
MAY - 9 2008
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

On Petition For Appeal From
The Circuit Court of Mercer County, West Virginia
Hon. William Sadler, Judge

BRIEF OF THE WEST VIRGINIA INSURANCE FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR APPEAL

Re-FILED
MAY 12 2008
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRIGINIA

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I. INTRODUCTION

The West Virginia Insurance Federation files this brief as *amicus curiae* because the Circuit Court erred in determining that an insurance company's termination of an agency agreement is a violation of antitrust law, even though there was no showing of an adverse effect on the insurance market and Plaintiffs' Complaint is really just a contract dispute. This decision, if upheld, will have a dramatic effect on the relationship between insurance companies and their insurance agents in the State of West Virginia. It will threaten insurance companies' ability to effectively and efficiently provide insurance to consumers through independent agents. That, in turn, will adversely impact the range of insurance products West Virginians can expect to receive and the prices they pay for those products. Rather than fostering competition, the ruling in this case will, in fact, serve to stifle it. That is clearly opposite the result intended to be achieved under the antitrust laws. For these reasons, and those contained herein, the West Virginia Insurance Federation respectfully urges this Court to accept the Petition and, ultimately, to reverse the Circuit Court's decision.

II. STATEMENT OF INTEREST

The West Virginia Insurance Federation ("the Federation") is the state trade association for property and casualty insurance companies doing business in West Virginia. Its members insure approximately eight of every ten automobiles and homes in West Virginia. The Federation is widely-regarded as the voice of West Virginia's insurance industry and has served the property and casualty insurance industry for nearly thirty years. The Federation has a strong interest in promoting a healthy and competitive insurance market in this State to ensure that insurance is both available and affordable to West Virginia's insurance consumers.

The Federation files this brief in support of the Petition filed by the Erie Insurance Companies[1], Charles Michael Fletcher, and Carl Olian, II, to underscore the far-reaching effect that the Circuit Court's decision will have on the insurance industry and insurance consumers in West Virginia. That a party may be awarded treble damages for what amounts to nothing more than an exercise of a clear contractual right runs afoul of the very reason antitrust claims are given special status: to preserve the right of freedom of trade. *See U.S. v. Colgate & Co.*, 250 U.S. 300, 307 (1919). Indeed, the isolated termination that occurred in this case did not affect consumers in Mercer County or in West Virginia at all, and, as such, should not have been decided using antitrust principles.

The Circuit Court's application of antitrust principles significantly affects insurance companies doing business in West Virginia as they commonly enter into agency agreements that contain substantially the same provisions as the one at issue here. In light of this decision, insurers can no longer trust that their long-established contracts will be construed using contract rules, but now they must expect that what formerly might have been a breach of contract claim could morph into an antitrust claim -- albeit unsupported by antitrust law.

Importantly, the Federation's members consist of companies who offer insurance through both independent insurance agents and "captive" agents. Thus, while not every member of the Federation utilizes independent agency agreements to market and sell their products, nearly all use agents to reach their customers. Accordingly, this is an issue of such significance that the insurance industry generally respectfully urges this Court's reconsideration of the Circuit Court's decision.

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[1] The Erie Companies involved are the Erie Insurance Company, Erie Indemnity Company, Erie Family Life Insurance Company, Erie Property & Casualty Company, and the Erie Insurance Exchange. Because distinctions between them do not matter for the purposes of the issues before the Court, the companies are collectively referred to as "the insurers" or "the Erie Companies."

III. RELEVANT FACTS

Princeton Insurance Agency (the "Agency") is a West Virginia corporation engaged in the business of marketing insurance products for multiple insurance companies, including members of the Erie Insurance Group.[2] (Exhibit A, Trial Record ("T.R."), pp. 239-42). It operates as an independent insurance agency in West Virginia and is owned by Frazier Webb, and his son, Kevin Webb, who has served as its president since 1999. (T.R., pp. 205, 239-42). The Agency entered into an agency agreement in West Virginia with two members of the Erie Insurance Group, Erie Insurance Property and Casualty and Erie Family Life, in the early 1990s, and reaffirmed that agreement between 1999 and 2001, when Kevin Webb became the responsible agent. (T.R., p. 235).

In 2002, Princeton Insurance Agency began a relationship with Princeton Insurance Associates, which operated out of the Princeton Insurance Agency offices and used many of the same staff. (T.R., pp. 510-11, 602-03). Like Princeton Insurance Agency, this agency wrote business on behalf of multiple insurers in West Virginia, although none of the Erie Companies was among them. *Id.*

The Erie Companies noticed a decline in profits after the two agencies began coordinating operations. (T.R., pp. 494-98). By the end of 2003, personal automobile applications had declined by 73%; the number of commercial automobile policies declined by 79%; and commercial property and casualty applications dropped by 78%. (T.R., pp. 495-97). Over the preceding decade, the Erie Companies demonstrated losses of over $4.3 million. The Erie

[2] Claims were also asserted against members of the Erie Companies for termination of separate agency agreements entered into in Virginia. Those terminations, if improper, necessarily affected Virginia consumers and Virginia insurers and are, therefore, not addressed in herein. Instead the focus is on the termination of the one West Virginia agency agreement involved in this case.

Companies grew concerned -- and testimony at trial confirmed -- that, at times, the Agency was steering business to other insurers and away from the Erie Companies.[3]

The agency agreement governing the relationship between the Erie Companies and the Agency provided that it was terminable at will by either party upon ninety (90) days' notice. (*See* T.R. 229, ff., Plaintiffs' Exhibits 8, 9A, and 9B). As established during the trial, termination clauses such as these are common in agency agreements. (T.R., p. 585). Rita Kidd, who the Circuit Court deemed to have "qualified somewhat as an expert", testified that it was her understanding that termination clauses requiring only ninety days' notice are common in the industry, and the Agency did not dispute this. (T.R., pp. 585, 614). The agreement was terminated in March 2004, and, again, there is no dispute that proper notice was given prior to the termination to effectuate it under the terms of the agreement.

Additionally, for the purpose of examining the antitrust issue, *after* the termination, the Agency continued to represent seven insurance companies. Specifically, the Agency still represented State Auto, Zurich, SAFE, Progressive, Dairyland, Assured Health, and Blue Cross/Blue Shield. (T.R., pp. 512-13). The Erie Companies similarly continue to conduct business in Mercer County through two other independent agencies. (T.R., p. 829). Importantly, the Agency has never asserted that the Erie Companies discontinued their business in Mercer County entirely.

Nevertheless, the Agency filed this civil action in the Circuit Court of Mercer County, asserting, among other things, that the termination of its agency agreement violated the West Virginia Antitrust Act and the antitrust component of the Unfair Trade Practices Act. *See generally*, Complaint. The Erie Companies moved to dismiss the claims brought against them, and through a

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[3] *See* T.R., pp. 274-75 (testimony of Kevin Webb) ("A.: What that means is . . . is that new business walking in the door, that I was steering business in the direction of State Auto and leaving [Erie] out of the quotation loop. Q.: Were you doing that? A.: At first, I can't give you specific numbers but I did do some of that."); *see also*, T.R., p. 505 (testimony of Kevin Webb) ("But I did move some of that business over. I'm assuming that some of it happened.").

series of orders, the Circuit Court permitted the Agency to proceed on its Antitrust and Unfair Trade Practices claims.

Following a five-day jury trial, the jury returned a verdict finding that the Erie Companies had violated the West Virginia Antitrust Act when terminating the agency agreement by unreasonably restraining trade within this State. *See* Verdict Form. The jury awarded compensatory damages of $1,411,209 and punitive damages in the same amount. *Id.* After the trial, the Court concluded that punitive damages were not recoverable under the West Virginia Antitrust Act and, accordingly, set aside that portion of the jury's verdict. The Court did treble the compensatory damages, however, and on October 26, 2007, entered judgment against the Erie Companies in the amount of $4,233,627. The Erie Companies have petitioned for appeal from that judgment, and the West Virginia Insurance Federation supports the Petition as *amicus curiae.*

IV. DISCUSSION

The West Virginia Insurance Federation respectfully requests that the Court accept this appeal and reverse the decisions of the Circuit Court of Mercer County because the crux of this case relates to contract, not antitrust, principles. Here, because the Erie Companies exercised their right under the agency agreement to terminate the agreement and because the agent did not -- and could not -- demonstrate any adverse effect on the insurance market in Mercer County as a result of that termination, the Circuit Court erred by permitting the antitrust claim to survive summary judgment and refusing to grant judgment notwithstanding the verdict. This decision ignored the contractual rights and obligations of the parties, which thwarts insurance companies' ability to conduct business pursuant to similar agreements throughout the State. Thus, the Federation urges

this Court to accept the appeal to clarify that those agreements should have been interpreted under the rules of contract, not antitrust.

A. Plaintiffs offered no evidence of any adverse effect on the insurance market, a critical element of any antitrust claim.

The termination of the agency agreement here does not violate antitrust laws; there has been no allegation or proof of any adverse effect on the market that would inhibit competition or otherwise make out an antitrust claim. "[T]o constitute a Section 1 [antitrust] violation, the contract, combination, or conspiracy must be in restraint of trade", and "if the alleged conspiracy did not restrain competition [for contracted services] there can be no resulting antitrust violation." *Newman v. Universal Pictures*, 813 F.2d 1519, 1520 (9th Cir. 1987).

More specifically, an agreement between an insurer and an agent permitting termination will be unlawful only if it is shown to have a significant adverse effect on competition outweighed by precompetitive effects. This could be established by demonstrating that, for example, the termination enabled the surviving agent to achieve a dominant position in a market for insurance agency services or otherwise had the effect of foreclosing competition in an insurance market. *Given the large number of carriers and agents in most insurance markets, it seems unlikely that isolated agent terminations would have any significant adverse impact on competition. See* ABA Section of Antitrust Law, *Insurance Antitrust Handbook*, pg. 98 (2d ed. 2006) (emphasis added).

Indeed, a North Carolina appeals court upheld the dismissal of claims very similar to those Plaintiffs allege here on this very basis: that competitors were not affected by the termination of agency agreements. In that case, *Dull v. Mutual of Omaha Ins. Co.*, 85 N.C. App. 310, 354 S.E.2d 752 (1987), insurance agents brought unfair trade practices claims against insurance companies that had terminated their agency agreements. In affirming dismissal of the claims, the court stated, "Plaintiffs have not forecast any evidence that consumers were prevented from

purchasing insurance contracts on an open market as a result of defendants' acts or that defendants' competitors were in any way foreclosed from marketing insurance products to the public." *Id.* at 316-17, 354 S.E.2d at 756. Indeed, the court noted that the *Dull* plaintiffs were certainly free to terminate the relationship and to sell the products of other companies. *Id.* at 317, 354 S.E.2d at 756.

This is precisely the case here. Plaintiffs did not -- and could not -- offer evidence of a change in price; a change in the availability of goods or services; an agreement to force a competitor out of the relevant market; a change in the number of competitors in the market; a monopoly; or any effect on the market at all. In fact, the only damages even referenced during the trial were Plaintiffs', not consumers', the market's, or other agencies'.

"An industry is workably competitive when (1) there are a considerable number of firms selling closely related products in each important market area, (2) these firms are not in collusion, and (3) the long run average cost curve for a new firm is not materially higher than for an established firm." Louis Altman & Malla Pollack, 1 *Callman on Unfair Comp., Tr., & Mono.* § 4:2 (4th ed. 2008) (citing Ward S. Bowman, Jr., *Toward Less Monopoly*, 101 U. PA. L. REV. 577, 631 (1953)). Despite their hollow allegations to the contrary, the Agency here admitted that it is still representing *seven* insurers: State Auto, Zurich, SAFE, Progressive, Dairyland, Assured Health, and Blue Cross/Blue Shield. (T.R., pp. 512-13). And, Erie still does business -- as do many other insurance companies -- in Mercer County. Erie, in fact, uses two other Mercer County independent agents. (T.R., p. 829). Thus, there can be no antitrust violation when an isolated agency termination such as this does not affect the market in any way whatsoever.

Accordingly, the imposition of liability under the Antitrust Act in this case is flatly inconsistent with established antitrust law. Indeed, the Court's finding that the termination of the agency agreement amounts to an antitrust violation demonstrates a fundamental misunderstanding of

antitrust principles. "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce-in a word to preserve the right of freedom to trade." *U.S. v. Colgate & Co.*, 250 U.S. 300, 307 (1919). Absent a showing that the termination interfered with the free exercise of the parties' right to engage in the buying or selling of insurance products, this law is wholly inapplicable to this case.

For these reasons, the Federation respectfully requests that the Court accept this appeal to clarify that such claims are not properly brought as antitrust claims when there has been no adverse effect on the insurance market.

B. The Agency's claims are for behavior occurring *after* the consummation of a contract. As such, they cannot constitute an antitrust violation.

Antitrust principals are wholly inapplicable in this case also because the Agency's claims in this case are rooted in contract, not antitrust. The very fact that the agency agreements pre-date the termination giving rise to Plaintiffs' Complaint necessarily makes this a breach of contract case.

"When the defendant's anticompetitive behavior occurs only after the business relationship between the plaintiff and defendant is contractually fixed, any injury that results from such behavior *is not an antitrust injury*, but merely the kind of injury that is due to *breach of contract*." Louis Altman & Malla Pollack, 1 *Callman on Unfair Comp., Tr., & Mono.* § 4:48 (4th ed. 2008) (emphasis added) (citing *Newman v. Universal Pictures*, 813 F.2d 1519 (9th Cir. 1987); *Orion Pictures Dist. Corp. v. Syufy Enters.*, 829 F.2d 946 (9th Cir. 1987)). Additionally, "A common-law business tort is not magically transformed into a cause of action under antitrust law by the simple

addition of allegations of conspiracy or monopoly." Louis Altman & Malla Pollack, 1 *Callman on Unfair Comp., Tr., & Mono.* § 4:48 (4th ed. 2008).[4]

In a case notably similar to this one, the Western District of Pennsylvania held that termination of an agency agreement did *not* violate antitrust laws. *Black v. Nationwide Mutual Ins. Co.*, 429 F. Supp. 458 (W.D. Pa. 1977). The agent alleged that Nationwide had restricted its ability to stay in business by instituting new underwriting criteria that limited the type and number of policies written. *Id.* at 460 (compare with T.R., p. 166 (agent "felt compelled to write business that would strictly comply with the Erie guidelines"). In that case, Nationwide's agreement with the agent contained exclusive representation clauses, albeit through a captive agency relationship, which required the agent to sell only Nationwide insurance, and the agent alleged that he "was subjected to unannounced inspections and reviews of his files" after which Nationwide learned that he was writing for other companies. *Id.* at 459, 460 (compare with T.R., pp. 163-184). The agent asserted that these reviews constituted threats, harassment, and intimidation. *Id.* at 459.

The Pennsylvania court rejected that suggestion. In discussing whether the allegations constituted an improper boycott, the court opined that "[w]hile these matters can be considered acts of coercion and intimidation, they were efforts by Nationwide to enforce their contract with [the agent]", and "[t]heir legality depended upon the lawfulness of the contract which they were intended to enforce." *Id.* at 462. Because the contract was lawful, the efforts to enforce it were as well. *Id.* at 462. And, unlike the Circuit Court in this case, the District Court recognized that whether Nationwide had placed restrictions on the agent's ability to conduct business was

[4] The authors specifically criticize plaintiffs who reach for an antitrust claim when a business tort claim is truly what is alleged. "Framing a complaint or counterclaim to charge an antitrust violation, in preference to asserting a business tort under state law, has apparently been a temptation too difficult for counsel to resist. . . .The prospect of a treble damage award, plus costs and attorney's fees, has excited the ingenuity of counsel and invited resort to the Sherman and Clayton Acts as if they were remedies for any business tort affecting interstate commerce, and as if the antitrust laws were enacted to serve as general-purpose laws prohibiting unfair trade practices." Louis Altman & Malla Pollack, *Callman on Unfair Comp., Tr., & Mono.* § 4:48 (4th ed. 2008).

"immaterial to the question here, because *the business decisions of the defendant companies to preserve their own financial stability, are matters of their own internal control."* *Id.* at 462 (emphasis added).

It is undisputed that the Agency in this case entered into an agency agreement in the 1990s that allowed either the Erie Companies or the Agency to terminate the agreement upon ninety days' notice. When the Erie Companies exercised this right pursuant to the agreement, the Agency objected. Because the parties entered into the agency agreements long before the terminations at issue, the parties' behavior was fixed by the terms of the agreement. As such, any injury resulting from a termination or other objectionable activity believed to be inconsistent with the terms of the existing agency agreement is due to an alleged breach of contract, not a violation of antitrust law.

It is precisely because the Agency could not make out *any* breach of contract claim that it was forced to resort to a contorted claim under the Antitrust Act. That the Circuit Court permitted the Antitrust Act to be applied in this manner was substantial error and should be reversed.

C. Agency Agreements must be preserved in order to ensure customers receive the best available service and price.

This improper application of antitrust law threatens the legitimacy of countless agency agreements that include this common termination provision and infringe upon the rights of parties to contract generally. Succinctly, the integrity of agency agreements should be upheld. This overreaching and inapplicable interpretation of antitrust law will have a far-reaching effect on how insurance companies do business and how their products are delivered to consumers. What is more, the Circuit Court's disregard of the contract between the parties will affect other industries as well.

1. The Circuit Court's decision has a chilling effect on company - agent contracts.

Importantly, the parties to agency agreements have every right to expect that their agreements are sound. Agents have the flexibility to move from an independent to a captive relationship or to limit the number of companies they represents. If an agent is happy with one company's service and wants to offer his clients only that option, under the agreements, he can become a captive agent and do just that. Indeed, the Agency in this case had every right to terminate the arrangement at any time and stop helping Erie reach Mercer County customers -- even if it did so for a reason purely attributable to "whim, caprice, prejudice, or malice." *See Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 F. 46 (2d Cir. 1915). Similarly, if a company believes it can offer a less expensive product or can serve its clients better by terminating a given agency relationship, it likewise can do that.

It is for this very reason that insurers and agents agree to termination clauses in the first place. Either party must be able to withdraw from the relationship if the relationship is not profitable to that party. Just as an agent should not be forced to stay in a relationship that is not beneficial to it, and the termination of which is contemplated by contract, the insurer should not either.

Accordingly, because insurance companies rely on agents to reach their customers, agency agreements are an integral part of a company's business. Because companies' agency agreements control their relationships with agents, and termination provisions are common in these agreements, the Circuit Court's determination that a company's termination of an agency agreement makes out an antitrust claim, subjecting the company to treble damages, will force all insurance companies to re-evaluate their agent relationships and how they offer insurance to their customers. (T.R., p. 585).

Under the rule of this case, companies will not be permitted to terminate agency agreements regardless of an agent's service or performance. Here, as Charles "Mike" Fletcher explained, Princeton Insurance Agency was "hemorrhaging" money, so much so that he thought the Agency was "giving up." (T.R., p. 773). For example, between 1999 and 2003, the Agency's loss ratio as to personal auto policies was 111%, 88%, 98%, 71%, and 98%.[5] (T.R., p. 826). In fact, during 2003, the Agency was unprofitable in every line of insurance that it offered. (T.R., p. 826). Indeed, during that year, the Agency wrote thirty-eight total personal automobile insurance applications (down 73% from the year before), while the other two independent agencies marketing Erie's products in Mercer County *each* wrote over 150. (T.R., pp. 828-29). Overall, Princeton Insurance Agency and Mr. Webb were unprofitable in four out of the last five years, and nine out of the last ten. (T.R., pp. 826-27). And, over that ten-year period, the Agency demonstrated losses totaling $4.3 million.

In the face of that evidence, that the Circuit Court still allowed this case to proceed is simply amazing. The agency was being outperformed by leaps and bounds in its own county, let alone any comparison to the rest of the state. And, Erie could demonstrate losses over a decade totaling $4.3 million. This type of performance is one reason agency agreements are terminable at will: because those losses cannot be sustained and must be made up somewhere, most likely in the form of higher premiums paid by all Erie customers -- or at least those within the State. If Erie had not demonstrated sufficient evidence using just these numbers to justify its termination of the agreement, no company will ever be able to and, like here, companies will be forced to raise premiums to account for such losses to ensure they are able to pay claims.

[5] According to Mr. Fletcher, Erie breaks even when the loss ratio is 68%; anything above that number represents a loss of money, while anything below represents a profit. (T.R., p. 826).

Thus, if the agent is not efficient or profitable or if the agent's service is inconsistent with standards expected by the company, the company will be locked into the relationship, ultimately resulting in higher prices or diminished service for its customers. Companies expectedly could not endure this for long, and ultimately would be forced to move toward the captive agent model, thus depriving consumers with the policy, service, and price options that independent agents are able to provide by virtue of their relationships with a variety of companies. If, on the other hand, the company preserves the agency agreement and ultimately seeks to terminate the agreement, the rule of this case will subject the company to treble damages, forcing the company to make up for those lost monies to ensure its ability to pay claims. Under any scenario, it is clear that the Circuit Court's decision undermines the independent agent model and is detrimental to West Virginia's insurance consumers.

2. The Circuit Court's decision applies to any independent contractor arrangement; it is not limited to the insurance context.

Additionally, and importantly, the Circuit Court's conclusion can be applied equally to any business transaction involving similar circumstances. The Circuit Court's decisions could implicate virtually every independent contractor relationship, regardless of the industry. Specifically, if one party -- a builder or realtor, for example -- terminates an independent contractor relationship, and even if the market is not impacted, as here, then the terminating party could be liable in antitrust. Thus, while the Federation's concern is far-reaching in the insurance context, the effect of the Circuit Court's decision is not limited to the insurance industry alone. Its effect extends to other industries, businesses, and virtually any independent contractor relationship. Certainly, this is an unintended -- and undesirable -- consequence.

As such, the Federation respectfully encourages the Court to accept this appeal and preserve the contractual right of the parties.

V. CONCLUSION

Based on the foregoing, the West Virginia Insurance Federation respectfully requests that this Court grant the Petition for appeal and reverse the Circuit Court's decision.

WEST VIRGINIA INSURANCE FEDERATION

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V.

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Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May, 2008, a true and correct copy of the **"BRIEF OF THE WEST VIRGINIA INSURANCE FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR APPEAL"** has been served upon the following counsel by U.S. Mail, postage prepaid, addressed as follows:

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