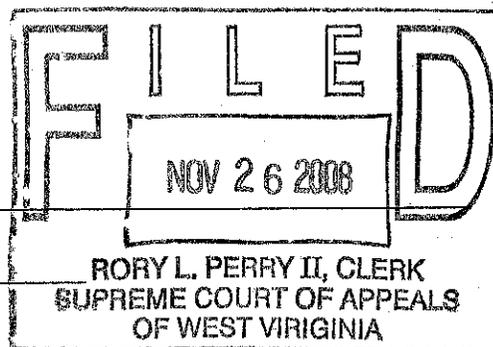


NO. 34498



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,

**Appellants,**

v.

PRINCETON INSURANCE AGENCY, INC., AND KEVIN WEBB,

**Appellees.**

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

### APPELLANTS' BRIEF

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## KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

On October 29, 2008, the Court granted the Petition for Appeal in this matter. It did so in recognition of the fact that this case presents fundamental issues regarding the scope and application of the West Virginia Antitrust Act<sup>1</sup> and the specific conduct that it is designed to regulate. This Court has previously held that the antitrust laws of West Virginia are not designed to deter all the evils known to modern commercial life; rather, they are designed to deter one specific evil – namely anti-competitive, "conspiratorial *economic* behavior." *Gray v. Marshall County Bd. of Educ.*, 179 W.Va. 282, 288, 367 S.E.2d 751, 757 (1988) (emphasis in original). It has likewise held that these laws are directed at regulating anti-competitive behavior in this state. *Kessel v. Monongalia County Gen. Hosp.*, 220 W. Va. 602, 611, 648 S.E.2d 366, 375 (2007).

At issue in this case is whether, absent evidence that the challenged conduct had a detrimental effect on competition, there can be said to have been any violation of the Antitrust Act. Also at issue is whether there was, in fact, any evidence presented of "conspiratorial" anti-competitive conduct; that is, anti-competitive conduct entered into by two separate commercial entities in competition with one another. And finally, at issue is whether the Antitrust Act can be extended beyond the borders of our state so as to regulate competition in neighboring jurisdictions.

The Circuit Court effectively answered each of these questions in the affirmative. In so doing, it extended the scope of the conduct regulated by the Antitrust Act beyond anti-

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<sup>1</sup> W. VA. CODE § 47-18-3 (2007) (the "Antitrust Act"). In addition to the Antitrust Act, claims were made in this case predicated upon the provisions of W. VA. CODE § 33-11-4(4) (the "Unfair Trade Practices Act") that alleged a boycott in restraint of trade in West Virginia. Except to the extent required by discrete distinctions between the two claims, the discussion hereinafter will speak primarily in terms of the overarching antitrust claim. Those arguments are applicable, however, to both claims, each of which is grounded in alleged anticompetitive activity.

competitive, conspiratorial economic behavior to what was, in reality, nothing more than a dispute over the propriety of a decision by one business entity to terminate an at-will agency contract with another. It also expanded the reach of the Antitrust Act to conduct allegedly impacting commerce in our sister state of Virginia, thereby calling into question the constitutionality of the Act under the Commerce Clause of the United States Constitution. Each of these decisions represents a fundamental misinterpretation and misapplication of the antitrust laws which, if allowed to stand, will impact not only the parties to this appeal but also parties to commercial transactions throughout the state.

As Appellants have previously noted, the antitrust laws, when properly applied, serve to protect consumers and businesses alike from conspiratorial conduct that thwarts legitimate competition and limits the choices available to consumers. However, when, as here, those laws are improperly applied, they serve to deter legitimate business practices and the exercise of proper business judgment, thereby harming the very interests those laws are designed to protect. Accordingly, for the reasons set forth in hereinafter, Appellants urge the Court to correct the errors committed by the Circuit Court in interpreting and applying the Antitrust Act to the specific facts presented, and, in so doing, provide guidance to the business community and the lower courts regarding the legitimate parameters of these specific laws.

The specific orders from which relief is sought are:

- 1.) The Trial Court's Order of June 27, 2006, denying Erie's Motion to dismiss PIA's Antitrust Claims for failure to state a claim under the West Virginia Antitrust Act;
- 2.) The Trial Court's Order of September 25, 2007, denying Erie's Motion for Summary Judgment with respect to PIA's Antitrust Claims;

- 3.) The Trial Court's Orders denying Erie's Motion for Judgment at the close of PIA's case in chief and at the conclusion of all evidence; and
- 4.) The Trial Court's Order of January 9, 2008, denying Erie's Motion for Judgment as a Matter of Law.

### STATEMENT OF FACTS

#### A. THE CLAIMS ASSERTED

This case arises out of a decision made by the Appellant companies<sup>2</sup> to terminate certain independent insurance agency agreements with Kevin Webb, an independent agent licensed in Virginia and the Princeton Insurance Agency<sup>3</sup>, an independent agency licensed in West Virginia. There was no dispute below and there can be none here that the agency agreements in question were terminable at will by either party upon proper notice. There likewise can be no dispute here that the Erie Insurance Group gave proper notice of its intent to terminate those agreements. As such, there was and is no basis for asserting that those terminations gave rise to cognizable breach of contract claims.

In lieu of such claims, Mr. Webb and PIA initially alleged that the termination of their respective contractual relationships, even though permissible under the written agreements between the parties, was contrary to substantial public policy in West Virginia.<sup>4</sup> In response to a motion to dismiss filed by the Erie Insurance Group pursuant to Rule 12(b)(6), former Judge John Frazier, who originally presided over this matter, dismissed

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<sup>2</sup> Hereinafter referred to collectively as the "Erie Insurance Group." *See also*, pages 13-15, *infra*.

<sup>3</sup> Hereinafter "PIA."

<sup>4</sup> How the termination of agency agreements in **Virginia** violated public policy in **West Virginia** was never fully articulated by PIA. PIA and Mr. Webb further alleged a second violation on the part of the Erie Insurance Group of the provisions of the Unfair Trade Practices Act for purportedly making false entries in its books and records relative to the business of PIA. They also asserted that PIA was a "captive" rather than an independent insurance agency and that, as a consequence, its termination by the Erie Insurance Group violated W. VA. CODE § 33-12A-3. In addition they claimed damages based upon a claim of economic and business duress and as a result of an alleged tortious interference with its agency agreements by Erie Indemnity as the parent of its individual operating companies. *See generally*, Complaint.

the public policy claim. With Judge Frazier's retirement, Judge William Sadler assumed responsibility for this case.

PIA and Mr. Webb then sought and were granted leave to file a Second Amended Complaint which again asserted claims based upon violations of the substantive public policies of West Virginia identical to those previously dismissed by Judge Frazier. The Second Amended Complaint also asserted claims under West Virginia's version of the federal Graham Leach Bliley Act based upon alleged attempts to obtain private consumer information as well as claims based upon violations of the West Virginia Antitrust.<sup>5</sup>

In response to the Erie Insurance Group's renewed motion to dismiss the public policy claims, Judge Sadler agreed with Judge Frazier's earlier ruling and dismissed those claims for failure to state a claim. As a result, the only claims that proceeded to trial were those alleging violations of the Antitrust Act and those alleging violations of West Virginia's prohibition against seeking disclosure of private consumer information.

In permitting the antitrust claims to go forward, the Trial Court necessarily concluded that, when the Erie Insurance Group severed its relationship with PIA in West Virginia and Mr. Webb in Virginia, it was not simply invoking a contractual right to cease doing business with them but was, instead, engaging in what is referred to in antitrust parlance as a "concerted refusal to deal" and that this concerted refusal to deal caused an unreasonable restraint of trade "in West Virginia," all in violation of the Antitrust Act.

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<sup>5</sup> Gone were the claims based upon tortious interference, economic and business duress, entry of false statements onto the books of the Erie Insurance Group and the captive agent statute.

## **B. THE PARTIES**

### **1. THE PRINCETON INSURANCE AGENCY AND KEVIN WEBB**

PIA is a West Virginia corporation engaged in the business of marketing insurance products for multiple insurance companies, including members of the Erie Insurance Group.<sup>6</sup> PIA operates as an independent insurance agency in West Virginia.<sup>7</sup> It is owned by Frazier Webb<sup>8</sup> and his son, Kevin Webb, served as its president from 1999 forward.<sup>9</sup>

In the early 1990's, PIA entered into an agency agreement with Erie Insurance Property & Casualty and Erie Family Life Insurance, two members of the Erie Insurance Group authorized to write business in West Virginia.<sup>10</sup> In 1999, that agreement was updated with Kevin Webb being substituted for his father as the responsible agent.<sup>11</sup> In 2001, Kevin Webb executed a separate agency agreement in his own name as a licensed insurance agent in Virginia.<sup>12</sup> That agreement authorized him to write automobile, homeowners, and general commercial insurance in Virginia on behalf of Erie Insurance Exchange and Erie Insurance Company, two additional members of the Erie Insurance Group, both of whom were authorized to conduct the business of insurance in that state.<sup>13</sup> At about that same time, Mr. Webb entered into a second agency agreement in Virginia that authorized him to write life insurance on behalf of Erie Family Life in Virginia.<sup>14</sup> Because PIA was not licensed to do business in Virginia, it was never a party to any agency agreement with the Erie Insurance Group other than those entered into in West Virginia.<sup>15</sup>

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<sup>6</sup> Trial Transcript ("T.T.") 239-42.

<sup>7</sup> *Id.*

<sup>8</sup> T.T. 205.

<sup>9</sup> T.T. 205.

<sup>10</sup> T.T. 229-30, Plaintiffs' Exhibit 8.

<sup>11</sup> T.T. 235.

<sup>12</sup> T.T. 232.

<sup>13</sup> T.T. 236.

<sup>14</sup> T.T. 233.

<sup>15</sup> T.T. 33, Plaintiffs' Exhibit 9B.

The contractual relationship between the Erie Insurance Group and PIA deteriorated over the years as the profitability of the business PIA wrote in West Virginia continued to decline. The concerns over this decline were heightened in 2002, when PIA began working in cooperation with a separate insurance agency, Princeton Insurance Associates ("PI Associates").<sup>16</sup> Like PIA, this agency wrote business on behalf of multiple insurers in West Virginia, although no operating company within the Erie Insurance Group was among them.<sup>17</sup>

The interlocking relationship between PIA and PI Associates was self-evident from the outset. For example, PIA and PI Associates operated out of the same office and had many of the same employees; indeed the sign outside the offices identified only PIA, there being no mention of PI Associates.<sup>18</sup> Not surprisingly given this arrangement, employees of one agency often did work for the other and *vice versa*.<sup>19</sup>

Shortly after the formation of PI Associates, the Erie Insurance Group experienced a precipitous decline in not only the profitability of the business being placed by PIA but also the absolute number of policies being written on its behalf.<sup>20</sup> Despite this, in 2003, shortly after Mike Fletcher became the manager of Erie's Parkersburg office, he made a point to meet with Mr. Webb to discuss the situation in hopes of preserving their agency relationship. Based upon that meeting, Mr. Fletcher came away believing that PIA was committed to taking the actions necessary to achieve that goal.<sup>21</sup> His optimism was dashed when, at the end of 2003, the numbers continued to decline. Personal automobile applications were down by 73%; the number of commercial automobile policies declined by

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<sup>16</sup> T.T. 243-48, 575.

<sup>17</sup> *Id.*

<sup>18</sup> T.T. 510-11, 602-03.

<sup>19</sup> T.T. 510, 602.

<sup>20</sup> T.T. 494-98.

<sup>21</sup> T.T. 761-69, 772-73.

79%; and commercial property and casualty applications dropped by 78%.<sup>22</sup> This, combined with losses of over \$4.3 million during the preceding decade,<sup>23</sup> rekindled serious concerns within the Erie Insurance Group as to whether it should continue its relationship with PIA. The Erie Insurance Group was also concerned that PI Associates was, in fact, being used as a vehicle to steer business away from it.<sup>24</sup> Although PIA, as an independent agency, certainly had the right to take those actions, the Erie Insurance Group also had the right to determine whether a continued relationship with PIA remained commercially reasonable in light of those actions.

## 2. THE ERIE INSURANCE GROUP

The Erie Insurance Group, like most insurers, consists of a family of companies, operating under the umbrella of a parent corporation. In the case of the Erie Insurance Group, the parent company is **Erie Indemnity Company**, a publicly-traded entity. It is not licensed to and does not write insurance. Instead, it provides management services to its operating subsidiaries.<sup>25</sup> In order to perform this function, it employs management personnel such as Mike Fletcher, the manager of the Erie Insurance Group's Parkersburg branch office and Carl Olian, a district sales manager, who also worked out of Parkersburg.<sup>26</sup> As a consequence, decisions within a given region--such as through which independent agents the operating subsidiaries should market their products--are made by Erie Indemnity through individuals such as Mr. Fletcher and Mr. Olian.<sup>27</sup>

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<sup>22</sup> T.T. 495, 497.

<sup>23</sup> T.T. 492

<sup>24</sup> See T.T. 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 [another insurer] 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.T. 505 (testimony of Kevin Webb) ("But I did move some of that business over. I'm assuming that some of it happened.").

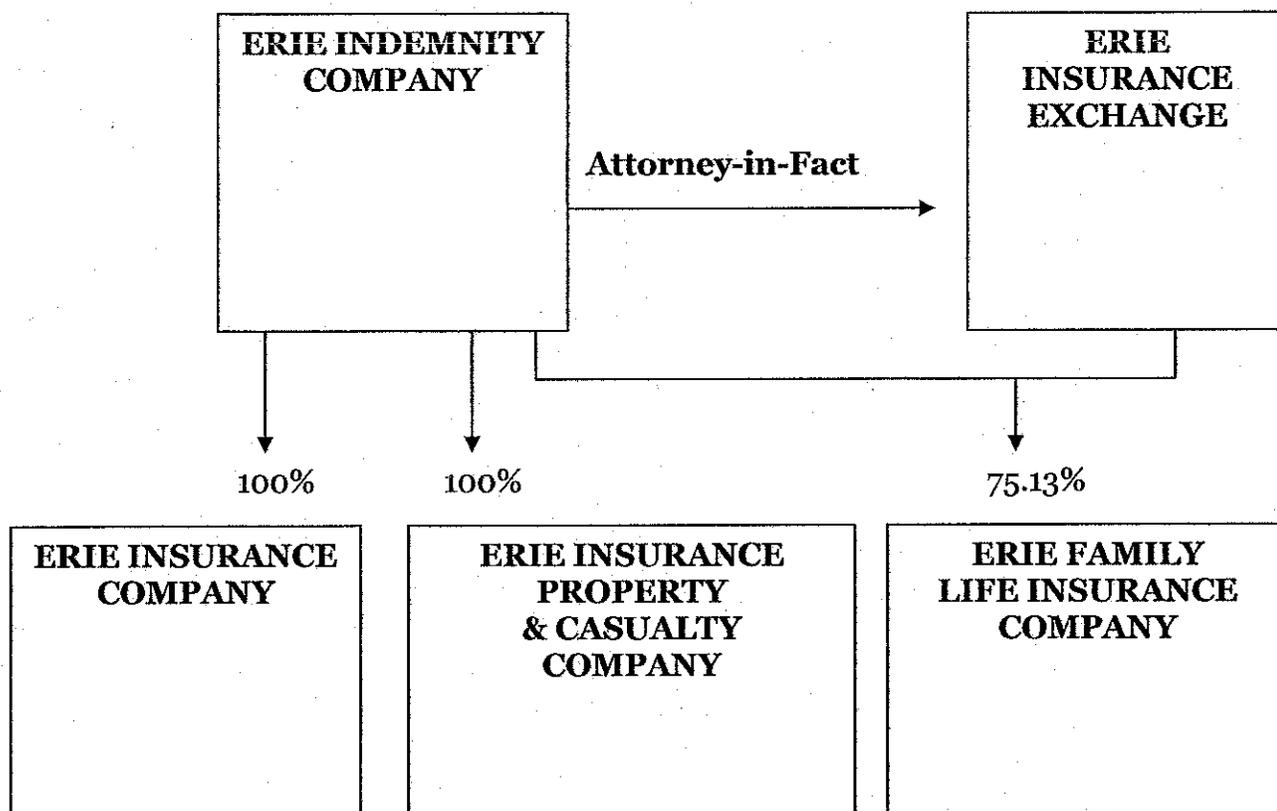
<sup>25</sup> T.T. 220.

<sup>26</sup> T.T. 226, 747.

<sup>27</sup> T.T. 226-27, 747.

The relevant portions of the Erie Insurance Group's overall organization with its various operating companies are depicted below:<sup>28</sup>

### CORPORATE ORGANIZATION CHART



In West Virginia, two Erie Insurance Group operating companies wrote insurance during the relevant timeframe. **Erie Insurance P & C** offered private and commercial automobile insurance, homeowners insurance, and commercial liability insurance.<sup>29</sup> **Erie Family Life**, by contrast, wrote only life insurance.<sup>30</sup> Neither company had or has any employees.<sup>31</sup> Instead, and consistent with the overall organization of the Erie Insurance

<sup>28</sup> This chart replicates, in simplified version, Plaintiffs' Exhibit 7 as presented at trial.

<sup>29</sup> T.T. 459-60. The Erie Exchange and Erie Insurance were licensed to write business in West Virginia but did not do so during any time relevant to these proceedings, confining their activities, as between Virginia and West Virginia, solely to Virginia.

<sup>30</sup> T.T. 464.

<sup>31</sup> *Id.*

Group, they were and are managed and controlled by Erie Indemnity and its employees. With respect to their relationship with PIA, these companies acted through Mike Fletcher and Carl Olian.<sup>32</sup>

In Virginia, insofar as is relevant to this case,<sup>33</sup> the Erie Insurance Group operates through the **Erie Insurance Exchange** (the "Erie Exchange"), **Erie Insurance Company** ("Erie Insurance") and **Erie Family Life**.<sup>34</sup> The Erie Exchange markets private and commercial automobile insurance, homeowner's insurance, and commercial liability coverage to "preferred tier" customers.<sup>35</sup> Erie Insurance offers the same type of coverage offered by the Exchange.<sup>36</sup> However, that coverage is available only to "standard tier" customers as opposed to those in the "preferred" tier. Erie Insurance does not insure preferred tier policyholders and the Erie Exchange does not insure standard tier policyholders. While both Erie Insurance and the Erie Exchange were licensed to operate as insurers in West Virginia, they did not market any insurance in West Virginia at any time relevant to these proceedings.<sup>37</sup>

Finally, Erie Family Life was authorized by Virginia to offer life insurance products similar to those that it offers in West Virginia.<sup>38</sup> In offering those products, however, it did not and could not market products approved by the regulatory authorities in West Virginia to customers in Virginia. Likewise, it did not and could not offer products approved for the

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<sup>32</sup> See, e.g., T.T. 226-28.

<sup>33</sup> Since the Antitrust Act and the Unfair Trade Practices Act are both directed at activities that unreasonably restrain of trade "in West Virginia," activities confined solely to Virginia simply cannot serve as a legal basis for a claim under either act. See Discussion of Law, Part A., *infra*.

<sup>34</sup> T.T. 459-61. Erie Insurance P&C is also licensed to write business in Virginia but, during this period, confined those writings to workers' compensation coverage. As such, it did not write any coverage that competes with that of the Erie Exchange or Erie Insurance.

<sup>35</sup> T.T. 219-20.

<sup>36</sup> T.T. 464.

<sup>37</sup> T.T. 464.

<sup>38</sup> *Id.*

Virginia market to West Virginia residents. The two jurisdictions are separately regulated and are, as a consequence, treated as separate markets.<sup>39</sup>

In sum, these operating companies do not compete with one another. While the Erie Exchange and Erie Insurance both offer automobile insurance in Virginia, they offer those policies to differently-rated customers.<sup>40</sup> In addition, because of regulatory controls, their offerings are limited to consumers in Virginia and in no way affect the market for similar insurance in West Virginia.<sup>41</sup> As such, they do not compete with Erie Insurance P&C, which markets automobile and homeowner's coverage in West Virginia, not in Virginia. Finally, while Erie Family Life is licensed to offer life insurance products in Virginia and West Virginia, none of the other members of the Erie Insurance Group involved in this case offer similar insurance products or compete with it for that business. Each of the Erie Insurance Group's operating companies markets non-competing products within the geographic area in which it is licensed to conduct business.

### **C. THE AGENCY RELATIONSHIP**

The agency agreement governing the relations between the Erie Insurance Group and PIA in West Virginia and the two agreements governing the relationship between Mr. Webb and the Erie Insurance Group in Virginia all provided that they were terminable at will by either party upon ninety (90) days' notice.<sup>42</sup> The agency agreements state: "AGENT or ERIE may terminate the Relationship upon 90 days written notice to the other party."<sup>43</sup> It was clear that PIA owned the expirations and the right to replace those policies.<sup>44</sup> In

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<sup>39</sup> See, e.g., T.T. 234.

<sup>40</sup> See, e.g., T.T. 223-24, 460-61.

<sup>41</sup> *Id.*

<sup>42</sup> See T.T. 229, ff., Plaintiffs' Exhibits 8, 9A, and 9B.

<sup>43</sup> *Id.*

<sup>44</sup> T.T. 430. What the law of the Commonwealth of Virginia required with respect to such policies was neither a matter that was addressed in the evidence nor an issue that is pertinent to the issues before the

other words, PIA had the right to contact the policyholder and could place the expiring Erie coverage with another of PIA's companies. Upon termination of the agency agreements, the Erie Insurance Group was prohibited from renewing that coverage. Only if the policyholder told PIA that he or she wished to remain with the Erie Insurance Group would he or she be referred to another agent by PIA for purposes of securing that coverage. The sole exception to this related to automobile policies in force for two years or longer and homeowner policies in force for four years or longer. As to those policies, Erie was required by law to renew coverage. The right of PIA to place those coverages reverted to it only upon a policyholder's decision not to renew its policy with the Erie Insurance Group or cancellation of the policy by the Erie Insurance Group for cause. Since the termination of its agency relationship with PIA, the Erie Insurance Group has complied with each of the foregoing obligations.<sup>45</sup>

With respect to the agency agreement between PIA and the Erie Insurance Group, the termination process itself commenced only after the ninety days' notice required by the agreement was given.<sup>46</sup> Again, that termination occurred only after continuing decline in the absolute number of policies written by PIA on behalf of the Erie Insurance Group as well as a sustained period of losses resulting from that business, both of which continued despite Erie's attempt to work with PIA to correct the situation.<sup>47</sup> It was this decline in the absolute number of policies being written that finally led the Erie Insurance Group to suspect that PIA was using PI Associates as a conduit through which to steer business to

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Court. If there is a dispute over the disposition of those policies, that is an issue for the Virginia Courts. It is not a matter over which the Trial Court had subject matter jurisdiction.

<sup>45</sup> PIA did allege at trial that Erie had attempted to non-renew or cancel some policies, which it was required by law to keep, but it also admitted that for the policy holders mentioned, Erie did keep those policies. T.T. 532-33.

<sup>46</sup> See T.T. 404, Plaintiffs' Exhibit 27.

<sup>47</sup> See generally, T.T. 777, ff.; see also, T.T. 255-57; T.T. 790-91; T.T. 826-27.

other, competing insurers that PI Associates represented.<sup>48</sup> While PIA had the right to do this, it evidenced PIA's lack of interest in writing policies for the Erie Insurance Group and resulted in the deterioration of the relationship. The Erie Insurance Group's suspicion was confirmed at trial when PIA acknowledged that during 2003, it directed new business to insurance companies represented by PI Associates rather than place that business with the Erie Insurance Group.<sup>49</sup>

Prior to that testimony, PIA had never admitted that this was occurring. In fact, prior to the termination of its agency relationship with PIA, the Erie Insurance Group, acting through Mr. Fletcher and Mr. Olian, requested that PIA share its production information relating to other insurers that it represented for the relevant period.<sup>50</sup> This information had been voluntarily provided to insurers in the past<sup>51</sup>--indeed, Mr. Webb had even provided Erie's production numbers to another insurer in the past.<sup>52</sup> This practice was and is common in the industry.<sup>53</sup> It is, in fact, one of the few mechanisms available to insurers dealing with independent agents to ensure those agents are fairly representing them. When this information was requested in 2003, however, PIA pointedly refused to provide it with respect to its sister company, PI Associates.<sup>54</sup> Had it done so, what the Erie Insurance Group suspected was occurring would have been confirmed.

Irrespective of that, however, the Erie Insurance Group was clearly entitled to terminate its contractual relationship with PIA whether PIA was steering business away from it through the artifice that was the PI Associates or not. The relationship was

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<sup>48</sup> T.T. 809.

<sup>49</sup> T.T. 274-75, 496, 505-06. PIA claimed that it did so only out of concern that the Erie Insurance Group was about to exercise its contractual right to cancel its agency relationship with PIA. T.T. 506, 516.

<sup>50</sup> T.T. 305-29, 366-78, 780-81, 812-13.

<sup>51</sup> T.T. 433.

<sup>52</sup> T.T. 438.

<sup>53</sup> T.T. 596-97, 634-35.

<sup>54</sup> T.T. 452-54, Plaintiffs' Exhibit 19.

terminable at will, with or without cause, on ninety (90) days' notice. Even if there were no steering and even if there had not been the decline in the business written or the associated losses, the Erie Insurance Group had the contractual right to walk away from PIA if, in its judgment, the continuation of their association was not in the best interest of the Erie Insurance Group. That is what it did and that is all that it did in this case.

#### **D. THE JURY VERDICT**

Following a trial that commenced on September 18 and concluded on September 24, 2007, the jury returned a verdict finding that the Erie Insurance Group had not violated the provisions of West Virginia law prohibiting efforts to obtain the disclosure of private consumer information.<sup>55</sup> The jury did find, however, that as a consequence of its termination of its agency agreements with PIA in West Virginia and Kevin Webb in Virginia, the Erie Insurance Group had violated the West Virginia Antitrust Act by unreasonably restraining trade within this state.<sup>56</sup> As a result of this finding, the jury concluded that PIA and Mr. Webb were entitled to compensatory damages in the form of future lost commissions that PIA would have earned in West Virginia and Mr. Webb would have earned in Virginia. The aggregate amount of those commissions was calculated to be One Million Four Hundred Eleven Thousand Two Hundred and Nine Dollars (\$1,411,209).<sup>57</sup> The jury also found that the conduct of the Erie Insurance Group in severing its relationship with PIA in West Virginia and Mr. Webb in Virginia was such that punitive damages were appropriate and awarded it an additional One Million Four Hundred Eleven Thousand Two Hundred and Nine Dollars (\$1,411,209).<sup>58</sup>

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<sup>55</sup> See Verdict Form.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

## **E. POST-TRIAL MOTIONS AND RULINGS**

In response to post-trial motions filed by the Erie Insurance Group, the Trial 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 Trial Court went on to conclude, however, that under the Antitrust Act, treble damages should be awarded. Accordingly, it entered judgment against the Erie Insurance Group and in favor of PIA and Mr. Webb on October 26, 2007, in the amount of Four Million Two Hundred Thirty Three Thousand Six Hundred Twenty Seven Dollars (\$4,233,627). The Erie Insurance Group petitions for appeal from that judgment for the reasons set forth below.

### **ASSIGNMENTS OF ERROR**

1. PIA failed to allege or prove any antitrust injuries that were compensable under the West Virginia Antitrust Act.
2. 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."
3. 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.
4. The Trial Court erred when it held that the Erie Insurance Group could have conspired with PIA or Mr. Webb for purposes of liability under the West Virginia Antitrust Act.
5. The Trial Court erred when it permitted recovery as antitrust damages, lost future commissions to be earned on insurance policies not yet written.

## STANDARD OF REVIEW

A *de novo* standard of review is applied to the denial of both pre-verdict and post-verdict motions for judgment as a matter of law. The evidence is to be considered in the light most favorable to the non-moving party, but if that evidence and the applicable law leads to a single conclusion inconsistent with that reached by the Trial Court, its decision denying such a motion should be reversed. *Brannon v. Riffle*, Syl. Pt. 3, 197 W. Va. 97, 459 S.E.2d 374 (1995). Similarly, the appellate standard of review regarding questions of law raised and ruled upon during the course of a trial is also *de novo*. *Pipemasters, Inc. v. Putnam County Comm'n*, 218 W. Va. 512, 625 S.E.2d 274 (2005).

## DISCUSSION OF LAW

Our state antitrust laws are intended to deter conspiratorial economic behavior that artificially constrains competition to the ultimate detriment of the consuming public--in this case purchasers of insurance. *See, e.g., Gray v. Marshall County Bd. of Educ.*, 179 W. Va. 282, 288, 367 S.E.2d 751, 757 (1988). That is one of the core precepts upon which our state antitrust laws are based and, with the exception of the intra-state component, is at the heart of the federal statutes after which our laws are patterned.<sup>59</sup>

Unfortunately, the Trial Court lost sight of this precept in rendering its decision below. In so doing, it committed a number of critical errors. First, it erred in holding that the members of the Erie Insurance Group who wrote business for Virginia consumers through Mr. Webb, in his capacity as a Virginia licensed insurance agent, could be held liable for violating the West Virginia antitrust laws for cancelling Mr. Webb's Virginia agency agreement. Second, it erred in holding that the members of the Erie Insurance

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<sup>59</sup> As this Court has recently noted, West Virginia courts have been directed by the legislature to interpret the West Virginia Act in harmony with federal statutory and case law. *Kessel v. Monongalia County Gen. Hosp. Co.*, 220 W. Va. 602, 648 S.E.2d 366 (2007) (citing W. VA. CODE § 47-18-16 (2007)).

Group were separate and independent entities capable of conspiring with one another in violation of the antitrust laws. Third, it erred in entering judgment against the Erie Insurance Group without any evidence having been presented that the offending conduct relied upon by PIA and Mr. Webb in any way constrained competition or resulted in harm to the purchasers of insurance. Finally, it erred in permitting PIA and Mr. Webb to claim as damages commissions that might be earned if insurance policies were written in the future, when this Court has expressly prohibited those very damages.

**A. The Circuit Court Lacked Subject Matter Jurisdiction to Hear West Virginia Antitrust Act Claims Regarding the Virginia Agency Agreement.**

Because cancellation of Mr. Webb's agency agreements to sell insurance in Virginia on behalf of the Erie Insurance Group was not shown to have impacted the market for insurance products in West Virginia, the West Virginia Antitrust Act did not, by its terms, extend to that cancellation. Given the limitations of that Act, the Circuit Court, as a consequence, lacked subject matter jurisdiction over the those activities and the judgment entered below, to the extent predicated upon acts involving the Virginia agency agreements, is void. The West Virginia Antitrust Act prohibits, among other things, "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce *in this State* . . . ." W. VA. CODE § 47-18-3 (2008) (emphasis added). It also prohibits "any part of a monopoly *in this State*." W. VA. CODE § 47-18-4 (2008) (emphasis added).

This Court has not yet decided to what extent the West Virginia Antitrust Act may reach conduct or effects beyond its borders, despite its limitations "in this State." The Court has recognized the difference between the West Virginia Act and the federal Sherman Act--namely that "the West Virginia statute applies to contracts and conspiracies in restraint of

trade 'in this state' while the federal statute is applicable to contracts and conspiracies in restraint of trade or commerce among the several States, or with foreign nations." *Kessel v. Monongalia County Gen. Hosp.*, 220 W. Va. 602, 611, 648 S.E.2d 366, 375 (2007). Similarly, in 1981, the District Court for the Southern District of West Virginia, in deciding that there was no federal jurisdiction over certain conduct, held: "Federal antitrust law is obviously directed toward interstate commerce. West Virginia's antitrust law is directed towards intrastate commerce." *Anziulewicz v. Bluefield Community Hosp.*, 531 F. Supp. 49, 53 (S.D.W.Va. 1981).

But neither this Court nor the federal courts have been asked to determine specifically what conduct is covered by the West Virginia Act. This Court should first determine that the West Virginia Antitrust Act reaches conduct that substantially affects West Virginia trade or commerce. Second, based upon that holding, the Court should hold that the Circuit Court in the present case lacked subject matter jurisdiction to hear complaints regarding the cancellation of agreements to sell insurance to Virginia consumers.

- 1. The West Virginia Antitrust Act Should Reach Conduct that Substantially Affects West Virginia Trade or Commerce.**

The majority of state courts to consider the reach of their own antitrust acts have held that to support a claim, there must be a local effect, as opposed to local conduct. Most of those employ a substantial effects standard and have held that the important consideration is whether "the alleged anticompetitive conduct affects [the state's] trade or commerce to a substantial degree." *Freeman Indus., LLC v. Eastman Chemical Co.*, 172 S.W.3d 512, 523 (Tenn. 2005) (construing the state act's "in this state" and "into this state" language); *see also, Amarel v. Connell*, 202 Cal.App.3d 137, 248 Cal.Rptr. 276, 284 (Ct.

App. 1988) (allowing a state claim so long as anticompetitive conduct has a "direct, substantial, and reasonably foreseeable effect within the state"); *Leader Theatre Corp. v. Randforce Amusement Corp.*, 58 N.Y.S.2d 304, 307 (Sup. Ct. 1945), *aff'd*, 76 N.Y.S.2d 846 (1948) ("It is now well-established that states . . . can enact and implement legislation which affects interstate commerce, when such commerce has significant local consequences"). *But see, Olstad v. Microsoft Corp.*, 700 N.W.2d 139, 284 Wis.2d 224 (2005) (allowing a Wisconsin claim if the conduct "substantially affects" the people of Wisconsin or if the conduct occurred within Wisconsin); *Abbott Laboratories v. Durrett*, 746 So.2d 316 (Ala. 1999) (holding that Alabama act, containing "within this state" language regulated conduct occurring in the state, regardless of where its effects were felt).<sup>60</sup>

Tennessee's examination of the "in this state" language is instructive. There, the court was asked to consider whether an out-of-state indirect purchaser may bring an antitrust claim in Tennessee against producers of goods located in-state. *Freeman Indus.*, 172 S.W.3d at 516. Although the court concluded that the Tennessee act did permit indirect purchaser claims, the court determined that the language of the act could only properly be read to regulate conduct that had a substantial effect on Tennessee trade or commerce. Since the purpose of the Tennessee act is to protect the state's trade or commerce, the court rejected any standard that considered where the anticompetitive acts took place; rather the question must be where the conduct had its effect. *Id.* at 522. The court stated that the test was pragmatic and did not turn on "mathematical nicet[ies]." *Id.* at 523. Thus, even though some defendants were located in Tennessee, and even though they were alleged to

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<sup>60</sup> It should be noted that many of the cases that address this argument actually discuss the reach of state acts versus the federal act (as opposed to the reach of the state act versus another state's act as argued here). However, since the decisions still announce the courts' opinions as to the requirements to make claims under those state acts, their precedential value is unchanged.

have communicated a price-fixing arrangement from Tennessee, because the plaintiff could not demonstrate how Tennessee commerce was affected, Tennessee's act did not cover the conduct. *Id.* at 524.

Notably, the federal Sherman Act has a similar reach.<sup>61</sup> The Supreme Court has stated that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993); *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242 (1980). As with other states' interpretations of their own acts, the Supreme Court has held that the important consideration is whether the conspiracy or restraint of trade affects commerce of the United States, even if the conduct occurs elsewhere. *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 704 (1962).

At the same time, the reach of the state antitrust acts must be limited. As this Court has recognized, the Sherman Act reaches interstate commerce, and the West Virginia Act--whether construed to reach conduct or commerce in West Virginia--is limited to intrastate commerce. *Kessel v. Monongalia County Gen. Hosp.*, 220 W. Va. 602, 611, 648 S.E.2d 366, 375 (2007); *see also, State ex rel. Palumbo v. Graley's Body Shop, Inc.*, 188 W. Va. 501, 425 S.E.2d 177 (1992). As other courts have found, it must be, in order to avoid any implication of the federal Commerce Clause. *See e.g., H-Quotient, Inc. v. Knight Trading Group, Inc.*, 2005 WL 323750, \*5 (S.D.N.Y. Feb. 9, 2005) (finding a New York state claim actually arose under the Sherman Act, where the alleged conspiracy was between entities from three states, directed at a foreign-operated securities exchange, and involving stock of a Virginia corporation, and the complaint did not specifically allege impact on intrastate commerce).

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<sup>61</sup> Again, as this Court has recently noted, West Virginia courts have been directed by the legislature to interpret the West Virginia Act in harmony with federal statutory and case law. *Kessel v. Monongalia County Gen. Hosp. Co.*, 220 W. Va. 602, 648 S.E.2d 366 (2007) (citing W. VA. CODE § 47-18-16 (2007)).

Thus, in order for the Antitrust Act to apply to a particular set of circumstances, there must be some nexus with West Virginia.

The Court should find that the nexus is anticompetitive conduct that creates a substantial effect in West Virginia. As stated by the Tennessee court and as this Court has recognized, the purpose of the antitrust laws is to protect competition, not individual competitors. *Gray v. Marshall County Bd. of Educ.*, 179 W.Va. 282, 288, 367 S.E.2d 751, 757 (1988). As such, our Antitrust Act should reach anticompetitive conduct that affects trade and commerce in West Virginia, whether or not the actors are located here. It simply makes no sense for the West Virginia Act to regulate only conduct that occurred in West Virginia, because anticompetitive conduct in another state may impact West Virginia consumers. See Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 Ind. L.J. 375, 389 (1982) ("In these cases of competing sovereigns, it makes sense to examine the relationship between a state and a particular transaction by looking at the effects of the transaction within the forum state.").

As the majority of courts have recognized, this is simply a pragmatic approach to balancing the state's interests against the reasonable expectations of the individuals and businesses regulated. It creates a nexus with West Virginia sufficient to avoid any Commerce Clause implications but also permits the Act to fulfill its intended purpose: protection of the West Virginia market and West Virginia consumers. As the Tennessee court noted, this approach also allows the court to consider in each circumstance whether subject matter jurisdiction exists, since it does not reduce to simple calculations.

For those reasons, the Court should hold that the West Virginia Antitrust Act is limited to regulating anticompetitive conduct that substantially affects West Virginia trade or commerce.

**2. Applying the 'Substantial Effect' Standard, the Court Should Find That No Subject Matter Jurisdiction Existed as to Claims Concerning Virginia Insurance Agency Agreements in This Case.**

The cases that have held that state antitrust acts or the Sherman Act reach foreign conduct that creates substantial local effects demonstrate that the Circuit Court lacked subject matter jurisdiction over antitrust claims regarding cancellation of the Virginia agency agreements. As such even if the Court finds that PIA and Mr. Webb met their burdens at trial, this Court should find that a trial against the Erie Companies could have only proceeded on antitrust claims regarding the West Virginia agency agreements.

What constitutes a substantial effect within a state sufficient to bring an antitrust claim is obviously a case-by-case determination, but decisions from other states are instructive. In *Freeman Indus.*, the Tennessee Supreme Court held that the mere location of a defendant and some of its activities within Tennessee was not enough, because the effects of the anticompetitive conduct were not felt in Tennessee. *Freeman Indus.*, 172 S.W.3d at 524. There, the claim was a claim of price-fixing by indirect purchasers. *Id.* at 516. The claim was brought against a Tennessee-based company and others, and the plaintiff alleged that some of the negotiations to fix prices occurred in Tennessee. *Id.* But importantly, the plaintiff was not a Tennessee entity that could claim that the prices affected Tennessee commerce to a substantial degree. *Id.* at 524. As a result, the Court found that Tennessee's antitrust act did not reach that conduct, and the courts lacked subject matter jurisdiction to hear the complaint.

By contrast, courts have found a sufficient connection with the state when the relevant market for goods is affected in the state. For example, in *Amarel*, the Court of Appeal of California, Third District, found sufficient that a variety of alleged conduct, such as price-fixing, boycotts, and refusals to deal (most of which were the results of agreements

reached in California), resulted in a depressed price for California rice. *Amarel*, 202 Cal. App.3d at 142. The court held that the state acts could reach any such conduct "[s]o long as the anticompetitive conduct in question has a direct, substantial and reasonably foreseeable effect within the state." *Id.* at 150.

In another case, the Court of Appeal of California, Second District, found important that the consequences of a restraint of trade (territorial limitations on an exclusive distributorship agreement) were felt within the State of California. *R.E. Spriggs Co. v. Adolph Coors Co.*, 112 Cal. Rptr. 85, 37 Cal. App.3d 653 (Ct. App. 1974). That is, because the exclusive distributorship applied to distributors within the State, the consequences were also felt within the State. *Id.* What is important about that holding, though, is the fact that the Court did not stop its analysis at the location of the plaintiffs. Instead, the location of the plaintiffs merely meant that in the distributorship context, the consequences of a restraint (altered prices and reduced competition) also would be felt within the State.

It was that additional step that made application of the West Virginia Antitrust Act to the termination of the Virginia agency agreements impermissible. As is more fully discussed below, there was no anticompetitive effect to termination of the agency agreements at all; it was simply insufficient to allege a violation of the Antitrust Act without any indication that the market for insurance products has been or even could be affected. Thus, the Court lacked subject matter jurisdiction to hear such a claim, because PIA could not demonstrate that the Erie Companies' decision to terminate the agreements had any anticompetitive effect--let alone a substantial effect in West Virginia.

But if there were, that effect would be felt in Virginia by consumers of Virginia insurance policies. Assuming PIA has alleged or proven enough to demonstrate that the decision to terminate the agreements was a violation of the Antitrust Act, it would succeed

only because its evidence demonstrated that that decision was a restraint of trade or commerce. The relevant market to be examined to make that determination is the market for insurance--and in the case of the Virginia agency agreements--the market for Virginia insurance policies.

It cannot be the case that there is a substantial effect on the market for insurance in West Virginia if the only possible policies under discussion are Virginia policies. The rare consumer who lives in West Virginia but needs a Virginia insurance policy or lives in Virginia but needs a West Virginia policy is not sufficient to demonstrate a substantial effect on the market for insurance in West Virginia. The Commerce Clause certainly requires more of a nexus than such rarities to preclude a finding that the West Virginia Antitrust Act overreaches into interstate commerce.

For the same reason, even if it is to be believed that PIA's personal damages are enough to allege an antitrust violation, one such violation is not a substantial connection to West Virginia, sufficient to apply the West Virginia Antitrust Act. The reach of the West Virginia Antitrust Act would be incredible if that were a sufficient nexus. If a contract between a California manufacturer and a Tennessee distributor prohibited delivery by the Tennessee distributor to one customer in West Virginia, the Act would now apply. That is precisely the kind of reach that the Commerce Clause precludes and that overreaches into another state's sovereignty.

The Erie Insurance Group does not dispute that if the allegations and evidence were sufficient, West Virginia courts would have subject matter jurisdiction over a claim concerning cancellation of the West Virginia agency agreements. But, this case was not limited to the Erie Insurance Group's decision to terminate the West Virginia agency agreements. Tied together with that claim was a claim that the Erie Insurance Group

violated a West Virginia Act by terminating Virginia agreements, a decision that could only affect Virginia consumers, Virginia commerce, or Virginia trade.

For those reasons, the Erie Insurance Group requests that the Court find that the Circuit Court lacked subject matter jurisdiction over PIA's claim, insofar as it relies on termination of the Virginia agency agreements.

**B. The Termination of the PIA Agency Agreement did not Violate the West Virginia Antitrust Act, Because PIA has Demonstrated no Conspirational Conduct.**

With respect to the agency agreement entered into between PIA and the Erie Insurance Group in West Virginia, while the Trial Court had subject matter jurisdiction to hear that claim, the evidence presented did not make out a legal basis for recovery under the West Virginia Antitrust Act. The two members of the Erie Insurance Group that were party to that agency agreement were not in competition with one another; given their "unity of purpose" they were incapable of conspiring with one another for antitrust purposes; and the termination of their contractual relationship with PIA was not shown to have restrained competition and thereby caused antitrust damage to PIA. These are all necessary elements of any antitrust claim.

**1. In order to demonstrate that the Erie Insurance Group violated the West Virginia Antitrust Act, PIA was required to show that "two or more persons" engaged in anti-competitive conduct.**

As this Court and others have held, in order to demonstrate that the Erie Insurance Group violated the West Virginia Antitrust Act, PIA was required to show that the companies involved in the cancellation of its agency agreement, Erie Family Life and Erie Insurance P&C, were separate entities--entities that did not share a "unity of purpose or common design." *See generally, Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). This requirement is predicated on the fact that "[a] corporation, as a single

business entity, acts with one 'mind' and the unilateral acts of a corporation will not satisfy the requirement of a 'contract, combination in the form of trust or otherwise, or conspiracy'" under the Antitrust Act. *Gray v. Marshall County Bd. of Educ.*, 179 W. Va. 282, 286, 367 S.E.2d 751, 755 (1988).

Because a corporation acts only through its officers, agents, and employees, a contract, combination, or conspiracy involving the corporation and its employees will not satisfy the concerted action requirement of Antitrust Act. *Id.* at 286, 367 S.E.2d at 755. Similarly, an internal agreement to implement a single unitary firm's policies does not raise the antitrust dangers that the Antitrust Act was designed to police. *Id.* at 286, 367 S.E.2d at 755. That is because "[t]he antitrust laws are not designed to deter all the evils known to modern commercial life; rather, they are designed to deter one specific evil--namely anticompetitive, **conspiratorial** economic behavior." *Id.* at 288, 367 S.E.2d at 757 (emphasis added).

The reason for this is simple. The West Virginia Antitrust Act--like its federal counterpart--openly permits competition among firms. It even permits one party to try to gain a competitive edge over another. The Antitrust Act only intercedes when the conduct "corrupt[s] [] the competitive process." *Tal v. Hogan*, 453 F.3d 1244 (10th Cir. 2006) (interpreting a nearly identical provision of the Sherman Act). That is not surprising, given that antitrust laws were enacted "for the protection of competition not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). Antitrust laws intercede when two or more independent parties in competition with one another combine to thwart competition.

The same applies to the portion of the Unfair Trade Practices Act cited by PIA in support of its claims. By its very terms, it also only prohibits certain agreements or

combinations among independent actors. It states, "No person shall enter into any agreement to commit, or by concerted action commit, any act of boycott, coercion or intimidation resulting in or tending result in unreasonable restraint of, or monopoly in, the business of insurance." W. VA. CODE § 33-11-4(4) (2007) (emphasis added). In order for there to be an agreement or concerted action that violates this section of the Code, therefore, two or more actors are required.

Thus, in order to prove its antitrust claims against the Erie Insurance Group based upon the cancellation of its agency agreement, PIA was required to prove that the members of the Erie Insurance Group who were parties to that agreement, Erie Insurance P&C and Erie Family Life, were "separate" entities for purposes of antitrust analysis. The evidence clearly establishes that they were not.

**2. The Erie companies are unitary in purpose and common design and therefore cannot be considered separate entities for antitrust purposes.**

Because the Erie Insurance Group has a unitary purpose and common design, the individual members of that group are not separate actors for purposes of antitrust analysis. The case law is clear. The Supreme Court of the United States<sup>62</sup> has stated plainly, "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984).<sup>63</sup> The Court so held after also

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<sup>62</sup> As stated above, the Erie Insurance Group relies heavily upon federal case law, because, as this Court has recently noted, West Virginia courts have been directed by the legislature to interpret the West Virginia Act in harmony with federal statutory and case law. *Kessel v. Monongalia County Gen. Hosp. Co.*, 220 W. Va. 602, 648 S.E.2d 366 (2007) (citing W. VA. CODE § 47-18-16 (2007)).

<sup>63</sup> PIA argued repeatedly below that *Copperweld* somehow changed the landscape of federal antitrust law, but the Supreme Court, itself, explained that it had simply never examined the intra-agency doctrine overruled in *Copperweld* in any detail. *Copperweld*, 467 U.S. at 760. Indeed, the Court noted that in all but one of its prior decisions in which the intra-agency doctrine was approved, that finding was not essential to the Court's holding. *Id.* This Court has also criticized the Supreme Court's prior "infelicitous" language and stated that the Supreme Court in *Copperweld* "finally agreed with the overwhelming weight

recognizing that officers and employees do not provide the plurality necessary for an antitrust claim. *Id.* at 770. The rationale underlying this is the fact that the objective of the parent and its subsidiary "are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one" and they are not separate entities capable of conspiring for antitrust purposes. *Id.* at 752. That is, "[i]f a parent and a wholly owned subsidiary do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny." *Id.*

PIA has repeatedly tried to argue that *Copperweld's* holding has no bearing on relationships other than that between a parent and its wholly-owned subsidiary; yet such a reading completely ignores the Court's analysis instead focusing on the facts of the case. While the Supreme Court's opinion in *Copperweld* was factually limited to whether a parent and a wholly owned subsidiary are capable of conspiring in violation of the antitrust laws, *Id.* at 767, what is also clear in that opinion is that the extent of a parent company's ownership of its subsidiary did not dictate the result reached. Rather, as the United States Court of Appeals for the Third Circuit noted in *Siegel Transfer, Inc. v. Carrier Exp., Inc.*, 54 F.3d 1125, 1132 (3d Cir. 1995), the *Copperweld* Court **encouraged** the lower courts to always look to the substance--not the form--of allegedly conspiring companies when faced with allegations of intra-company conspiracies, regardless of whether wholly-owned subsidiaries were involved.<sup>64</sup> If they operated as a single economic unit rather than

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of authority in the lower courts." *Gray*, 179 W. Va. at 286, 367 S.E.2d at 755. Thus, *Copperweld* was simply the Court's first attempt at clarifying the doctrine and did not express an outright change of prior precedent.

<sup>64</sup> In the same opinion, the Third Circuit specifically rejected the argument that *Copperweld* announced a bright line rule which should only be applied to wholly-owned subsidiaries. *Id.* at 1133, n. 8.

competing market entities, they were not separate actors capable of conspiring within the ambit of the antitrust laws.

For this reason, the overwhelming majority of the courts that have addressed this question have held that the *Copperweld* decision does not foreclose the possibility that affiliated corporations not wholly owned by a parent entity can nevertheless have interests that are "common, not disparate;" or that their "general corporate actions" can still be "guided or determined not by two separate corporate consciousnesses, but one."<sup>65</sup> As a consequence, courts have held that an ownership interest of 51% or greater is sufficient to establish a lack of separateness for purposes of antitrust analysis where that ownership is coupled with a unity of interest.<sup>66</sup> As one commentator has noted the "logic of *Copperweld*" calls for a finding of no antitrust conspiracy wherever the parent owns a majority interest in the subsidiary company, because their joint actions would not constitute a "destruction of competition that was otherwise in the market." Diane Wood Hutchinson, *Antitrust 1984: Five Decisions in Search of a Theory*, 1984 S. Ct. Rev. 69 (Philip B. Kurland, et al., eds.

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<sup>65</sup> See e.g., *Am. Chiropractic Ass'n, Inc. v. Trigon Healthcare, Inc.*, 367 F.3d 212 (4th Cir. 2004) (discussing that unity of interest is the primary consideration and finding that independent physicians on a panel chaired by the defendant had a unity of interest); *Fraser v. Major League Soccer, LLC*, 284 F.3d 47 (1st Cir. 2002) ("But what the Supreme Court has never decided is how far *Copperweld* applies to more complex entities and arrangements that involve a high degree of corporate and economic integration but less than that existing in *Copperweld* itself."); *Siegel Transfer v. Carrier Exp., Inc.*, 54 F.3d 1125 (3d Cir. 1995) (discussing a *de minimis* deviation from 100% ownership); *Williams v. I.B. Fischer Nevada*, 999 F.2d 445 (9th Cir. 1993) (finding a franchisor and franchisee to be a "common enterprise" and thus incapable of conspiring); *Century Oil Tool, Inc. v. Production Specialties, Inc.*, 737 F.2d 1316 (5th Cir. 1984) (discussing two corporations commonly owned by three individuals, none of whom held any more than 40% ownership).

<sup>66</sup> *Coast Cities Truck Sales v. Navistar Int'l Transport*, 912 F. Supp. 747, 765 (D.N.J. 1995) (finding unity of interest when parent owned at least 70% of voting shares at all relevant times); *Bell Atlantic Bus. Sys. Servs. v. Hitachi Data Sys. Corp.*, 849 F. Supp. 702, 706 (N.D. Cal. 1994) (finding 80% ownership sufficient); *Rosen v. Hyundai Group (Korea)*, 829 F. Supp. 41, 45, n. 6 (E.D.N.Y. 1993) (complete unity of interest shown where corporation owned 80% of subsidiary's stock, and one of parent's managing directors owned the remaining 20%); *Viacom Int'l, Inc. v. Time Inc.*, 785 F. Supp. 371 (S.D.N.Y. 1992) (dismissing a claim involving a parent that owned 82% of the stock and controlled 93% of the voting power); *Leaco Enters., Inc. v. Gen. Elec. Co.*, 737 F. Supp. 605 (D. Or. 1990) (unity of purpose found based upon 91.9% stock ownership where, under Canadian law, parent could compel subsidiary to merge); *Novatel Communications, Inc. v. Cellular Tel. Supply, Inc.*, 1986 WL 498475, 1986-2 Trade Cas. (CCH) ¶ 67,412 (N.D. Ga. 1986) (51% stock ownership sufficient).

1985). Indeed, in its brief in *Copperweld*, the Solicitor General suggested that "levels of 50-100 percent stockholdings should create a rebuttable presumption that the two entities are insufficiently independent to conspire." Stephen Calkins, *Copperweld in the Courts: the Road to Caribe*, 63 Antitrust L.J. 345, 352 (1995) (citing DOJ Merits Brief).

In assessing whether a parent and a subsidiary are, in fact, separate entities for antitrust purposes, the courts have looked to a number of factors to determine whether they share a unity of interest. The Fifth Circuit in *Century Oil* found a unity of interest when the parent and subsidiary: 1) operated out of the same plant; 2) occupied complimenting roles in product distribution (one manufactured, and one primarily sold the products); and 3) shared a common purpose. *Century Oil*, 737 F.2d at 1317. As the Ninth Circuit described--predicting *Copperweld*--the type of corporate relations not subject to antitrust regulations are those involving "single business unit[s] separated by the technicality of separate incorporation." *Thomsen v. Western Elec. Co., Inc.*, 680 F.2d 1263, 1266 (9th Cir. 1982) (citing *Knutson v. Daily Review Inc.*, 548 F.2d 795, 802-03 (9th Cir. 1976)). In that case, the Court found important that the corporations had common ownership and discretion and they did not compete with one another. *Thomsen*, 680 F.2d at 1266.

The Sixth Circuit has also recognized that the reason affiliated corporations or individuals are excluded from the scope of the antitrust laws is that agreements between them do not "coalesce economic power that was previously directed toward divergent goals." *Potters Med. Ctr. v. City Hosp. Ass'n*, 800 F.2d 568, 573 (6th Cir. 1986). In that case, the Court decided that even though two individuals had individually entered into contracts with an entity, their status as members of that entity's board of directors and agents of the entity exempted them from antitrust liability. *Id.* In another decision, the Sixth Circuit found important that--even though two racetracks were owned by separate

corporations--the shareholders of those corporations were identical, and thus, the two corporations had a "common economic identity." *Guzowski v. Hartman*, 969 F.2d 211, 214 (6th Cir. 1992).

As was aptly stated by the District Court for the District of New Jersey, "a court must [] determine whether the parent and subsidiary are inextricably intertwined in the same corporate mission, are bound by the same interests which are affected by the same occurrences, and exist to accomplish essentially the same objectives." *Coast Cities Truck Sales, Inc. v. Navistar Int'l Transp. Co.*, 912 F. Supp. 747, 765 (D. N.J. 1995). In that case, the court found important that: 1) the parent owned at least 70% of the voting shares of stock at all times; 2) the parent relied on the subsidiary for marketing and distribution functions; and 3) the parent and subsidiary were cooperating to promote a product, albeit in different geographical reaches. *Id.* at 765-66. This was so notwithstanding the fact that the subsidiary--if successful--was given the option to purchase the parent's shares and it was governed by a different board of directors, which only reported to the parent's. *Id.*

In this case, insofar as the companies that were parties to the PIA agency agreement are concerned, the evidence clearly established that there was a unity of interest between them. First, Erie Insurance P&C, as the organizational chart on page 13 clearly demonstrates, is a wholly-owned subsidiary of Erie Indemnity Company. As that same chart further demonstrates, Erie Indemnity and the Erie Exchange together own more than seventy-five percent of Erie Family Life. Given that Erie Indemnity is the attorney-in-fact for the Erie Exchange and that all of these companies, Erie Exchange, Erie Family Life, and Erie Insurance P & C were managed by employees of Erie Indemnity, they all acted with a single corporate consciousness. Indeed, insofar as is relevant here, the Erie Insurance Group's West Virginia operations were managed by the same individuals: Mike Fletcher

and Carl Olian. Mike Fletcher and Carl Olian were responsible for operations involving not just life insurance, not just automobile insurance, not for any one specific Erie product, but for all Erie products marketed by all members of the Erie Insurance Group within their region of responsibility in West Virginia.<sup>67</sup>

To suggest that there was not a unity of purpose and a common goal among Erie Insurance P & C and Erie Family Life in the face of this is to deny the obvious. Their corporate outlook and goals "are common, not disparate" and "their general corporate actions are guided or determined not by [] separate corporate consciousnesses, but one." *Copperweld*, 467 U.S. at 752. To conclude otherwise would be to conclude that Mike Fletcher, acting for Erie Insurance P & C, conspired with Mike Fletcher, acting for Erie Family Life when he reached the decision to terminate their agency relationship with PIA. Such a holding places form over substance and stands the rationale underlying the *Copperweld* decision on its head. Even if the conspiracy for antitrust purposes were alleged to be between Mike Fletcher and Carl Olian, it would still fail, since both are employees of the same company, Erie Indemnity. *See Gray*, 179 W. Va. at 286, 367 S.E.2d at 755.

Unfortunately, that is precisely what the Trial Court did when it concluded that the because Erie Family Life was not wholly owned by Erie Indemnity and/or the Erie Exchange, Erie Family Life could conspire with Erie Insurance P & C for antitrust purposes. The mechanical analysis employed to reach this result was clearly erroneous. The analysis that should have been applied was that employed by the United States Court of Appeals for the Fifth Circuit in its decision in *Century Oil*. In that case, the ownership of two companies was split between three individuals, two of whom owned 30% of each company,

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<sup>67</sup> T.T. 227.

and one of whom owned 40% of each company.<sup>68</sup> No single one of the three owners could control either company, because each owned a minority of the stock. Nevertheless, the Fifth Circuit found that the companies had a unity of interest because they had common ownership. That common ownership and the unitary interest and goals of those owners in terms of the conduct of the two companies involved demonstrated a common purpose.

The present situation differs only slightly. As noted, Erie Indemnity and the Erie Exchange together own more than seventy-five percent of the stock of Erie Family Life. Erie Family Life, like the other subsidiary companies of Erie Indemnity, has no employees. Rather, it is managed and controlled on a day-to-day basis by employees of Erie Indemnity. Those employees also manage Erie Insurance P & C. As such, Erie Family Life and Erie P&C necessarily have interests and goals that are unitary in nature with one another. Moreover, given their common management, they have a single corporate consciousness, not separate ones. In sum, control is what matters for purposes of *Copperweld*. That there is not total and complete uniformity in the ownership structure of the two entities in question is irrelevant. Where there is common control there is no basis under *Copperweld* for a finding of the requisite separateness necessary to establish an antitrust claim.<sup>69</sup>

**3. The members of the Erie Insurance Group do not compete with one another.**

In looking at whether entities are capable of conspiring or engaging in concerted action in violation of the Antitrust Act, courts look not only to whether those entities are

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<sup>68</sup> *Century Oil*, 737 F.2d at 1317. The court relied on other factors to then conclude that the two companies had a unity of interest, but important for the present discussion is the fact that the first step in the court's analysis was to conclude that the companies could have a unity of interest as a result of common ownership.

<sup>69</sup> This conclusion is in no way altered if the two members of the Erie Insurance Group who write in Virginia but not West Virginia are included in this analysis. Erie Insurance and the Erie Exchange each are managed and controlled by Erie Indemnity. They are no more capable of "conspiring" with the other members of the Erie Insurance Group than are Erie Insurance P & C and Erie Family Life.

independent economic actors but also to whether they are, in fact in competition with one another. *See, e.g., Copperweld*, 467 U.S. at 752. If they are, even if there is common ownership, those entities may be found capable of conspiring or engaging in concerted activity in violation of the antitrust laws. Here, as discussed above and as illustrated in the graph below, the members of the Erie Insurance Group named in this case clearly are not in competition with one another in terms of the products offered or their geographic markets:<sup>70</sup>

<b>Company</b>	<b>Product</b>	<b>Market for Covered Lines of Insurance</b>
Erie Indemnity Company	None	None
Erie Insurance P&C	Private Passenger Auto, Commercial Auto, Homeowner's, Commercial General Liability	West Virginia
Erie Insurance Company	Private Passenger Auto, Commercial Auto, Homeowner's, Commercial General Liability <b>(all standard tier only)</b>	Virginia
Erie Insurance Exchange	Private Passenger Auto, Commercial Auto, Homeowner's, Commercial General Liability <b>(all preferred tier only)</b>	Virginia
Erie Family Life Insurance	Life Insurance	West Virginia and Virginia

Erie Family Life clearly competes with no other member of the Erie Insurance Group involved in this case with respect to life insurance products, either in West Virginia or Virginia. Simply put, no entity other than Erie Family Life offers life insurance products. Erie Insurance P&C clearly does not compete with Erie Insurance or the Erie Exchange, and they do not compete with it. Erie Insurance P&C offers the lines of insurance listed above

<sup>70</sup> See T.T. 221 ff., Plaintiffs' Exhibit 7.

only in West Virginia. Erie Insurance and the Erie Exchange market those lines to customers in Virginia, not West Virginia. Finally with respect to the operations of the Erie Exchange and Erie Insurance in Virginia, to the extent relevant here, they market to different segments or tiers of customers within that state and, as such, do not compete for customers between one another.<sup>71</sup>

Thus, for purposes of this case, since these companies do not compete, they could very well have been organized under one corporate umbrella with each operating a division rather than a subsidiary company--a structure specifically discussed by the Supreme Court in its *Copperweld* decision. *Copperweld*, 467 U.S. at 772, 774. That they did not organize in that manner does not create separate economic units capable of conspiring with one another for antitrust purposes. The failure of the Trial Court was, again, a failure to recognize that it is not the form of the ownership and structure of the entities involved but their functional relationship and whether, as a consequence of that functional relationship, they are capable of conspiring for antitrust purposes. Here, the evidence is clear that the members of the Erie Insurance Group were not and, as such, they were incapable of acting in a concerted fashion in violation of the Antitrust Act. As such, the Erie Insurance Group could not be held liable for violations of the Antitrust Act, as it could not have engaged in concerted action.

#### **4. The Erie companies did not conspire with PIA or Kevin Webb.**

In an effort to salvage its antitrust claims in the face of the dictates of *Copperweld*, PIA argued in the alternative that the Erie Insurance Group could be found liable to it for

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<sup>71</sup> Even though PIA attempted to argue that there was competition between Erie Insurance Exchange and Erie Insurance Company, its only assertion was that the agents had discretion to write certain policies within those governed by the Erie Insurance Company or the Exchange. TT. 224. PIA never disputed that the Exchange and Erie Insurance Company market to different types of customers and hold themselves out as specializing in different tiers of policies.

terminating its agency relationship as a consequence of having conspired with PIA or Kevin Webb. The United States Supreme Court in *Perma Life Mufflers, Inc. v. Int'l Parts Group*, 392 U.S. 134 (1968), *overruled in part by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) permitted antitrust claims to proceed even though it was alleged that plaintiff himself acquiesced in the antitrust conspiracy. However, in order to proceed on such a basis, the Court requires a showing by the plaintiff that there was a "a meeting of the minds" or "a common scheme" between the plaintiff and the defendants. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). As the Court went on to note, this requires more than "than a showing that the [plaintiff] conformed. . . . It means . . . that evidence must be presented both that the [plaintiff] communicated its **acquiescence or agreement**" to the proposed anticompetitive scheme. *Id.* at 765 (emphasis added).<sup>72</sup>

There was no such showing in this case. Certainly there was no showing that either PIA or Mr. Webb acquiesced or agreed to the termination of their agency agreements. To have asserted otherwise at trial would clearly have been folly. In order to get around this hurdle, PIA argued that the request by the Erie Insurance Group for information regarding policies steered to its competitors through PI Associates was a separate antitrust violation and it was this violation that served as the under-pinning for PIA's alternative antitrust claim.<sup>73</sup> Yet, it was undisputed that PIA, far from acceding to this request for information, rejected it.<sup>74</sup>

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<sup>72</sup> See also, *Parkway Gallery Furn., Inc. v. Kittinger/Pa. House Group, Inc.*, 878 F.2d 801, 805 (4th Cir. 1989) (applying the *Monsanto* standard in non-price fixing cases).

<sup>73</sup> See, e.g., T.T. 156 (opening statement) ("These Defendants . . . asked [PIA] to produce confidential documents . . . [t]hat my clients could not lawfully produce."); T.T. 206 (testimony of Kevin Webb) ("Basically . . . I would not produce information to Erie that they were demanding me that was quite frankly illegal for me to produce.). PIA alleged that it would violate privacy laws if it released this confidential information, a claim that the jury rejected at the conclusion of the evidence.

<sup>74</sup> See, e.g., T.T. 283-84.

All that was supplied to the Erie Insurance Group, according to Kevin Webb, were production numbers relating to the business written other than through PI Associates, information that he acknowledged was perfectly appropriate to share.<sup>75</sup> PIA's only other witnesses to testify to this issue agreed: it would have been a business decision on PIA's part whether it provided production numbers to the Erie Insurance Group, but there was nothing inherently wrong or illegal about doing so.<sup>76</sup>

The difference between what was alleged would be shown and what was actually shown is critical. During briefing on summary judgment and during opening statements, PIA and Mr. Webb asserted that they would show that Kevin Webb had "acquiesced" in some sort of plan on the part of the Erie Insurance Group to "steal" policyholders from one of its competitors.<sup>77</sup> In reality, the only thing he gave the Erie Insurance Group was a single number, written on a napkin, reflecting the number of policies PIA wrote for one of the Erie Insurance Group's competitors: not confidential information; not names of policyholders; not even a report containing researched numbers.<sup>78</sup> In fact, the information supplied to the Erie Insurance Group by Mr. Webb was exactly the same type of information he provided to other insurers for whom PIA wrote.<sup>79</sup> There simply is no basis in the record, therefore, to conclude that Mr. Webb agreed to participate in any antitrust scheme under *Perma Life*. Moreover, there is absolutely no evidence that this alleged antitrust scheme, even if proven, served to restrain trade in West Virginia in any way whatsoever. As such, the judgment

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<sup>75</sup> See, e.g., T.T. 432.

<sup>76</sup> See, e.g., T.T. 603-04, 615; T.T. 635-36, 42.

<sup>77</sup> See, e.g., T.T. 156 (opening statement) ("These Defendants . . . asked [PIA] to produce confidential documents . . . [t]hat my clients could not lawfully produce.").

<sup>78</sup> T.T. 287.

<sup>79</sup> T.T. 438 ("Q. In fact you provided Erie production numbers to State Auto, didn't you? A. I did.")

against the Erie Insurance Group and in favor of PIA cannot be sustained based upon this alternative theory of liability under the Antitrust Act and must be reversed.

**C. Absent Proof of Anti-Competitive Damages, No Violation of the Antitrust Laws Can Be Established.**

The West Virginia Antitrust Act, insofar as relevant here, prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in this State." W. VA. CODE § 47-18-3 (2008). The Act is not designed to deter all evils known to modern commercial life. It is, instead, designed to deter one specific evil—namely anti-competitive, conspiratorial *economic* behavior. *Gray v. Marshall County Bd. of Educ.*, 179 W.Va. 282, 288, 367 S.E.2d 751, 757 (1988) (emphasis in original). Thus, absent evidence that the conduct in question caused harm to competition, that conduct cannot be deemed to have violated the provisions of that Act.

Federal courts interpret the Sherman Antitrust Act, after which our state act is patterned, in a similar manner. Beginning with its earliest decisions interpreting that enactment, the Supreme Court recognized that the Sherman Act was intended to prohibit "**only** unreasonable restraints of trade." *Bus. Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 723 (1988) (emphasis added). Consistent with this, the United States Court of Appeals for the Tenth Circuit observed in *Tal v. Hogan*, 453 F.3d 1244 (10th Cir. 2006), "the primary concern of the antitrust laws is the corruption of the competitive process, not the success or failure of a particular firm." *Id.* at 1258. Stated somewhat differently, "because antitrust law aims to protect competition, not competitors, a court must analyze the antitrust injury question from the viewpoint of the **consumer**. An antitrust plaintiff must prove that the challenged conduct affected the prices, quantity or quality of goods or

services, not just his own welfare." *Matthews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 641 (3d Cir. 1996) (emphasis in original).

Here, PIA and Mr. Webb offered no proof whatsoever that the cancellation of their agency agreements affected either the price consumers paid for insurance or the availability of that insurance. In their zeal to manufacture an antitrust claim, PIA and Mr. Webb argued instead that the decision of the Erie Insurance Group to cancel their respective agency agreements constituted an unlawful refusal to deal or boycott and was, as a consequence, a *per se* antitrust violation. Yet this is **not** a typical "refusal to deal" case under antitrust law. As was discussed above, at best, PIA has demonstrated that one economic actor made a business decision to terminate its relationship with PIA. There simply is no basis to find concerted action by competitors that affected competition. The Supreme Court, in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), has made clear that the concept of a group boycott or refusal to deal should not be expanded lightly, particularly where the impact on competition is far from clear. *Id.* at 458-59.<sup>80</sup> Here, the impact on competition is not simply unclear; it is nonexistent.

Moreover, as the United States Supreme Court itself has recognized, there is nothing inherently anticompetitive about a refusal to deal. Thus, even if it is accompanied by ill-will, unless that refusal to deal is shown to have an anticompetitive effect, there can be no resulting antitrust violation. Specifically, in *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128

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<sup>80</sup> *Id.* at 458-59 ("[T]he category of restraints classed as group boycotts is not to be expanded indiscriminately, and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor . . ." and the Court has been slow to "extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious."); *see also*, *Retina Assocs., P.A. v. So. Baptist Hosp. of Florida, Inc.*, 105 F.3d 1376, 1381 (11th Cir.1997) ("[T]he recent jurisprudence of the Supreme Court . . . cautions against the haphazard expansion of the group boycott label and the concomitant imposition of *per se* liability."); *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1412 (9th Cir. 1991) (noting that the *per se* rule should only be invoked "when the challenged activity would almost always tend to be predominantly anticompetitive.").

(1998), the Court held that the rule that group boycotts are *per se* illegal did not apply to a buyer's decision to purchase from a competitor, even if the decision was not justified by ordinary competitive practices. *Id.* at 138-39. There, the plaintiff alleged that, in order to defraud consumers of telephone services and regulators, a telephone service provider agreed to buy services from the plaintiff's competitors. *Id.* at 131-32. The plaintiff further alleged that its competitor stood to receive larger fees, which the defendant could pass on to consumers, and that the result of this arrangement was that the plaintiff lost revenues and was forced out of business. *Id.* at 132.

The Supreme Court first discussed the Sherman Act's prohibition against "[e]very" agreement in "restraint of trade." In the course of that discussion, it observed that the Act only precludes agreements that unreasonably restrain trade--that is, those that adversely affect competition in an unreasonable manner. *Id.* at 133. The question in *NYNEX* was whether, when a buyer chooses not to do business with the plaintiff, much as the Erie Group chose not to continue doing business with PIA and Mr. Webb, that decision had the requisite adverse impact on competition to give rise to an antitrust claim.<sup>81</sup> *Id.*

The Supreme Court held that it did not. As such, before a violation of the Sherman Act could be said to exist, it had to be proven that the decision not to deal with the plaintiff caused anticompetitive harm, "**not just to plaintiff, but to the competitive process, i.e., to competition itself.**" *Id.* at 135 (emphasis added). The reason for that is self-evident. The purpose of the antitrust laws is to protect competition. As such, there simply

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<sup>81</sup> PIA and Mr. Webb will undoubtedly argue that the *NYNEX* decision is inapplicable here because it involved a single business entity and, as such, there could be no conspiracy for antitrust purposes. As is discussed in greater detail at beginning at page 31 *infra*, however, the question of whether there is, in fact, a single or multiple corporate entities involved turns on the unity of purpose between the named defendants and the central nature of the corporate control over their activities. Here, the Erie Insurance Group clearly acted with a unity of purpose and the decision-making authority was centrally controlled. As such, the rationale of the *NYNEX* decision and its insistence that there be proof of anti-competitive impact before an antitrust claim can be made out is apposite.

is no reason to extend the reach of antitrust laws to situations where no anticompetitive harm is proven. *Id.* at 137.

In its *NYNEX* decision, the Court forecast precisely the type of claim PIA and Mr. Webb advanced below. They sought to impose liability on the Erie Insurance Group by attempting to characterize its decision to terminate its business relationship with them within the rubric of a *per se* violation of the antitrust laws. By so doing, they hoped to avoid having to show that the cancellation of that relationship had an adverse impact on the market for insurance, evidence that they knew was non-existent. In order to mask this lack of proof, moreover, PIA and Mr. Webb attempted to characterize the motives behind the decision to cancel the agency agreements in evocative terms.

Yet, the Supreme Court in its *NYNEX* decision found similar efforts unpersuasive. Bad motives do not convert a claim in which there is no injury to competition into a cause of action cognizable under the antitrust laws. *Id.* at 137. As the Court observed elsewhere, "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).<sup>82</sup> Unfortunately, the Trial Court failed to recognize that fact in this case.

The similarities between the claims made in *NYNEX* and those advanced here are clear: as in *NYNEX*, PIA and Mr. Webb offered no proof of damage to competition as a result of the cancellation of their agency agreements. Instead, they argued only that that cancellation caused harm to them and their business. Yet, as is clear from the foregoing, it

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<sup>82</sup> See also, Louis Altman & Maria Pollack, *1 Callman on Unfair Comp., Tr., & Mono.* § 4:48 (4th ed. West 2008) ("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. 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.").

is harm to **competition**, not to the business of PIA and Mr. Webb that is at the heart of any valid antitrust claim. Likewise, the impact of holding the conduct here illegal under the antitrust laws would be similar to that forecast in the *NYNEX* decision. Parties will remain in inefficient business relationships for fear that their conduct will result in trebled damages. In this case, that would not be a fear borne just by insurers. Agents or any other businesses that elect to sever a contractual relationship and thereafter transact the same business with another, if the decision below is sustained, will subject themselves to potential antitrust claims.

The freedom that one party has to choose for itself whether to continue in a relationship cannot be overstated, and no court has ever attached treble damages to such freedom in the manner the Trial Court did in this case. *See e.g., Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F.2d 283, 286 (6th Cir. 1963) ("A manufacturer has a right to select its customers and to refuse to sell its goods to anyone, for reasons sufficient to itself."); *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 F. 46 (2d Cir. 1915) (noting the "liberty to refuse business relations with any person whomever, whether the refusal rests upon reason or is attributable to whim, caprice, prejudice, or malice."). No antitrust liability attaches to that decision merely based upon the motives of the actor. *See also, Marder v. Conwed Corp.*, 378 F. Supp. 109, 111 (E.D. Pa. 1974) (holding that the decision to terminate a relationship "changed the identity of a competitor, but did not eliminate competition" and thus did not violate the Sherman Act).

The West Virginia Antitrust Act is intended to protect competition, not competitors. Here, PIA and Mr. Webb alleged that the cancellation of their agency agreements by Erie Insurance violated that Act. Yet, during the course of the trial below, they offered not a scintilla of evidence that the cancellation of those agreements caused any anticompetitive

harm whatsoever. Absent such evidence, they cannot and did not sustain their burden below and, accordingly, the judgment entered against the Erie Insurance Group for violation of the Antitrust Act should be reversed.

**D. Even if PIA and Kevin Webb Alleged and Proved Sufficient Conduct to Maintain an Antitrust Claim, This Court has Specifically Precluded the Damages Claimed.**

Under antitrust law, a plaintiff is entitled to recover only what are referred to as "antitrust damages"--damages flowing from an injury of the type the antitrust laws were intended to prevent. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* 429 U.S. 477 (1977). In order to recover damages, therefore, "it is not enough for a plaintiff to claim economic injury." *Valley Prods. Co. v. Landmark*, 128 F.3d 398 (6th Cir. 1997). Rather, it must show economic injury flowing from a restraint on trade occasioned by the offending conduct of the defendant. *Id.* at 402 (citing *Brunswick Corp.*, 429 U.S. at 489).

PIA did not and could not show that the damages it claimed (loss of commissions due to the termination of their agency agreement) flowed from any restraint of trade in West Virginia. There was no evidence that any consumer of insurance saw his or her ability to procure insurance diminished or that the price of that insurance increased as a consequence of the termination of that agency agreement. Simply put, PIA failed to prove any antitrust injury in this case.

Beyond this, the damages that it did claim and that were awarded were clearly improper, even outside the antitrust context. Syllabus Point 2 in the *Shrewsbury* decision discussed above clearly states that: "An insurance agent is not a party to an insurance contract; he is but an incidental beneficiary to the contract between insured and insurance company, and therefore his right to commissions is solely a matter of contract between the insurance agent and his principal, the insurance company." *Shrewsbury*, Syl. Pt. 2, 183

W.Va. at 323, 395 S.E.2d at 746. In other words, "[c]ommissions . . . accrue only when a policy is written or renewed, and are not the inherent property of the agent." *Id.* at 327, 395 S.E.2d at 750.

Given this, PIA should not have been allowed to claim as damages any commissions after the last Erie policy written through that agency had been replaced by other carriers or placed with Erie pursuant to state law, even if those commissions were somehow considered antitrust damages. Neither PIA nor Mr. Webb had any right to those commissions. As the Court stated in *Shrewsbury*, PIA knew the expiration dates of the policies it placed with the Erie Insurance Group and, therefore, knew when they would not be renewed. *Id.* at 327, 395 S.E.2d at 750. At that point, PIA had the right to contact its policyholders and attempt to place them with any of the various other insurers it continued to represent. Only if the policyholder expressed a desire to remain with the Erie Insurance Group would the business be lost to PIA. At that point in time, however, PIA would have had an equal or greater opportunity to compete for that business when compared to other agents in the field. That PIA, despite that opportunity, might not have been capable of retaining the business, however, does not give rise to a claim for antitrust damages. Simply put, PIA cannot complain about commissions that it might have earned, whether two, ten or twenty years in the future when it had the right and ability to contact policyholders and compete for that business.

#### CONCLUSION

The Circuit Court's decision to permit this case to proceed to trial in the absence of any sort of allegations of anticompetitive conduct cannot be justified. There can be no dispute: the purpose of the present action was nothing more than to compensate PIA and Kevin Webb for lost profits when the Erie Companies exercised their contractual right to

terminate their relationship. In other words, PIA and Kevin Webb seek only to protect individual competitors, not competition--a goal that the Antitrust Act simply does not protect. For those reasons as well as those set forth above, the Erie Insurance Group respectfully requests that the Court reverse the judgment of the Circuit Court of Mercer County.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the within and foregoing  
***Appellants' Brief*** upon all parties to this matter by first class mail to the following:

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This 25<sup>th</sup> day of November, 2008.

Dinsmore & Shohl

By: 

W. Henry Jernigan, Jr.