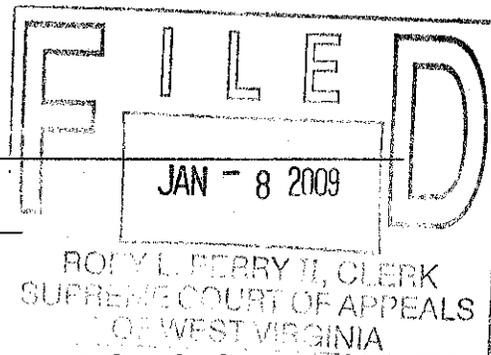


NO. 34498



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' REPLY BRIEF

COUNSEL FOR APPELLANTS:

LAMP, O'DELL, BARTRAM, LEVY
& TRAUTWEIN, P.L.L.C.
Of Counsel

James D. Lamp, Esq. (W.Va. Bar No. 2133)
Matthew J. Perry, Esq. (W.Va. Bar No. 8589)
1108 Third Avenue, Suite 700
Post Office Box 2488
Huntington, West Virginia 25725

DINSMORE & SHOHL LLP
Of Counsel

W. Henry Jernigan, Jr., Esq. (W.Va. Bar No. 1884)
Jacob A. Manning, Esq. (W.Va. Bar No. 9694)
Huntington Square
900 Lee Street, Suite 600
Post Office Box 11887
Charleston, West Virginia 25339

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INTRODUCTION

The Response Brief of the Princeton Insurance Agency and Kevin Webb¹ makes quite clear that their concern is over protecting their own competitive position and not the elimination of anticompetitive behavior. They seek to hold Erie Insurance Group liable for treble damages under the West Virginia Antitrust Act for nothing more than exercising its contractual right² to terminate what it deemed to be unfavorable independent agency relationships with PIA and Webb. Yet, the law is abundantly clear: the antitrust laws, both federal and state, are not designed to protect competitors. Rather, they exist to protect consumers from the consequences of anticompetitive behavior, whether in the form of artificially inflated prices for goods and services or an equally artificial reduction in the availability of those goods and services. *Gray v. Marshall County Bd. of Educ.*, 179 W.Va. 282, 288, 367 S.E.2d 751, 757 (1988). It is precisely because of the fact that there is a complete absence of any evidence that the decision by Erie Insurance Group to terminate its agency agreements with PIA and Webb had any anticompetitive impact that each of arguments now advanced by PIA and Webb fails.

For example, their assertion that the West Virginia Antitrust Act somehow granted the lower court subject matter jurisdiction to consider the alleged antitrust implications of the termination of certain agreements entered into between Webb and certain companies of Erie Insurance Group **in Virginia**, fails to acknowledge the fact that the West Virginia Antitrust Act, by its own terms, is intended to protect consumers **in West Virginia** from artificial restrictions in terms of their choices for goods and services **in West Virginia**. It

¹ Hereinafter "PIA and Webb."

² There was no dispute below and can be none here that, under the terms of its agency agreements with PIA and Webb Erie Insurance Group was permitted to cancel the agreements, upon ninety days' notice. As such, this is not and never has been a breach of contract action.

does not and cannot regulate, consistent with the limitations of the Commerce Clause of the United States Constitution, all commercial activities outside our State's borders.

The proper disposition of this case ultimately turns on a proper understanding and application of not only the express terms of our Antitrust Act but the policies and principles underlying that Act. As the courts have long recognized, the antitrust laws are not designed to remedy all perceived wrongs associated with commerce. *Gray v. Marshall County Bd. of Educ.*, 179 W.Va. 282, 288, 367 S.E.2d 751, 757 (1988). Rather, they are intended to address specific activities that have been deemed antithetical to the interest of free and fair competition. They are not designed to provide an alternative remedy in cases where contractual relationships are terminated and no breach of contract claim arises out of that termination. Loud protestations about "misconduct" and "cooking numbers" and the like, whether true or, as in this case, untrue, cannot change that fundamental fact. PIA and Mr. Webb have lost sight of that. Yet it is that fundamental fact that must control.

When properly applied, the Antitrust Act provides strong protection against anti-competitive behavior and the harms that such behavior can inflict upon the consuming public. When, however, that Act is improperly applied, as here, to protect a competitor rather than competition, the very interests that the Act is designed to advance, those of the consuming public, are placed at risk. Inefficient or non-productive competitors are shielded from the natural consequences of their own inefficiency and lack of productivity with the result that consumers of their goods and services are forced to pay higher prices or see their choices artificially restricted.³ It is for this reason that the judgment of the lower court should be reversed.

³ In the context of this case, as the *amicus* brief of the West Virginia Insurance Federation filed in support of the Petition points out, if insurers who enter into contracts with independent agents throughout the state cannot, consistent with the terms of those contracts, terminate those contracts in appropriate

COUNTER-STATEMENT OF FACTS

PIA and Webb spend considerable time in their Brief denigrating the Erie Insurance Group and what they claim were and are its business practices, both in terms of its dealings with them as independent agents as well as with Erie's insureds. In its opening brief, the Erie Insurance Group set forth in detail, with extensive record cites, the relevant facts insofar as they relate to the antitrust claims at issue in this case. As such, the Erie Insurance Group does not propose to now go through and correct each and every misstatement of those facts as now put forth by PIA and Webb. Time simply does not permit that and the record below speaks for itself.⁴

That said, however, the Erie Insurance Group cannot let stand un rebutted one of the most egregious mischaracterizations of those facts advanced by PIA and Webb: the implication that the Erie Insurance Group inappropriately and illegally raised the rates of

situations without exposing themselves to claims of antitrust violations, independent agents may well find themselves with fewer carriers willing to do business through the independent agency model. That, in turn, will limit the options available to consumers of insurance. That result is completely at odds with the purpose underlying the Antitrust Act and serves to highlight its inapplicability to this case.

⁴ PIA and Webb accuse the Erie Insurance Group of manipulating reserves to show a higher loss ratio for PIA (Appellees' Br. at 12) when the testimony below was that reserves for losses in prior years were included in the loss ratio calculation. T.T. 318-21, 341-45. There was no evidence that reserves were manipulated, however. PIA and Webb also suggest that it was significant that "all of the Erie insurance policies were written through PIA and its offices" as if that that fact is somehow significant for antitrust purposes. Appellees' Br. at 24. The policies issued to Virginia residents could not legally have been written through PIA since PIA was not licensed as an agent in Virginia. Thus, Erie business in Virginia could only have been placed through Mr. Webb as the principal agent licensed in Virginia. PIA and Webb at page 10 of their brief, further castigate the Erie Insurance Group for doing no more than complying with West Virginia law when Erie kept certain policies that had reached the 2- and 4-year statutory "lock-in" periods and non-renewed other policies in accordance with the agency agreements. In fact, the non-renewals were for the benefit of PIA. Upon non-renewal, policyholders were free to rewrite their coverage with other insurers represented by PIA. And, finally, for purposes of illustration, PIA and Webb tout the fact that 2002 was the agency's best year in terms of production numbers. Appellees' Br. at 5. As set out in the Erie Insurance Group's petition in this matter, while those production numbers may have been better when compared with prior years, they were still poor. Indeed, if that were not the case and if PIA was such a well run and profitable agency, that begs the question as to why the Erie Insurance Group would have ever wanted to terminate its contractual relationship with PIA. The fact of the matter is that it was a poor performing agency as the evidence below reflects, and one in which Erie Insurance Group had lost confidence. Regardless of how PIA and Webb attempt to twist the record evidence in this case, however, the Erie Insurance Group did no more than exercise its right to terminate a contractual relationship that it did not desire to maintain. That is not a violation of the West Virginia Antitrust Act, however portrayed.

its insureds during the policy periods through its AWARE reunderwriting program.⁵ That is simply not true. Anyone even casually familiar with how insurance rates are set knows that those rates are established by the West Virginia Department of Insurance and cannot be arbitrarily raised by an insurer licensed to write coverage in this State.

What did occur and what the record below establishes is that, in certain instances, policies of insurance were reunderwritten, sometimes at renewal and sometimes during the policy period. The AWARE program ("Agents Writing And Reunderwriting Excellence") was an underwriting program designed to ensure that risks were properly classified and insured. This simply means that homeowners policies, to take one example, insuring homes to which additions had been made or personal property that had increased in value were reunderwritten to reflect the added value of those additions. In those instances where those additions resulted in a significant increase in the value of the insured's property, the premiums for the insurance covering that property were adjusted accordingly. That is simply sound underwriting practice designed, if nothing else, to make sure that the insured does not find himself underinsured in the event of a covered loss. It is not, as PIA and Webb now argue, a mechanism that increased the risk to the insured in order to generate greater premium volume.

There is absolutely nothing nefarious about that process, PIA and Webb's assertions to the contrary notwithstanding. If there were, one would expect policyholders as well as independent agents to have complained vociferously to the West Virginia Insurance Commissioner. The record in this case is devoid of any evidence of such complaints, however, a fact that PIA and Webb are well aware of.

⁵ Appellees' Br. at 11, 34.

The efforts of PIA and Webb to twist the evidence below is a reflection of nothing so much as the fact that they are now painfully aware that they cannot prevail on their antitrust claims under the applicable law. The only way they can possibly hope to salvage their case then is to attempt to portray the Erie Insurance Group in the worst possible light in hopes of diverting the Court's attention away from the dictates of that law. Yet, even if this Court were to accept virtually every mischaracterization of the facts below as advanced by PIA and Webb, they would not sustain a cause of action under the West Virginia Antitrust Act. The reason is quite simple, the antitrust laws are not designed to remedy every perceived wrong arising out of commercial transactions. They are only designed to prohibit conduct that inhibits competition to the detriment of the consuming public. *Gray v. Marshall County Bd. of Educ.*, 179 W. Va. 282, 267 S.E.2d 751 (1988). Evidence that might establish that is simply not present in this case.

DISCUSSION OF LAW

I. Whether West Virginia Courts May Hear a Claim Under the Antitrust Act is a Question of Jurisdiction, not Choice of Law, and the Antitrust Act did not Provide Jurisdiction Over the Sale of Virginia Insurance Policies.

PIA and Webb seriously misconstrue the extent to which a state may stretch to reach commerce beyond its borders and, in so doing, badly confuse the concepts of subject matter jurisdiction and choice of laws. West Virginia's Antitrust Act--despite protestations to the contrary--has jurisdictional limits. By its very terms, it only reaches conspiracies that restrain trade or commerce *in this State*. Consistent with the terms of the Commerce Clause of the United States Constitution, it can do no more. Specifically, it cannot reach beyond the borders of our State so as to regulate trade or commerce elsewhere. In the context of this case, that means that the West Virginia Antitrust Act does not and cannot

address whether the termination of Webb's agency agreement in **Virginia**⁶ improperly restricted the availability choices of consumers of insurance in that state. That has nothing to do with choice of law principles.

A. The West Virginia Antitrust Act Extends Subject Matter Jurisdiction Only to Claims Involving Conspiracies in Restraint of Trade in This State.

- 1. No state may, consistent with federalism and comity, regulate commerce outside its own jurisdiction.**

The arguments advanced by PIA and Webb that West Virginia courts have subject matter jurisdiction over the termination of Webb's Virginia agency agreement reflect a clear misunderstanding of the nature of and limitations on subject matter jurisdiction. It is a fundamental principle of federalism that "[n]o State can legislate except with reference to its own jurisdiction." *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881). Indeed, the United States Supreme Court initially interpreted this principle to mean that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established." *Pennoyer v. Neff*, 95 U.S. 714 (1877). That is, "no State can exercise direct jurisdiction and authority over persons or property without its territory." *Id.*

Although the Court has since expanded the limit on subject matter jurisdiction beyond the geographical boundaries of the states, the principle remains: there is a limit on the extent to which one state may reach commerce in other states. In a 1914 case, in which the Missouri Supreme Court voided a contract that was valid under New York law (where

⁶ Erie Insurance Group does not dispute that the need for separate agency agreements in Virginia was primarily due to Virginia's insurance law. Here, there is no dispute that as between Webb and PIA, Webb was the sole licensed agent in that state. For purposes of subject matter jurisdiction as it relates to the antitrust claims asserted here, the question is whether the business being placed through Webb involved policies for Virginia consumers. It clearly did. Erie Insurance Group's reference to that portion of the business written in Virginia by agency agreement is simply a shorthand method of referencing the business covering insureds or insured property in Virginia.

the contract was formed) but invalid in Missouri, the United States Supreme Court reversed, explaining:

"[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York and there destroy freedom of contract without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. **This is so obviously the necessary result of the Constitution that it has rarely been called in question** and hence authorities directly dealing with it do not abound."

New York Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914) (emphasis added).

More recently, the Court has explained the same principle as it relates to the United States' regulation of foreign conduct. In *F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004), the Court refused to allow the Sherman Act to apply to a conspiracy to fix prices that took place outside the United States, even if the price-fixing also had an effect in the United States. It did so because the adverse foreign effect was independent of the domestic effect of the price fixing scheme, and the foreign effect was the sole basis for the injury at issue.⁷

Because the application of the Sherman Act to foreign conduct intruded on the affairs of sovereign nations, the Court concluded that the Sherman Act could only be applied to conduct occurring outside our national borders where it was being done "to redress **domestic** antitrust injury that foreign anticompetitive conduct has caused." *Id.* at 165 (emphasis in original). But the Court continued, "But why is it reasonable to apply

⁷ Importantly, as Erie Insurance Group has asked the Court to do in this case, the Court was considering whether only a portion of the claims brought should be dismissed. *F. Hoffmann-La Roche*, 542 U.S. at 159-60. In that case, the defendants had moved to dismiss claims by foreign purchasers of vitamins that the price-fixing agreement violated the Sherman Act, when there was no allegation that the foreign purchasers ever purchased vitamins in the United States. The defendants did not move to dismiss the claims of domestic purchasers who were allegedly harmed by the price-fixing agreement. *Id.*

those laws to foreign conduct **insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?"** *Id.* (emphasis in original). Stated more directly, "Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?" *Id.* at 165. The Court supplied its own response: "We can find no good answer to the question." *Id.* at 166.

Virtually every state court to examine its antitrust law has agreed with the reasoning applied in the *F. Hoffman-LaRoche* decision. State antitrust acts can only reach out-of-state conduct to the extent it has an impact within that state. For those laws to reach further would violate fundamental principles of federalism and interstate comity. *See e.g., Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671 (Tex. 2006) (holding that Texas courts had no subject matter jurisdiction over portions of a claim involving injury to other states' commerce); *Olstad v. Microsoft Corp.*, 700 N.W.2d 139, 284 Wis.2d 224 (2004) (limiting the reach of the Wisconsin Act to conduct or effect in Wisconsin, because to allow unlimited reach of the Act would "jeopardize the action, undermine the validity of [Wisconsin's] antitrust statute, and create the spectacle of Lilliputian harassment in Wisconsin courts"); *Freeman Indus. v. Eastman Chemical Co.*, 172 S.W.3d 512 (Tenn. 2005) (limiting the scope of the Tennessee statute to conduct occurring anywhere that had a substantial effect on Tennessee commerce); *Abbott Laboratories v. Durrett*, 746 So.2d 316 (Ala. 1999) (limiting the reach of the Alabama statute to intrastate conduct that affects consumers in Alabama).

Thus, in this case, before the West Virginia Antitrust Act can be said to reach the termination of the Virginia agreement authorizing Webb to write certain insurance on behalf of certain of the Erie companies licensed to issue policies of insurance in that state, there must have been evidence presented that that termination had an anticompetitive impact on consumers of such insurance in West Virginia. Not only was no such evidence offered, there could have been not such evidence presented.

The policies of insurance written by Webb as a licensed agent in Virginia necessarily covered insureds and insured property in that State. He could not, through the Erie Companies authorized to write business only in Virginia, as a matter of law, write coverage for insureds or insured property in West Virginia. To the extent, therefore, the termination of Webb's Virginia agency agreement affected consumers of insurance, it affected consumers of insurance in that State, not West Virginia. As such, the West Virginia Antitrust Act did not and could not, consistent with the concepts of federalism and interstate comity, regulate the circumstances under which those Virginia agency agreements were terminated.

Restricting state jurisdiction in this manner is simply a recognition that each state is uniquely situated to determine how its commerce is to be protected, while not infringing on another state's right to make that same determination. For example, in *Coca-Cola Co. v. Harmar Bottling Co.*, the Texas Supreme Court held that Texas's antitrust statute only applied to protect Texas consumers and Texas commerce. *Coca-Cola Co.*, 218 S.W.3d at 684. As the Court noted, "[f]or a court in one state to undertake to determine what would benefit competition and consumers in another state would pose a significant affront to the interstate comity sister states should accord each other in our federal system." *Id.* at 685. As the Alabama Attorney General noted, in an *amicus* brief submitted in support of

restricting jurisdiction in that case, the State of Alabama had already determined to what extent its statute would apply to conduct occurring in other states and "[i]n so doing, the Supreme Court of Alabama has implicitly expressed a substantial measure of respect for its sister States, their laws, and their citizens." Brief of *Amicus Curiae* the State of Alabama at ii, *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671 (Tex. 2006) (No. 03-0737).

2. Choice of law principles do not expand the subject matter jurisdiction of West Virginia Court under the Antitrust Act.

The question posed in this case with regard to subject matter jurisdiction is the limit of the West Virginia Antitrust Act and the Unfair Trade Practices Act with regard to the termination of an agency agreement to place insurance policies in Virginia. This does not, as PIA and Webb suggest, raise issues as to whether the Virginia Antitrust Act would reach the same conduct. Indeed, that question was never before the lower court because neither PIA nor Webb elected to bring their claims in this case under the Virginia Antitrust Act. They chose to sue solely on the basis of the West Virginia Antitrust Act.

Any discussion, therefore, as to whether the Virginia Antitrust Act would or would not have prohibited the conduct at issue here is simply an irrelevant diversion. The sole question is whether the West Virginia Antitrust Act conferred jurisdiction on the lower court to adjudicate claims relating to the Virginia agency agreement. As the foregoing authorities as well as the plain language of the Act itself make clear, it did not.

Equally irrelevant and inapposite are the arguments of PIA and Webb that the lower court properly applied "choice of law" principles in adjudicating the propriety of the termination of the Virginia agency agreements under the West Virginia Antitrust Act. This is not a choice of law question. Indeed, the lower court was never asked to choose between applying the West Virginia or Virginia antitrust acts. As such, the question of whether the

Circuit Court could have chosen to instruct the jury regarding Virginia antitrust law is simply a non-issue.

The sole question before it was whether the West Virginia Antitrust Act, limited as it is to restraints of trade "**in this State**" consistent with principles of federalism and comity, conferred upon courts jurisdiction to adjudicate the propriety of commercial activity occurring outside of our borders. Again, consistent with the foregoing authorities, it clearly did not and could not have so intended.

3. The limits on the amounts of claims below which the circuit courts may exercise subject matter jurisdiction do not extend such jurisdiction beyond our state's borders.

PIA's and Mr. Webb's only remaining argument with respect to the issue of jurisdiction appears to be that their claims involving the termination of Webb's Virginia agency contracts involve \$300 or more in damages. As such, the lower court had subject matter jurisdiction over those claims regardless of the express limitations on jurisdiction contained in the Antitrust Act and the limitations imposed on such jurisdiction under concepts of federalism and comity. This argument is nothing short of breath-taking and, if adopted, would set aside centuries of jurisprudence. It would literally grant state courts unlimited jurisdiction over commercial disputes, not just nationwide but worldwide as well.

To take a hypothetical, according to PIA's and Webb's construct of the proper limits of subject matter jurisdiction, a West Virginia court would have authority to hear a claim by an Alaskan distributor against a Russian seller of goods for the latter's refusal to deal with it instead of a Canadian distributor, even where the customers of the two distributors were only Alaskan residents. All that would be required of the Alaska distributor is that it establish that its claims were for in excess of \$300. And so long as personal jurisdiction

could be established over the defendant, according to PIA and Webb, the Alaska distributor could bring suit in our courts for this conduct.

Even more far fetched, under this construct, the Alaskan distributor could bring suit that suit under the West Virginia Antitrust Act and then leave it to our state courts to divine whether to allow the action to proceed on that basis or, instead to apply Alaskan, Russian, or Canadian law. West Virginia courts would, in essence, have subject matter jurisdiction, quite literally, to hear and pass upon the antitrust implications of commercial activity occurring anywhere in the world, regardless of whether that activity had any impact on consumers in West Virginia or not. Unfortunately from PIA's and Webb's perspective, that is clearly not the law. See, e.g., *F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004)⁸; *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671 (Tex. 2006); *Olstad v. Microsoft Corp.*, 700 N.W.2d 139, 284 Wis.2d 224 (2004); *Freeman Indus. v. Eastman Chemical Co.*, 172 S.W.3d 512 (Tenn. 2005). Indeed, no court has ever found such expansive subject matter jurisdiction to exist, either on the federal or state level.

4. The West Virginia Legislature properly exercised its authority in limiting the jurisdictional scope of the Antitrust Act.

Here, the West Virginia Antitrust Act and the Unfair Trade Practices Act limit the subject matter jurisdiction of West Virginia courts to claims falling within the scope of those Acts. That scope is restricted to claims involving conduct that impacts the consuming

⁸ Before the United States Supreme Court decision in *F. Hoffman-La Roche* was announced, commentators had already begun to criticize the Court of Appeals' holding that the Sherman Act could reach such conduct. *F. Hoffman-La Roche*, 542 U.S. at 166. One commentator's explanation of the ridiculous scope of jurisdiction that the Court of Appeals permitted could be applied equally convincingly to PIA's and Webb's arguments: "Effectively, the United States courts would provide worldwide subject matter jurisdiction to any foreign suitor wishing to sue its own local supplier, but unhappy with its own sovereign's provisions for private antitrust enforcement, provided that a different plaintiff had a cause of action against a different firm for injuries that were within U.S. [other-than-import] commerce. It does not seem excessively rigid to infer that Congress would not have intended that result." *Id.* (citing P. Areeda & H. Hovenkamp, *Antitrust Law* § 273, pp. 51-52 (Supp. 2003)).

public "in this State." W. VA. CODE §§ 33-11-3; 47-18-3 (2008). Conduct, such as the termination of Webb's Virginia agency agreement, that impacts consumers outside the state falls outside the purview of these statutes, and the courts have no subject matter jurisdiction to adjudicate those claims under those statutes.

This Court has previously found that the Legislature may properly exercise its power to limit subject matter jurisdiction to statutory causes of action. *See e.g., Motto v. CSX Transp., Inc.*, Syl. Pt. 3, 220 W. Va. 412, 647 S.E.2d 848 (2007) (holding that compliance with pre-suit notification provisions in certain suits against the Executive Branch are jurisdictional); *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1997) (finding that West Virginia Legislature had limited subject matter jurisdiction of West Virginia courts such that a nonresident employee could not sue a nonresident employer under West Virginia Deliberate Intention Statute); *Woodall v. IBEW, Local 596*, 192 W. Va. 673, 453 S.E.2d 656 (1994) (holding that the requirement that to be subject to the Human Rights Act, an employer must have twelve employees is jurisdictional--not an element of the *prima facie* case).

Application of those principles to this case leads to the same result: the Legislature has clearly stated that the Antitrust Act and the Unfair Trade Practices Act are limited to acts or an effect **in this State**. As a result, subject matter jurisdiction did not exist to adjudicate the claims arising out of the termination of Webb's Virginia agency agreement. Arguments over choice of laws and jurisdictional amounts do not alter that reality. Equally unavailing is PIA's and Webb's final argument: that the question of subject matter jurisdiction was either waived below or that Erie Insurance Group is judicially estopped from asserting lack of subject matter jurisdiction before this Court. W. VA. R. CIV. P. 12(h); *see also, Hinkle v. Bauer Lumber & Home Bldg. Ctr.*, Syl. Pt. 1, 158 W. Va. 492, 211 S.E.2d

705 (1975) ("**Whenever** it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket.") (emphasis added). The only remaining issue concerns the limit to be placed on the Antitrust and Unfair Trade Practices Acts, given that they are restricted to activities "in this State."

B. This Court Should Find that the Antitrust Act Regulates Conduct-- No Matter Where it Occurs--That has a Substantial Anticompetitive Effect in West Virginia.

Beyond criticizing the case law on which Erie Insurance Group relies, PIA and Webb have cited little in the way of authority to support application of the West Virginia Antitrust Act⁹ to the sale of Virginia insurance policies. Moreover, what they do cite is plainly inapplicable to this case.

For example, they criticize Erie Insurance Group for relying on Tennessee case law interpreting its antitrust act as requiring a "'substantial effect' on local commerce" standard without first comparing that statute with our own. Appellees' Brief at 19. That statement is inaccurate at best. First, asserting that Erie Insurance Group relied on only Tennessee's interpretation of its antitrust laws--as if Tennessee occupied an outlying position on the subject--completely misstates the status of the law around the country. Courts in California,¹⁰ Michigan,¹¹ Missouri,¹² Nebraska,¹³ New York,¹⁴ Tennessee,¹⁵ Texas,¹⁶ and

⁹ For ease of reference, throughout the remainder of this section, Erie Insurance Group refers mainly to the Antitrust Act, as opposed to both the Unfair Trade Practices Act and the Antitrust Act. However, since the two contain the same limiting language ("in this State"), and they are cited to apply to the same conduct, all references in this section to the Antitrust Act should also be construed to apply to the Unfair Trade Practices Act as well.

¹⁰ *Amarel v. Connell*, 202 Cal.App.3d 137, 248 Cal. Rptr. 276, 284 (1988) (construing "within this State" and allowing a state claim so long as anticompetitive conduct has a "direct, substantial, and reasonably foreseeable effect within the state.").

¹¹ *People's Savings Bank v. Stoddard*, 102 N.W.2d 777, 359 Mich. 297 (1960) (finding state court had jurisdiction over antitrust claim that had an "overwhelmingly local" effect).

¹² *C. Bennett Bldg. Supplies, Inc. v. Jenn Air Corp.*, 759 S.W.2d 883 (Mo. App. 1988) (construing statute which was inapplicable if the conduct affected foreign or interstate commerce).

Washington¹⁷ have each held that their Acts--the language of which differ in only minor respects--regulate conduct occurring outside their borders but only to the extent that that conduct has an anticompetitive effect within those borders. Far from being a radical departure from established antitrust jurisprudence, these decisions are in complete conformity with the decision in *F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004).¹⁸

To reiterate, the imposition of a limitation on the antitrust regulation of commercial conduct occurring beyond a state's borders to conduct that impacts consumers within its borders is not a principle that relies upon specific statutory language for its legitimacy. It is predicated upon fundamental concepts of federalism and comity that restrict the reach of an individual state's regulatory authority. Antitrust laws are passed to protect commerce. *See e.g.*, 21 Cong. Rec. 2456-57 (1890) (comments of Senator Sherman) (Sherman Act was proposed to "supplement the enforcement of the established rules of the common and statute law by the courts of the several states in dealing with combinations that affect injuriously the industrial liberty **of the citizens of these states.**") (emphasis added).

At the federal level, they are designed to protect against anticompetitive activities that cause our citizens to suffer antitrust damages within our national borders and have the same jurisdictional limitations, albeit for different jurisprudential reasons. *F. Hoffman-La*

¹³ *Health Consultants, Inc. v. Precision Instruments, Inc.*, 527 N.W.2d 526, 247 Neb. 267 (1995) (finding state statute, with language of "within this State," was not preempted by Sherman Act where conduct had an impact on local residents).

¹⁴ *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).

¹⁵ *Freeman Indus., LLC v. Eastman Chemical Co.*, 172 S.W.3d 512 (Tenn. 2005) (construing "into this State").

¹⁶ *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671 (Tex. 2007) (construing an antitrust statute that regulated "trade and commerce occurring wholly or partly within the State of Texas.").

¹⁷ *State v. Sterling Theatres Co.*, 394 P.2d 226, 64 Wash.2d 761 (1964) (finding state statute was not preempted by Sherman Act where state statute reached conduct that was of "local significance and impact").

¹⁸ *See* Discussion at pages 9-10 *supra*.

Roche Ltd. v. Empagran, S.A., 542 U.S. 155 (2004); see also, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) ("[T]he Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."); *Nat'l Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6, 8 (2d Cir. 1981) ("[W]e think the inquiry should be directed primarily toward whether the challenged restraint has, or is intended to have, any anticompetitive effect upon United States commerce, either commerce within the United States or export commerce from the United States) (citing *Areeda & Turner*, *Antitrust Law* §234b, at 255 (1978)). Indeed, the Foreign Trade Antitrust Improvements Act, which limited the extent to which the Sherman Act may apply to foreign commerce, recognized this very exception. 15 U.S.C. § 6a (2008) (allowing a Sherman Act claim for conduct that has a "direct, substantial and reasonably foreseeable effect" on domestic commerce.).

On the state level, the antitrust laws are designed to protect against anticompetitive activities that cause the citizens within that state's borders to suffer antitrust damages. *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671 (Tex. 2006); *Olstad v. Microsoft Corp.*, 700 N.W.2d 139, 284 Wis.2d 224 (2004); *Freeman Indus. v. Eastman Chemical Co.*, 172 S.W.3d 512 (Tenn. 2005). They are not and cannot, however, extend to alleged anticompetitive activities outside that state that do not cause its citizens to suffer antitrust injuries.

In arguing for more jurisdictional reach with respect to the West Virginia Antitrust Act, moreover, PIA and Webb consistently misconstrue the applicable law. For example, PIA and Webb argue by analogy that the Sherman Act reaches all activity "in commerce" or having an "effect on commerce" in the United States in an effort to persuade the Court to allow the West Virginia Act to be expanded to cover commercial activity beyond its borders.

In support of this proposition, they cite to the case of *McClain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980). While that case does state that the jurisdictional requirements of the Sherman Act are satisfied by either the "in commerce" theory or the "effect on commerce" theory,¹⁹ a careful reading of that decision reveals that this discussion refers to what conduct would be in **inter**state commerce (and thus covered by the Sherman Act) or **intra**state commerce (and thus covered by state acts). "In commerce" and "effect on commerce" quite clearly refer to the tests that the Court has created to make that determination: commerce is interstate if it actually takes place across state lines or even if it takes place entirely within a state and it nevertheless affects interstate commerce. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

Thus, the assertion of PIA and Webb to the contrary notwithstanding, the *McClain* decision has nothing whatsoever to do with the reach of the Sherman Act beyond the United States' borders. Were it to have done so, and done so in the manner PIA and Webb suggest, it would have clearly been overruled by the Supreme Court's later decision in *F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004).

If the same standard applies to the West Virginia Antitrust Act as has been applied to the federal Sherman Act, it necessarily follows that our act does not and cannot not constitutionally reach the Virginia agency agreement at issue in this case. It matters not where Webb was physically when he placed policies pursuant to his Virginia agent's license on behalf of Virginia insureds and insured property. What matters for antitrust purposes is where the antitrust impact--the restrictions on consumer choices for insurance or any impact on the price paid for that insurance--occurred. That impact, if there was any, and none was ever proven, necessarily occurred in Virginia, not West Virginia.

¹⁹ *Id* at 450.

Finally, PIA and Webb assert that, even though there is no evidence to establish any antitrust damages in the form of either limitations on or the price of insurance paid by West Virginia residents as a result of the termination of Webb's Virginia agency agreement, the West Virginia Antitrust Act applies because it had an adverse impact on Webb who was himself a West Virginia resident. And thus the arguments come full circle.

First, while Webb, like any other independent agent whose contract is terminated, may assert that he has been adversely affected by the termination, the alleged adverse effect was not the type covered by the antitrust laws. The Supreme Court specifically rejected that notion in *F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004). There, it made clear that in order to establish an antitrust violation, one first had to show that an effect of the kind that the Sherman Act considers harmful--that is damage to competition of the type outlined above--occurred within the United States. *F. Hoffman-La Roche*, 542 U.S. at 162; *see also, Harmar Bottling Co.*, 218 S.W.3d at 683 (finding that Texas courts only have jurisdiction when the effect felt in Texas is an anticompetitive effect). Here, the injury that Webb claims to have sustained in no way relates to or arises out of an injury to competition - that is a lessening of available insurance to Virginia consumers or an increase in the price of that insurance paid by Virginia insurance.

Second, and to reiterate, by arguing that because he was affected by the alleged antitrust conduct in Virginia, he is entitled to invoke the protections of the West Virginia Antitrust Act, Webb is essentially arguing that that act is designed to protect competitors, not competition. That is clearly contrary to the established law in the field. *Gray v. Marshall County Bd. of Educ.*, 179 W.Va. 282, 288, 367 S.E.2d 751, 757 (1988).

Given the foregoing, it is clear that the West Virginia Antitrust Act does not confer subject matter jurisdiction over Webb's claims arising out of the cancellation of his Virginia

agency agreement. If that cancellation were somehow deemed to have an anticompetitive effect, the resulting antitrust damages would have occurred in Virginia, not West Virginia.

The issue is not Erie Insurance Group's contacts with West Virginia. It is not whether the Virginia Antitrust Act would cover the same conduct. Nor is it whether West Virginia courts have subject matter jurisdiction over a similar claim involving cancellation of PIA's agency agreement. The issue is solely whether the West Virginia Act extends the jurisdiction of our courts to regulate Virginia commerce. Not only does not do so, it cannot do so for the reasons heretofore set forth.

II. Erie Insurance Group Could Not Have Conspired to Restrain Trade or Boycott PIA and Kevin Webb.

A. The Erie Insurance Group Companies Were Not Separate and Independent Entities for Antitrust Purposes.

PIA and Webb do not dispute the fact that in order to establish an antitrust violation, they were first required to offer proof that the Erie Insurance Group companies were separate and independent entities that were in competition with one another and otherwise capable of conspiring for antitrust purposes. Their arguments in this regard are, at best, confusing. First, they assert that the evidence below established three of the five Erie Insurance Group companies named in the Amended Complaint--Erie Family Life, Erie Insurance Exchange, and Erie Indemnity Company--were capable of conspiring with one another.

As Erie Insurance Group pointed out in its opening brief, however, Erie Indemnity does not write insurance in either West Virginia or Virginia and is not licensed to write insurance in any State. Rather, it is a management service company and is the only one of those three companies to have employees. As such, it does not compete with Erie Family Life, Erie Insurance Exchange, or any of the other Erie Companies. To the contrary, its

employees direct and conduct the business of those companies. In this case, it was, in fact, one of those employees who made the decision to terminate the agency agreements of PIA and Webb and implemented that decision.

Thus, to accept PIA and Webb's assertion that Erie Family Life, Erie Insurance and Erie Indemnity were capable of conspiring with one another, the Court would necessarily have to conclude that that individual employee conspired with himself. While PIA and Webb may consider this an irrelevancy, the courts have not. This Court, for example, held in *Gray v. Marshall County Bd. of Educ.*, 179 W. Va. 282, 286, 367 S.E.2d 751, 755 (1995) that a corporation cannot conspire with its employees, because corporations act only through their employees. Given that all three of these companies act through a single set of employees acting with a common purpose, therefore, it is simply not possible for them to have conspired with one another. They are neither separate nor independent entities for purposes of antitrust analysis.

B. The Erie Insurance Group Companies Were Not In Competition With One Another.

While PIA and Webb concede that Erie Family Life, Erie Insurance and Erie Indemnity are not in competition with one another, they assert that that is simply irrelevant for antitrust purposes. They argue, without any real clarity, that Erie Family Life (which sells only life insurance), the Erie Insurance Exchange (which offers only automobile, homeowner's, and general liability policies in Virginia), and Erie Indemnity Company (which offers no products for sale), as separately incorporated but affiliated entities, could enter into the type of conspiracy necessary to support an antitrust claim. How non-competing entities can do so, however, is far from clear from their filing and is certainly not supported by any established case law.

Beyond this, however, and while they never address the point directly, one presumes that PIA and Webb would concede that, if Erie Family Life and the Erie Exchange were unincorporated divisions of Erie Indemnity rather than incorporated subsidiaries, they could not be deemed to be either in competition with or capable of conspiring with one another. That is a self-evident proposition for antitrust analysis. Thus, the only distinguishing factor that renders the affiliated companies subject to the Antitrust Act, under the logic of PIA and Webb, is the fact that Erie Indemnity has chosen to operate Erie Family Life and Erie Exchange as separate legal entities rather than as divisions. Yet, that it chose to incorporate its affiliates in this manner makes no difference in antitrust law because the only concern is "conspiratorial economic behavior." *Gray*, 179 W. Va. at 288, 367 S.E.2d at 757.

Incorporation does not change the fact that Erie companies sell the Erie line of insurance products or that these three companies in particular do not overlap at all in terms of what insurance products they offer. They act for a common purpose--the promotion of Erie's products--and towards that end, do not compete with one another for market share. To hold otherwise would be counter-intuitive.

To hold that these companies are capable of and did, in fact, conspire with one another for antitrust purposes not only elevates form over substance, it completely ignores the purpose for which antitrust laws were enacted: to protect competition. Commerce is not affected when these three affiliated, non-competing companies, acting under the directive and control of a common parent, work cooperatively to promote the overall business of the corporate family. "A contract between them does not join formerly distinct economic units." *Century Oil Tool, Inc. v. Production Specialties, Inc.*, 737 F.2d 1316, 1317 (5th Cir. 1984). And the situation does not involve "collaboration by independent business

entities that inhibits competition." *Gray v. Marshall County Bd. of Educ.*, 179 W. Va. 282, 286, 367 S.E.2d 751, 755, n. 3 (1988).

Here then, we have affiliated, non-competing companies that operate under unitary management control and that, acting through a single employee, have exercised their contractual right to terminate independent agency agreements. There is no allegation that those terminations were inconsistent with the terms of the agreements or that these affiliated companies were not entitled to terminate those agreements with or without cause. Moreover, there is no proof whatsoever that by terminating those agreements, competition for insurance products offered by these affiliated non-competing companies was in any way inhibited. Specifically, there was and is no evidence that the availability of insurance of the type offered by these companies was restricted or that the price of that insurance was increased in any way. Given that, PIA and Webb's claims fail on multiple levels.

There was not and could not have been a conspiracy between separate and independent business entities in violation of the antitrust laws. There was not and could not have been a conspiracy among competitors to inhibit competition in their segment of the market. And finally, there was not injury to competition that would support an award of antitrust damages. Given this, whether or not the three are separately incorporated, they do not compete and are not the type of separate economic units that the antitrust laws protect.

C. The *Copperweld* Decision Does Not Support a Finding of That The Erie Insurance Group Companies Were Capable of Conspiring With One Another For Antitrust Purposes.

PIA's and Webb's assertions regarding the Supreme Court's *Copperweld* decision are disingenuous at best. They rely upon a single statement in a fairly complex decision in which the Supreme Court was considering a factual scenario involving ownership of 100%

of a subsidiary and the question of whether, under that scenario, the parent and subsidiary corporation were capable of conspiring with one another for antitrust purposes. While conceding that the Court concluded they could not, PIA and Webb seize upon the fact that the subsidiary in that case was wholly owned by the partner and completely ignore the reasoning behind the Court's decision as well as the application of that reasoning in virtually every case that has followed.

First, they assert that *Copperweld* announced a change in the state of the law. From this PIA and Webb argue that since the Supreme Court's decision was limited to wholly-owned subsidiaries, non-wholly-owned subsidiaries can still be said to compete with one another for antitrust purposes. Had PIA and Webb read the *Copperweld* decision with more care, however, they would have discovered that it did not announce a change in the state of the law. Indeed, it specifically noted that it had never previously decided the issue before it in that case. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 760 (1984). And when the Court did examine its prior cases, it 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.*

Moreover, PIA and Mr. Webb, by mechanically arguing that one could determine whether a subsidiary is capable of competing with its parent by simply counting the number of shares of the subsidiary the parent owns, completely ignore the rationale behind that decision as well as this Court's decision on that issue. In *Gray*, this Court criticized the Supreme Court's pre-*Copperweld* "infelicitous" language and noted that in *Copperweld*, the Supreme Court "finally agreed with the overwhelming weight of authority in the lower courts" in terms of the proper methodology to be applied in passing upon such questions. *Gray*, 179 W. Va. at 286, 367 S.E.2d at 755. The questions to be determined are the extent

to which the parent controls the actions of its subsidiary and the commonality of purpose of the two entities, questions which PIA and Webb are loath to address in the context of this case.

Were that alone not sufficient reason to reject their contorted interpretation of the *Copperweld* decision, the fact that PIA and Webb cite to no court that agrees with their reading of that case should. In its opening brief, Erie Insurance Group cited case after case which apply *Copperweld* in situations involving non-wholly-owned subsidiaries. "Courts have held **uniformly** that de minimis deviations from 100 percent do not prevent application of *Copperweld*." Stephen Calkins, *Copperweld in the Courts: The Road to Caribe*, 63 Antitrust L.J. 345, 352 (1995) (emphasis added). In the twenty-four years that have passed since *Copperweld* was decided, not a single case has held what PIA and Webb argue.

The cases discussing *Copperweld* demonstrate that, as a matter of law,²⁰ the Erie Companies could not compete for purposes of antitrust law. They are commonly owned and controlled, and a decision among them to cooperate to promote the Erie line of insurance products or to terminate a substandard agent does not suddenly join previous competitors in a way that threatens competition. *Copperweld*, far from undermining this conclusion, fully supports it.

²⁰ PIA and Mr. Webb incorrectly assert that *Copperweld* and its progeny discuss or that Erie Insurance Group raises *Copperweld* and its progeny to discuss a factual question. Appellees' Brief at 33. *Copperweld* quite clearly decided that a parent and its wholly-owned subsidiary were **legally** incapable of competing, and the post-*Copperweld* cases follow. As a result, in citing *Copperweld* or other similar cases, Erie Insurance Group is not challenging the sufficiency of the evidence submitted to the jury, but the Circuit Court's decision to allow the matter to go to the jury at all. See also, *Gray*, 179 W. Va. at 286, 367 S.E.2d at 755 (discussing *Copperweld's* and other decisions' holdings that various economic actors were legally incapable of conspiring).

D. There Is No Evidence That PIA and Mr. Webb Acquiesced in Any Antitrust Conspiracy With Erie Insurance Group.

In what can only be described as a last ditch effort to salvage their antitrust claims, PIA and Mr. Webb assert that an antitrust conspiracy could have existed, because Mr. Webb acquiesced in Erie Insurance Group's demands, by "pushing" business towards Erie Insurance Group or providing information about their sales of other insurers' products. First, to suggest that the communication of gross production numbers is a meeting of the minds sufficient to demonstrate a conspiracy for purposes of the Antitrust Act is pure fantasy. Even accepting everything Mr. Webb says as true about that exchange, it involved no more than an inquiry by Erie Insurance Group as to how much business written by PIA was going to other insurers and Mr. Webb providing the number of such policies. T.T. 432. He did not provide information about the policies, confidential information about the policyholders, or any information that Erie Insurance Group could use to gain a competitive advantage.²¹ That is hardly the type of "meeting of the minds" or "acquiescence" that the Supreme Court has found will satisfy the Sherman Act and it should not be sufficient here. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984).

Moreover, the suggestion that Mr. Webb "pushed" business towards Erie Insurance Group in response to "threats" of termination misstates the evidence at trial regarding Mr. Webb's role in the sale of insurance. While he claimed at trial that he had "pushed" business towards a competitor of Erie Insurance Group,²² and though he now appears to

²¹ As Erie Insurance Group has previously mentioned, it must also be noted that Mr. Webb has provided this same information to Erie in the past. T.T. 373.

²² 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.**") (emphasis added); *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.").

assert that this was done out of spite,²³ the fact remains that Mr. Webb readily admits having steered business away from Erie Insurance Group, an activity which, as an agent of those companies, more than justified terminating that agency relationship. Despite that, it is Webb and PIA who claim to be the injured parties here.

Beyond this, Mr. Webb's claim that he was "pushing" business to Erie due to some threat of termination is not supported by the evidence. Mr. Webb testified at trial that the underwriting guidelines used by Erie Insurance Group were more strict than other companies, and as a result, he sometimes had trouble finding customers who fit those guidelines.²⁴ He testified that--particularly in 2003--when he did find a customer who fit those guidelines, he "pretty much wrote with Erie."²⁵ It is a giant leap of logic to conclude from those statements that Mr. Webb was pushing Erie Insurance Group business due to threats of termination.²⁶

Beyond this, the law is clear that in order to satisfy their burden to prove a violation of the kind discussed in the *Perma-Life Mufflers*²⁷ and *Monsanto*²⁸ cases, PIA and Webb must show that what they agreed was to do something anticompetitive. It is not sufficient

²³ Appellees' Brief at 34 ("Prior to May 1, 2003, the majority of the insurance business was sold to [another insurer] because of the conduct of former Erie branch manager, Jerry Murphy . . .").

²⁴ T.T. 380.

²⁵ T.T. 380.

²⁶ Further, Mr. Webb's surreptitious recording of his conversation with Mr. Olian does not aid his argument. He pulls quotes from that conversation as if to support the statement that Erie was asking for business to be pushed to it and Mr. Webb complied. That is certainly not what the two were discussing. The statement, "I give Erie what Erie asked for" is followed immediately by "So [sic] wrote business within the spirit of the AWARE program." Later in the conversation, Mr. Webb states that "the new business that [he] placed with Erie was not the bottom percentage of the barrel. I gave him the premium business that they asked for." The two are quite clearly discussing that Mr. Webb sold Erie Insurance products when he felt his customers fit within the AWARE guidelines. That is, he "didn't just start writing new business with Erie just because it walked through the door"; he gave Erie the premium business that it wanted. There is nothing anticompetitive about this. Erie Insurance Group is free to choose what kind of customers it wants. Mr. Webb is free to recommend Erie or another insurer's products to his customers. The customer is still free to choose from which insurer she will purchase insurance. Even if Erie Insurance Group had more stringent guidelines, it was still free to terminate PIA and Mr. Webb as agents if they were unable to find customers who met those guidelines.

²⁷ *Perma Life Mufflers, Inc. v. Int'l Parts Group*, 392 U.S. 134 (1968) overruled on other grounds by *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

²⁸ *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).

to show that Mr. Webb agreed to do something that promotes Erie's business but that does not rise to the level of restraining competition. They must show that they assisted Erie Insurance Group in gaining some competitive advantage that it would not gain through normal competition. There is no evidence of that here.

The fact is that PIA and Webb apparently believe that they have a right to retain the Erie business, regardless of the circumstances. They do not, under either antitrust law or any other possible theory upon which they might have relied.

III. PIA and Mr. Webb Have Yet to Demonstrate an Antitrust Injury.

Misunderstanding what they must show to make a valid antitrust claim, PIA and Webb argue that injury to profits is sufficient to support a claim for antitrust damages. That is simply incorrect as a matter of law. "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). In other words, the plaintiff in an antitrust case must show that the defendant's conduct caused anticompetitive harm "not just to plaintiff, but to the competitive process, *i.e.*, to competition itself." *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998). Again, the position of PIA and Webb highlights the fact that they have not come before the Courts for the purpose of protecting competition but instead to protect their own competitive position. That is not what the antitrust laws are designed to achieve, however.

At trial, they produced not one insurance customer who testified that he or she would have purchased another insurer's insurance had he or she not been "pushed" to Erie. They could not even identify one customer who was "pushed" to Erie instead of another insurer. In fact, they did not even argue until this response brief that the evidence

supported this claim. *See* Resp. in Opp. to Pet. for Appeal. The absence of such evidence is fatal to their antitrust claims.

Arguing now that a boycott or a refusal to deal could theoretically lead to an antitrust claim does not avoid this inevitable conclusion, moreover. The *McCready* case on which PIA and Webb rely heavily--and particularly the sections of the opinion from which they quote--discussed whether a boycotted business has standing to bring an antitrust claim. *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). Erie Insurance Group does not dispute that if a plaintiff can demonstrate that a refusal to deal had occurred and it had anticompetitive effects (to consumers, not to the plaintiff), then the plaintiff can sue for its damages as a result.

But demonstrating that there has been a refusal to deal with the required anticompetitive effects and the right to recover damages when that is proven are two entirely different matters. First, where anticompetitive effect is far from clear, or nonexistent as is the case here, there is no presumption that the conduct in question constitutes an illegal boycott or refusal to deal. In order to succeed in such instances, a plaintiff must show both: 1) that the refusal to deal had an anticompetitive effect to consumers; and 2) the plaintiff was injured by it. PIA and Mr. Webb consistently argue that they were injured by Erie Insurance Group's decision to terminate the agency agreements, but they have never shown that any consumer of insurance products felt the effects of that decision--in other words, that there was any anti-competitive effect.²⁹ Absent such proof, their antitrust claims must fail.

²⁹ Their statement that Erie Insurance Group's conduct caused them to "restrain the sales of [another insurer's] insurance policies to consumers" is entirely unsupported in the record by any situation in which actual customers were directed away from one insurer and towards Erie. Mr. Webb only testified that he was asked to do that and he wrote business with Erie when he felt it fit the Erie guidelines. He could not

IV. This Court has Precluded Recovery of Future Damages as Damages, Regardless of Whether They Were Properly Calculated.

This Court has previously held that the type of damages claimed by Mr. Webb and PIA are too remote to be considered in cases like this one; thus, even if Erie Insurance Group was properly held liable, the damage calculation that was made was incorrect as a matter of law. As noted in Erie Insurance Group's opening brief, this Court held in *Shrewsbury v. National Grange Mutual Ins. Co.*, 183 W. Va. 322, 625 S.E.2d 177 (1992), that commissions earned when an insurance agent sells an insurance policy do not accrue until the policy is written or renewed. *Id.* at 327, 395 S.E.2d at 750. They are not the inherent property of the agent, and therefore, neither PIA nor Mr. Webb should have been entitled to seek damages for lost future commissions. They should have been allowed only to seek damages for commissions on policies already written or renewed.

As with other cases cited by Erie Insurance Group, the response of PIA and Webb is not to address the point of law, but to assert that the case cited was factually different. The Court could not have been more clear, though: the agent has no inherent property right in commissions until they have been earned. As a result, whether *Shrewsbury* considered an antitrust claim or not is irrelevant. What matters is that the Court has already addressed the exact claim made here, and again, it has rejected the specific argument being made by PIA and Mr. Webb.

CONCLUSION

Distilled to its essence, PIA and Webb assert what amounts to an absolute right to retain their agency relationship with Erie Insurance Group regardless of the terms of the

testify that the availability of insurance changed or that prices changed, and neither he nor PIA could offer any evidence to support that they did.

agreement creating that relationship. There being no cognizable theory for achieving that under contract or tort law, in an effort to concoct a means to achieve their ends, they have attempted to contort statutory remedies created through the Antitrust Act.

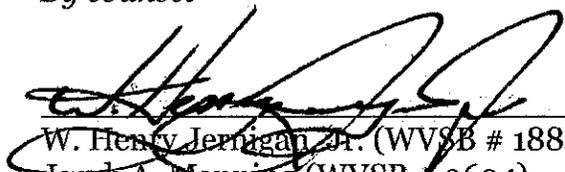
Yet, the antitrust laws were not designed for this purpose. They were designed to protect competition. In the context of this case, that means protecting purchasers of insurance from artificial, anti-competitive conspiracies between competitors that are designed to restrict the availability of insurance or to drive up the price of that insurance. There was no evidence below of any conspiracy between competitors to achieve that purpose and there was, consequently, no evidence of any adverse impact on competition arising out of the activities complained of.

All the evidence in this case established was that PIA's and Webb's relationship with Erie Insurance Group had deteriorated and, as a consequence of that, Erie Insurance Group chose to terminate its agency relationships with PIA and Webb in a manner consistent with its rights under the agency agreements. PIA and Erie clearly did not appreciate that action on the part of Erie Insurance Group and though Erie does not agree, feel they were treated unfairly in the process. That, however, does not give rise to an antitrust cause of action and, for the reasons set forth, Erie Insurance Group demands that the judgment below be reversed.

Respectfully submitted,

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

By counsel



W. Henry Jennings Jr. (WVSB # 1884)
Jacob A. Manning (WVSB # 9694)
DINSMORE & SHOHL LLP
Post Office Box 11887
Charleston, West Virginia 25311-1887
Phone: (304) 357-0900
Fax: (304) 357-0919

James D. Lamp (WVSB # 2133)
Matthew J. Perry (WVSB # 8589)
LAMP, O'DELL, BARTRAM, LEVY, &
TRAUTWEIN, PLLC
1108 Third Avenue, Suite 700
Post Office Box 2488
Huntington, West Virginia 25725
Phone: (304) 523-5400
Fax: (304) 523-5409

CERTIFICATE OF SERVICE

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

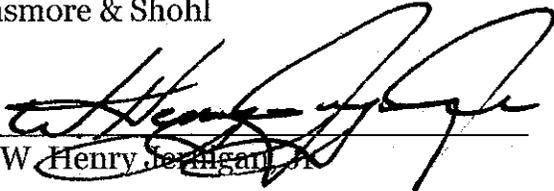
Anthony R. Veneri, Esq.
1600 West Main Street
Princeton, West Virginia 24740

Marc E. Williams, Esq.
Huddleston Bolen LLP
611 Third Avenue
P.O. Box 2185
Huntington, West Virginia 25722

This 8th day of January, 2009.

Dinsmore & Shohl

By:


W. Henry Jerigan, Jr.