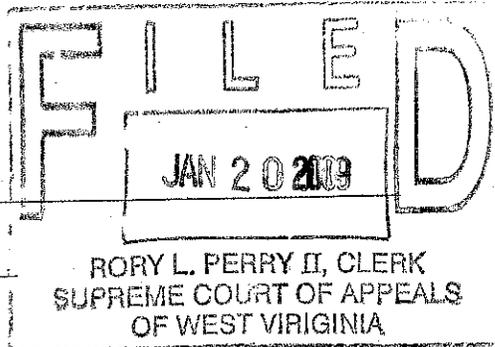


NO. 34498



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' RESPONSE TO AMICUS BRIEF OF THE
INDEPENDENT INSURANCE AGENTS OF WEST VIRGINIA**

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INTRODUCTION

The *amicus* brief filed by the Independent Insurance Agents of West Virginia, Inc.¹ should be rejected and disregarded, as it not only misrepresents the facts of this case but also it plainly misstates the law that applies to its own members. Perhaps even more fundamentally, the *amicus* brief does not address the core legal issue presented in this appeal and upon which the verdict was based: the scope and applicability of the West Virginia Antitrust Act. As such, it does nothing to assist the Court in determining the issues before it.

Inexplicably, the *Amicus* argues that Erie Insurance Group was statutorily prohibited from terminating its agency agreements with Princeton Insurance Agency ("PIA") and Kevin Webb without good cause. This very argument was raised by plaintiffs below and then voluntarily abandoned, as the statute cited quite clearly applies only to captive agents--not independent agents.² Since PIA and Webb were independent agents, Erie Insurance Group was allowed to terminate those independent agency agreements--with or without the statutorily-defined good cause³--upon ninety days' notice, and the captive agent statute relied upon in the *amicus* brief did not prevent that.

Beyond this, that the *Amicus* misstates the facts as presented below is further justification for this Court to disregard it. For example, the *Amicus* argues that Erie

¹ Hereinafter, "IIAWV."

² Both the Complaint and Amended Complaint included this allegation, citing West Virginia Code Section 33-12A-1, et seq. in support. However, prior to filing their Second Amended Complaint, PIA and Webb served a Motion to Amend Complaint and Motion to Non-Suit Certain Parties and Claims which states, "The claims of the plaintiffs regarding the 'captive agency doctrine' as provided in the statute is [sic] not adequately supported with the evidence and therefore the plaintiffs desire to dismiss same." The Second Amended Complaint, which was attached to these motions and subsequently filed, did not include the allegation.

³ As Erie Insurance Group has demonstrated in its prior briefs, it had good cause to terminate the agreements, given that the agreements with PIA and Webb had been unprofitable and given its concerns that Webb was encouraging his customers to favor other insurers: a fact that Webb admitted at trial. T.T. 274-75, 505. Whether that constitutes good cause under the statute does not matter, because as stated above, either party could have canceled the agreements for any reason upon ninety days' notice.

Insurance Group's conduct might constitute illegal tying--an argument never made by PIA or Webb, not the basis for the verdict below and for which there is absolutely no evidentiary support. It also argues that the jury's award was justified because Erie Insurance Group wanted Webb to "push" business towards it. Significantly, the *amicus* brief does not once cite to the record in support of those alleged "facts." The *Amicus* has performed no careful analysis of this case and no examination of the arguments that actually were made to the jury, to the Circuit Court, and to this Court. Indeed, it is questionable--given the noticeable lack of citation to the record--whether the *Amicus* consulted the record at all.

For those reasons, the *amicus* brief should be disregarded.

DISCUSSION OF LAW

I. Erie Insurance Group was Clearly Permitted to Terminate the Agency Agreements.

For the proposition that the Erie Insurance Group was not permitted to terminate the independent agency agreements without certain reasons defined as "good cause," the *Amicus* relies solely upon a statute that does not apply to independent insurance agents. Specifically, it cites West Virginia Code Section 33-12A-3 for the proposition that Erie Insurance Group could not terminate independent agency agreements without good cause. W. VA. CODE § 33-12A-3 (2008). While Section 33-12A-3 does state that no insurance company may terminate an agency agreement with an "insurance agent" without good cause in certain circumstances, *id.*, the *Amicus* ignores that "insurance agent" is a defined term. An "insurance agent," for the purposes of the statute cited, is an individual engaged in the sale of insurance in West Virginia, "whose exclusive activity in this field is in behalf of a single insurance company. . . ." W. VA. CODE § 33-12A-2 (2008) (emphasis added). Thus, when Section 33-12A-3 prohibits an insurance company from terminating an agreement

with an "insurance agent," it is only referring to insurance agents who are engaged in the sale of insurance solely on behalf of that particular company.

It is readily apparent that the statute cited by the *Amicus* only applies to captive agents--not to independent agents such as PIA and Webb. It does not preclude an insurance company from terminating an agency agreement with an independent agent. And as a consequence, it does not state a general "policy preference for agency relationship stability over insurance company control." *Amicus* Brief at 16. Indeed, it does not even address independent agents at all. It simply announces a prohibition on terminating captive agents for reasons other than those which constitute good cause.

As a result, Section 33-12A-3 has no bearing on this case whatsoever, and the fact that the *amicus* brief presented by the Independent Insurance Agents argues that it does borders on irresponsibility. There has never been any question that PIA and Webb were independent insurance agents acting on behalf of Erie Insurance Group as well as on behalf of other companies.⁴ If the *Amicus* was aware this statute did not apply to independent agents, then its citation to it as controlling law is a clear misstatement of the law to this Court. If it was not aware this statute did not apply, then its expertise in this area, and the extent to which any of its opinions can aid in this Court's determination in this case, are highly questionable.

In either case, citation to a captive agent statute that is clearly inapplicable to the independent agent relationship at issue is only an indication of the weight that ought to be given to IIAWV's brief: none.

⁴ T.T. 239-42.

II. PIA and Webb Failed to Demonstrate That There Has Been or Would be Any Anticompetitive Effect.

The *Amicus*' argument that PIA and Webb have met their burden of proof is equally unavailing. The *Amicus* asserts that Erie Insurance Group is arguing for a heightened evidentiary standard--evidence of a market effect. *Amicus* Brief at 6-11. It then argues that the antitrust claims of PIA and Webb should survive either because they have shown that an anticompetitive effect occurred or because an antitrust plaintiff should not be required to meet the so-called heightened standard. Both of these arguments fail.

First, assertions that there has been a market effect are baseless. The *Amicus* asserts that Erie Insurance Group forced Webb to suggest Erie policies to his customers or risk termination of the agency agreements. *Amicus* Brief at 6-7. The *Amicus* suggests that the evidence shows that, in response, Webb began offering customers higher-priced Erie policies. *Id.* at 7. It claims--without citation to the record--that this "clearly resulted in numerous customers being placed into Erie policies that required the payment of higher premiums than those of Erie's direct competitors in the same local market through [] Webb and [PIA]." *Id.* at 7.

These statements, while perhaps interesting rhetoric, find no support whatsoever in the record. Webb never testified that he placed customers with Erie rather than other insurers, resulting in their payment of higher premiums. Moreover, nowhere does the evidence presented at trial indicate this. It is perhaps instructive that the *Amicus* referred to Webb's and PIA's brief for a recitation of the facts, because Webb and PIA made the same baseless assertions. Frankly, it does not matter what PIA and Webb argue now or even what they argued below; the simple fact is, they never presented any evidence at all that consumers of insurance products paid higher prices or were forced to accept Erie policies

because of any action of Erie Insurance Group.⁵ No such evidence was offered for one simple reason--because none existed.

Webb testified at trial that he found it difficult to place customers with Erie Insurance Group because he found the underwriting guidelines to be stricter.⁶ Thus, when he found a customer that did fit the guidelines, he placed that customer with Erie Insurance Group, unless the customer asked if Webb could place the customer's business with another company due to price or other concerns, in which case he told the customer what other options were available.⁷ He plainly did not testify that he did, in fact, place customers with Erie Insurance Group in response to any demands by the Erie Insurance Group that he do so.⁸ Thus, PIA and Webb have shown no market effect--no change in the goods or services offered to consumers of insurance products in West Virginia.

To be clear, though, Erie Insurance Group is not asking for a heightened evidentiary standard; it is asking only for the same standard that applies in virtually every antitrust case. Even if PIA and Webb were arguably damaged by the termination of the agency agreements, they have not alleged or proven an antitrust claim. They have not shown "injury of the type the antitrust laws were intended to prevent and that flows from that which makes [Erie Insurance Group's] acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). As the Supreme Court has stated, "[t]he injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made

⁵ This case would not make any sense if that were true. Essentially they argue that Erie Insurance Group forced Webb to "push" business to Erie Insurance Group and Webb complied. Erie Insurance Group then terminated the agency agreements. But why, if Webb had agreed to send business to it and was, in fact, doing so, would the Erie Insurance Group nevertheless terminate? It would be nonsensical.

⁶ T.T. 380.

⁷ T.T. 381.

⁸ Webb did describe that his claim was that he was asked to place business with Erie Insurance Group, but other than describing his efforts to meet the AWARE guidelines, he did not testify that he placed business with Erie Insurance Group in response to any demands by Erie that he do so. T.T. 206.

possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.'" *Id.* (citing *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 125 (1969)).

This is not an issue of standing. It is not an issue of whether an antitrust claim may be brought before damages are incurred. It is much more basic than that. The issue with respect to antitrust injury is whether PIA and Webb demonstrated at trial that the Erie Insurance Group's actions violated antitrust laws. They clearly did not. The only evidence they put forth at trial was that Webb and PIA were damaged by termination of the agreements. That is not an injury to competition of the type governed by antitrust law. At best, it is an injury to a competitor--one suffered whenever any contract is terminated.

They also did not, contrary to IIAWV's assertions, even attempt to show that insurance consumers in West Virginia might be harmed by these actions. They did not offer proof that even a single consumer was forced into an Erie Insurance Group policy when he or she did not want to be. Indeed, Webb testified that if a consumer was unhappy with the Erie policy, he offered other policies.⁹ They did not even offer evidence that consumers may be forced to purchase higher-priced Erie policies as a result of any of Erie Insurance Group's actions, beyond mere speculation. Thus, whether an antitrust claim may be brought preemptively (before damages are incurred) is not at issue in this case.

The only issue with respect to antitrust injury is whether PIA and Webb met their burden to show that they have an antitrust claim (as opposed to a breach of contract claim, for example). They did not, and as a result, their claims should have been dismissed.

⁹ T.T. 381.

III. Affirming Trebled Damages Against the Erie Insurance Group Would Extend Antitrust Principles Beyond the Legislature's Intentions.

Finally, the *Amicus'* argument that the Erie Insurance Group's actions in this case are unique and would not extend antitrust principles to all agency terminations is shortsighted. The simplicity of this case cannot be overstated. The Erie Insurance Group terminated agency agreements with an agent that had had only one profitable year in the previous ten. It terminated agreements with an agent who was admittedly pushing business to another insurer.¹⁰ And it terminated agreements with an agent whose losses over a decade totaled \$4.3 million.¹¹ It terminated agreements that were terminable, by their own terms, with or without cause. There is no question at all that Erie Insurance Group had contracted with PIA and Webb for this very possibility.¹²

Yet, when it did exercise its contractual right, Erie Insurance Group was accused of violating antitrust principles. Erie Insurance Group's actions fall far short of "conspiratorial economic behavior." *Gray v. Marshall County Bd. of Educ.*, 179 W.Va. 282, 288, 367 S.E.2d 751, 757 (1988). And to reiterate the obvious, this case is not about the protection of competition, but competitors. *Brown Shoe Co. v. United States*, 370 U.S. 294, 319 (1962).

Asserting that no other terminated agent will make these same accusations and bring an antitrust claim is naïve at best, and a convenient--if not cynical--argument at worst. Erie Insurance Group had legitimate reasons to terminate these agreements even when none was required, and it is now still put in the position of arguing that termination does not constitute a violation of the antitrust laws. Why would any subsequently-terminated agent, with the prospect of receiving three times the total of all of its potential future commissions,

¹⁰ T.T. 275, 505-06.

¹¹ T.T. 492.

¹² T.T. 229, Plaintiffs' Exhibits 8, 9A, and 9B.

not make the same assertion? Indeed, why would any independent contractor in any line of business, terminated from an unprofitable relationship, not make the same accusations? This Court would not be alone in recognizing that artfully pleading an antitrust claim in these circumstances pushes the Antitrust Act beyond what it was intended to prevent.¹³

Permitting PIA's and Webb's antitrust claims to go forward with a complete lack of any evidence that Erie Insurance Group's conduct was anticompetitive expands the Antitrust Act beyond its intended purpose of protecting competition. This Court should recognize the limit that has always existed on the Act (protection of competition, not competitors) and reverse the decision of the Circuit Court to allow these claims to go forward.

CONCLUSION

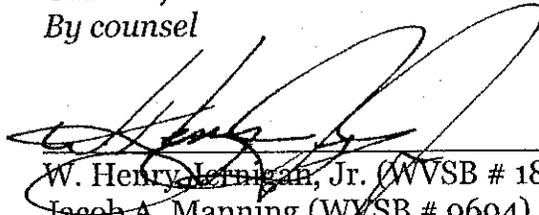
IIAWV's brief adds nothing of value to the analysis of the issues in this case. It clearly failed to seriously consider the law relevant to independent agents like PIA and Webb. And instead of conducting a thorough review, or indeed, any review of the record, it simply assumed that PIA's and Webb's assertions were accurate. What it does argue is short-sighted and was apparently filed simply in a misguided effort to support its own independent agent member more so than it was to provide the Court with the independent thoughts of an experienced association. For those reasons, Erie Insurance Group requests that the Court disregard the brief and for the reasons stated in its own briefs, requests that the Court reverse the decisions of the Circuit Court.

¹³ See 1 Callmann on Unfair Comp., Tr., & Mono. § 4:48 (4th ed. 2008) ("Framing a complaint or counterclaim to charge an antitrust violation, in preference to asserting a business tort under state law, has apparently been a temptation too difficult for counsel to resist." "The prospect of a treble damage award, plus costs and attorney's fees, has excited the ingenuity of counsel and invited resort to the [federal antitrust laws] 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.")

Respectfully submitted,

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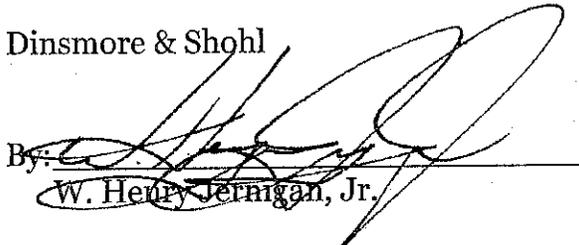
I hereby certify that I have this day served a copy of the within and foregoing
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Dinsmore & Shohl

By: 
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