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Antitrust

by Carl W. Mullis, III*

I. INTRODUCTION

In 1991, the Eleventh Circuit ruled on eight full-blown federal antitrust decisions. Although the courts below found for defendants in each of these cases, the Eleventh Circuit found primarily for plaintiffs in three of the cases, for defendants in four of the cases, and for both plaintiffs and defendants in one case. Several of the cases are significant in that they either explore new areas in the antitrust law or have the potential for

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1. See Todorov v. DCH Healthcare Auth., 921 F.2d 1438 (11th Cir. 1991); Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555 (11th Cir. 1991); Municipal Util. Bd. v. Alabama Power Co., 934 F.2d 1493 (11th Cir. 1991), superseding 925 F.2d 1385 (11th Cir. 1991); Taffet v. Southern Co., 930 F.2d 847 (11th Cir. 1991), vacated and petition for rehearing en banc granted, 958 F.2d 1514 (11th Cir. 1992); T. Harris Young & Assocs., Inc. v. Marquette Elecs., 931 F.2d 816 (11th Cir. 1991); Tidmore Oil v. B.P. Oil Co./Gulf Prod. Div., 932 F.2d 1384 (11th Cir.); cert. denied, 112 S. Ct. 339 (1991); Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566 (11th Cir. 1991); FTC v. University Health, Inc., 938 F.2d 1206 (11th Cir. 1991); see also Bell South Advertising & Publishing Corp. v. Donnelley Information Publishing, 933 F.2d 952 (11th Cir. 1991). The Eleventh Circuit in Bell South was concerned with several copyright issues, including an alleged copyright antitrust misuse defense. The court refrained from ruling on whether the patent antitrust misuse defense could be extended to copyrights but instead found that there was no antitrust violation to constitute such a misuse. Id. at 960-61.


nationwide influence. Most of the cases simply build on previous holdings of the Eleventh Circuit and are well reasoned. One or two cases, however, contain some reasoning that appears to be questionable, and one case has been vacated with the granting of a petition for rehearing en banc. Each of the cases is discussed in detail below.

II. Survey

In *FTC v. University Health, Inc.*, the Federal Trade Commission ("FTC") sought a preliminary injunction to prevent defendants University Hospital and St. Joseph Hospital ("St. Joseph") of Augusta, Georgia from consummating a proposed asset acquisition agreement. The FTC asserted that the proposed acquisition would violate section 7 of the Clayton Act. Under the proposed transaction, University Hospital would acquire most of the assets of St. Joseph including its acute-care hospital facility. St. Joseph's owner would receive a cash settlement, as well as University Hospital's fifty percent interest in a rehabilitation hospital. A ten-year covenant not to compete would provide that St. Joseph's owner would stay out of the general acute-care hospital market in the Augusta area and that University Hospital would stay out of the rehabilitation hospital market in the Augusta area.

The district court denied the FTC's motion for preliminary injunction. Although the district court found that (1) the relevant market was the provision of inpatient services by acute-care hospitals in the Augusta area; (2) only four hospitals would compete in this market after the planned acquisition, with University Hospital controlling approximately 43% of the market; and (3) the Georgia Certificate of Need Law created a substantial barrier to entry into the relevant market, the district court

5. See infra text accompanying notes 8-42, 43-78.
8. 938 F.2d 1206 (11th Cir. 1991).
10. The procedural history of this case demonstrates just how quickly such matters can move through the courts. On March 20, 1991, the day that the Hart-Scott-Rodino waiting period was to expire, the FTC filed this action seeking a temporary restraining order and a preliminary injunction. After expedited discovery, the district court held a hearing on April 3 and 4, 1991, to determine whether to issue a preliminary injunction. The district court orally denied the FTC's motion for preliminary injunction and issued a written order on April 11, 1991. The FTC filed an expedited appeal to the Eleventh Circuit, and the appeal was argued on May 6, 1991. On the day of the argument, the Eleventh Circuit orally vacated the district court's order and directed it to grant the requested injunction. On July 26, 1991, the Eleventh Circuit issued its written opinion. 938 F.2d at 1210.
still concluded that it was not likely that the proposed acquisition would substantially lessen competition.\textsuperscript{13}

The district court based this conclusion on its belief that (1) University Hospital and St. Joseph, as nonprofit corporations, would not act anti-competitively; (2) St. Joseph was a weak competitor in the market, and in fact, was not a "true competitor" of University Hospital; and (3) a number of efficiencies would result from the proposed acquisition, including the elimination of duplicate expenses for capital outlays and administration, and the elimination of "wasteful competition" in the market.\textsuperscript{13} The Eleventh Circuit vacated the district court's order, and directed the district court to issue the preliminary injunction.\textsuperscript{14}

The Eleventh Circuit's analysis begins with the threshold issue of whether section 7 of the Clayton Act applies to asset acquisitions by nonprofit hospitals. Defendants argued that section 7 should not apply to nonprofit entities such as the defendant hospitals because section 7 applies only to "person[s] subject to the jurisdiction of the [FTC];"\textsuperscript{15} yet, the FTC has no jurisdiction to regulate nonprofit, charitable entities\textsuperscript{16} because section 5 of the Federal Trade Commission Act ("FTCA")\textsuperscript{17} provides the FTC with jurisdiction over "corporations," which section 4 of the FTCA defines to be entities organized to carry on business for a profit.\textsuperscript{18}

In rejecting defendants' argument,\textsuperscript{19} the Eleventh Circuit determined that the jurisdictional requirement of section 7\textsuperscript{20} was governed not by the FTCA, but by section 11 of the Clayton Act.\textsuperscript{21} Section 11 provides the FTC with the authority to enforce compliance with sections 2, 3, 7 and 8 of the Clayton Act, except in certain circumstances when compliance is to

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\item \textsuperscript{12} 938 F.2d at 1210-11. The FTC and the Justice Department rely on the Herfindahl-Hirshman Index ("HHI") to measure market concentration. Under the United States Department of Justice Merger Guidelines, a market in which the pre-merger HHI is above 1800 is considered "highly concentrated," and in such a market a merger that would increase the HHI by over 50 raises significant antitrust concerns. The proposed merger of St. Joseph would have increased the HHI by over 630 to approximately 3,200. Id. at 1211 n.12.
\item \textsuperscript{13} Id. at 1211.
\item \textsuperscript{14} Id. at 1226.
\item \textsuperscript{15} Section 7 provides in part that "no person subject by the jurisdiction of the [FTC] shall acquire the whole or any part of the assets of another person . . . where . . . the effect of such acquisition may be substantially to lessen competition." 15 U.S.C.A. § 18 (West Supp. 1991).
\item \textsuperscript{16} See Community Blood Bank v. FTC, 405 F.2d 1011 (8th Cir. 1969).
\item \textsuperscript{18} 938 F.2d at 1214.
\end{itemize}
be enforced by four other federal agencies. The court reasoned that (1) Congress had amended both section 7 and 11 of the Clayton Act in 1950 so as to increase the FTC's jurisdiction, and, therefore, Congress could not have meant to explicitly exempt all nonprofit entities from this jurisdiction; (2) Congress intended for the FTC's jurisdiction to be greater in enforcing the specific provisions of the Clayton Act than in enforcing the general provisions of the FTCA; and (3) it is better to interpret a section of a statute by referring to other sections of the same statute instead of turning to provisions in other statutes.

The court's holding that section 7 of the Clayton Act applies to nonprofit hospitals appears to be one of first impression among the circuit courts. The court's reasoning is very persuasive, and its decision should be followed by the other circuits. Not surprisingly, the FTC has held in a recent opinion that it has jurisdiction over nonprofit hospitals under section 7 of the Clayton Act.

After determining that section 7 applies to the acquisition of nonprofit hospitals and that the FTC had jurisdiction to bring this action under section 13(b) of the Federal Trade Commission Act, the Eleventh Circuit focused on whether a preliminary injunction should be issued. In finding that there was a

23. 938 F.2d 1214-17. Defendants also argued that even if the FTC had jurisdiction to enforce section 7 against a nonprofit entity, the FTC could not seek to enjoin this acquisition under 13(b) of the Federal Trade Commission Act ("FTCA") because section 5 of the FTCA provided the FTC with jurisdiction only over "for profit" entities. The Eleventh Circuit summarily rejected this argument and held that "section 13(b) applies to the FTC's enforcement power under all statutes, not just those contained in the FTCA." Id. at 1217 n.23.
24. Judge Posner, in United States v. Rockford Memorial Corp., 898 F.2d 1278, 1280-81 (7th Cir. 1989), cert. denied, 111 S. Ct. 295 (1990), stated in dicta that the FTC had authority to bring an action under section 7 of the Clayton Act to enjoin the merger of two nonprofit hospitals. Judge Posner also reasoned that the jurisdictional language of section 7 of the Clayton Act was controlled by the language of section 11. 898 F.2d at 1280-81.
25. Contrary to the Eleventh Circuit's holding, the district court in United States v. Carilion Health Serv., 707 F. Supp. 841 n.1 (W.D. Va.), aff'd on other grounds, 892 F.2d 1042 (4th Cir. 1989), found that the FTC did not have jurisdiction to bring a section 7 action against two nonprofit hospitals because the FTCA did not confer jurisdiction over nonprofit entities.
28. The Eleventh Circuit stated: [1] In determining whether to grant a preliminary injunction under section 13(b), a district court must (1) determine the likelihood that the FTC will ultimately succeed on the merits and (2) balance the equities. To obtain a preliminary injunction, then, the FTC need not satisfy the traditional equity standard that courts impose on private litigants—the FTC need not prove irreparable harm.
938 F.2d at 1217-18 (citation omitted).
"reasonable probability that the proposed transaction would substantially lessen competition in the future," the court focused on the high level of concentration in the market after the acquisition, and on the substantial barrier to entry created by the Georgia Certificate of Need Law. The court rejected defendants' argument that because St. Joseph is a "weak competitor" this undermines the predictive value of the FTC's market share statistics. The court pointed out that a "weak company" is not the same as a "failing company" and refused to hold that the acquisition of a "weak company" was absolutely immune from section 7. The court noted that it would credit a "weak company" defense "only in rare cases, when the defendant makes a substantial showing that the acquired firm's weakness, which cannot be resolved by any competitive means, would cause that firm's market share to reduce to a level that would undermine the government's prima facie case." The court found no such showing in the present case.

The Eleventh Circuit also rejected defendants' argument that the proposed acquisition would result in such efficiencies that it would not substantially lessen competition. Although the FTC asserted that the law has not recognized such an "efficiency defense" in any form, the Eleventh Circuit stated that such a defense might rebut the government's prima facie case under certain circumstances. The court refrained from defining the parameters of such a defense, but did hold "that a defendant who

29. Id. at 1218.
30. The court stated that:

[under the "failing company" defense, an acquisition [of a company] that otherwise would violate section 7 is allowed if: (1) the firm being acquired faces a "grave probability of business failure" (i.e., bankruptcy) and (2) there is no less anticompetitive means of avoiding the failure, such as merger with some other firm. See Citizen Publishing Co. v. United States, 394 U.S. 131, 136-39 . . . (1969); International Shoe Co. v. FTC, 280 U.S. 291, 302 . . . (1930).

938 F.2d at 1220 n.28. Section 5-1 of the Department of Justice and Federal Trade Commission Horizontal Merger Guidelines issued on April 2, 1992 recognizes a failing firm defense if the following circumstances are met: 1) the allegedly failing firm would be unable to meet its financial obligations in the near future; 2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; 3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm that would both keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger; and 4) absent the acquisition, the assets of the failing firm would exit the relevant market.

Section 5.2 also recognizes a "failing division" defense.

31. 938 F.2d at 1221.
32. Id. at 1222. The United States Department of Justice Merger Guidelines (1984) and the April 2, 1992 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines provide that some mergers that would otherwise be challenged might not be challenged because of their resulting efficiencies.
seeks to overcome a presumption that a proposed acquisition would sub-
stantially lessen competition must demonstrate that the intended acquisi-
tion would result in significant economies and that these economies ulti-
mately would benefit competition and, hence, consumers." The court
went on to find that defendants had failed to show that the acquisition of
St. Joseph would result in significant economies.

The court next rejected defendants' argument that because they are
nonprofit organizations, they would be less likely to collude and, there-
fore, the acquisition would be less likely to result in substantially less
competition. The court also was unmoved by defendants' argument that
their prior history of service to the public demonstrated a proclivity to
compete and not to collude. Moreover, the court noted that the acquisi-
tion would make it easier for the three additional hospitals in the market
to collude.

The Eleventh Circuit in a footnote also summarily rejected defend-
ants' argument that the proposed acquisition was immune under the state
action doctrine of Parker v. Brown. The court held that Georgia has not
clearly articulated a policy to displace competition by hospitals, and it
refused to conclude that Georgia's policy clearly favors asset acquisitions
by hospitals regardless of the competitive effect. The court also rejected
defendants' argument that because the consumers in the relevant market
were primarily large, sophisticated insurers, this would lessen the possi-
bility of any collusion among the remaining hospitals. Finally, after balancing the equi-
ties associated with issuing an injunction, the court vacated the district
court's order and directed the district court to issue a preliminary
injunction.

33. Id. at 1223.
34. Id. at 1223-24.
35. Id. at 1224. Judge Posner was unpersuaded by a similar argument in United States v.
Rockford Memorial Corp., 898 F.2d 1278, 1285 (7th Cir. 1990), cert. denied, 111 S. Ct. 295
36. 938 F.2d at 1224.
37. Id. at 1213 n.13.
38. 317 U.S. 341 (1943).
39. 938 F.2d at 1213 n.13.
40. Id. See Section 2-12 of April 2, 1992 Department of Justice and Federal Trade Com-
mision Horizontal Merger Guidelines ("buyer characteristics and the nature of the procure-
ment process may affect the incentives to deviate from terms of coordination").
41. Id.
42. Id. at 1224-26.
Overall the Eleventh Circuit’s opinion in FTC v. University Health, Inc. is well reasoned. It is appropriate for nonprofit entities to be subject to section 7 of the Clayton Act, and for the FTC to be able to utilize section 13(b) of the FTCA to enforce section 7 as to nonprofit entities. The court’s holdings with respect to the state action doctrine and the noncompetitive effect of insurers on the market are well reasoned. Even the court’s comments concerning a “weak company” defense and an “efficiency” defense are acceptable if one considers that such defenses are primarily theoretical concepts and available in the real world only in very rare circumstances. In essence, the opinion appears to be a reaffirmance of the great weight that courts should place on market concentration data in the merger area, especially when there are significant barriers to entry.

In Thompson v. Metropolitan Multi-List, Inc., plaintiffs were concerned with the membership requirements of a realty multilist service. Defendant, Metropolitan Multi-List Inc. (“Metro”), was a computerized real estate multilisting system wholly owned by defendant Dekalb Board of Realtors (“Dekalb”). Metro provided its multilist service throughout all of Atlanta. While another multilist company, First Multiple, competed with Metro on the north side of Atlanta, Metro had little or no competition on the south side of Atlanta. Plaintiff, Fletcher Thompson, was a real estate broker who owned a brokerage firm on the south side of Atlanta, and plaintiff, Empire Real Estate Board (“Empire”), was a predominantly African-American professional association of real estate brokers and agents. Real estate brokers and agents could utilize Metro’s multilist service only if they also were members of a “Realtor Board” such as Dekalb or the Atlanta Board of Realtors.

Plaintiff Thompson applied to use Metro’s multilist service, but was refused access unless he agreed to join a Realtor Board. Empire was not a Realtor Board and asserted that it was losing members because many of its members who needed to use Metro’s multilist service could not afford to pay membership dues to both Empire and a Realtor Board. Plaintiffs therefore brought, inter alia, three antitrust claims against the defendants claiming an illegal tying arrangement, a group boycott, and a conspiracy to monopolize. The district court dismissed each of these three claims pursuant to a motion for summary judgment. The Eleventh Circuit affirmed the district court’s grant of summary judgment in favor of defend-

43. 934 F.2d 1566 (11th Cir. 1991).
44. The author was retained in this case to assist plaintiffs’ counsel in the drafting of plaintiffs’ brief in opposition to defendants’ petition for writ of certiorari to the Eleventh Circuit.
45. 934 F.2d at 1569-70. A “Realtor Board” is one of the local branches of the National Association of Realtors.
46. Id.
ants on the conspiracy to monopolize claim, but reversed the district court’s grant of summary judgment with respect to the tying and group boycott claims.47

The Eleventh Circuit initially addressed the issue of whether plaintiffs had standing to bring the antitrust claims. Utilizing the two-pronged inquiry set forth in Todorov v. DCH Healthcare Authority,48 the court found that Empire had antitrust standing with respect to each of the antitrust counts, but that Thompson had antitrust standing to litigate only the tying and group boycott claims.49

The court then found that the relevant product market was the market for multilist services.50 The court rejected the district court’s conclusory finding that the relevant geographic market was all of Atlanta. Instead, the court found there was a material issue of fact as to whether the appropriate geographic market was all of Atlanta or simply the south side of Atlanta, and that, therefore, summary judgment was inappropriate.51

Reaffirming the elements of a per se tying claim set forth in Tick-X-Press, Inc. v. Omni Promotions Co.52 and Keener v. Sizzler Family Steakhouse,53 the court rejected Metro’s argument that the multilist service offered by Metro and the support services offered by the Realtor Boards were actually one product because the multilist service was useless without the support services provided by the Realtor Boards.54 The court found that the relevant evidence demonstrated the market for professional affiliation was separate from the market for multilist services

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47. Id. at 1583.
48. Under Todorov, to determine whether a plaintiff has antitrust standing the court must determine (1) whether the plaintiff has suffered an antitrust injury and (2) whether the plaintiff is an efficient enforcer of the antitrust laws. Todorov v. DCH Healthcare Auth., 921 F.2d 1438 (11th Cir. 1991).
49. 934 F.2d at 1571-72.
50. Id. at 1572.
51. Id. at 1573-74.
52. 815 F.2d 1407 (11th Cir. 1987). The court held that the four basic elements of a per se tying claim are:
   (1) that there are two separate products, a “tying” product and a “tied” product;
   (2) that those products are in fact “tied” together—that is, the buyer was forced to buy the tied products to get the tying product;
   (3) that the seller possesses sufficient economic power in the tying product market to coerce buyer acceptance of the tied product; and
   (4) involvement of a not “insubstantial” amount of inter-state commerce in the market of the tied product.
53. 597 F.2d 453 (5th Cir. 1979). The court in Keener added a fifth requirement that the tying company have an economic interest in the tied product. Id. at 466.
54. 934 F.2d at 1574-75.
and, therefore, held that summary judgment in favor of the defendants was inappropriate on this element of the claim.\footnote{Id. at 1575-76.}

This holding by the Eleventh Circuit appears correct in light of the Supreme Court's statement in \textit{Jefferson Parish Hospital District No. 2 v. Hyde}\footnote{466 U.S. 2 (1984).} that the "answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items."\footnote{Id. at 19.} Because the record clearly demonstrated a separate consumer demand for both Realtor and multilist services, these products appear to be separate and distinct.\footnote{But cf. Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors, 850 F.2d 803, 815 (1st Cir.), cert. denied, 488 U.S. 955 (1988) (raises issue in dicta of whether membership in Realtor Board and membership in multilist are two separate products).}

The Eleventh Circuit next found no dispute between the parties as to the requirement that the two products actually be tied together.\footnote{934 F.2d at 1576.} With respect to the requirement that the seller must possess sufficient economic power in the tying product market to coerce buyer acceptance of the tied product, the court found that in order to determine whether the seller has market power there must first be a determination of what constitutes the relevant geographic market.\footnote{Id.} Because there was a material issue of fact as to whether the appropriate geographic market was strictly the south side or all of Atlanta, the court remanded the case to the district court to make the initial determination of whether the tying market was the portion of multilist services containing listings in the south side or the portion containing listings in all of Atlanta.\footnote{Id. at 1577.}

The Eleventh Circuit found there was "evidence in the record suggesting that multilist systems are necessary, that there are few realistic substitutes, that there are entry barriers to the market, and that Metro may not have any competitors."\footnote{Id. at 19.} In short, the court found there was a material issue of fact as to whether the defendants had the necessary

\footnote{Id. at 1575-76. The court found, for example, that: there is evidence that the bill for joining the Realtors is separate from Metro's bill; that a broker can join the Realtors and choose not to use the multilist service; that, within Atlanta, there are at least two professional groups competing for members; that some local Realtor groups offer multilist services and some do not; that Metro was once an independent organization that was later purchased by the Realtors who imposed the Realtor membership requirement; and that in other markets, multilist services are independent of professional membership.}
The court held there was sufficient evidence in the record to find that (1) "Metro wielded this market power to force brokers to alter their choice of professional associations;" (2) "the tie had more than an insubstantial effect on commerce," and (3) Metro had an economic interest in Dekalb and the Atlanta Board of Realtors. Thus, the court held that plaintiffs had placed sufficient evidence into the record supporting the five prima facie elements of a per se illegal tying arrangement.

In analyzing plaintiffs' group boycott claims, the court applied the controlling precedent of United States v. Realty Multi-List, Inc. In Realty Multi-List, the Antitrust Division of the United States Department of Justice alleged that certain membership requirements for a multilist service located in Columbus, Georgia resulted in a group boycott that was per se illegal under section 1 of the Sherman Act. The Fifth Circuit held that the multilist's membership criteria should not be subject to per se review and instead adopted a hybrid rule of reason analysis. First, in order for a violation to exist, the multilist service must have sufficient market power to warrant a review of its rules. Even if the multilist service has sufficient market power, its rules will be considered reasonable if (1) they are justified by the legitimate competitive needs of the multilist service, and (2) the rules requirements are reasonably necessary to the accomplishment of the legitimate goals of the multilist service, and are narrowly tailored to that end. If the rules fail to meet these standards, then they will be found unreasonable.

In Thompson the district court found that Metro did not have sufficient market power and granted summary judgment. The Eleventh Circuit, however, found that the district court was in error (1) because it defined the relevant market as all of Atlanta when there was at least a material issue of fact as to whether a smaller geographic market was appropriate; and (2) because it required plaintiffs to produce exact percentages of Metro's share of the market even though no showing of exact percentages was required by the Eleventh Circuit. The Eleventh Circuit

63. Id.
64. Id. at 1577-79.
65. Id. at 1579.
66. 629 F.2d 1351 (5th Cir. 1980).
67. Id. at 1354.
68. Id. at 1369.
69. Id. at 1372-73.
70. Id. at 1374-75.
71. Id. at 1375. See generally Pope v. Mississippi Real Estate Comm'n, 872 F.2d 127, 130-31 (5th Cir. 1989) (court used Realty Multi-List test to determine that Realtor Board's membership fee schedule was reasonable).
72. 934 F.2d at 1580.
concluded that summary judgment was inappropriate because there was an issue of material fact as to the existence of Metro's market power.73

Metro argued that even if it had market power, its Realtor membership requirement was reasonable because the Realtor code of ethics imposed a "no solicitation" rule and required Realtors to arbitrate all disputes, and that both of these requirements were necessary to the successful operation of Metro's multilist service. Because Metro itself could adopt a "no solicitation" rule and require arbitration among its members, the court found that Metro's requirement of Realtor Board membership, which resulted in Metro's members having to pay additional fees and follow rules and regulations not related to the operation of the multilist service, did not meet the "narrowly tailored" requirement of Realty Multi-list.74 The court, therefore, found as a matter of law that the Realtor Board requirement was unreasonable and resulted in an illegal group boycott if Metro had sufficient market power.75 The court remanded the case to the district court to determine whether Metro had this market power.76

The Eleventh Circuit then found nothing in the record that suggested that Metro had a specific intent to monopolize,77 and, therefore, affirmed the district court's grant of summary judgment in favor of defendants with respect to the alleged conspiracy to monopolize.78

The Eleventh Circuit's opinion in Thompson is well reasoned and straightforward. The court's review of the record to determine if there was any evidence in support of plaintiffs' claims is a refreshing respite from the pro-defendant, pro-Chicago School days of the late 1980s. It re-

73. Id. at 1581.
74. Id. at 1582.
75. Id.
76. Id. at 1582-83. Metro's requirement that a real estate broker or agent must belong to any Realtor Board in order to use Metro's multilist service appears to be significantly different from a requirement by a Realtor Board that a real estate broker or agent must belong to that Realtor Board in order to use a multilist service which that Realtor Board operates. Id. at 1583. A few district courts have found the latter requirement reasonable. See, e.g., Pope v. Mississippi Real Estate Comm'n, 695 F. Supp. 253, 269-72 (N.D. Miss.), aff'd on other grounds, 872 F.2d 127 (5th Cir. 1989).
77. The Eleventh Circuit found that the district court had incorrectly placed the burden of proving defendants' specific intent to monopolize on plaintiffs without first determining whether defendants had come forward with evidence suggesting that summary judgment was warranted. Although the moving party has the initial burden of demonstrating that there are no genuine issues of material fact that should be decided at trial, the district court had not examined whether the moving party had any evidence on the issue of intent. 934 F.2d at 1583 n.16.
78. Id. at 1582-83. The elements of a conspiracy to monopolize claim under section 2 of the Sherman Act are: (1) the existence of concerted action by knowing participants; (2) a specific intent to monopolize and (3) an overt act. See Key Enter. of Del., Inc. v. Venice Hosp., 919 F.2d 1550 (11th Cir. 1990).
mains to be seen, however, whether district courts reviewing summary judgment motions will consider the case to be a signal to be more sensitive to the possibility of conflicting evidence in the record.

Unfortunately, the Eleventh Circuit occasionally lacks consistency in its handling of antitrust issues, as *Todorov v. DCH Healthcare Authority* illustrates. *Todorov* concerned a hospital's refusal to grant a staff neurologist the additional privileges of administering and interpreting CT scans in the hospital's radiology department. Soon after receiving staff privileges in neurology at DCH Regional Medical Center ("DCH"), Dr. Todorov applied to DCH for the privilege to administer and interpret CT scans of the head. At the time of Dr. Todorov's application, the administering and interpreting of CT scans at DCH was being performed by the defendant radiologists. Dr. Todorov's application for privileges was reviewed by a number of committees at DCH, some of which included one of the defendant radiologists. Both Dr. Todorov and his lawyer were granted opportunities to appear before these committees.

The hospital's executive committee recommended that Dr. Todorov not be granted radiology privileges because it did not want to establish a precedent of granting radiology privileges to nonradiologists. The committee felt that if such privileges were granted, the radiology department's operations, especially the scheduling of radiological procedures, could become chaotic. The committee also was concerned that Dr. Todorov would have difficulty complying with the hospital's requirement that a report be filed in the hospital's medical records for a patient within twenty-four hours after a CT scan procedure was completed. The hospital's Board of Directors accepted the reasons expounded by the executive committee for its recommendation and denied Dr. Todorov's application for radiology privileges. Dr. Todorov then filed a complaint alleging, inter alia, violations of sections 1 and 2 of the Sherman Act, and a violation of 42 U.S.C. § 1983.

The district court granted defendants' motion for summary judgment and held that (1) DCH was immune from antitrust liability under the state action doctrine because it was a local governmental entity; and (2) the activities of the defendant radiologists were not illegal under the antitrust laws because they were protected under the Noerr-Pennington Doctrine or, alternatively, because the defendant radiologists were employees of DCH and as such enjoyed DCH's immunity. The district court also granted summary judgment with respect to the section 1983 claim, finding that Dr. Todorov had no protected liberty or property interest in his

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79. 921 F.2d 1438 (11th Cir. 1991).
80. *Id.* at 1441-43.
81. *Id.* at 1443-44.
application for radiology privileges, and that even if he did, DCH had not denied him due process of law in the processing of his application.\textsuperscript{83} The Eleventh Circuit affirmed the district court's grant of summary judgment.\textsuperscript{84}

The Eleventh Circuit expressed serious doubts concerning the district court's application of the Noerr-Pennington Doctrine to defendant radiologists because their activities were more economic than political in nature.\textsuperscript{85} The court, therefore, declined to rely on this doctrine in affirming the district court's grant of summary judgment.\textsuperscript{86}

The Eleventh Circuit also held that the district court's finding that the defendant radiologists, as active employees of DCH, could not conspire with DCH was incorrect.\textsuperscript{87} The court felt that this finding did not comport with its holding in \textit{Bolt v. Halifax Hospital Medical Center}\textsuperscript{88} "that members of a hospital's medical staff should be considered independent legal entities for antitrust purposes if they are not employed by the hospital and are acting as separate economic actors."\textsuperscript{89}

Before examining Dr. Todorov's antitrust claims, the court set forth an explanation of the economic operation of the market at issue.\textsuperscript{90} The court then addressed the issue of whether Dr. Todorov had standing to bring

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\item \textsuperscript{83} 921 F.2d at 1445-46.
\item \textsuperscript{84} Id. at 1446-47.
\item \textsuperscript{85} Id. at 1446 n.14.
\item \textsuperscript{86} Id.
\item \textsuperscript{87} Id. at 1446.
\item \textsuperscript{88} 891 F.2d 810, 819 (11th Cir.), \textit{cert. denied}, 110 S. Ct. 1960 (1990).
\item \textsuperscript{89} 921 F.2d at 1446 n.13.
\item \textsuperscript{90} Id. at 1447-48. In this explanation, the court, in essence, asserted that if the defendant radiologists were receiving monopolistic profits as alleged by plaintiff then it would be in DCH's best interest to increase competition among the radiologists so as to lower their fees to patients. These lower fees would attract additional patients and increase the hospital's own revenue. Thus, the court reasoned that it would be in the hospital's economic self-interest to grant Dr. Todorov the requested radiology privileges; yet, the hospital refused to do so.

Although the court's description of the market appears reasonable initially, it suffers from a lack of data, and therefore, might be nothing more than speculation. For example, the court did not explore the extent to which the radiologists influenced the outpatients' decision as to which hospital to use for CT scans, nor did it explore the number of patients the radiologists might divert to competing hospitals if their fees were lowered at DCH. Similarly, there was no discussion as to whether DCH was concerned that if it attempted to increase competition among the defendant radiologists it might lose the services of all, or a number of, the defendant radiologists; nor was there any indication in the opinion that DCH was currently trying or had tried to increase the number of radiologists on its staff. Thus, there was no exploration of whether DCH was concerned that if it unilaterally attempted to foster competition among defendant radiologists, it would lose revenue because a significant number of outpatients would be diverted by defendant radiologists to hospitals where they made greater profits because of less competition.
the antitrust claims. The court stated that such an inquiry requires a
two-pronged approach:

[first, a court should determine whether the plaintiff suffered "antitrust
injury";91 second, the court should determine whether the plaintiff is an
efficient enforcer of the antitrust laws, which requires some analysis of
the directness or remoteness of the plaintiff’s injury. This two-pronged
approach was endorsed by the Supreme Court when it stated that “[a]
showing of antitrust injury is necessary, but not always sufficient, to es-
establish standing under [section] 4, because a party may have suffered
antitrust injury but may not be a proper plaintiff under [section] 4 for
other reasons.”92

The Supreme Court in Cargill, Inc. v. Monfort of Colorado, Inc.93 held
that “other factors” in addition to antitrust injury might be required for
antitrust standing.94 These other factors include the directness or indi-
rectness of the alleged injury, “the potential for duplicative recovery, the
complexity of apportioning damages, and the existence of other parties
that have been more directly harmed.”95 The Eleventh Circuit’s require-
ment of an “efficient enforcer,” therefore, seems to be simply a shorthand
way of identifying these other factors.

The Eleventh Circuit then undertook a remarkable analysis in an effort
to demonstrate that Dr. Todorov would be an inefficient competitor of
defendant radiologists and as such would be concerned only with seeking
a share of defendant radiologists’ alleged monopoly profits. Because Dr.
Todorov allegedly was seeking only a share of defendant radiologists’ mo-
nopoly profits as damages, the court concluded that his injury was not the
type that the antitrust laws were designed to prevent.96 Moreover, be-

91. Antitrust injury is:
injury of the type the antitrust laws were intended to prevent and that flows from
that which makes the defendants’ acts unlawful. The injury should reflect the an-
ticompetitive effect either of the violation or of anticompetitive acts made possible
by the violation. It should, in short, be “the type of loss that the claimed viola-
tions . . . would be likely to cause.”
v. Hazeltine Research, 395 U.S. 100, 125 (1969)).
92. 921 F.2d at 1449 (quoting Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 110
n.5 (1986)).
94. Id. at 110-11 nn.5 & 6.
95. Id. at 111 n.6. The Supreme Court also noted that the requirements for standing
under section 4 of the Clayton Act are different than the requirements for standing under
section 16 of the Clayton Act because of the difference in remedy that each section provides.
Id. Both sections 4 and 16 require a showing of antitrust injury for standing. 921 F.2d at
1452.
96. 921 F.2d at 1453-54.
cause Dr. Todorov did not have any antitrust injury, the court found that he did not have antitrust standing. Finally, the court suggested that Dr. Todorov would not be an efficient enforcer of the antitrust laws because his interest in seeking monopoly profits would be at odds with the interests of the patients undergoing CT scans.

The Eleventh Circuit’s analysis appears potentially flawed in several respects. First, the analysis appears to be nothing more than pure speculation by the court. For example, there does not appear to be any kind of study or evidence in the record concerning the cost efficiencies and overhead costs of Dr. Todorov or defendant radiologists. The court did not examine the cost to defendant radiologists of maintaining offices at both DCH and West Alabama General Hospital or of the travel time wasted by defendants in commuting between these two locations. There also was no hard evidence that defendant radiologists could interpret a CT scan more efficiently than Dr. Todorov, nor was there any accounting for the fact that Dr. Todorov was already interpreting CT scans as part of his neurological practice without receiving any form of compensation. By receiving radiology privileges from DCH, Dr. Todorov would not incur any more time, costs, or expenses in interpreting CT scans, but instead would be compensated for the interpretations that he was already performing.

Second, and more important, the court did not appear to consider that, under economic theory, when the market for CT scans reaches a competitive level, and defendant radiologists are receiving a competitive fee instead of monopoly profits, this competitive fee by definition would include a reasonable profit. Under economic theory, if Dr. Todorov were an efficient supplier of services once the market reached a competitive level, he still would be receiving a reasonable profit, and he still would have an incentive to administer and interpret CT scans. Consequently, the court’s statements that Dr. Todorov would have “no profits to lose once price settled at the competitive level” and that “Dr. Todorov eventually would either be driven from the market or reach some agreement with the radiologists to fix prices” appear to be inaccurate. Because Dr. Todorov still would be receiving a reasonable profit at competitive price levels, his inability to compete for those reasonable profits because of the alleged illegal conduct by defendants should have been found to constitute antitrust injury.

Even though the court refused to afford Dr. Todorov standing to raise his antitrust claims, the court still addressed the merits of his section 1

97. Id.
98. Id. at 1454-55.
99. Dr. Todorov apparently would incur additional expenses in administering the tests.
100. 921 F.2d at 1454.
101. Id. at 1453.
and section 2 claims. The court, reaffirming its holding in *Bolt v. Halifax Hospital Medical Center* that a hospital and the members of its medical staff, who are separate legal entities, are capable of conspiring with each other, found that Dr. Todorov had presented only circumstantial evidence of a conspiracy between the radiologists and DCH and that this circumstantial evidence was not sufficient to infer a conspiracy under section 1 of the Sherman Act.

The circumstantial evidence consisted of (1) Dr. Todorov’s qualifications to administer and interpret CT scans; (2) the radiologists’ economic interest in limiting the number of physicians performing services at DCH; (3) the radiologists’ recommendation that Dr. Todorov’s request for privileges be denied; and (4) DCH’s decision to follow the radiologists’ recommendation and deny Dr. Todorov’s request. Although these facts suggested that DCH may have conspired with the radiologists, they did not “exclude the possibility that the hospital acted unilaterally, and procompetitively, in denying him the privileges he requested.” Instead, the court accepted DCH’s Board of Directors’ assertion that it refused to grant Dr. Todorov’s privileges because this would invite a flood of similar applications from nonradiologists, and these nonradiologists eventually would create chaos in the radiology department, impairing the department’s ability to turn a profit. The court held that Dr. Todorov had failed to meet his burden of proving that DCH’s Board of Directors was willing to act against the hospital’s economic interest simply to further the goals of the radiologists.

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102. *Id.* at 1455-62. Judge Anderson did not concur with the other two justices on the panel with respect to part 2A of the opinion, which related to the antitrust standing of Dr. Todorov. *Id.* at 1465.


104. 921 F.2d at 1455 (citing *Bolt*, 891 F.2d at 819). In *Bolt* the medical staff members were not employees of the hospitals, 891 F.2d at 819; whereas in *Todorov* the district court found that the radiologists were acting as employees of DCH. If the radiologists were in fact employees of DCH, then the issue remains whether they should have shared in DCH’s immunity. 921 F.2d at 1446.

105. 921 F.2d at 1459. Although the Eleventh Circuit characterized all the evidence as circumstantial, some courts might consider the radiologists’ communications to the committees and to the board of directors to be direct evidence of collusion. See, e.g., Oltz v. St. Peters Community Hosp., 861 F.2d 1440, 1451 (9th Cir. 1988). (evidence that board knew of threat to leave hospital constituted direct evidence of collusion).

106. 921 F.2d at 1456.

107. *Id.*

108. *Id.* at 1457-59. This assertion appears weak on its face, but a review of the entire record would be necessary to determine if this is simply a pretext on the part of the Board of Directors.

109. *Id.* at 1455-59. The court did not address the fact that it had found DCH would benefit from fostering competition among the radiologists. *Id.* at 1448. One could argue,
The issue of what evidence should be sufficient to prove a conspiracy in the staff privilege context is difficult. There is the impression among certain members of the antitrust bar that the courts in general dislike antitrust staff review cases and affirmatively seek ways to dismiss these cases. Certainly there is an inherent tension that arises from attempting to accommodate the competing desires to allow physicians to complain about incompetent peers and to restrain physicians from complaining about peers simply to avoid competition. It is difficult to walk the line between these two concerns, and the courts are merely human if they appear to lean in one direction or the other.110

In attempting to walk this line, the Eleventh Circuit has taken standards that were applied specifically to dealer-termination cases111 and to cases in which the antitrust claims made no economic sense112 and applied the standards to staff privilege cases so as to require that "when the defendant puts forth a plausible, procompetitive explanation for his actions, [the court] will not be quick to infer, from circumstantial evidence, that a violation of the antitrust laws has occurred; the plaintiff must produce more probative evidence that the law has been violated."113 While such restrictive standards might be justified in the peer review, dealer termination, or implausible economic situation contexts, it is questionable whether they should be applied across the board to all situations, especially in the horizontal context.114

therefore, that DCH was acting against its own economic interest in denying Dr. Todorov radiology privileges.

The court also found that even if defendant radiologists conspired among themselves, they were not liable under section 1 because they were not the cause of Dr. Todorov's injury in as much as it was DCH and not the radiologists who denied Dr. Todorov's application. Id. at 1459. If the radiologists had misrepresented any facts to DCH, however, one might expect a different finding by the court. See Patrick v. Burget, 486 U.S. 94, 98 (1988); Bolt, 891 F.2d 810, 820-23 (11th Cir.), cert. denied, 110 S. Ct. 1960 (1990).

110. This process should be a little easier as a result of the passage of the Health Care Quality Improvement Act of 1986, 42 U.S.C.A. §§ 11101-11152 (West Supp. 1992), which provides antitrust immunity in the staff privilege situation under certain conditions.

111. See, e.g., Monsanto Co. v. Spray Rite Serv. Corp., 465 U.S. 752, 764 (1984). For a plaintiff with only circumstantial evidence to survive a motion for summary judgment, plaintiff "must present evidence that reasonably 'tends to exclude the possibility' that the alleged conspirators acted independently." 921 F.2d at 1456 (quoting Monsanto, 465 U.S. at 764).


113. 921 F.2d at 1456.

114. For example, under the standards set forth in Todorov, it is quite conceivable that a court would allow competitors to verify their prices with each other so as to justify a possible "meeting competition" defense under the Robinson-Patman Act. Yet, the Supreme
The court next held that DCH was immune from Dr. Todorov's section 2 claim because it was acting pursuant to state authorization. The court reviewed the Alabama Healthcare Authority's Act of 1982 and determined that the Alabama legislature had made hospitals such as DCH political subdivisions of the state and authorized them to select and appoint staff members and to engage in what might be characterized as anticompetitive activity. The court, therefore, found that under *Town of Hallie v. City of Eau Claire*, the actions of DCH with respect to staff privileges were immunized from antitrust laws. The court also concluded that Dr. Todorov could not maintain a section 2 claim against defendant radiologists for his injuries because DCH had acted unilaterally. Finally, with respect to Dr. Todorov's section 1983 claim, the court found that defendants did not deprive Dr. Todorov of any constitutionally protected property or liberty interest and affirmed the district court's grant of summary judgment.

In *Seagood Trading Corp. v. Jerrico, Inc.*, the Eleventh Circuit considered allegations that defendants Long John Silver's, Inc. ("LJS"), Martin-Brower Company ("M-B"), and others had conspired to drive plaintiffs out of business in violation of sections 1 and 2 of the Sherman Act. Defendant LJS owned and franchised numerous fast-food seafood restaurants throughout the United States and operated a wholesale food distributor that competed with plaintiffs in servicing these restaurants. Defendant M-B contracted with LJS to deliver its products to these restaurants. Although LJS did not prohibit M-B from providing delivery service to the restaurants for plaintiffs, M-B nonetheless turned down plaintiffs' requests. In response to competitive actions by plaintiffs, LJS contracted with certain of plaintiffs' suppliers to purchase virtually all of their supply of high quality, low-priced Canadian cod, and M-B, with LJS's approval, also began to charge a delivery fee to the restaurants that purchased below a certain volume. These two actions resulted in a sub-

Court in United States v. United States Gypsum Co., 438 U.S. 422 (1978), rejected an assertion that such behavior was immunized from the antitrust laws. *Id.* at 458-59. See also United States v. Container Corp. of America, 393 U.S. 333 (1969) (implied price fixing agreement found from competitors exchanging pricing information).

115. 921 F.2d at 1462.
117. 921 F.2d at 1461.
119. 921 F.2d at 1459-62.
120. *Id.* at 1462.
121. *Id.* at 1462-64.
123. 924 F.2d at 1563.
substantial loss of business to plaintiffs, and plaintiffs brought a sixteen count complaint, including six antitrust counts.\textsuperscript{124} The district court granted summary judgment for M-B on Count 2,\textsuperscript{125} which alleged that LJS and M-B conspired in violation of section 1 of the Sherman Act to have M-B refuse to serve plaintiffs, and on Count 6, which alleged that M-B and LJS conspired to unreasonably limit competition in the sale of cod to the restaurants in violation of sections 1 and 2 of the Sherman Act.\textsuperscript{126} The Eleventh Circuit affirmed the district court’s grant of summary judgment.\textsuperscript{127}

In upholding the district court’s grant of summary judgment with respect to Count 2, the Eleventh Circuit found that the alleged agreement between LJS and M-B that M-B would not deal with plaintiffs did not constitute a group boycott or a concerted refusal to deal because only one party (M-B) was refusing to deal with plaintiffs.\textsuperscript{128} The alleged agreement between LJS and M-B, therefore, was subject to rule of reason and not per se review.\textsuperscript{129} The court also found that the alleged agreement should be reviewed under the rule of reason because it was in the nature of a vertical agreement.\textsuperscript{130} Employing a rule of reason analysis, the court focused on such things as (1) LJS’s economies of scale, (2) the passing of cost savings to the restaurants, (3) the court’s belief that plaintiffs simply wanted a “free ride” on LJS’s economies of scale, and (4) M-B’s position as just one of many providers of restaurant delivery services.\textsuperscript{131} Upon consideration of these factors, the court found that plaintiffs had failed to meet their burden of proving an illegal anticompetitive effect from the agreement.\textsuperscript{132}

The Eleventh Circuit next reviewed the district court’s finding that plaintiffs’ circumstantial evidence was not sufficient to support an inference that M-B had joined a conspiracy with LJS and LJS’s cod suppli-

\textsuperscript{124} Id. at 1159-62.
\textsuperscript{125} The district court granted a number of additional summary judgment motions, but these were not appealed to the Eleventh Circuit. Id. at 1566.
\textsuperscript{126} Id.
\textsuperscript{127} Id. at 1565, 1577.
\textsuperscript{128} Id. at 1568.
\textsuperscript{129} Id. at 1567-68. See Construction Aggregate Transp., Inc. v. Florida Rock Indus., Inc., 710 F.2d 752, 772-74 (11th Cir. 1983); Abadir & Co. v. First Miss. Corp., 651 F.2d 422, 426-28 (5th Cir. 1981).
\textsuperscript{130} 924 F.2d at 1568-69. The court assumed that there was an agreement between LJS and M-B and found that there was sufficient circumstantial evidence in the record to support this finding. Interestingly, this evidence consisted primarily of normal business contact between LJS and M-B, and on its face, does not appear to be any more probative than the circumstantial evidence set forth in Todorov. See id. at 1570 n.38.
\textsuperscript{131} Id. at 1570-73.
\textsuperscript{132} Id. at 1573.
Applying virtually the same standards for reviewing circumstantial evidence as set forth in *Todorov,* the court found there was insufficient evidence to infer that M-B had knowledge of the alleged conspiracy or participated in the alleged conspiracy. In light of the very weak circumstantial evidence cited in the opinion, the court’s holding appears reasonable. Even the court’s adoption of the *Todorov* standards is understandable, if one views this case in the context of a vertical conspiracy.

In *Municipal Utilities Board v. Alabama Power Co.*, plaintiff municipal and public corporations filed a complaint against twenty-two rural electric cooperatives, the Alabama Rural Electric Association of Cooperatives, and the Alabama Power Company, alleging that defendants had illegally agreed to divide service territories among themselves and had conspired with members of the Alabama legislature and state government to immunize their behavior by codifying this illegal agreement into the Service Territories for Electrical Suppliers Acts (the “Acts”). The Acts governed activities by electric suppliers both outside and inside existing city limits and incorporated certain private agreements among defendants. These private agreements had been entered into previously by defendant electric suppliers and allegedly prevented line duplication in certain areas.

The district court granted defendants’ motion to dismiss. The district court found that plaintiff cities lacked standing to bring claims for any antitrust injuries occurring outside the service areas assigned to them by the Acts, but had standing to bring claims for antitrust injuries occurring within their service areas. With respect to antitrust claims arising within these service areas, however, the district court found that the alleged illegal conduct was immune from antitrust liability under the state factions.

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133. *Id.*
134. See 921 F.2d at 1455-56.
135. 924 F.2d at 1575.
136. For example, there is no mention in the opinion of even unilateral comments along the lines that defendants should cut off all of plaintiffs’ supplies or put plaintiffs out of business.
139. 934 F.2d at 1497-98.
140. *Id.* at 1498.
141. *Id.*
action doctrine and the Noerr-Pennington Doctrine. The Eleventh Circuit affirmed in part and reversed in part.

The Eleventh Circuit applied the Todorov test for antitrust standing, which requires that a plaintiff have an antitrust injury and be an efficient enforcer of the antitrust laws, and found that plaintiffs (1) had an antitrust injury because the Acts affected where plaintiffs could compete in the retail electricity market and (2) were efficient enforcers of the antitrust laws because they were directly injured by defendants' actions. Contrary to the district court decision, the Eleventh Circuit, therefore, held that plaintiffs had antitrust standing with respect to practices both inside and outside their service areas.

The Eleventh Circuit next found that the state action doctrine partially immunized defendants from antitrust liability. The court rejected defendants' argument that a "public co-conspirator" exception to the state action doctrine should apply and observed that the Supreme Court had recently held in City of Columbia v. Omni Outdoor Advertising, Inc. that there was no "public co-conspirator" exception to the state action doctrine.

The Eleventh Circuit then reviewed whether the Acts met the two-pronged requirement of California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc. After reviewing the Acts, the court found that the Alabama legislature had clearly articulated a state policy to displace competition in the retail electric market except for large industrial customers. The court also found that the active state supervision requirement of Midcal was met because the Acts left virtually no decision making authority over restraints of competition in the hands of private parties so there was basically no discretionary authority remaining for the retail electric suppliers. Defendants' actions taken pursuant to the Acts, therefore, were immunized by the state action doctrine. However, because the terms of the private agreements incorporated into the Acts were not in the record, the court could not determine whether defendants' ac-

144. 934 F.2d at 1505-06.
145. Id. at 1498-1500.
146. Id. at 1500.
147. Id. at 1504.
149. 934 F.2d at 1501.
151. 934 F.2d at 1502.
152. Id. at 1502-04.
153. Id. at 1504.
tions taken pursuant to the private agreements also were immunized.\textsuperscript{154} The court remanded this issue to the district court so that it could review the provisions of the private agreements.\textsuperscript{155}

Finally, the court rejected plaintiffs' assertion that defendants' actions prior to the enactment of the Acts were conspiratorial and that the passage of the Acts could not immunize this prior conduct.\textsuperscript{156} The court found that defendants' actions were simply joint efforts to petition the government and as such were immunized from antitrust liability under the Noerr-Pennington Doctrine.\textsuperscript{157}

In \textit{Tidmore Oil Co. v. BP Oil Co./Gulf Products Division},\textsuperscript{158} the Eleventh Circuit concerned itself with defendant BP Oil Company's ("BP") refusal to permit one of its customers, plaintiff Tidmore Oil Company, to open additional Gulf stations. Plaintiff and defendant had entered into several written contracts, which allowed plaintiff to display the Gulf brand and logo at certain locations and provided that plaintiff would not display any Gulf indicia at any other location unless it had been approved by defendant.\textsuperscript{159} After BP, which was a dual distributor, refused on several occasions to grant plaintiff permission to open additional Gulf locations, plaintiff brought an action alleging, inter alia, horizontal and vertical restraints in violation of section 1 of the Sherman Act.\textsuperscript{160}

The district court granted summary judgment with respect to the section 1 claim because it did not believe plaintiff had produced sufficient facts to support the inference that there was a conspiracy between plaintiff and defendant.\textsuperscript{161} The Eleventh Circuit made no attempt to distinguish between vertical and horizontal agreements, but simply agreed that there was no showing of an agreement between BP and plaintiff and found that BP was doing nothing more than exercising a unilateral refusal to deal.\textsuperscript{162} The court, emphasizing that BP did not need or seek plaintiff's acquiescence or agreement to effectuate its marketing decisions, stated that "[t]o find an agreement on these facts would be to find an agreement every time a party takes an independent action. This would render the 'agreement' element of section 1 a nullity."\textsuperscript{163}

\textsuperscript{154} Id. at 1504-05.  
\textsuperscript{155} Id. at 1502-05.  
\textsuperscript{156} Id. at 1505.  
\textsuperscript{157} Id.  
\textsuperscript{158} 932 F.2d 1384 (11th Cir. 1991).  
\textsuperscript{159} Id. at 1386-87.  
\textsuperscript{160} Id. at 1387.  
\textsuperscript{161} Id.  
\textsuperscript{162} Id. at 1388.  
\textsuperscript{163} Id. at 1389. The court also agreed with the district court's finding that BP did not breach the express terms of the 1987 Branded Jobbers Agreement and that BP did not breach any implied covenant of good faith or fair dealing. Id. at 1391.
Although the ultimate finding of no antitrust violation in *Tidmore Oil* appears reasonable under the facts of the case, the court does not appear to have adequately taken into consideration the existence of a written contract between plaintiff and defendant, which provided that plaintiff would not use the Gulf brand logo at any nonapproved locations. In essence, this was a vertical agreement between defendant and plaintiff as to the locations where defendant would use the logo and the areas where it would not use the logo. It is difficult to conceive how such a written contract could not meet the "contract, combination, or conspiracy" requirement of section 1. Thus, the better approach might have been to find that there was an agreement between plaintiff and defendant, that the agreement was a vertical and not a horizontal agreement, and that the vertical agreement accomplished the reasonable marketing goals of BP and passed the rule of reason standard.

In *T. Harris Young & Associates, Inc. v. Marquette Electronics, Inc.*, the Eleventh Circuit addressed claims asserting an illegal tying arrangement, attempted monopolization, and tortious interference with business. Defendant Marquette manufactured electrocardiograph and stress testing machines and sold the heat sensitive paper that these machines used to record test results. Plaintiff T. Harris Young & Associates was a former distributor of Marquette's machines and continued to be a distributor of Marquette's recording paper. Until 1987, plaintiff was the only seller of Marquette's paper in the Southeast. After plaintiff informed Marquette that it intended to begin selling a generic recording paper in addition to Marquette's recording paper, plaintiff attempted to show that Marquette had hurt plaintiff's sales of generic paper by telling owners of Marquette's machines that non-Marquette paper would damage the machines and that the equipment warranties on the machines would be void if non-Marquette paper was used with the machines. Marquette denied that its employees made such statements but admitted that it told customers that if non-Marquette paper damaged one of the machines, then it would not

164. *Id.* at 1386.

165. The Eleventh Circuit's reliance on Barnosky Oils, Inc. v. Union Oil Co., 665 F.2d 74 (6th Cir. 1981), as precedent for finding that no agreement existed was misplaced because in that case the Sixth Circuit was concerned with the existence of a horizontal agreement to allocate customers and territories. The Sixth Circuit did not find that there was no vertical agreement between Union Oil and its distributor. The Sixth Circuit stated in dicta that there was sufficient concerted action between Union Oil and its direct-served dealers to support an exclusive dealing claim under Section 1 of the Sherman Act. *Id.* at 85. Similarly, in the dual distribution case of American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1253-54 (3d Cir. 1975), cited by the Eleventh Circuit, the court was concerned with finding whether there was a horizontal conspiracy.

repair the machine for free. No evidence was presented at trial that Marquette ever voided a warranty or service contract. The jury returned a verdict in favor of plaintiff on all three claims.167

The district court entered a judgment notwithstanding the verdict ("JNOV") on the antitrust claims, but denied defendant's motions for JNOV and for a new trial on the tort claim.168 The Eleventh Circuit affirmed the district court's JNOV on the antitrust claims and reversed the district court's denial of JNOV on the tort claim.169 The Eleventh Circuit found that there was no tying arrangement because there was no evidence that defendant had ever withheld or threatened to withhold any of its machines (the tying product) from a customer unless that customer also purchased defendant's recording paper (the tied product).170 Because there was no tie between the two products, the court affirmed the district court's grant of JNOV on the tying claim.171

With respect to the attempted monopolization claim,172 the district court found that there was sufficient evidence concerning the geographic market, but that there was insufficient evidence concerning the product

167. 931 F.2d at 819-21. We should take notice of, and draft our future briefs in light of, the court's strong admonishment of the attorneys for plaintiff and defendant for misstating the record and wrongfully accusing each other of misstating the record. Id. at 819-20 n.4.
168. Id. at 821.
169. Id. at 829.
170. Id. at 823. The court held that its review of a motion for JNOV should be done under the same standard that the district court applies, which is

[all of the evidence presented at trial must be considered "in the light and with all reasonable inferences most favorable to the party opposed to the motion." A motion for judgment n.o.v. should be granted only where "reasonable [people] could not arrive at a contrary verdict . . . ." Where substantial conflicting evidence is presented such that reasonable people "in the exercise of impartial judgment might reach different conclusion, [sic]" the motion should be denied. Id. at 821 (quoting Castle v. Sangamo Weston, Inc., 837 F.2d 1550, 1558 (11th Cir. 1988) (citations omitted).
171. Id. at 821-23. Although this is a different basis for granting the JNOV than was cited by the district court, it appears to be a reasonable and valid basis for granting the JNOV. One might question whether defendant could have alleged that Marquette illegally tied the granting of warranties on Marquette's machines with the purchase of Marquette's recording paper.
172. The Eleventh Circuit stated that:

[the offense of monopolization under section 2 of the Sherman Act contains two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident." The offense of attempted monopolization requires specific intent on the defendant's part to bring about a monopoly and a dangerous probability of success.

The Eleventh Circuit, however, found there was insufficient evidence to support an inference that the nine state area proposed by plaintiff was the appropriate geographic market.\textsuperscript{173} The Eleventh Circuit also determined that the JNOV was proper with respect to the monopoly claim because there was insufficient evidence to support plaintiff's claim that the relevant product market was "200+ bed hospitals."\textsuperscript{175} The language in the opinion that the product market plaintiff was asserting was "200+ bed hospitals"\textsuperscript{176} is somewhat confusing. One must assume that plaintiff intended to allege that the relevant product market was recording paper for use in "200+ bed hospitals." The Eleventh Circuit made short shrift of this product market definition, however, and pointed out that the recording paper used by "200+ bed hospitals" is the same as the recording paper used by smaller hospitals, clinics, and doctor's offices.\textsuperscript{177} All of these consumers used the same recording paper, and the court found no basis for differentiating the product market between these end users.\textsuperscript{178}

Reviewing the evidence supporting plaintiff's tort claim, the court determined that because most of the evidence was, or should have been, inadmissible, plaintiff had failed to produce sufficient admissible evidence to support a rational jury determination of tortious interference with business.\textsuperscript{179} The court, therefore, reversed the district court's denial of the defendant's motion for JNOV.\textsuperscript{180}

In \textit{Taffet v. Southern Co.},\textsuperscript{181} the Eleventh Circuit reviewed two consolidated cases\textsuperscript{182} alleging illegal action by the Southern Company and two of its subsidiaries, the Alabama Power Company and the Georgia Power Company. Plaintiffs alleged that these two subsidiaries expensed spare part purchases contrary to IRS regulations and that the effect of this im-

\textsuperscript{173} Id. at 821.
\textsuperscript{174} Id. at 823-24. This finding by the court is slightly surprising. There apparently was evidence in the record that there was a price differential between paper purchased within the nine state area and paper purchased outside the nine state area. There also was evidence of a customer preference for paper purchased within the nine state area. Id. at 820.
\textsuperscript{175} Id. at 824-25.
\textsuperscript{176} Id. at 820, 824-25.
\textsuperscript{177} Id. at 824-25.
\textsuperscript{178} Id.
\textsuperscript{179} Id. at 828-29.
\textsuperscript{180} Id.
\textsuperscript{181} 930 F.2d 847 (11th Cir. 1991), vacated and petition for rehearing en banc granted, 958 F.2d 1514 (11th Cir. 1992).
proper accounting was to overstate the utilities' expenses and to underrate their income. Defendants filed motions to dismiss both cases. The district courts granted these motions holding that the clear statement doctrine, the doctrine of abstention, the primary jurisdiction doctrine and the filed rate doctrine barred the complaints. On appeal, defendants also raised the question of whether plaintiffs stated a claim under RICO, in that they had suffered no cognizable injury for RICO purposes. The Eleventh Circuit reversed the district courts' dismissals and remanded for trials on the merits. This 1991 opinion by the Eleventh Circuit was vacated on April 10, 1992, and a petition for rehearing en banc was granted. At the time of this writing, the result of the rehearing en banc is not known. Thus, it is perhaps best to simply summarize the court's finding in its 1991 opinion.

In its 1991 opinion, the Eleventh Circuit reviewed the clear statement doctrine and found that the RICO statute was unambiguous on its face as to its application. The court pointed out that the statute prohibits "any person" from violating its proscriptions and defines the term "person" as "'any individual or entity capable of holding a legal or beneficial interest in property.'" Because utilities are legal entities which can hold property, the court felt that the RICO statute would specifically apply to them and that the clear statement doctrine did not apply.

In reviewing the Burford Abstention Doctrine, the court, in its 1991 opinion, found that abstention did not apply because plaintiffs' allega-

183. 930 F.2d at 849-51.
184. Id. at 849-50. In this opinion, the Eleventh Circuit is concerned primarily with how each of the doctrines propounded by the defendants applied to the federal RICO statute. Although the court's opinion primarily addressed the application of these doctrines to the RICO statute, one might argue that the principles expounded by the court also should apply to the federal antitrust statutes because the court also reversed the district court's grant of summary judgment as to the antitrust claims in the Carr complaint.
185. 958 F.2d 1514 (11th Cir. 1992).
186. Id. at 1514.
187. 930 F.2d at 851. The Eleventh Circuit stated that 
'[t]his doctrine of statutory construction counsels that a federal court should not apply a federal statute to an area of traditional state concern unless Congress has articulated its desire in clear and definite language to alter the delicate balance between state and federal power by application of the statute to that area."
Id. (citation omitted).
189. Id.
190. The Eleventh Circuit, quoting New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350 (1989), stated that the Supreme Court distilled the "Burford doctrine" by explaining that where adequate state court review is available a federal court sitting in equity should abstain from interfering with proceedings of state administrative agencies: "'(1) when there are 'difficult questions of state law bearing on policy problems of substantial public import
tions primarily involve federal questions rather than state law questions and because a federal court's award of damages would not disrupt the states' efforts to regulate the utilities' rates. The Eleventh Circuit also rejected defendants' arguments concerning the primary jurisdiction doctrine, reasoning that the issue in this case is not what a reasonable rate should be, an area in which the states' public service commissions would clearly have expertise, but whether the utilities committed a fraud and violated the RICO statute.

Finally, in reviewing the applicability of the filed rate doctrine, the court, in its 1991 opinion, found that this doctrine did not apply in the instant case because of the alleged fraud that had been committed upon the regulating agencies. The court reasoned that if there was the possi-

whose importance transcends the result in the case then at bar; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." 

930 F.2d at 852 (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976)).

191. 930 F.2d at 853-54.

192. The Eleventh Circuit, quoting United States v. Western Pacific R.R., 352 U.S. 59, 63 (1956), stated that the primary jurisdiction doctrine applies:

whenever "enforcement of the claim requires resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views . . . ." The rationales for this doctrine are that (1) the agency has a superior expertise in the area in question, and (2) there is a need for uniformity in interpretation of a statute or regulation on a subject with which Congress has entrusted an agency.

930 F.2d at 854 (quoting United States v. Western Pac. R.R., 352 U.S. 59, 63 (1956)).

193. 930 F.2d at 856. Judge Birch dissented from the opinion of the majority and stated that he believes "the primary jurisdiction doctrine and the filed rate doctrine . . . prohibit application of the RICO statute to public utilities after a rate has been approved by the state PSC." Id. at 857 (Birch, J., dissenting).

194. Id. at 855-56. The Eleventh Circuit stated that:

the "filed rate doctrine," in its most basic form, "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority . . . ." The purpose of the doctrine is (1) to preserve the regulating agency's authority to determine the reasonableness of rates and (2) to insure that the regulated entities charge only those rates which the agency has approved or been made aware of, as the law may require. The uniformity of rates engendered by the doctrine prevents the regulated entities from discriminating among customers and stabilizes rates . . . . In accordance with this uniformity rationale, courts are barred from imposing a rate different from the rate filed with the regulating agency; the agency, moreover, cannot alter a rate retroactively . . . . Thus, courts are also generally considered without authority to award a party what might amount, to a "retroactive rate increase based on speculation about what the [regulating agency] might have done had it been faced with the facts."
bility of a RICO action being brought against a utility that defrauded a state, this would create a great incentive for utilities to present their PSC's with accurate and truthful information upon which to base rate decisions, and the creation of such incentives would simply enhance the regulatory agencies' authority to set reasonable and uniform rates. Finally, the court found that plaintiffs had a legally cognizable injury under the RICO statute.

III. CONCLUSION

The federal antitrust cases decided by the Eleventh Circuit in 1991 include some important and well reasoned decisions. The court grappled ably with some novel issues, and there was a balance between pro-plaintiff and pro-defendant decisions. Unfortunately, however, there were one or two instances of questionable reasoning by the court.

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Id. at 855 (quoting Arkansas La. Gas Co. v. Hall, 453 U.S. 571, 577 (1981)) (citations omitted).

195. Id. at 855-56.
196. Id. at 857.