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## Antitrust

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# Antitrust

by Michael Eric Ross\*

## I. INTRODUCTION

The Eleventh Circuit handed down only two antitrust decisions in 1992.<sup>1</sup> It was by far the lowest number of antitrust cases in any calendar year since the court was created in 1981. Nonetheless, both antitrust opinions last year were solidly reasoned and squarely in line with the current state of antitrust law.

## II. SURVEY

In *McGuire Oil Co. v. Mapco, Inc.*,<sup>2</sup> several petroleum wholesalers or "jobbers" sued Mapco, a retailer, in state court for selling gasoline below cost in violation of the Alabama Motor Fuel Marketing Act ("AMFMA").<sup>3</sup> Mapco removed the case to federal court on the basis of diversity of citizenship and counterclaimed against plaintiffs under the Sherman Act,<sup>4</sup> the Robinson-Patman Act,<sup>5</sup> and state law. The only antitrust issue before the Eleventh Circuit was whether the district court erred in granting summary judgment against Mapco on its counterclaim that plaintiffs had engaged in an unlawful conspiracy to fix prices by giving Mapco a "Hobson's choice" of either raising its prices or facing vexatious and costly litigation.<sup>6</sup>

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1. See *McCallum v. City of Athens*, 976 F.2d 649 (11th Cir. 1992); *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552 (11th Cir. 1992).

2. 958 F.2d 1552 (11th Cir. 1992).

3. ALA. CODE §§ 8-22-1 to -18 (1984 & Supp. 1992).

4. 15 U.S.C. §§ 1, 2 (Supp. III 1991).

5. 15 U.S.C. §§ 13(a)-(f) (1988).

6. 958 F.2d at 1555. The district court also granted summary judgment against Mapco on its Robinson-Patman Act counterclaim, but Mapco did not appeal this ruling. *Id.* at 1557 n.6.

The district court found<sup>7</sup> that Mapco lacked standing to assert this counterclaim because it failed to establish antitrust injury<sup>8</sup> under the Supreme Court's recent ruling in *Atlantic Richfield Co. v. U.S.A. Petroleum Co.*<sup>9</sup> that price fixing "does not cause a competitor antitrust injury unless it results in predatory [below cost] pricing."<sup>10</sup> Accordingly, the district court did not reach plaintiffs' alternative argument that the *Noerr-Pennington* doctrine protected their allegedly anticompetitive conduct from antitrust liability.<sup>11</sup> By contrast, the Eleventh Circuit pretermitted the question of Mapco's antitrust standing<sup>12</sup> and held that plaintiffs were entitled to summary judgment on its Sherman Act counterclaim by virtue of *Noerr-Pennington* immunity.<sup>13</sup>

The essence of the *Noerr-Pennington* doctrine is that "the federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from the government."<sup>14</sup> Thus, activities that might otherwise violate the antitrust laws are tolerated under the *Noerr-Pennington* doctrine so long as they are directed to obtaining relief from the government—whether legislative, administrative, or adjudicative.<sup>15</sup>

The gist of Mapco's Sherman Act counterclaim was that plaintiffs threatened and initiated litigation against it under the AMFMA for the purpose of forcing Mapco to raise its prices.<sup>16</sup> On its face, therefore, *Noerr-Pennington* barred this counterclaim.<sup>17</sup> However, Mapco tried to

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7. The district court's opinion is reported at 763 F. Supp. 1103, 1108-09 (S.D. Ala. 1991).

8. Antitrust injury is an indispensable element of antitrust standing. *See, e.g., Cargill, Inc. v. Monfort, Inc.*, 479 U.S. 104, 110 n.5 (1986) ("A showing of antitrust injury is necessary, but not always sufficient, to establish [antitrust] standing . . ."); *Austin v. Blue Cross & Blue Shield*, 903 F.2d 1385, 1389 (11th Cir. 1990) (Antitrust injury is "the touchstone for antitrust standing.").

9. 495 U.S. 328 (1990).

10. *Id.* at 339 (footnote omitted).

11. *See* 958 F.2d at 1556. The *Noerr-Pennington* doctrine emanates from the Supreme Court's decisions in *Eastern R.R. Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127 (1961), and *UMW v. Pennington*, 381 U.S. 657 (1965), and is discussed *infra* notes 14-21 and accompanying text.

12. 958 F.2d at 1557 n.7.

13. *Id.* at 1557.

14. *City of Columbia v. Omni Outdoor Advertising*, 111 S. Ct. 1344, 1354 (1991).

15. *See, e.g., California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) (*Noerr-Pennington* covers attempts to influence judicial and other adjudicatory proceedings); *King v. Idaho Funeral Serv. Ass'n*, 862 F.2d 744, 745-46 (9th Cir. 1988) (*Noerr-Pennington* immunizes complaints to state licensing agency that a competitor was selling caskets illegally).

16. 958 F.2d at 1558.

17. *Id.* at 1559.

avoid this defense<sup>18</sup> under the so-called "sham" exception to *Noerr-Pennington* immunity.<sup>19</sup>

The "sham" exception applies when anticompetitive behavior "ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor."<sup>20</sup> The exception excludes from *Noerr-Pennington* protection "a [competitor] whose activities are 'not genuinely aimed at procuring favorable government action' at all."<sup>21</sup>

Mapco contended that plaintiffs' conduct fell within the "sham" exception in that it (i) was in furtherance of an anticompetitive purpose and (ii) included threats of litigation against Mapco and other competitors.<sup>22</sup> The Eleventh Circuit rejected both of these arguments.<sup>23</sup>

Alleging that plaintiffs acted with an anticompetitive purpose did not help Mapco since "it is axiomatic that actions taken with an anti-competitive purpose or intent remain insulated from antitrust liability under the *Noerr-Pennington* doctrine."<sup>24</sup> If anything, the court was even less recep-

18. *Noerr-Pennington* immunity is an affirmative defense. See, e.g., *In re Wheat Rail Freight Rate Antitrust Litigation*, 759 F.2d 1305, 1309 n.3 (7th Cir. 1985), cert. denied, 476 U.S. 1158 (1986); *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 666 F.2d 50, 52 (4th Cir. 1981). But see P. AREEDA & H. HOVENKAMP, *ANTITRUST LAW* § 203.4c, at 56 (Supp. 1992) ("*Noerr* protection . . . should not be regarded as an affirmative defense . . . . Rather, the antitrust plaintiff has the burden of establishing that the defendant restrained trade unreasonably, which cannot be done when the restraining action is that of the government."). Quoting this treatise statement, the Eleventh Circuit held that Mapco had the burden "to allege facts sufficient to show that *Noerr-Pennington* immunity did not attach to plaintiff's actions." 958 F.2d at 1558 n.9. It may be that the court meant only to require that Mapco present on summary judgment evidence of the "sham" exception to *Noerr-Pennington*. See *id.* at 1561 n.12; see also *infra* notes 19-21 and accompanying text. If so, the Eleventh Circuit was on firm ground. See, e.g., *California Motor Trans.*, 404 U.S. at 518 (Stewart, J., concurring); *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 791 F.2d 288, 292 (4th Cir. 1986).

19. 958 F.2d at 1559. The Supreme Court first applied the sham exception in *California Motor Trans.* See 404 U.S. at 513 ("[P]attern of baseless, repetitive claims . . . effectively barring respondents from access to the agencies and courts" would not qualify for *Noerr-Pennington* protection).

20. *Noerr*, 365 U.S. at 144.

21. *City of Columbia*, 111 S. Ct. at 1354 (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 n.4 (1988)).

22. 958 F.2d at 1559.

23. *Id.* at 1560.

24. *Id. Accord*, e.g., *Pennington*, 381 U.S. at 670; *St. Joseph's Hosp. v. Hospital Corp. of Am.*, 795 F.2d 948, 955 (11th Cir. 1986). The Supreme Court granted certiorari in *Columbia Pictures Indus. v. Professional Real Estate Investors*, 944 F.2d 1525 (9th Cir. 1991), cert. granted, 112 S. Ct. 1557 (U.S. Mar. 30, 1992) (No. 91-1043), to consider whether a lawsuit that was found to have probable cause could nevertheless be excluded from *Noerr-Pennington* under the sham exception if it were brought by a party that "did not honestly believe that [its] claim was meritorious." 944 F.2d at 1530. The Court answered the question

tive to Mapco's suggestion that threats of litigation, as opposed to initiation of suit, are outside the ambit of *Noerr-Pennington* protection:

Given that petitioning immunity protects joint litigation, it would be absurd to hold that it does not protect those acts reasonably and normally attendant upon effective litigation. The litigator should not be protected only when he strikes without warning. If litigation is in good faith, a token of that sincerity is a warning that it will be commenced in a possible effort to compromise the dispute.<sup>25</sup>

Thus, the Eleventh Circuit concluded that Mapco had all but conceded that plaintiffs' lawsuit and related conduct could not be deemed a sham.<sup>26</sup> Nor was the court persuaded by Mapco's last ditch effort to survive summary judgment on its Sherman Act counterclaim under the Seventh Circuit's decision in *Premier Electrical Construction Co. v. National Electrical Contractors Ass'n.*<sup>27</sup>

*Premier* arose out of a contract between the Association and a union that required the union to obtain, as part of any collective bargaining agreement it entered into with an electrical contracting firm not in the Association, a contribution of one percent of the firm's gross payroll to the Association's financial fund.<sup>28</sup> The Association sued Premier in state court for refusing to make this contribution. The Association voluntarily dismissed the action after a federal court ruled that the Association-union contract was per se illegal under Section 1 of the Sherman Act. Premier then brought an antitrust suit against the Association seeking to recover the trebled costs it incurred in defending the state court litigation.<sup>29</sup> The Association defended under *Noerr-Pennington*, but the Seventh Circuit held that *Noerr-Pennington* did not apply.<sup>30</sup> The court reasoned that Premier based its antitrust claim on the Association-union contract and

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"in the negative and [held] that an objectively reasonable effort to litigate cannot be a sham regardless of subjective intent." *Professional Real Estate Investors v. Columbia Pictures Indus.*, No. 91-1043, 1993 U.S. LEXIS 3121, at \*15 (1993). *Cf., e.g., In re Burlington Northern, Inc.*, 822 F.2d 518, 533-34 (5th Cir. 1987) (Litigation that ultimately succeeds can be a sham if it is "undertaken without a genuine desire for judicial relief as a significant motivating factor, or if there was no reasonable expectation of judicial relief, or if there was no reasonable basis for party standing."). Even under a purely subjective standard, the Eleventh Circuit ruled that Mapco came up short since "[t]here is simply no evidence in the record to suggest the plaintiffs did not honestly believe that their claims under the AMFMA were meritorious." 958 F.2d at 1561 n.12.

25. 958 F.2d at 1560 (quoting *Coastal States Mktg. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983)).

26. *Id.*

27. 814 F.2d 358 (7th Cir. 1987).

28. *Id.* at 359.

29. *Id.* at 359-60.

30. *Id.* at 373.

that the Association's state court suit only furnished the measure of damages.<sup>31</sup>

Mapco argued that its Sherman Act counterclaim was analogous to Premier's claim.<sup>32</sup> The Eleventh Circuit disagreed. The court pointed out that Mapco alleged that plaintiffs' litigative activities were the antitrust violation, not just the source of antitrust injury.<sup>33</sup> Further, unlike in *Premier*, in which the Association-union contract that the Association attempted to enforce was per se illegal, here plaintiffs had sued Mapco to enforce the AMFMA—a lawfully enacted statute.<sup>34</sup> Hence, Mapco's reliance on *Premier* was wholly misplaced.

In *McCallum v. City of Athens*,<sup>35</sup> the Eleventh Circuit also affirmed summary judgment against the antitrust claimant.<sup>36</sup> Again, an antitrust exemption was at the heart of its opinion.

Plaintiffs were an individual businessman and an unincorporated association of commercial and residential consumers of treated water in Clarke County, Georgia.<sup>37</sup> Plaintiffs alleged that the City had violated Sections 1 and 2 of the Sherman Act and the Robinson-Patman Act by, respectively, agreeing with the neighboring Oconee County Public Utility Authority to divide territories and charging nonresidents of the City 225% more than residents for water.<sup>38</sup> The district court granted summary judgment to the City on plaintiffs' Sherman Act claims under the "state action" doctrine and on their Robinson-Patman Act claim for lack of subject matter jurisdiction.<sup>39</sup>

The state action doctrine is largely the flip side of *Noerr-Pennington* immunity.<sup>40</sup> Whereas *Noerr-Pennington* exempts from the antitrust laws

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31. *Id.* at 371-76.

32. 958 F.2d at 1561.

33. *Id.*

34. *Id.*

35. 976 F.2d 649 (11th Cir. 1992).

36. *Id.* at 650.

37. *Id.*

38. *Id.* at 650-51.

39. *Id.* at 651. The district court converted the City's motion to dismiss into a motion for summary judgment and, without any discovery by the parties, granted it as to plaintiff's Sherman Act claims. *Id.* See *Wall v. City of Athens*, 663 F. Supp. 747 (M.D. Ga. 1987). The trial judge certified this ruling for interlocutory appeal under 28 U.S.C. § 1292(b) (1988), but the Eleventh Circuit refused to entertain the appeal. 976 F.2d at 651. After discovery, the district court granted summary judgment to the City on plaintiff's Robinson-Patman Act claim as well. *Id.*

40. See, e.g., *City of Columbia*, 111 S. Ct. at 1355 ("Parker [*v. Brown*, 317 U.S. 341 (1943), which announced the state action doctrine] and *Noerr* are complimentary expressions of the principle that the antitrust laws regulate business, not politics; . . . [they are] generally . . . two faces of the same coin.").

efforts to influence or secure governmental action,<sup>41</sup> state action immunizes private conduct that is (i) undertaken "pursuant to a 'clearly articulated and affirmatively expressed state policy' to replace competition with regulation"<sup>42</sup> and (ii) "actively supervised" by the state itself.<sup>43</sup>

The state action doctrine extends to municipalities.<sup>44</sup> Indeed, the "actively supervised" prong of the test for state action immunity does not apply to municipalities.<sup>45</sup> Instead, a municipality is entitled to state action protection "[o]nce it is clear that the state authorization exists" for the challenged restraint.<sup>46</sup>

In *Town of Hallie v. City of Eau Claire*<sup>47</sup> the Supreme Court "fully considered . . . how clearly a state policy must be articulated for a municipality to be able to establish that its anticompetitive activity constitutes state action."<sup>48</sup> The Court declined to require that the state explicitly authorize the specific municipal action in question.<sup>49</sup> Rather, it would be enough if "[s]uch conduct is a foreseeable result" of the regulatory authority conferred on the municipality by the state.<sup>50</sup> Moreover, just two years ago in *City of Columbia v. Omni Outdoor Advertising, Inc.*,<sup>51</sup> the Court not only expressly confirmed this "foreseeability" standard,<sup>52</sup> but interpreted it so broadly that the "clear articulation" test will apparently

41. See *supra* text accompanying notes 14-21.

42. *Hoover v. Ronwin*, 466 U.S. 558, 569 (1984) (quoting *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 54 (1982)).

43. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978)); see also *infra* note 73.

44. See, e.g., *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *Executive Town & Country Serv. v. City of Atlanta*, 789 F.2d 1523, 1530 (11th Cir. 1986). Municipalities and other local governmental entities, local governmental officials and employees "acting in an official capacity," and private parties engaged in "official action directed by a local government, or official or employee thereof acting in an official capacity," are additionally insulated from antitrust damages, albeit not from injunctive relief or attorneys fees, under the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (1988). The City invoked this legislation in the district court, but the Eleventh Circuit decided the case without having to determine whether it applied to the facts at hand. 976 F.2d at 651 n.4.

45. *Town of Hallie*, 471 U.S. at 47.

46. *Id.*

47. 471 U.S. 34 (1985).

48. *Id.* at 40.

49. *Id.* at 41-42.

50. *Id.* at 42. In *Town of Hallie* the court concluded that Wisconsin statutes authorizing municipalities to construct and operate sewage systems and to refuse to service unincorporated areas immunized the City of Eau Claire from antitrust liability for refusing to supply sewage treatment services to landowners in surrounding towns unless they voted to have their property annexed and to use the City's sewage collection and transportation services. *Id.*

51. 111 S. Ct. 1344 (1991).

52. *Id.* at 1350.

be met so long as the state has authorized the municipality to regulate virtually any aspect of the relevant field of business.<sup>53</sup>

The Eleventh Circuit consequently had little trouble finding that Georgia's comprehensive legislative scheme authorizing municipalities to construct and operate water systems<sup>54</sup> provided a sufficiently clear expression of state policy. The state opposes competition among local water suppliers within a single territory to immunize the City's territorial agreement with the Oconee County Public Utility Authority from Sherman Act liability under the state action doctrine.<sup>55</sup> In particular, the court highlighted<sup>56</sup> the constitutional and statutory provisions empowering municipalities to supply water outside of their city limits "pursuant to contract"<sup>57</sup> and expressly declaring that, in exercising the authority granted to them with respect to waterworks, municipalities "are acting pursuant to state policy"<sup>58</sup> and "shall be immune from antitrust liability to the same degree and extent as enjoyed by the State of Georgia."<sup>59</sup>

Plaintiffs fared no better on their Robinson-Patman Act claim. The district court ruled that plaintiffs had failed to establish subject matter jurisdiction by not demonstrating either that the City sold water at discriminatory prices in interstate commerce or that any of these allegedly discriminatory sales benefited any competing customer.<sup>60</sup> The Eleventh

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53. *Id. See id.* at 1347, 1350 n.4 (South Carolina statute authorizing municipalities to promulgate zoning regulations over "structures" imbued the City of Columbia with state action protection to enact and enforce an ordinance that effectively froze out potential competitors of a company that controlled more than 95% of the billboards in the City); *see also* Brent S. Kinkade, Note, *Municipal Antitrust Immunity After City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991), 67 WASH. L. REV. 479, 494 (1992) ("Omni's reliance on [Town of Hallie's] foreseeability standard . . . shows that the Court has implicitly abandoned the clear articulation test.").

54. *See* GA. CONST. art. IX, § 2, para. 3(a)(7); O.C.G.A. § 36-34-5 (1987); City of Athens-New Charter § 1-103(a), 1979 Ga. Laws 3770, 3772. Notably, the court accepted the City's Charter as state law in that it had been adopted by the Georgia General Assembly. 976 F.2d at 654 n.8.

55. 976 F.2d at 654-55. The Eleventh Circuit regarded Georgia's statutory regime as "remarkably similar" to that in Florida which it held to confer state action immunity over the activities of municipal waterworks in *Falls Chase Special Taxing Dist. v. City of Tallahassee*, 788 F.2d 711, 713-14 (11th Cir. 1986), and *Auton v. Dade City*, 783 F.2d 1009, 1010-11 (11th Cir. 1986). 976 F.2d at 654-55. *See* Michael Eric Ross, *Antitrust*, 38 MERCER L. REV. 1053, 1055-56 (1987). Moreover, the court rejected plaintiff's argument that the allegedly proprietary nature of the City's waterworks removed it from state action immunity. 976 F.2d at 653 n.7 (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 541-43 (1985)).

56. 976 F.2d at 655.

57. GA. CONST. art. IX, § 2, para. 3(b)(2).

58. O.C.G.A. § 36-65-1 (1987).

59. *Id.* § 36-65-2.

60. 976 F.2d at 655.

Circuit affirmed summary judgment against plaintiff for lack of proof of "in commerce" sales without considering the district court's second reason for its decision.<sup>61</sup>

In contrast to the Sherman Act, which applies to activities "in" or "affecting" interstate commerce to the maximum extent of Congress' constitutional power under the commerce clause,<sup>62</sup> the Robinson-Patman Act can only be triggered if at least one of the purchases involved in the alleged discrimination is "in commerce."<sup>63</sup> Plaintiffs tried to satisfy this jurisdictional element by contending that (i) the City purchased water-purifying chemicals from out-of-state, (ii) its water comes from a river flowing across state lines, and (iii) a customer "resold" water that it purchased from the City as ice used for packing chickens to out-of-state customers.<sup>64</sup> The Eleventh Circuit gave short shrift to each of these arguments.

First, while the City purchased chlorine and fluoride for treating its water from out-of-state suppliers, the court held that these chemicals were merely ingredients of the distinct commodity—treated water—that was the City's final product.<sup>65</sup> This product transformation defeated plaintiffs' allegation of interstate commerce since the City sold its water only intrastate.<sup>66</sup>

Second, even if the City's waterworks could be characterized as having some nexus with interstate commerce by drawing its water from a river that moves across state lines, which the Eleventh Circuit did not accept,<sup>67</sup>

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61. *Id.*

62. *See, e.g.,* Summit Health, Ltd., v. Pinhas, 111 S. Ct. 1842, 1846 (1991); McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 241-42 (1980).

63. *See, e.g.,* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195 (1974); Moore v. Mead's Fine Bread Co., 348 U.S. 115, 119-20 (1954).

64. 976 F.2d at 656.

65. *Id.* at 656-57. *See, e.g.,* Bacon v. Texaco, Inc., 503 F.2d 946, 948 (5th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975) (interstate purchase of crude oil did not bring subsequent intrastate sales of gasoline within the Robinson-Patman Act); Scranton Const. Co. v. Litton Indus. Leasing Corp., 494 F.2d 778, 781 (5th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (no Robinson-Patman Act jurisdiction over the intrastate sales of ready-mix concrete even though its key ingredients, including cement, were purchased from out-of-state suppliers).

66. "The final product that [the City] sells, water, differs significantly from the elemental ingredients purchased in interstate commerce. Undoubtedly, [the City's] customers believe that they are purchasing water, not chlorine and fluoride. [The City] is engaged in the business of selling treated water, not hydrated chlorine and fluoride." 976 F.2d at 657.

67. *Id.* at 658. *Cf. Gulf Oil*, 419 U.S. at 197-99 (intrastate sales of asphaltic concrete are not "in commerce" for purposes of the Robinson-Patman Act just because the material was used for surfacing interstate highway).

there would at most be an "affect" on interstate commerce.<sup>68</sup> The City still would not be selling water "in commerce."<sup>69</sup>

Finally, the court concluded that plaintiffs' last argument "border[ed] on the frivolous."<sup>70</sup> The court disposed of this creative bit of lawyering simply by observing that the customer in issue "is in the business of selling fowl, not fluids. [Its] resale of the water that it purchased from [the City] is irrelevant to determining whether [the City] has engaged in interstate commerce under Robinson-Patman."<sup>71</sup>

### III. CONCLUSION

The Eleventh Circuit's antitrust docket in 1992 was the smallest in its history with only two cases. Both claimants could not get past antitrust exemptions and lost. Any other results would have been surprising in light of the reported facts and the controlling authorities.

The new Administration and the Supreme Court's decisions last year in *Eastman Kodak Co. v. Image Technical Services, Inc.*<sup>72</sup> and *FTC v. Titor Title Insurance Co.*<sup>73</sup> may lead to a marked upswing in antitrust enforcement and litigation. It remains to be seen, therefore, whether the Eleventh Circuit's skeletal antitrust workload in 1992 was an aberration or the most compelling signal yet to antitrust lawyers in this jurisdiction that they ought to look for another speciality.

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68. 976 F.2d at 658. See *Gulf Oil*, 419 U.S. at 195 ("[T]he jurisdictional requirements of [the Robinson-Patman Act] cannot be satisfied merely by showing that allegedly anticompetitive acquisitions and activities affect commerce.") (emphasis in original).

69. 976 F.2d at 658.

70. *Id.*

71. *Id.*

72. 112 S. Ct. 2072, 2083-89 (1992) (in affirming the denial of summary judgment to Kodak the Court clarified that summary judgment is not any more favored in antitrust cases than in other litigation and that an equipment manufacturer with a small share of the equipment market can nonetheless risk antitrust liability by acting improperly to control the aftermarkets for parts or service of its products).

73. 112 S. Ct. 2169, 2178-80 (1992) (statutory scheme under which states had the power to review and disapprove fees for title searches and examinations filed jointly by title insurance companies did not meet the "active supervision" prong of the test for state action immunity, see *supra* text accompanying note 43, when this potential state participation in the rate setting process was not realized).

