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Antitrust

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The Eleventh Circuit Court of Appeals published only four antitrust decisions in 1997.[1] Two of these cases were decided on procedural grounds[2] and two on substantive grounds.[3] Once again, defendants prevailed in most of these cases, including an action brought by the Government to enjoin an acquisition.

I. PROCEDURAL DECISIONS

A. *Nonappealability of Denial of Motion to Dismiss Based on the McCarran-Ferguson Act*

In *Jordan v. Avco Financial Services, Inc.*,[4] the Eleventh Circuit considered whether the denial of a motion to dismiss based on the McCarran-Ferguson Act[5] is reviewable on interlocutory appeal pursuant

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The views expressed in this Article are personal opinions of the authors and do not necessarily represent the views of King & Spalding or any of its clients.

1. United States v. Engelhard Corp., 126 F.3d 1302 (11th Cir. 1997); Jordan v. Avco Fin. Servs., Inc., 117 F.3d 1254 (11th Cir. 1997); Retina Assocs., P.A. v. Southern Baptist Hosp., Inc., 105 F.3d 1376 (11th Cir. 1997); Florida Seed Co. v. Monsanto Co., 105 F.3d 1372 (11th Cir. 1997).

2. *Jordan*, 117 F.3d 1254 (denial of motion to dismiss based on McCarran-Ferguson Act not appealable under collateral order doctrine); *Florida Seed*, 105 F.3d 1372 (affirming dismissal for lack of standing).

3. *Engelhard Corp.*, 126 F.3d 1302 (affirming denial of motion for permanent injunction); *Retina Assocs.*, 105 F.3d 1376 (affirming grant of summary judgment).

4. 117 F.3d 1254 (11th Cir. 1997).

5. 15 U.S.C. §§ 1011-1015 (1994).

to the collateral order doctrine.[6] Plaintiffs, consumers in credit transactions, alleged that defendants fraudulently induced them to purchase "nonfiling insurance" to protect against losses that merchants and financial institutions might incur as a result of failing to file a Form UCC-1, which would perfect a security interest in items plaintiffs purchased on credit.[7] Plaintiffs alleged that this nonfiling insurance in fact was an undisclosed finance charge, not insurance.[8] Plaintiffs filed a purported class action alleging violations of the Sherman Act,[9] the Clayton Act,[10] the Truth in Lending Act,[11] and the Racketeer Influenced and Corrupt Organization Act.[12] Defendants moved to dismiss the complaint, contending that the product sold to plaintiffs was insurance, that the dispute was covered by state insurance law, and that defendants thus were immunized from liability by the McCarran-Ferguson Act on issues concerning the business of insurance.[13] The district court denied that motion, as well as defendants' motion to certify the order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).[14]

Defendants, nonetheless, filed an appeal. A motion panel of the Eleventh Circuit initially denied plaintiffs' motion to dismiss the appeal for lack of jurisdiction, ruling that the district court's denial of the motion to dismiss was immediately appealable based on the collateral order doctrine.[15] A subsequent merits panel of the Eleventh Circuit, however, vacated the motion panel's order and dismissed the appeal for want of jurisdiction.[16]

The Eleventh Circuit concluded that the collateral order doctrine does not apply to the denial of a motion to dismiss based on the McCarran-

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6. *Id.* at 1255. The collateral order doctrine, first announced in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), provides a "narrow exception" to the normal rule requiring a final judgement before an appeal may be taken. The doctrine is limited to orders that (1) conclusively determine (2) important legal questions that are (3) completely separate from the merits of the underlying action and (4) are effectively unreviewable on appeal from a final judgment. *Cohen*, 337 U.S. at 546.

7. *Jordan*, 117 F.3d at 1255-56.

8. *Id.* at 1256.

9. 15 U.S.C. §§ 1-11 (1994).

10. *Id.* §§ 12-26 (1994 & Supp. II 1996).

11. *Id.* §§ 1601-1677.

12. 18 U.S.C. §§ 1961-1968 (1994 & Supp. II 1996).

13. *Jordan*, 117 F.3d at 1255.

14. *Id.* at 1256.

15. *Id.*

16. *Id.* at 1258. Eleventh Circuit Rule 27-1(f) provides that "[a] ruling on a motion or other interlocutory matter, whether entered by a single judge or a panel, is not binding upon the panel to which the case is assigned on the merits, and the merits panel may alter, amend, or vacate it." 11TH CIR. R. 27-1(f).

Ferguson Act.[17] The court recognized that questions of immunity may be appealed interlocutorily because these issues are effectively unreviewable following final judgment.[18] The court held, however, that the McCarran-Ferguson Act, which exempts from federal antitrust and certain other law the business of insurance to the extent it is regulated by state law,[19] provides a pre-emption defense to liability rather than a grant of immunity.[20] The court concluded that the rejection of a pre-emption defense at the pleading stage could be reviewed effectively on appeal from a final judgment.[21] For this reason, the court concluded that the collateral order doctrine does not apply to orders denying motions based on the McCarran-Ferguson Act.[22] Accordingly, the court dismissed the appeal for lack of jurisdiction.[23]

B. Antitrust Standing

In *Florida Seed Co. v. Monsanto Co.*,[24] the Eleventh Circuit affirmed the dismissal of a Sherman Act claim based on the lack of antitrust standing.[25] In the Eleventh Circuit, antitrust standing involves a two-pronged analysis of (1) "antitrust injury" and (2) whether the plaintiff is an "efficient enforcer" of the antitrust laws (for example, not remotely injured).[26] 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."[27] Accordingly, when a plaintiff's claimed injury results simply from heightened competition or when the injury is unrelated to the alleged antitrust violation or to an adverse effect on competition, there is no antitrust injury.[28]

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17. 117 F.3d at 1258.

18. *Id.* at 1257. *See* Mitchell v. Forsyth, 472 U.S. 511 (1985); Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993); Parker v. Brown, 317 U.S. 341 (1943).

19. 15 U.S.C. §§ 1011-1015. *See generally* Michael Eric Ross & Jeffrey S. Cashdan, *Antitrust*, 48 MERCER L. REV. 1389, 1397-98 (1997).

20. *Jordan*, 117 F.3d at 1258.

21. *Id.*

22. *Id.*

23. *Id.*

24. 105 F.3d 1372 (11th Cir. 1997).

25. *Id.* at 1373.

26. Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1449 (11th Cir. 1991).

27. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

28. Antitrust injury is required for all private claims brought pursuant to either section 4 (damages) or section 16 (injunctive relief) of the Clayton Act, 15 U.S.C. §§ 15(a), 26. *See Brunswick*, 429 U.S. at 489 (claim for damages); Cargill v. Monfort of Colo., Inc., 479 U.S. 104 (1986) (claim for injunctive relief); Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) (claim for damages based on per se theory of liability).

In *Florida Seed* the court focused on the antitrust injury element of antitrust standing. The case involved a terminated distributor's challenge to Monsanto's 1993 acquisition of Ortho, a lawn and garden business.[29] Prior to this acquisition, Florida Seed distributed and marketed both Monsanto's and Ortho's lawn and garden products. After the acquisition Monsanto terminated Florida Seed as an Ortho distributor pursuant to a broad strategic decision to use fewer distributors.[30] Florida Seed and its sole shareholder, Frit Industries ("Frit"), filed suit, alleging that Florida Seed's termination was part of Monsanto's plan to monopolize or attempt to monopolize the residential nonselective herbicide market in part by damaging the value of the trademark of an Ortho product ("Kleenup") that was to be divested pursuant to a consent decree with the Federal Trade Commission.[31] The district court dismissed the action for lack of standing.[32]

The Eleventh Circuit affirmed.[33] First, the court explained that Florida Seed's only injury, termination as a distributor, does not qualify as antitrust injury.[34] The complaint failed to allege an anticompetitive impact on consumers—higher price or lower output—that flowed from the injury Florida Seed purportedly suffered from its termination as an Ortho distributor.[35] As the Eleventh Circuit explained, the mere termination of a distributor, by itself, is insufficient to demonstrate harm to competition.[36] Because Florida Seed alleged only injury to itself, and not to consumers as a whole, Florida Seed failed to plead antitrust injury. Thus, dismissal of the antitrust claims was appropriate.[37]

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29. *Florida Seed*, 105 F.3d at 1373.

30. *Id.*

31. *Id.*

32. Florida Seed Co. v. Monsanto Co., 915 F. Supp. 1167 (M.D. Ala. 1995), *aff'd*, 105 F.3d 1372 (11th Cir. 1997).

33. *Florida Seed*, 105 F.3d at 1376.

34. *Id.* at 1374.

35. *Id.*

36. *Id.* Other circuit courts of appeal agree. For example, the court in Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 735 (9th Cir. 1987), commented:

> A termination is not unlawful because of some adverse effect on the distributor's business, even if the effect is the elimination of the distributor from the market. The complaining distributor must show that the refusal to deal was intended to or did bring about some restraint of trade beyond the loss of business suffered by the distributor or the market's loss of a distributor-competitor.

37. In dicta the court further held that Florida Seed would be an inefficient enforcer of the antitrust laws because its injuries, if any, were remote from harm to consumers in the relevant market. 105 F.3d at 1374.

The court likewise rejected for lack of antitrust standing the claims of Frit, Florida Seed's sole shareholder and the guarantor of its debt.[38] Frit was neither a competitor nor a consumer in the relevant market.[39] Because Frit's only injury, if any, derived from its capacity as Florida Seed's shareholder and guarantor, the court held that Frit also lacked antitrust injury.[40]

II. SUBSTANTIVE DECISIONS

A. *Retina Associates, P.A. v. Southern Baptist Hospital*

Retina Associates, P.A. v. Southern Baptist Hospital[41] addressed an antitrust challenge to a joint venture of eye care physicians. Plaintiff Retina Associates ("RA") is a Florida corporation located in Jacksonville that specializes in the diagnosis and treatment of diseases of the retina and vitreous.[42] General opthamologists typically refer patients with specific retina problems to retina specialists. Thus, when certain individual defendant opthamologists decided to form a full service opthamology practice at a major hospital, there was a perceived need to include a retina specialist practice in the venture.[43] Certain of the individual defendants invited RA to join them in forming the Baptist Eye Institute ("BEI") to be located on the campus of the Baptist Medical Center, the largest acute care hospital in Jacksonville.[44] RA turned the invitation down twice.[45] Ultimately, after some initial reluctance, defendant Florida Retina Institute ("FRI"), another retina specialist practice, joined BEI.[46] As a result, all or most of the retina service referrals of BEI's general opthamologists went to FRI, not RA.[47] The parties estimated that the referrals from BEI's opthamologists to retina specialists accounted for only fifteen percent of the total retina referrals made in the relevant geographic market (the Jacksonville area) during the relevant period.[48]

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38. *Id.* at 1375-76.
39. *Id.*
40. *Id.*
41. 105 F.3d 1376 (11th Cir. 1997).
42. *Id.* at 1378-79.
43. *Id.* at 1379.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 1379-80.
48. *Id.* at 1379.

Upset at having lost access to the referrals from BEI's opthamologists, RA filed suit alleging (1) that BEI's exclusive referral arrangement constituted a horizontal concerted refusal to deal or group boycott in violation of section 1 of the Sherman Act and (2) that FRI attempted to monopolize the retina services market by entering into the exclusive referral arrangement in violation of section 2 of the Sherman Act.[49] The district court granted summary judgment for defendants on both counts, holding that there was no basis in law or fact for either claim.[50] The Eleventh Circuit affirmed, expressly adopting in full the reasoning of the district court.[51]

First addressing the section 1 claim, the district court rejected application of the per se rule of illegality because of the lack of precedent suggesting the arrangement at issue harmed competition and because BEI's physicians, who controlled only fifteen percent of the referrals for retina services, lacked economic power in the alleged relevant market for retina services referrals.[52] The court correctly determined that RA's section 1 claims instead should be judged by the rule of reason, pursuant to which any substantially anticompetitive effects of the restraint at issue are balanced against the restraint's procompetitive effects.[53] Rule of reason analysis was particularly appropriate in this case given that BEI appeared to be an efficiency-enhancing joint venture and that the referral restraint seemed to have been reasonably related to achieving those integrative efficiencies.[54]

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49. *Id.* at 1380. *See* 15 U.S.C. §§ 1-2.

50. 105 F.3d at 1380.

51. *Id.* at 1378. The district court opinion is reproduced in full as an appendix to the Eleventh Circuit decision.

52. *Id.* at 1381-83. The district court considered defendants' collective market power in connection with the per se analysis in an attempt to comply with the Supreme Court's directive in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 296 (1985), which held that the per se rule should only apply in the group boycott context when the group at issue possesses "market power or exclusive access to an element essential to effective competition." *See also* F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 458 (1986) ("[T]he per se approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor . . . .").

53. 105 F.3d at 1381. *See generally* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

54. *See* Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979). The district court mentioned the ancillariness of the restraint on referrals solely in noting that the venture's restraints are not immune from antitrust liability. *Retina Assocs.*, 105 F.3d at 1380 n.4. The district court failed to recognize the importance of the ancillary restraint doctrine for purposes of determining whether per se or rule of reason treatment is appropriate for the joint venture. *See, e.g.*, National Bancard Corp. v. VISA U.S.A., Inc., 779 F.2d 592 (11th Cir. 1986) (approving ancillary restraint of joint venture under rule of reason). *See also* U.S. Dep't

Turning to the rule of reason, the district court quickly dispensed with plaintiff's arguments.[55] Under the rule of reason, structural proof of market power, based on analysis of market share, entry barriers, and other evidence, is not necessary when actual anticompetitive effects can be shown.[56] Thus, the district court initially considered plaintiff's purported proof of alleged anticompetitive effects.[57] Plaintiff pointed to the allegedly higher prices FRI's patients were paying for BEI referred services compared to prices paid by patients of other retina service providers.[58] The district court properly rejected this argument, observing that RA would benefit from any increase in the price of retina services and consequently lacked standing to assert a claim.[59] Also noteworthy, though not discussed by the court, is the lack of evidence that patients in the relevant market could not switch retina specialists if FRI's prices were unreasonably high.[60]

Having found no evidence of actual anticompetitive effects, the district court considered structural proof of market power.[61] Given BEI's small fifteen percent share of the retina services referral market and the lack of evidence of entry barriers, the district court correctly rejected plaintiff's assertion that defendants collectively had the power to control price and output.[62] Thus, the court held that there was insufficient evidence to sustain a section 1 claim and granted summary judgment.[63]

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of Justice & Federal Trade Comm'n, Statements Of Antitrust Enforcement Policy In Health Care (1996), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,153, at 20,800 (stating that federal enforcement agencies generally will apply the rule of reason to joint ventures when there is sufficient integration "to produce significant efficiencies [and] any agreements on price [are] reasonably necessary to accomplish the venture's procompetitive benefits."). The ancillary restraint doctrine for joint ventures usually is traced to then Judge Taft's opinion in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899).

55. *Retina Assocs.*, 105 F.3d at 1383-85.

56. *See Indiana Fed'n of Dentists*, 476 U.S. at 460-61 ("'[P]roof of actual detrimental effects, such as a reduction of output' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" *Id.* at 460-61 (quoting PHILLIP E. AREEDA, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1511, at 429 (1986))).

57. *Retina Assocs.*, 105 F.3d at 1383.

58. *Id.*

59. *Id.* at 1383-84.

60. The only other "evidence" of anticompetitive effect offered by RA was an alleged price-fixing agreement among BEI physicians who perform radial keratotomies. *Id.* at 1384. The district court rejected this argument because the alleged price-fixing was unrelated to the restraint at issue in this action. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

Plaintiff's section 2 claim against its direct competitor, FRI, suffered a similar fate. The district court first held that the record failed to establish that FRI engaged in any anticompetitive conduct, which is an essential element of a section 2 attempt claim.[64] While plaintiff suggested that FRI's participation in the alleged group boycott evidenced predatory conduct, the district court's grant of summary judgment on plaintiff's section 1 claim gutted this section 2 argument.[65] The district court also held that there was no evidence of a specific intent by FRI to monopolize the retina services market by joining BEI.[66] Indeed, the evidence to the contrary showed that FRI was initially reluctant to join BEI and that FRI was willing to share the BEI referrals if RA subsequently joined the venture.[67] Moreover, according to plaintiff, FRI's agreement with BEI at most affected only fifteen percent of the relevant market, far short of the market share necessary to evidence an intent to monopolize.[68] Accordingly, the court granted summary judgment against plaintiff on the section 2 claim as well.[69]

B. *United States v. Engelhard Corp.*

United States v. Engelhard Corp.[70] concerned the Government's unsuccessful effort to enjoin Engelhard Corporation's acquisition of certain assets of Floridin Corporation. Engelhard and Floridin were the two largest domestic producers and distributors of gel quality attapulgite clay ("GQA").[71] GQA is a form of clay found throughout the world; however, "[i]n the United States it is found only along the Georgia-Florida border."[72] GQA is used as a thickening and suspension agent in a variety of industrial products, such as suspension fertilizer, animal feeds, paints, and asphalt roof-coatings.[73] Prior to the acquisition, the GQA business was very concentrated with Engelhard and Floridin each

64. *Id.*
65. *Id.*
66. *Id.* at 1385.
67. *Id.*
68. *Id.* This evidence also calls into question plaintiff's ability to prove a dangerous probability of successfully monopolizing the relevant market—the third element of an attempt claim. *See* U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 1001 (11th Cir. 1993) ("[W]hen the defendant possesses less than 50% of the market . . . there [is] no dangerous probability of success . . . as a matter of law.").
69. 105 F.3d at 1385.
70. 126 F.3d 1302 (11th Cir. 1997).
71. *Id.* at 1303.
72. *Id.*
73. *Id.*

holding over forty percent of the United States market and a third company holding fifteen percent.[74]

Floridin's parent company decided to exit the GQA business and offered to sell Floridin's assets.[75] Engelhard expressed an interest in acquiring Floridin's assets, largely to acquire Floridin's more modern processing plant in Quincy, Florida.[76] In an attempt to avoid antitrust problems with the transaction, the parties structured the deal so that Engelhard would not purchase Floridin's GQA business.[77] Instead, the plan was to have a third party, ITC Corporation, acquire Floridin's GQA business; Engelhard and ITC would enter into a joint venture to share the Quincy processing plant, otherwise competing independently as GQA distributors of the clay processed at the Quincy plant.[78]

The Antitrust Division of the United States Department of Justice nonetheless challenged the transaction, arguing that it would substantially lessen competition in the GQA market in violation of section 2 of the Clayton Act.[79] Following a three-week bench trial, the district court rejected the Government's motion to enjoin the transaction.[80] Specifically, the district court held that the Government failed to establish its proposed relevant product market.[81]

The Eleventh Circuit affirmed.[82] The court initially rejected the Government's contention that the district court improperly refused to apply the approach to product market definition set forth in the 1992 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (the "Guidelines").[83] Under the Guidelines, the relevant product market is determined by evaluating the substitutes, if any, to which a customer would switch in response to a "'small but significant and nontransitory price increase' in the product in question," which the enforcement agencies generally define as a five percent price increase.[84] Without addressing the appropriateness of the Guidelines'

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74. *Id.*
75. *Id.* at 1304.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. United States v. Engelhard Corp., 970 F. Supp. 1463 (M.D. Ga. 1997).
81. *Id.*
82. *Engelhard*, 126 F.2d at 1308. The Eleventh Circuit refused to enter a stay pending appeal. *Id.* at 1304. By the time of the decision, the transaction had been consummated. *Id.*
83. *Id.* at 1304. The Guidelines are reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Apr. 2, 1992).
84. 126 F.3d at 1304 (quoting Federal Trade Commission Horizontal Merger Guidelines §§ 1.0, 1.11).

approach to product market definition, the Eleventh Circuit ruled that the district court did not base its decision on a rejection of this approach.[85] The Eleventh Circuit explained that "[d]espite the Government's protestations to the contrary, this case does not touch on broad antitrust principles, but instead turns on a simple question asked in every civil case—whether the plaintiff carried its burden of proof."[86]

Turning to the evidence, the court held that the district court's factual determinations concerning the relevant product market were not clearly erroneous, the deferential appellate review standard applicable here.[87] Rather, the Eleventh Circuit agreed with the district court that "the Government's methodology for determining the relevant product market, as applied in this case, was flawed."[88] Specifically, the court faulted the Government for failing to ascertain the size of the GQA market, which would have allowed the district court to appreciate whether the customers on which the Government relied for its evidence were representative of the GQA market generally.[89] Moreover, the court questioned the Government's failure to consider and present evidence concerning the effect, if any, that competition among industrial thickness and suspension agents, such as GQA, prior to the time an ingredient is chosen for a particular formulation would have on overall prices for those agents.[90] The court correctly noted that while a GQA price increase might have little effect in causing GQA consumers to reformulate their end-use products when a product already has been produced using a particular agent, the effect of a price increase on consumers at the preformulation state—at which switching costs are low if they exist at all—might prevent an exercise of monopoly power by Engelhard.[91] The Government's failure to consider this market factor called the reliability of its evidence into question and justified the district court's rejection of the Government's evidence.[92] Because the district court did not clearly err in finding that the Government failed to carry its burden of proof on the factual issue of the definition of the relevant product market, the Eleventh Circuit affirmed the district court judgment.[93]

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85. *Id.* at 1304-05.
86. *Id.* at 1305.
87. *Id.* at 1305-08.
88. *Id.* at 1307.
89. *Id.* at 1306.
90. *Id.* at 1306-07.
91. *Id.* at 1307.
92. *Id.* at 1307-08.
93. *Id.* at 1308.

III. CONCLUSION

The Eleventh Circuit's antitrust workload in 1997 continued the pattern of at least the last ten years. It was light, fairly routine, and generally not good for plaintiffs, including the Antitrust Division. We do not anticipate any material changes in this trend for the foreseeable future.[94]

94. Indeed, as we predicted last year, the Supreme Court in 1997 reversed prior precedent and held that vertically imposed maximum retail price maintenance is not per se unlawful. *See* State Oil Co. v. Khan, 118 S. Ct. 275 (1997).