Mercer Law Review

Volume 42
Number 4 *Eleventh Circuit Survey*

Article 3

7-1991

Antitrust

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I. INTRODUCTION

The antitrust docket of the Eleventh Circuit last year mirrored the general state of antitrust law in several respects. It included only five full blown decisions,[1] three involved health care,[2] and defendants had won below in all five cases. On the other hand, the Eleventh Circuit went against the antitrust grain in 1990 by finding for plaintiffs in three of its five opinions[3] and again refusing to be mesmerized by contemporary economic arguments.[4] Moreover, a few of the Eleventh Circuit's specific antitrust holdings rendered last term might fairly be questioned.[5]

This Article discusses each of the Eleventh Circuit's 1990 antitrust decisions. As will be shown, this output seems unlikely to do much to raise the court's national antitrust profile.

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1. *See* Key Enterprises of Delaware, Inc. v. Venice Hosp., 919 F.2d 1550 (11th Cir. 1990); Mr. Furniture Warehouse, Inc. v. Barclays American/Commercial, Inc., 919 F.2d 1517 (11th Cir. 1990); Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414 (11th Cir. 1990); Austin v. Blue Cross & Blue Shield, 903 F.2d 1385 (11th Cir. 1990); Bolt v. Halifax Hosp. Med. Center, 891 F.2d 810 (11th Cir.), *cert. denied*, 110 S. Ct. 1960 (1990); *see also* Consolidated Gas Co. of Florida, Inc. v. City Gas Co., 912 F.2d 1262 (11th Cir. 1990) (en banc) (per curiam) (reinstates panel decision, 880 F.2d 297 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 1300 (1991), despite 72 page dissent by Chief Judge Tjoflat). *See* Ross, *Antitrust*, 41 MERCER L. REV. 1217, 1218-21 (1990), *vacated and remanded for dismissal*, 59 U.S.L.W. 3635 (U.S. March 18, 1991); United States v. Pippin, 903 F.2d 1478, 1481-82 (11th Cir. 1990) (defendant did not withdraw from conspiracy to rig bids on school milk contracts where he honored previous agreement not to bid and continued to manage plant while it performed and received compensation under bid-rigged contracts).

2. *See Key Enterprises*, 919 F.2d 1550 (11th Cir. 1990); *Austin*, 903 F.2d 1385 (11th Cir. 1990); *Bolt*, 891 F.2d 810 (11th Cir. 1990).

3. *See Key Enterprises*, 919 F.2d 1550 (11th Cir. 1990); *Alan's*, 903 F.2d 1414 (11th Cir. 1990); *Bolt*, 891 F.2d 810 (11th Cir. 1990).

4. *See infra* text accompanying notes 147-50.

5. *See infra* text accompanying notes 57-59 and 75.

II. SURVEY

In *Austin v. Blue Cross & Blue Shield*,[6] plaintiffs alleged that Blue Cross & Blue Shield of Alabama ("Blue Cross") violated sections 1 and 2 of the Sherman Anti-Trust Act ("Sherman Act")[7] by contracting with most, if not all, of the hospitals in Alabama for discounts on services rendered to its insureds.[8] According to plaintiffs, these price concessions led the hospitals to engage in "cost shifting" by increasing their charges to patients who were either covered by other insurers or uninsured.[9] The district court dismissed plaintiffs' complaint for lack of standing, and the Eleventh Circuit affirmed.[10]

Section 4 of the Clayton Anti-Trust Act[11] authorizes a private treble damage action to be brought by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."[12] In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*,[13] the Supreme Court disapproved of "[a] literal reading of the statute . . . [that would] encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation."[14] Instead, the Court concluded that "the question [of antitrust standing] requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them."[15] Further, the Court found that this inquiry is not significantly aided by any of the formulations of antitrust standing that have been developed by the lower federal courts,[16] such as the "target area" or "direct injury" tests.[17] Rather, trial courts are to "analyze each situation"[18] in light of "factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances."[19] The Court identified these factors to include: (1) the existence of "a causal connection between an [alleged] antitrust violation and [plaintiff's

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6. 903 F.2d 1385 (11th Cir. 1990).
7. 15 U.S.C. §§ 1, 2 (1988).
8. 903 F.2d at 1386.
9. *Id.*
10. *Id.*
11. 15 U.S.C. § 15 (1988).
12. *Id.*
13. 459 U.S. 519 (1983).
14. *Id.* at 529.
15. *Id.* at 535 (footnote omitted).
16. *Id.* at 536 n.33.
17. *See generally* Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809 (1977); Taylor, *Antitrust Standing: Its Growing—or More Accurately Its Shrinking—Dimensions*, 55 ANTITRUST L.J. 515 (1986).
18. 459 U.S. at 536 n.33.
19. *Id.* at 537.

alleged] harm,"[20] (2) "the nature of the plaintiff's alleged injury,"[21] and (3) "the directness or indirectness of the asserted injury."[22] Determining directness of injury involves considerations of the following factors: (1) the availability of more "immediate victims of . . . [the alleged antitrust violation] to maintain their own treble-damages actions against the defendants,"[23] (2) whether plaintiff's alleged damages are "speculative,"[24] and (3) "the strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits [by] . . . avoiding either the risk of duplicative recoveries on the one hand, or the danger of complex apportionment of damages on the other."[25]

Despite the Supreme Court's admonition that the use of "black-letter rules" or "labels" to assess whether a claimant falls within section 4 "may lead to contradictory and inconsistent results[,]"[26] the Eleventh Circuit has continued to adhere to the "target area" test of antitrust standing.[27] As applied by the Eleventh Circuit, however, this test

> requires the plaintiff to prove that "he is within the sector of the economy which is endangered by the breakdown of competitive conditions in a particular industry." The plaintiff must be the target against which anticompetitive activity is directed. The injury must be "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." "Incidental or consequential injury remotely caused by an antitrust violation does not give a plaintiff standing to complain that he has been injured by reason of anything forbidden in the antitrust laws."[28]

There is, therefore, little practical difference between the "target area" test of antitrust standing in the Eleventh Circuit and the less structured approach to section 4 urged by the Supreme Court in *Associated General Contractors*.[29] In *Austin* the Eleventh Circuit agreed with the district

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20. *Id.*
21. *Id.* at 538.
22. *Id.* at 540.
23. *Id.* at 541.
24. *Id.* at 542.
25. *Id.* at 543-44 (footnote omitted).
26. *Id.* at 536 n.33.
27. *See, e.g.*, Pallazo v. Gulf Oil Co., 764 F.2d 1381, (11th Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1494-95 (11th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986).
28. *Austin*, 903 F.2d at 1388-89 (citations omitted).
29. *Id.* at 1389; *accord, e.g.*, Mr. Furniture Warehouse, Inc. v. Barclays American/Commercial, Inc., 919 F.2d 1517, 1520 n.1 (11th Cir. 1990); *Amey*, 758 F.2d at 1497; *see also* Ross, *Antitrust*, 37 MERCER L. REV. 1197, 1200 (1986).

court that plaintiffs failed to establish their antitrust standing by either measure.[30]

The Eleventh Circuit first held that "the causal connection between plaintiffs' injuries and Blue Cross' alleged misconduct is at best remote and tenuous."[31] Put simply, plaintiffs did not claim that the contracts between Blue Cross and the hospitals said anything about the rates that they would charge to others.[32] Moreover, plaintiffs did not allege that Blue Cross played any role in the hospitals' independent decisions to charge higher rates to non-Blue Cross patients, including by coercing or conspiring with the hospitals to do so.[33]

The Eleventh Circuit concluded that plaintiffs had not alleged "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[34] The court rested this finding on its determination that none of plaintiffs' allegations "charged actions on the part of [Blue Cross] which would constitute a violation of antitrust law if proved."[35] In other words, the Eleventh Circuit reasoned that plaintiffs failed to allege antitrust injury because the activities complained of did not violate the antitrust laws, and without antitrust injury plaintiffs could not show antitrust standing.[36] Indeed, the court characterized antitrust injury as "the touchstone for antitrust standing."[37]

It is hard to fault the Eleventh Circuit's decision that Blue Cross did nothing wrong under the antitrust laws by merely getting the hospitals in Alabama to agree to accept lower payments for its insureds. Nonetheless, the court appears to have reversed the usual sequence of analysis in antitrust cases by (1) first ruling for Blue Cross on the merits of plaintiffs' Sherman Act claims, (2) relying on this finding to hold that plaintiffs had not suffered any antitrust injury, and (3) using plaintiffs' absence of antitrust injury to conclude that they did not have antitrust standing.

The Eleventh Circuit next "observe[d] that neither of the [plaintiffs] dealt directly with Blue Cross, suggesting the remoteness of [their] injury

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30. 903 F.2d at 1389.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* (quoting Brunswick Co. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (emphasis in original)).

35. *Id.* at 1390.

36. *See id.* at 1391-92; *cf. Mr. Furniture*, 919 F.2d 1517, 1523 n.6 (11th Cir. 1990); ("[L]ack of an antitrust injury demonstrates the absence of antitrust violation . . . .).

37. 903 F.2d at 1389. *See* 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 standing under § 4, because a party may have suffered antitrust injury but may not be a proper plaintiff under § 4 for other reasons.").

from any purported antitrust violation."[38] The court viewed plaintiffs as essentially asserting the kind of "pass-on"[39] claim for damages that the Supreme Court rejected in *Illinois Brick Co. v. Illinois*.[40] The remoteness of plaintiffs' putative antitrust injuries from Blue Cross' alleged misconduct also persuaded the Eleventh Circuit that proof of their damages "would require the construction of complex and highly speculative economic models"[41] that "militates still further in favor of the conclusion that [plaintiffs] lack antitrust standing."[42]

Plaintiffs in *Mr. Furniture Warehouse, Inc. v. Barclays American/Commercial, Inc.*[43] were likewise found to lack antitrust standing.[44] Plaintiffs were two related companies in the furniture business in south Florida.[45] In the furniture industry credit is often extended to wholesalers and retailers not by the manufacturer, but by a commercial factor that purchases the accounts receivable from the manufacturer at a discount and assumes the risk of and responsibilities for collection.[46] Barclays, a major, if not dominant, factor in the south Florida "market" entered into exclusive factoring arrangements with many of the furniture manufacturers that plaintiffs did business.[47] It refused to extend credit to plaintiffs either because of their poor credit rating or, as plaintiffs alleged, due to personal animosity between their president and a Barclays employee.[48]

Plaintiffs brought suit against Barclays alleging, *inter alia*, that it violated sections 1 and 2 of the Sherman Act. The district court held that plaintiffs lacked antitrust standing and granted Barclays' motion for summary judgment.[49] The Eleventh Circuit affirmed.[50]

The linchpin of the court's analysis was its determination that denying credit to plaintiffs was not "a necessary component of," or "had any relationship at all to," any scheme by Barclays to exclude competition from other factors.[51] Accordingly, the Eleventh Circuit concluded not only that there was no causal connection between plaintiffs' claimed injury and

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38. 903 F.2d at 1392.
39. *Id.*
40. 431 U.S. 720, 735 (1977); *see also* Hanover Shoe, Inc. v. United States Machinery Corp., 392 U.S. 481, 493-94 (1968) (sharply limits the availability of the pass-on defense in antitrust damage litigation).
41. 903 F.2d at 1393.
42. *Id.*
43. 919 F.2d 1517 (11th Cir. 1990).
44. *Id.* at 1521.
45. *Id.* at 1519.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* (citing 708 F. Supp. 331 (S.D. Fla. 1988)).
50. *Id.*
51. *Id.* at 1521.

Barclays' allegedly anticompetitive exclusive dealing agreements,[52] but that plaintiffs had not suffered any antitrust injury at all.[53] These two factors from *Associated General Contractors*[54] were enough to defeat plaintiffs' antitrust standing,[55] especially when combined with the court's additional finding that Barclays' competitors were "more direct victims" of its allegedly exclusionary practices.[56]

The Eleventh Circuit, however, might have held differently if it had not focused on why Barclays refused to extend credit to plaintiffs. Their *antitrust* complaint was that Barclays used its exclusive factoring agreements to gain sufficient control over the factored credit market effectively to cut off plaintiffs from their desired furniture manufacturers.[57] If so, and the court was willing to make this assumption for purposes of appeal,[58] it would appear that plaintiffs should have antitrust standing to attack Barclays' allegedly unlawful acquisition of a factoring monopoly even if it exercised this market power to deny credit to plaintiffs for business reasons that independently raise no antitrust concern.[59]

Plaintiff physician fared better before the Eleventh Circuit in *Bolt v. Halifax Hospital Medical Center*.[60] After plaintiff's medical staff privileges were revoked at three hospitals in Daytona Beach, Florida within a two month period,[61] he filed an antitrust and civil rights action against the three hospitals, members of their respective medical staffs, and a local

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52. *Id.*

53. *Id.*; *see also supra* text accompanying note 34. The Eleventh Circuit further found that "this lack of an antitrust injury also indicates that Barclays has not violated § 2 at all." 919 F.2d at 1523 n.6. The court regarded § 2 of the Sherman Act as providing plaintiffs their only "possibility of standing." *Id.* at 1521; *cf. supra* text accompanying notes 35-36.

54. *See supra* text accompanying notes 13-25.

55. 919 F.2d at 1521 n.3.

56. *Id.* at 1521.

57. *See id.* at 1520, 1522.

58. *Id.* at 1522.

59. *Cf., e.g.*, Nelson v. Monroe Regional Medical Center, 7 Trade Reg. Rep. (CCH) ¶69,343, at 65,364-67 (7th Cir. 1991) (mother and son suffered antitrust injury as a result of an allegedly anticompetitive acquisition of a medical clinic by a competitor when the son was subsequently refused nonemergency medical treatment by the acquiring clinic even if it did so solely in retaliation for the son's earlier frivolous malpractice action against a doctor who was on the staff of the acquired clinic); Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1497-1500 (11th Cir. 1985) (mortgagors had antitrust standing to sue banks for allegedly inflating the fees that plaintiffs had to pay for title searches and other legal services in connection with their home mortgages by requiring them to use the lending bank's outside law firm), *cert. denied*, 475 U.S. 1107 (1986).

60. 891 F.2d 810 (11th Cir.), *cert. denied*, 110 S. Ct. 1960 (1990). This opinion was the court's third attempt to dispose of plaintiff's appeal. *See* 851 F.2d 1273 (11th Cir. 1988), *vacated in part and reinstated in part*, 874 F.2d 755 (11th Cir. 1989) (en banc), *cert. denied*, 110 S. Ct. 1960 (1990).

61. 891 F.2d at 814-15.

medical society alleging in pertinent part that defendants engaged in three separate anticompetitive conspiracies.[62] The district court required plaintiff at trial to first present his evidence of these alleged conspiracies.[63] The court found this proof inadequate and directed a verdict against plaintiff on all of his antitrust claims.[64] The Eleventh Circuit disagreed.[65]

The Eleventh Circuit first confirmed that members of a hospital medical staff are legally capable of conspiring with each other.[66] Moreover, although some courts have concluded that a hospital and its medical staff are a single enterprise for purposes of section 1 of the Sherman Act, and hence cannot conspire by themselves,[67] the Eleventh Circuit held otherwise.[68]

The court then considered whether plaintiff had established a prima facie case as to any or all of his three alleged conspiracies.[69] Since plaintiff relied wholly on circumstantial evidence to prove these conspiracies,[70] he had to establish two elements. First, plaintiff had to " 'show that the conspiracy alleged is an economically reasonable one'—that is, one that would inure to the defendants' economic benefit."[71] Second, plaintiff had to "adduce evidence that tends to exclude the possibility that the alleged co-conspirators acted independently and in a manner consistent with rational business objectives[,]"[72] and instead had "(1) an intent to adhere to an agreement (2) designed to achieve an unlawful objective."[73] The Eleventh Circuit determined that plaintiff satisfied this burden of proof concerning all three of his alleged conspiracies except as to the local medical society.[74]

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62. *Id.* at 816-17 & nn.8-9.

63. *Id.* at 817. The Eleventh Circuit strongly criticized this procedure. *See id.* at 828 ("We do not hesitate to say that the district court's handling of this case was unfortunate.").

64. *Id.* at 817.

65. *Id.* at 828.

66. *See id.* at 819; *accord, e.g.*, Nurse Midwifery Assoc. v. Hibbett, 918 F.2d 605, 614 (6th Cir. 1990).

67. *See, e.g.*, Potters Medical Center v. City Hosp. Ass'n, 800 F.2d 568, 573 (6th Cir. 1986); Weiss v. York Hosp., 745 F.2d 786, 817 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985).

68. 891 F.2d at 819; *accord, e.g.*, Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1450 (9th Cir. 1988). *See generally* Blumstein & Sloan, *Antitrust and Hospital Peer Review*, LAW & CONTEMP. PROBS. 7, 52-53 (1988).

69. 891 F.2d at 819.

70. *Id.*

71. *Id.* (quoting Winn v. Edna Hibel Corp., 858 F.2d 1517, 1519 (11th Cir. 1988)).

72. *Id.*

73. *Id.* at 820.

74. *See id.* at 820-28.

Not surprisingly, the Eleventh Circuit quickly found that the physician defendants had a rational economic motive to conspire to deny plaintiff medical staff privileges.[75] By contrast, the court failed to address the motivation of the hospital defendants, each of which presumably had an economic incentive to *increase* the size of its medical staff. Perhaps the Eleventh Circuit assumed, not illogically, that the hospitals had an overriding economic interest in preserving the loyalty and support of their existing medical staffs and none of the hospitals were willing to jeopardize this support and loyalty for the sake of plaintiff.

The court next concluded that plaintiff had met the second prong of the evidentiary test for a Sherman Act conspiracy by coming forward with evidence that "tended to exclude the possibility that the alleged coconspirators acted legitimately and independently."[76] The court was particularly swayed by plaintiff's evidence that certain members of the peer review committees, which voted to deny him staff privileges, suborned false and fabricated evidence against plaintiff.[77] The court found that these physicians had personal motives for subverting the peer review proceedings,[78] and that at least some of the grounds stated by the hospitals for their adverse actions against plaintiff were pretextural.[79] The Eleventh Circuit ruled that the trial court erred in prohibiting plaintiff from introducing any of this proof that the peer review proceedings were a sham.[80]

One of the defendant hospitals, Halifax Hospital Medical Center ("HHMC"), nevertheless maintained that its peer review activities relating to plaintiff were immune from the antitrust laws under the state action doctrine of *Parker v. Brown*.[81] HHMC contended that it was either a state agency functioning as sovereign[82] or the equivalent of a municipality

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75. *Id.* at 820 ("If doctors in a hospital can exclude other doctors from practicing in that hospital, then obviously the remaining doctor can charge a higher price for their services.").

76. *Id.*

77. *Id.* at 817, 821.

78. *Id.*

79. *Id.*

80. *Id.* at 822; *see id.* at 821 ("[A] factfinder could easily infer from that evidence that the hospital and its peer review committees intended to enter into an agreement designed to achieve an end not dictated by legitimate business concerns.").

81. 317 U.S. 341 (1943). *See generally* Ross, *Antitrust*, 35 MERCER L. REV. 1091, 1092-94 (1984). HHMC could not take advantage of the protection against antitrust damage liability that was provided to local governmental units by the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (1988), because the district court entered its order in the case prior to the effective date of the Act. 891 F.2d at 824 n.26. *See* U.S.C. § 35(b)(1988).

82. 891 F.2d at 823. In Hoover v. Ronwin, 466 U.S. 558 (1984), the Supreme Court held that a state legislature and supreme court are entitled to *Parker* immunity so long as their "action be that of 'the State acting as a sovereign.'" *Id.* at 574 (quoting Bates v. State Bar, 433 U.S. 350, 360 (1977)); *see also id.* at 568 n.17 (reserves the question of whether a state

acting pursuant to "a clearly expressed state policy to displace competition in the hiring of physicians."[83]

The Eleventh Circuit rejected both of these arguments. The court held that HHMC was not acting as a state agency in denying hospital privileges to plaintiff because the enabling legislation, which created it as a special tax district run by a board of commissioners selected by the governor, did not confer on the governor, the state legislature, or the Florida Supreme Court any authority to supervise directly the board's personnel decisions.[84] Alternatively, the Eleventh Circuit found that HHMC would lose any state agency antitrust protection anyway if, as plaintiff alleged, HHMC participated in a private conspiracy among some or all of the other defendants to revoke plaintiff's hospital privileges.[85] The court also relied on this putative conspiracy to conclude that HHMC's allegedly wrongful treatment of plaintiff was not within the range of potentially anticompetitive conduct that might have been foreseen by the Florida legislature in authorizing HHMC's board of commissioners to employ such "agents and employees as may be advisable" consistent with the "public good."[86]

In *Key Enterprises of Delaware, Inc. v. Venice Hospital*[87] the Eleventh Circuit rescued an antitrust plaintiff based on its own detailed review of the trial record.[88] This case involved the sale and rental of prosthetic devices, hospital beds, oxygen equipment, wheelchairs and walkers, and other durable medical equipment ("DME") to home users in and around Venice, Florida.[89] Much of this business depends on referrals from hospitals, nursing homes and intermediate care facilities, home health agencies, physicians, and physical therapists.[90]

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governor enjoys this same status). The Court cautioned that "[c]loser analysis is required when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization." *Id.* at 568 (footnote omitted).

83. 891 F.2d at 825. *See* Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38-39 (1985) ("[T]o obtain [state action] exemption, municipalities most [only] demonstrate that their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.' ") (quoting Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413 (1978) (plurality opinion)). *See generally* Ross, *Antitrust*, 38 MERCER L. REV. 1053, 1054-55 (1987).

84. 891 F.2d at 823-24.

85. *Id.* at 823 n.23. In City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344 (1991), the Supreme Court rejected any such exception to the state action doctrine. *See id.* at 1350-53.

86. 891 F.2d at 825 (quoting 1979 Fla. Laws ch. 79-577, §§ 3, 5).

87. 919 F.2d 1550 (11th Cir. 1990).

88. *Id.* at 1556-68.

89. *Id.* at 1552.

90. *Id.*

Plaintiff, Venice Convalescent Aids Medical Supply ("VCA"), and defendant, Medicare Patient Aid Centers ("MPAC"), were rival DME suppliers.[91] Their market positions dramatically changed, however, after an affiliate of defendant Venice Hospital, by far the larger of the two general hospitals in the area,[92] purchased 50% of MPAC from defendant Sammett Corporation.[93] Within two years of this acquisition VCA's share of the local DME market dropped from 72.8% to 30%, and MPAC's market share jumped from 9.2% to 61%.[94] VCA alleged that MPAC achieved this sudden success at its expense only because defendants illegally channeled most of the Hospital's DME business to MPAC in violation of sections 1 and 2 of the Sherman Act.[95] The jury found in favor of VCA on all of its antitrust claims and awarded VCA $760,983 in damages,[96] which the court trebled to $2,282,949.[97] The district court granted defendants' motion for a judgment notwithstanding the verdict.[98] The Eleventh Circuit reversed.[99]

This decision can best be explained simply by listing defendants' anticompetitive acts that the Eleventh Circuit held the jury could have found from the evidence:

> 1. "[H]ome health care agenc[ies] and [their] individual nurses must be granted hospital privileges to work with patients while they are still in Venice Hospital."[100] This pre-discharge contact with patients is critical to the home health care business.[101] Consequently, by explicitly encouraging home health care nurses to recommend MPAC to their patients who needed DME,[102] and overtly investigating the possibility of entering into a joint venture with a home health care agency itself,[103] Venice Hos-

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91. *Id.*

92. *See id.* at 1553 ("Venice Hospital has 76% of the available beds; patient records show that it has 80% of patient admissions and 81% of the patient days in the Venice area.").

93. *Id.* at 1552.

94. *Id.* at 1555.

95. *Id.* It is noteworthy that VCA did *not* attack "the [Hospital-MPAC] joint venture as such . . . ." *Id.* at 1558. The Eleventh Circuit consequently not only "assumed the joint venture is legitimate," *Id.* (footnote omitted), but stressed that "[o]ur decision today does not limit the ability of firms to vertically integrate when that integration does not unnecessarily exclude competition, or is not undertaken to monopolize or restrain trade. *Id.* at 1558 n.6.

96. *Id.* at 1555-56.

97. *Id.* at 1556.

98. 703 F. Supp. 1513, 1519 (M.D. Fla. 1989), *rev'd*, 919 F.2d 1550 (11th Cir. 1990).

99. 919 F.2d at 1568.

100. *Id.* at 1554 n.4.

101. *Id.* at 1554.

102. *See id.* 1554, 1557.

103. *See id.* at 1552, 1555.

pital effectively coerced or unduly influenced home health care nurses to prefer MPAC over VCA and other DME vendors.[104]

2. An employee of MPAC named Bowers became the patient equipment coordinator in Venice Hospital's discharge planning department even though he had no prior training that would qualify him for this job.[105] Bowers was permitted to visit patients in the hospital to solicit DME business for MPAC.[106] He did so wearing a lab coat and otherwise holding himself out as an official of the hospital.[107] No other DME suppliers were allowed by the hospital to solicit business on its premises.[108]

3. "A standing order is a request by a physician which is kept on file by the hospital."[109] Although Venice Hospital maintained and followed standing orders from members of its medical staff for home health care agencies,[110] the hospital refused to follow standing orders from DME vendors.[111] A doctor had to indicate his or her preference for a DME supplier on the patient's individual chart before . . . .[112]

4. If a patient, home health care nurse, or physician asked for a specific DME vendor, which at least patients rarely did,[113] Bowers would honor this choice.[114] Absent such a request Bowers utilized a "default rule" and referred all DME business to MPAC.[115]

5. Sammett sold 50% of MPAC to Venice Hospital to eliminate it as a potential competitor in the DME business and to exclude other competitors from access to the hospital's captive referrals.[116]

Against this litany of misconduct the Eleventh Circuit had no trouble concluding, contrary to the district court, that VCA had suffered antitrust injury[117] due to defendants' alleged antitrust violations, even without any proof that these practices caused patients any monetary damage.[118] The Eleventh Circuit rightly recognized that "[c]ompetition ha[d] been injured because there is no effective means by which competing DME ven-

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104. *Id.* at 1562-63.
105. *Id.* at 1554.
106. *Id.* at 1554, 1557-58.
107. *Id.*
108. *Id.*
109. *Id.* at 1555.
110. *Id.* at 1555, 1557.
111. *Id.*
112. *Id.*
113. *Id.* at 1557.
114. *Id.* at 1554.
115. *Id.* at 1554-55.
116. *Id.* at 1552-53, 1557.
117. *See supra* text accompanying note 34.
118. 919 F.2d at 1559-60. The evidence showed "that prices have actually gone down and that the market is less concentrated than it was prior to the joint venture." *Id.* at 1560 n.7.

dors can reach those patients who require DME when they are discharged from the hospital."[119]

The court further determined that the evidence of defendants' efforts to restrict and exclude competition amply supported the jury's findings that defendants had violated sections 1 and 2 of the Sherman Act by (1) entering into a reciprocal dealing agreement with one or more home health care agencies to continue their access to patients in the hospital in exchange for preferential referrals of DME business to MPAC,[120] and (2) conspiring and attempting to monopolize the "DME market in the Venice area,"[121] including by "leveraging" the hospital's monopoly power in the acute care market to give MPAC an unfair competitive advantage in the DME business.[122] Although the Eleventh Circuit did not expressly rule on whether monopoly leveraging is a separate offense under section 2,[123] its handling of this claim suggests that the court perceives monopoly leveraging to be merely a form of attempted monopolization.[124]

The Eleventh Circuit's only Robinson-Patman Price Discrimination Act ("Robinson-Patman Act")[125] decision last year was in *Alan's of Atlanta, Inc. v. Minolta Corp.*[126] Plaintiff Alan's and defendant Wolf Camera, Inc. were competing "specialty" retailers of cameras and related

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119. *Id.* at 1560. As the court explained: "In the DME industry, because of the regulated nature of Medicare and Medicaid reimbursements, the primary means of competition is quality and service. The defendants here have knowingly and purposefully set in place a scheme which insulates the unknowing patient from learning of these nuances." *Id. See* FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 459 (1986) ("[A]n agreement limiting consumer choice by impeding the 'ordinary give and take of the market place' cannot be sustained . . . .") (citation omitted) (quoting National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978)).

120. 919 F.2d at 1561-64. The Eleventh Circuit concluded that it was unnecessary "to divide reciprocity cases into two categories; i.e. coercive and mutual." *Id.* at 1562. At bottom,

> where a plaintiff's evidence shows that one party has sufficient market power to unduly influence a second party to treat the first more favorably than the free market would otherwise dictate, and the second party acts in conformity with the reciprocal arrangement, the plaintiff has proved the existence of an arrangement which unreasonably restrains trade.

Id.

121. *Id.* at 1565.

122. *Id.* at 1567.

123. *See id.* Other courts of appeal have expressly reserved this issue as well. *See* Catlin v. Washington Energy Co., 791 F.2d 1343, 1346 (9th Cir. 1986); Association for Intercollegiate Athletics for Women v. NCAA, 735 F.2d 577, 586 n.14 (D.C. Cir. 1984).

124. *See* 919 F.2d at 1567-68. *But see* Kerasotes Mich. Theatres, Inc. v. National Amusements, Inc. 854 F.2d 135, 136-37 (6th Cir. 1988), *cert. dismissed*, 490 U.S. 1087 (1990); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

125. 15 U.S.C. §§ 13(a)-(f) (1988).

126. 903 F.2d 1414 (11th Cir. 1990).

equipment.[127] At the start of 1979 Alan's had about 33% of the total sales of Minolta-brand cameras in the Atlanta market and some 78% of this volume from specialty stores.[128] By the end of 1985 its approximately 33% market share had fallen to around 4%.[129] During this same period Wolf's share of the Atlanta market for Minolta cameras shot up from about 6% to approximately 41%,[130] and its share of specialty camera store sales increased from some 14% to over 65%.[131]

Relying on information that it received from an apparently disgruntled ex-Minolta employee,[132] Alan's alleged that this market turnabout resulted from discounts of 4% to 7%, and in a few instances of up to 10%, plus free goods, advertising, and other benefits that Minolta provided to Wolf but not to Alan's in alleged violation of sections 2(a), 2(d), and 2(e) of the Robinson-Patman Act.[133] The district court granted summary judgment to defendants on the grounds that (1) Alan's had failed to demonstrate that it was harmed by anything done by Minolta,[134] (2) the promotional allowances and services that Minolta offered to Alan's and Wolf were "proportionally equal,"[135] and (3) Minolta's entire allegedly discriminatory scheme to benefit Wolf was justified to meet the competition that Minolta faced for this business from the "grey market" in its own imported products.[136]

The Eleventh Circuit reversed and remanded.[137] The court held that the district court erred across the board,[138] including, by abusing its discretion in blocking Alan's from discovery of certain additional discrimina-

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127. *Id.* at 1416.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *See id.*

133. *Id.* at 1417. Alan's Complaint also included a Count against Wolf under section 2(f) of the Act, the "buyer's counterpart" to section 2(a), for knowingly inducing or receiving allegedly discriminatory prices from Minolta, and state law claims for tortious interference and breach of contract. *Id.* at 1419.

134. *Id.* at 1420.

135. *Id.* at 1421. The operative test of legality under both sections 2(d) and 2(e) of the Act is whether the allegedly discriminatory promotional allowances and services, respectively, were available to all of the seller's competing customers on "proportionally equal terms." 15 U.S.C. §§ 13(d), (e) (1988).

136. 903 F.2d at 1421-22. "The 'grey market' refers to goods that were sold abroad by camera manufacturers at a price low enough to make it profitable for the foreign purchasers of those goods to export them into the United States." *Id.* at 1417 n.4.

137. *Id.* at 1430.

138. *See id.* at 1423-30.

tory benefits that Minolta allegedly afforded to Wolf and other "key dealers" throughout the country.[139]

Most of the Eleventh Circuit's opinion was highly fact oriented.[140] Nonetheless, it also revealed the court's present thinking on several important issues of antitrust law and practice. First, and possibly foremost, the Eleventh Circuit declined to interpret the Supreme Court's decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[141] as mandating "a stricter-than-normal summary judgment standard in antitrust cases . . . that imposes extra burdens on a plaintiff."[142] Rather, the court concluded that *Matsushita* "merely informed the proper Rule 56 standard by placing it in a complex antitrust context."[143] The Eleventh Circuit thus joined the majority of lower federal courts that have similarly construed *Matsushita*, along with the Supreme Court's other 1986 opinions in *Celotex Corp. v. Catrett, Inc.*[144] and *Anderson v. Liberty Lobby, Inc.*,[145] as removing any predisposition against granting summary judgment in antitrust cases but not as directing or urging trial judges to use summary judgment more freely to dismiss antitrust claims than other alleged causes of action.[146]

Conversely, the Eleventh Circuit affirmed its resistance to the "new" antitrust jurisprudence of the so-called "Chicago school" of economics that sees the antitrust laws as intended to prevent only those activities which lower consumer welfare by raising prices or restricting output.[147] This resistance was consistent with its ruling two years earlier in *McGhee v. Northern Propane Gas Co.*,[148] where the court pointedly noted that

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139. *Id.* at 1429-30.

140. *See id.* at 1420-30 & nn.11, 14, and 17, 1426 n.18, and 1428 n.20.

141. 475 U.S. 574 (1986).

142. 903 F.2d at 1430 n.22.

143. *Id.*

144. 477 U.S. 317 (1986).

145. 477 U.S. 242 (1986).

146. *See, e.g.*, United Air Lines, Inc. v. Austin Travel Corp., 867 F.2d 737, 742 (2d Cir. 1989); Dreiling v. Peugot Motors of America, Inc., 850 F.2d 1373, 1379 (10th Cir. 1988); Miller v. Indiana Hosp., 843 F.2d 139, 143-44 (3d Cir.), *cert. denied*, 488 U.S. 870 (1988). *But cf.* DeLong Equip. Co. v. Washington Mills Abrasive Co., 887 F.2d 1499, 1505 (11th Cir. 1989) ("The Supreme Court has recently [in *Matsushita*] endorsed the use of summary judgment in antitrust cases in order to avoid chilling legitimate competitive behavior . . . ."), *cert. denied*, 110 S. Ct. 1813 (1990); Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 659 n.4 (7th Cir.) (Posner, J.) (summary judgments ought to be favored in antitrust cases), *cert. denied*, 484 U.S. 977 (1987). *See generally* Ross, *Antitrust*, 40 MERCER L. REV. 1141, 1145 n.24 (1989) and cited articles.

147. *See, e.g.*, R. BORK, THE ANTITRUST PARADOX (1978); Cohler, *The New Economics and Antitrust Policy*, 32 ANTITRUST BULL. 401 (1987); Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

148. 858 F.2d 1487 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989).

"[e]conomics provides the means for evaluating the facts, not the elements of an antitrust violation."[149] The Eleventh Circuit in *Minolta* "ma[d]e it clear that when confronted with contemporary economic argument on the one hand and judicial precedent on the other, we feel . . . that economic argument is not ultimately controlling; judicial precedent is."[150]

Accordingly, the court relied on its reading of over 50 years of Robinson-Patman Act precedent[151] to find that "the legal focus of the competitive injury inquiry [under section 2(a)] is on the competitor, not the consumer."[152] But the Eleventh Circuit additionally appreciated that this competitive injury requirement "concerns itself with injury to competition and competitors *in general*, not just injury to [plaintiff]."[153]

Finally, the court may have effectively foreclosed Robinson-Patman Act defendants in the Eleventh Circuit from successfully moving for summary judgment under the meeting competition defense of section 2(b).[154] In overruling the district court's decision that defendants had proven their defense of meeting competition from the grey market as a matter of law,[155] the Eleventh Circuit variously commented that (1) "a legal conclusion that the meeting competition defense has been established is rarely, if ever, reachable[,]"[156] (2) "the test for establishing the section 2(b) defense makes the removal of genuine doubt well nigh impossible . . . [since it] is particularly fact-bound[,]"[157] and (3) because "the concept of good faith lies at the core of the defense, . . . issues of credibility are inherently bound up with a decision on the section 2(b) defense and in a summary judgment proceeding, of course, issues of credibility are beyond a judge's ken."[158] In light of these remarks, the court appears to have un-

149. 858 F.2d at 1500 n.29; *see also* Ross, *Antitrust*, 40 MERCER L. REV. 1141, 1151-55 (1989) (discussing *McGahee*).

150. 903 F.2d 1414, 1418 n.6 (11th Cir. 1990).

151. *Id.*

152. *Id.*

153. *Id.* at 1429 (emphasis in original).

154. This section provides in pertinent part:

> [N]othing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

15 U.S.C. § 13(b) (1988). Despite the language of section 2(b), which refers only to "price" and "services or facilities," the meeting competition defense applies to section 2(d) allowances as well. *See, e.g.*, Exquisite Form Brassier, Inc. v. FTC, 301 F.2d 499, 501-06 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962).

155. *See* 903 F.2d at 1424-25.

156. *Id.* at 1425.

157. *Id.*

158. *Id.* at 1425-26.

derstated its message in cautioning that "[a]ltogether, these factors weigh heavily against any attempt to dispose of section 2(b) issues on summary judgment."[159]

III. CONCLUSION

The Eleventh Circuit's 1990 antitrust caseload lacked the substantive impact of recent years. The court did not announce any new antitrust tests or standards,[160] grapple with any novel antitrust questions,[161] or hand down any rulings that are likely to attract significant attention within the overall antitrust community.[162] Instead, last term's antitrust output is distinguished primarily by the Eleventh Circuit's willingness to parse the record for evidence of the alleged antitrust violations[163] and its resulting holdings for plaintiffs in three of five antitrust cases even though defendants had prevailed below in all five suits.[164]

After several years of overwhelmingly pro-defendant antitrust decisions,[165] 1990 was the second consecutive year in which antitrust plaintiffs won more than they lost in the Eleventh Circuit.[166] It would seem, therefore, that reports of the death of private antitrust litigation in the Eleventh Circuit might have been premature.[167]

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159. *Id.* at 1426.

160. *See* McGahee v. Northern Propane Gas Co., 858 F.2d 1487, 1493-1504, (11th Cir. 1988) (test for predatory pricing), *cert. denied*, 490 U.S. 1084 (1989); Helicopter Support Sys. v. Hughes Helicopter, Inc., 818 F.2d 1530, 1534 (11th Cir. 1987) (two part evidentiary test for an antitrust plaintiff to get a conspiracy claim past summary judgment).

161. *See* National Bancard Corp. (NaBanco) v. VISA U.S.A., 779 F.2d 592, 605 (11th Cir.) (upholds VISA interchange fee), *cert. denied*, 479 U.S. 923 (1986).

162. *See* Palmer v. BRG of Georgia, Inc., 874 F.2d 1417, 1428 (11th Cir. 1989) (affirms summary judgment for two bar review courses charged with *per se* illegal price fixing and market allocation), *rev'd per curiam*, 111 S. Ct. 401 (1990); *McGahee*, 858 F.2d 1487 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989).

163. *See supra* text accompanying notes 77-80, 100-16, 140.

164. *See supra* note 3.

165. *See* Ross, *Antitrust*, 40 MERCER L. REV. 1141, 1141 (1989) (five of eight for antitrust defendants in 1987-1988); Ross, *Antitrust*, 38 MERCER L. REV. 1053, 1053 (1987) (six of eight in 1986); Ross, *Antitrust*, 37 MERCER L. REV. 1197, 1198 (1986) (six of seven in 1985); Ross, *Antitrust*, 36 MERCER L. REV. 1101, 1102 (1985) (seven of eight in 1984).

166. *See*, Ross, *Antitrust*, 41 MERCER L. REV. 1217, 1217 (1990) (three of five antitrust opinions favored plaintiffs).

167. *See*, Ross, *Antitrust*, 37 MERCER L. REV. 1197, 1206 (1986); Ross, *Antitrust*, 36 MERCER L. REV. 1101, 1112 (1985).