Antitrust

by Michael Eric Ross*

The federal antitrust docket of the Eleventh Circuit[1] hit a new low last term with only seven decisions.[2] This downturn in workload[3] is hardly surprising, however, in light of the continued assault on the federal antitrust laws by the Supreme Court,[4] Congress,[5] and especially the current

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1. In addition, the court decided one case on state antitrust grounds. In Palazzo v. Gulf Oil Corp., 764 F.2d 1381 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 799 (1986), the court of appeals affirmed summary judgment for defendant on plaintiff's claims under the Florida Antitrust Act in light of plaintiff's absence of standing to seek to recover damages for alleged anticompetitive injury to his corporation and plaintiff's failure, after seven years of litigation, to adduce any evidence of defendant's alleged price fixing. 764 F.2d at 1387-88.

2. Of the Eleventh Circuit's twelve active judges, only Judges Henderson and Tjoflat did not sit on any of last year's federal antitrust panels. Judge Hatchett led the way by participating in four of these actions. Four different appellate judges wrote for the court, and none of these cases produced multiple opinions.

3. *Cf.* Ross, *Antitrust, 1984 Eleventh Circuit Survey*, 36 MERCER L. REV. 1101 (1985) (eight antitrust decisions in 1984); Ross, *Antitrust, 1983 Eleventh Circuit Survey*, 35 MERCER L. REV. 1091 (1984) (nine in 1983); Ross, *Antitrust, 1982 Eleventh Circuit Survey*, 34 MERCER L. REV. 1191 (1983) (twelve in 1982).

4. *See* Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 105 S. Ct. 2613 (1985) (expulsion of a stationery retailer from a wholesale purchasing cooperative without any procedural safeguards was not, in and of itself, a per se illegal group boycott); Southern Motor Carriers Rate Conf., Inc. v. United States, 105 S. Ct. 1721 (1985) (private parties are immunized from antitrust laws under 'state action' doctrine even if their allegedly anticompetitive activities are not compelled by the state as long as they are pursuant to an 'affirmatively expressed and clearly articulated' state policy to displace competition with regulation).

5. *See* The Local Government Antitrust Act of 1984, Pub. L. 98-544, 98 Stat. 2750 (1984) (to be codified at 15 U.S.C. §§ 34-36) (immunizes qualifying local governments, officials, and private parties engaged in 'official conduct' from damages, interest on damages, costs, or attorney's fees under §§ 4, 4A, or 4C of the Clayton Act, 15 U.S.C. §§ 15, 15a, 15c (Supp. II 1984)). Nonetheless, Congress has formally repudiated the highly permissive Vertical Restraint Guidelines of the Antitrust Division of the United States Department of Justice, *see* 49 ANTITRUST & TRADE REG. REP. (BNA) No. 1244, at 1019-20 (Dec. 12, 1985), and Senator

Administration.[6]

Moreover, the Eleventh Circuit again contributed to the present 'anti-antitrust' environment[7] by ruling in favor of defendants in all but one of its 1985 opinions.[8] Indeed, last year the court of appeals signaled its growing unwillingness to allow antitrust plaintiffs to avoid summary judgment by claiming either to need additional discovery,[9] or that the conclusory affidavit or deposition testimony of their experts is alone sufficient to create a triable issue of fact.[10]

Metzenbaum has introduced the Antitrust Improvement Act of 1986 (S. 2022) to counter the Administration package that is described below. *See* 50 ANTITRUST & TRADE REG. REP. (BNA) No. 1250, at 186-87 (Jan. 30, 1986).

6. Not only have the Antitrust Division and the Federal Trade Commission drastically curtailed their enforcement of federal antitrust laws, *see* 50 ANTITRUST & TRADE REG. REP. (BNA) No. 1248, at 114-15 (Jan. 16, 1986), but President Reagan has just proposed a series of statutory amendments that would: (i) Detreble all antitrust offenses except price-fixing, although it would also enable the federal government for the first time to recover treble damages when it has been the victim of this paradigmatic anticompetitive behavior; (ii) revise joint and several liability among antitrust defendants by proportionately reducing a settling plaintiff's claim against the remaining defendants by the share of plaintiff's damages that is fairly allocable to the settling defendant; (iii) substitute a standard of "reasonable probability of substantial harm" to competition for the incipiency test now contained in section seven of the Clayton Act, 15 U.S.C. § 18 (1983); (iv) codify the criteria set forth in the Antitrust Division's Merger Guidelines as a nonexclusive list of factors to be considered in evaluating mergers and acquisitions under section seven; (v) exempt from section seven industries that are severely hard-pressed by competition from imports; (vi) relax the prohibition against interlocking directorates in section eight of the Clayton Act, 15 U.S.C. § 19 (1983), by raising the jurisdictional amount and creating a *de minimis* defense; and (vii) authorize defendants to be awarded attorney's fees for successfully defending against antitrust claims that are "frivolous, unreasonable, without foundation, or in bad faith." 50 ANTITRUST & TRADE REG. REP. (BNA) No. 1249, at 143-44, 174-76 (Jan. 23, 1986).

7. *Cf.* survey articles cited *supra* note 3.

8. *See* Balogh's of Coral Gables, Inc. v. Getz, 778 F.2d 649 (11th Cir. 1985) (affirming jury verdict for defendants); American Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569 (11th Cir. 1985) (summary judgment); McGee v. First Fed. Sav. & Loan Ass'n, 761 F.2d 647 (11th Cir.) (per curiam) (dismissal), *cert. denied*, 106 S. Ct. 273 (1985); Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486 (11th Cir. 1985) (summary judgment), *cert. denied*, 106 S. Ct. 1513 (1986); Lombard's, Inc. v. Prince Mfg., Inc., 753 F.2d 974 (11th Cir. 1985) (directed verdict), *cert. denied*, 106 S. Ct. 851 (1986); Cha-Car, Inc. v. Calder Race Course, Inc., 752 F.2d 609 (11th Cir. 1985) (jury verdict).

9. *See* American Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1575-78 (11th Cir. 1985); Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1505-06 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 1513 (1986); Lombard's, Inc. v. Prince Mfg., Inc., 753 F.2d 974, 975-76 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 851 (1986); *cf.* Ohio-Sealy Mattress Mfg. Co. v. Duncan, 749 F.2d 1560, 1561-62 (11th Cir. 1985) (per curiam) (trial court did not abuse its discretion in denying plaintiff's motion to depose president of third-party competitor and in quashing subpoena for production of competitor's sales records).

10. *See* Balough's of Coral Gables, Inc. v. Getz, 778 F.2d 649, 652 (11th Cir. 1985); American Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1580 (11th Cir. 1985), discussed *infra* at notes 28-51.

The Eleventh Circuit's 1985 antitrust output was also singularly routine. Unlike previous years, none of the court's 1985 decisions dealt with novel or particularly significant legal questions nor did any of its decisions otherwise seem likely to attract, or to warrant, national attention. On the other hand, last term's antitrust rulings were generally solid and instructive.

I. SURVEY

In two cases, *Lombard's, Inc. v. Prince Manufacturing, Inc.*[11] and *Balogh's of Coral Gables, Inc. v. Getz*,[12] the Eleventh Circuit summarily affirmed findings below that plaintiffs had failed to prove a conspiracy under section one of the Sherman Act.[13] Likewise, in *McGee v. First Federal Savings & Loan Association*,[14] the court of appeals readily upheld the dismissal of plaintiff's claim that defendant had illegally conditioned its property loans on use of its wholly-owned real estate appraisal subsidiary. The court concluded that (i) defendant could not conspire with its own subsidiary as a matter of law[15] and (ii) loan-related appraisal services cannot be "tied" to the loan itself because they are not two distinct products.[16]

Plaintiffs in *Amey, Inc. v. Gulf Abstract & Title, Inc.*[17] were equally unsuccessful in alleging that the practice of the banks in Lee County, Florida of requiring plaintiffs and other mortgagors to obtain a real estate title search and opinion from the lending bank's outside law firm constituted illegal tying, exclusive dealing, price fixing, or exchange of price information.[18] As in *McGee* and two earlier decisions of the former Fifth Circuit that are even more squarely on point,[19] the Eleventh Circuit concluded that plaintiffs' tying claim fell for lack of two separate products.[20]

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11. 753 F.2d 974 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 851 (1986).

12. 778 F.2d 649 (11th Cir. 1985).

13. *Id.* at 652 (citing 15 U.S.C. § 1 (1982)). *See* 753 F.2d at 975.

14. 761 F.2d 647 (11th Cir.) (per curiam), *cert. denied*, 106 S. Ct. 273 (1985).

15. 761 F.2d at 648 (citing Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 766 (1984)). *See generally*, Comment, *The Intra-Enterprise Conspiracy Doctrine After* Copperweld Corp. v. Independence Tube Corp., 86 COLUM. L. REV. 198 (1986).

16. 761 F.2d at 648 (citing Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 18 (1984)).

17. 758 F.2d 1486 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 1513 (1986).

18. On appeal, plaintiffs apparently dropped their alternative theories of market and customer allocation, group boycott, and actual and attempted monopolization. *See* 758 F.2d at 1492.

19. *See* Sibley v. Federal Land Bank, 597 F.2d 459, 461-64 (5th Cir.), *cert. denied*, 444 U.S. 941 (1979); Forrest v. Capital Bldg. & Loan Ass'n, 504 F.2d 891, 891 (5th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975).

20. *See* 758 F.2d at 1503 ("We agree with the district court that the mortgage financing

It similarly agreed with the district court that plaintiffs had neither provided any evidence that the banks' exclusive dealing arrangements with their respective real estate attorneys had any anticompetitive effect,[21] nor raised even a reasonable inference of a price-fixing agreement among the alleged conspirators.[22]

Still, antitrust plaintiffs may take heart from two preliminary rulings of the *Amey* panel. First, the court of appeals held that plaintiffs, as the ultimate purchasers of the allegedly restrained title search legal services,[23] had standing to sue for damages resulting from allegedly inflated fees they claimed they had to pay due to defendants' alleged antitrust violations.[24] In making this determination, the panel confirmed that, while the Eleventh Circuit purports to adhere to the 'target area' test of antitrust standing,[25] it actually follows the multifactor approach urged by the Supreme Court in *Associated General Contractors v. California State Counsel of Carpenters*.[26] Second, the court in *Amey* sensibly reasoned that plaintiffs' antitrust cause of action, if any, could not have accrued until the closing of their bank loan, which was when they became bound to pay for the title search that had been performed by the bank's law firm. Plaintiffs' claims were, therefore, not untimely even though they had examined the preliminary title opinion outside of the applicable four year statute of limitations.[27]

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and the legal services were not purchased separately.") The appellate court made "[a]n additional observation," that the alleged $325 surcharge that plaintiffs supposedly paid for the "tied" legal services did not discharge their burden of proving that the alleged tie-in involved "a not insubstantial amount of interstate commerce" in the tied product market. *Id.* (quoting Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958)). *But see* Fortner Enter., Inc. v. United States Steel Corp., 394 U.S. 495, 502 (1969) (this element of a tying claim can be satisfied by showing the "total volume of sales tied by the sales policy").

21. 758 F.2d at 1503-04.

22. *Id.* at 1504-05.

23. Plaintiffs contended that they were given the choice of paying either the lending bank or its law firm directly for the title search and opinion. *Id.* at 1490.

24. *Id.* at 1497-1500.

25. *Id.* at 1496. The traditional target area test of standing obligates the plaintiff to establish that "he is within the sector of the economy threatened by the breakdown of competition." *Id.* at 1495. It also entails a two-step procedure: "First, the court identifies the area of the economy threatened by the alleged antitrust conduct. Second, the court determines whether the plaintiff's injury is within that target area, or if the defendant 'aimed' at the plaintiff." *Id.* at 1496; *accord*, Construction Aggregate Transp., Inc. v. Florida Rock Indus., Inc., 710 F.2d 752, 762-65 (11th Cir. 1983).

26. 459 U.S. 519, 536-45 (1983); *see* 758 F.2d at 1497 ("The Supreme Court cases [*Associates Gen. Contractors* and Blue Shield v. McCready, 457 U.S. 465 (1982)] . . . provide policy guidance consistent with that which is the foundation of this circuit's target area test."); *see also* Ross, *Antitrust, 1983 Eleventh Circuit Survey*, 35 MERCER L. REV. 1091, 1105 n.106 (1984).

27. *See* 15 U.S.C. § 15b (Supp. II 1984); 758 F.2d at 1501-02.

Conversely, it is difficult to detect any saving grace for antitrust plaintiffs in the decision in *American Key Corp. v. Cole National Corp.*[28] American Key tried to operate small key duplicating facilities in shopping malls and other retail locations in Atlanta and elsewhere in the Southeast.[29] Cole engages in this same business, primarily on the premises of major retailers in shopping centers. Since the 1930's, Cole has contracted with Sears to lease space to operate key stores in or adjacent to certain Sears stores. Under these nonexclusive agreements, Cole pays Sears a percentage of Cole's net sales for each shop, with this amount adjusted to compensate Sears for any reduction in revenue that might occur in those malls where Cole also duplicates keys in one of its 'Things Remembered' specialty stores for engraved or 'personalized' items.[30] American Key's lease was not renewed in one large Atlanta mall that also has a Sears store with a Cole-operated key shop in it,[31] while another major local shopping center would not lease American Key a kiosk location in a corridor.[32] American Key instituted suit against Cole, Sears, and the mall owners[33] alleging that it had been excluded from the two shopping centers pursuant to a conspiracy to restrain trade and to monopolize and attempt to monopolize the sale of keys in regional enclosed shopping malls in the Atlanta area in violation of sections 1 and 2 of the Sherman Act.[34]

Although the lower court found against American Key on virtually every element of its claims in granting defendants' motion for summary judgment,[35] American Key confined its antitrust arguments on appeal to the district court's refusal to accept American Key's alleged relevant product market of "key duplicating shops operating in high traffic areas

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28. 762 F.2d 1569 (11th Cir. 1985).

29. American Key was markedly unsuccessful in this endeavor, and it filed bankruptcy during the pendency of the litigation. *Id.* at 1574.

30. *Id.* at 1572-74.

31. Four of American Key's rent checks had bounced prior to the expiration of the leasehold term, and the new tenant agreed to a base rent of $500 more per month than American Key had paid. *Id.* at 1574.

32. American Key was offered, but declined, in-line space at this mall. *Id.* at 1575.

33. The mall owners settled with American Key and were not parties to the appeal. *Id.* at 1575 n.2.

34. 15 U.S.C. §§ 1-2 (1982). American Key additionally alleged in its complaint that the business relationships between Cole and Sears ran afoul of section two of the Sherman Act, including their agreement that Cole's prices for duplicating keys and other competitive services would be identical in both in-store and 'Things Remembered' shops in the same mall, and that Sears would be reimbursed for any lost revenue in such instances. 762 F.2d at 1575 n.2. The appellate court rejected these charges in dicta. *Id.* at 1578.

35. American Key was held to have failed to come forward with any significant probative evidence: (i) of any harm to competition or conspiracy involving Sears, (ii) that Sears or Cole had monopoly power, or (iii) that Sears or Cole had a specific intent to monopolize. *Id.* at 1579; *see also id.* at 1581.

in enclosed regional malls having 500,000 or more square feet and at least two major anchor tenants."[36] By not challenging the other adverse antitrust rulings below, each of which was deemed by the Eleventh Circuit to be dispositive of one or more of American Key's Sherman Act allegations,[37] American Key had effectively lost its appeal before it began.[38]

Nevertheless, the court of appeals proceeded to review, and to endorse, the lower court's conclusion that replacement keys and related products are available to customers not only in large enclosed malls, but also in other shopping centers and in freestanding hardware, variety, and drug stores, as well as from independent locksmiths.[39] Hence, the Eleventh Circuit held that the district court had correctly rejected as a matter of law American Key's "highly artificial definition" of the relevant product market.[40]

This affirmance is especially noteworthy because market definition is usually an issue of fact to be determined by the jury,[41] and American Key had included in its papers opposing defendants' summary judgment motion affidavits from both Ron DeWeese, its president and principal stockholder, and Dr. Henry, an outside economic expert, that fully supported American Key's proposed relevant product market.[42] The court of appeals, however, ruled that the lower court had properly given "little weight" to these affidavits.[43]

The Eleventh Circuit brushed past the DeWeese affidavit with the comment that "[c]onstruction of a relevant economic market or a showing of monopoly power in that market cannot . . . be based upon lay opinion testimony."[44] More surprisingly, it found that Dr. Henry's affidavit was entitled to no greater deference since all of the 'facts' on which he relied

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36. *Id.* at 1578.

37. *Id.* at 1579 n.9.

38. *See, e.g.*, Municipal Bond Reporting Antitrust Litig. v. Standard & Poor's Corp., 672 F.2d 436, 439 n.6 (5th Cir. 1982) (issues not raised on appeal are deemed to be abandoned); FED. R. APP. P. 28(a)(4).

39. 762 F.2d at 1578, 1581.

40. *Id.* at 1580. The panel confusingly, and mistakenly, sometimes referred to American Key's proposed *product* market as the allegedly relevant *geographic* market. *See id.* at 1580-81.

41. *See, e.g.*, Graphic Prod. Distrib., Inc. v. ITEK Corp., 717 F.2d 1560, 1569 (11th Cir. 1983); Associated Radio Serv. Co. v. Page Airways, Inc., 624 F.2d 1342, 1348-49 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981).

42. 762 F.2d at 1579.

43. *Id.*

44. *Id.*; *cf.* Forro Precision, Inc. v. International Business Mach. Corp., 673 F.2d 1045, 1059 (9th Cir. 1982), *cert. denied*, 105 S. Ct. 2664 (1985) ("Without the benefit of expert testimony or other credible evidence to support an inference of market power from the list of [competing] companies and the market share, any such inference would be sheer speculation.").

came from DeWeese's inadmissible lay testimony.[45] While the appellate court recognized that under Federal Rule of Evidence 703[46] expert opinion testimony can depend on inadmissible evidence if " 'of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject,' "[47] it pointed out that Dr. Henry's affidavit did not expressly state that he normally rested his economic opinions on information like that furnished to him by DeWeese.[48] Further, the Eleventh Circuit cut directly against the increasingly liberal application of rule 703[49] in asserting that "[e]xpert opinions ordinarily cannot be based upon the opinions of others whether those opinions are in evidence or not."[50] It will be interesting to monitor whether this hostile treatment of Dr. Henry's affidavit heralds a general stiffening of the standards for the admissibility of expert testimony in this jurisdiction.[51]

Plaintiffs in *Cha-Car, Inc. v. Calder Race Course, Inc.*,[52] likewise were hurt by their appellate strategy. This was a class action brought by thoroughbred race trainers who were denied access to free, on-track stall space by defendants Calder and Tropical Park, Inc. These two Florida race track corporations share use of the Calder facilities, have interlocking officers, and use the same racing secretary.[53] Since there are not enough of these free, on-track stalls to satisfy the number of owners and trainers who apply for them each racing season, they are subjectively allocated among the applicants by the racing secretary largely on the basis of his personal appraisal of the quality of the horses.[54] Although trainers who are not provided with this desirable stall space can still have their horses race at both Calder and Tropical Park,[55] plaintiffs alleged that to

45. 762 F.2d at 1580.

46. FED. R. EVID. 703.

47. 762 F.2d at 1580 (quoting FED. R. EVID. 703).

48. 762 F.2d at 1580.

49. *See generally*, Rossi, *Modern Evidence and the Expert Witness*, 12 LITIGATION 18 (1986).

50. 762 F.2d at 1580. *But cf.* O'Gee v. Dobbs Houses, Inc., 570 F.2d 1084, 1089 (2d Cir. 1978) (testifying doctor predicated his opinion of plaintiff's alleged back injury solely on plaintiff's own statements and the opinions of other physicians who had examined or treated her).

51. *Cf.* Hill v. Seaboard Coast Line R.R., 767 F.2d 771, 776 (11th Cir. 1985) (district court did not abuse its discretion in refusing to admit testimony of employer's expert in employment discrimination case that was based on a method of assessing employees for possible promotion that differed from the system actually used by the employer); Hull v. Merck & Co., 758 F.2d 1474, 1477-78 (11th Cir. 1985) (per curiam) (affirming exclusion of opinion of plaintiff's medical expert that was premised on speculative assumptions).

52. 752 F.2d 609 (11th Cir. 1985).

53. *Id.* at 611.

54. *Id.*

55. *Id.*

do so cost these trainers approximately $100 extra per day for each of their horses for offtrack boarding, transportation, and associated expenses.[56]

Plaintiffs claimed that defendants' allegedly arbitrary method of assigning stall space amounted to a per se unlawful concerted refusal to deal prohibited by section one of the Sherman Act.[57] The trial judge, however, declined to charge the jury on per se illegality,[58] and the jury returned a verdict for defendants under the rule of reason.[59] The only issue on appeal was whether the district court had determined the proper antitrust standard for evaluating defendants' combination or conspiracy.[60]

Plaintiffs, nonetheless, chose to place this question before the court without including a trial transcript in the record on appeal.[61] Accordingly, the court of appeals had to *presume* that the evidence proved below authorized the instructions given by the trial court and the jury's ultimate finding that the way in which defendants allocated stall space was not an *unreasonable* restraint of trade.[62]

Moreover, the Eleventh Circuit itself stressed that Calder and Tropical Park are not competitors,[63] that plaintiffs had not alleged any vertical combination or conspiracy between defendants and the allegedly 'favored' trainers who received on-track stall space,[64] and that plaintiffs had made no showing that the complained-of stall assignment system had brought about or threatened any anticompetitive effects.[65] The appellate court consequently had little problem in holding that "the unique circumstances present [in *Calder* did] not sufficiently resemble those arrangements which have been considered to be *per se* illegal in other cases,"[66]

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56. *Id.* at 611-12.

57. *Id.* at 612 (relying on 15 U.S.C. § 1 (1982)).

58. *Id.*

59. *Id.* "Under the rule of reason, a restraint will be held illegal only if it unreasonably harms competition." *Id.* at 612 n.5; *see, e.g.*, National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 101 (1984).

60. 752 F.2d at 612.

61. *Id.*

62. *Id.*

63. *Id.* at 614. The panel was not impressed by plaintiffs' argument that Calder and Tropical Park compete for racing dates. *Id.* at 614 n.11.

64. *Id.* at 614.

65. *Id.*

66. *Id.* at 613; *see* Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 105 S. Ct. 2613 (1985) ("Cases to which this Court has applied the per se approach have generally involved joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.' ") *Id.* at 2619 (quoting L. SULLIVAN, ANTITRUST § 92, at 261-62 (1977)).

and that the lower court had correctly decided that the rule of reason governed plaintiffs' claim.[67]

Only in *Shahawy v. Harrison*[68] did antitrust plaintiffs in the Eleventh Circuit come out ahead in 1985. Plaintiff, a physician, and his medical association accused defendants, *inter alia*, of violating sections one and two of the Sherman Act by denying Shahawy hospital staff privileges to perform cardiac catheterizations.[69] On rehearing, the panel withdrew its earlier opinion[70] and ruled that the district court had erred in granting defendants' motion to dismiss on the ground that plaintiffs had failed to allege facts adequate to demonstrate that defendants' alleged wrongdoing "had some not insubstantial effect upon [Shahawy's] activities as they affect interstate commerce."[71] Rather, the court of appeals reaffirmed that "in this circuit Sherman Act jurisdiction requires a focus on the interstate markets involved in the *defendant's* business activities."[72] Further, the panel held that it is enough for antitrust plaintiffs to plead that defendant's general business activities have a substantial impact on interstate commerce,[73] and that the complaint need not make the more particularized showing of a nexus between interstate commerce and the specific alleged acts or practices of defendant that are claimed to run afoul of the antitrust laws.[74] In *Shahawy*, the Eleventh Circuit thus rejected the restrictive interpretation of the Supreme Court's opinion in *McLain v. Real Estate Board, Inc.*[75] to which the majority of appellate courts have

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67. 752 F.2d at 615. This conclusion anticipated the Supreme Court's admonition later in the year that:

> A plaintiff seeking application of the *per se* rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects. The mere allegation of a concerted refusal to deal is predominantly anticompetitive. When the plaintiff challenges [an alleged group boycott], some showing must be made that the [group] possesses market power or unique access to a business element necessary for effective competition.

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 105 S. Ct. 2613, 2621 (1985).

68. 778 F.2d 636 (11th Cir. 1985).

69. *Id.* at 637-38.

70. *See* Shahawy v. Harrison, 755 F.2d 1432 (11th Cir. 1985).

71. 778 F.2d at 639.

72. *Id.* at 640 (emphasis added); *see* Construction Aggregate Transp., Inc. v. Florida Rock Indus., Inc., 710 F.2d 752, 767 n.31 (1983) ("The starting place for [jurisdictional] analysis, therefore, is the relationship between the defendant's business and interstate markets, in particular the effect the defendant's business will have on those markets.").

73. The court of appeals drew no distinction between a 'substantial' and a 'not insubstantial' effect on interstate commerce. 778 F.2d at 641; *see* McLain v. Real Estate Bd., Inc., 444 U.S. 232, 242, 246 (1980) (the Court uses the two phrasings interchangeably).

74. *See* 778 F.2d at 640-41 (quoting McLain v. Real Estate Bd., Inc., 444 U.S. 232, 242 (1980)).

75. 444 U.S. 232 (1980).

subscribed.[76]

II. Conclusion

Consistent with the current overall erosion of the federal antitrust laws, 1985 was another dismal year for antitrust plaintiffs in the Eleventh Circuit. Defendants enjoyed virtually a clean sweep, and their tally included potentially far-reaching rulings, upholding the discretion of trial judges to control the period of time for discovery in antitrust suits, and to disregard proffered expert testimony that lacks even the minimal credibility that is called for by Federal Rule of Evidence 703.

The message of last term's antitrust output may best have been expressed in *Amey*, in which the court of appeals candidly acknowledged that "Amey's inability to demonstrate existence of a genuine issue of fact does not suggest that its claims were frivolous but demonstrates the almost inherent inability of a single consumer, only having access to information to which consumers are usually given access, to litigate an antitrust claim effectively."[77] In short, if the private antitrust action is not now completely dead in this jurisdiction, and nationwide for that matter, it is plainly *in extremis*.

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76. *See* Seglin v. Esau, 769 F.2d 1274, 1280 (7th Cir. 1985); Hayden v. Bracy, 744 F.2d 1338, 1343 n.2 (8th Cir. 1984); Furlong v. Long Island College Hosp., 710 F.2d 922, 925-26 (2d Cir. 1983); Cordova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank, 649 F.2d 36, 45 (1st Cir. 1981); Crane v. Intermountain Health Care, Inc., 637 F.2d 715, 722-24 (10th Cir. 1980) (as amended *en banc*, Jan. 20, 1981); *cf.* Cardio-Medical Assoc., Ltd. v. Crozer-Chester Medical Center, 721 F.2d 68, 74 n.2 (3d Cir. 1983) (reserves ruling). *Contra* Western Waste Serv. Sys. v. Universal Waste Control, 616 F.2d 1094, 1096-97 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980).

77. 758 F.2d at 1510.