

# Antitrust

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In 1998 the Eleventh Circuit published eight antitrust opinions.<sup>1</sup> Some of these cases turned on procedural issues; some were decided on the merits. As in previous years, defendants generally were successful, but not always. Each of these decisions is briefly summarized below.

*Southern Card & Novelty, Inc. v. Lawson Mardon Label, Inc.*<sup>2</sup> concerned the legality of a “full-line forcing” arrangement.<sup>3</sup> Defendant, Lawson Mardon Label, Inc. (“Lawson”), manufactured postcards, which it sold to distributors throughout North America for resale to retail outlets, which in turn sold them to consumers. Lawson manufactured “local view” postcards depicting nonlicensed local images (for example, in Florida, pictures of beaches or alligators). Lawson also manufactured postcards bearing copyrighted images of Walt Disney Company characters pursuant to what effectively was an exclusive license.<sup>4</sup> There

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

1. *Johnson v. University Health Servs.*, 161 F.3d 1334 (11th Cir. 1998); *Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548 (11th Cir. 1998); *Aquatherm Indus. v. Florida Power & Light Co.*, 145 F.3d 1258 (11th Cir. 1998); *Southern Card & Novelty, Inc. v. Lawson Mardon Label, Inc.*, 138 F.3d 869 (11th Cir. 1998); *Bankers Ins. Co. v. Florida Residential Property & Cas. Joint Underwriting Ass'n*, 137 F.3d 1293 (11th Cir. 1998); *All Care Nursing Serv. v. High Tech Staffing Servs.*, 135 F.3d 740 (11th Cir. 1998); *Technical Resource Servs. v. Dornier Medical Sys.*, 134 F.2d 1458 (11th Cir. 1998); *Colsa Corp. v. Martin Marietta Servs.*, 133 F.3d 853 (11th Cir. 1998).

2. 138 F.3d 869 (11th Cir. 1998).

3. *Id.* at 875.

4. *Id.* at 871. Although Lawson's license with Disney is nonexclusive, Disney has not granted similar rights to any other postcard manufacturer. *Id.*

were at least six other postcard manufacturers that produced postcards specific to areas in Florida.<sup>5</sup> Plaintiff, Southern Card & Novelty, Inc. ("Southern Card"), was a Daytona Beach, Florida based business that distributed postcards to retailers in central and northern Florida. Southern Card distributed postcards manufactured by Lawson as well as other postcard manufacturers.<sup>6</sup>

In late 1991, Lawson introduced the "Disney Product Plan," which required Southern Card to purchase the same dollar amount of "local view" postcards that it purchased of Disney postcards. To prevent loss of its lone source of Disney postcards, Southern Card began buying Lawson's "local view" postcards in compliance with Lawson's new program. Eventually, Lawson requested that Southern Card buy all of its postcards from Lawson, a request that Southern Card refused. Thereafter, Lawson began recruiting other postcard distributors to distribute its products in competition with Southern Card. Lawson also limited Southern Card's purchase of Disney postcards.<sup>7</sup>

Upset by this turn of events, Southern Card sued Lawson, claiming federal and state antitrust violations based on: (1) alleged unlawful tying of Disney and "local view" postcards; and (2) monopolization and attempted monopolization of the greater Orlando area "market" for "local view postcards."<sup>8</sup> On defendant's motion for summary judgment, the district court dismissed plaintiff's claims.<sup>9</sup> In particular, the district court held that plaintiff's antitrust claims were not per se unlawful and that, applying the rule of reason, plaintiff failed to demonstrate that Lawson had unreasonably restrained competition in the "local view" postcard market.<sup>10</sup>

The Eleventh Circuit affirmed, explaining that the challenged practice—embodied in Lawson's "Disney Product Plan"—was a "line forcing" arrangement.<sup>11</sup> In a line forcing arrangement, a manufacturer compels its dealers to offer for sale some ("representative line forcing") or all ("full line forcing") of the manufacturer's line of products.<sup>12</sup> Generally, such arrangements do not bar the dealer from selling competing product lines, and in such cases these vertical, nonprice

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5. *Id.* at 872.

6. *Id.*

7. *Id.*

8. *Id.* at 873.

9. *Id.*

10. *Id.*

11. *Id.* at 875.

12. *Id.*

restrictions generally pass antitrust muster.<sup>13</sup> Moreover, as the Eleventh Circuit correctly observed, line forcing arrangements typically do not foreclose choice by an ultimate consumer, and thus, per se illegality treatment is unwarranted.<sup>14</sup>

Applying the rule of reason, the Eleventh Circuit concluded that plaintiff's claims could not survive summary judgment.<sup>15</sup> The court rejected as "woefully deficient" Southern Card's proffered affidavit of one of Lawson's competitors designed to show market foreclosure because the affidavit failed to provide even the most basic information necessary to truly evaluate the impact of Lawson's line forcing on its competitors' access to the alleged relevant market.<sup>16</sup> The court likewise rejected Southern Card's expert testimony that consumers were paying higher prices due to Lawson's conduct because the survey on which such testimony was based suffered from "biased" sampling and the failure to take local market factors into account, such as cost of living.<sup>17</sup> Southern Card's proffered evidence was insufficient to prove an antitrust claim under the rule of reason and, therefore, the Eleventh Circuit affirmed the grant of summary judgment.<sup>18</sup>

*Bankers Insurance Co. v. Florida Residential Property & Casualty Joint Underwriting Ass'n*<sup>19</sup> presented the Eleventh Circuit with another opportunity to address the state action doctrine. Once again, the issue before the court related to the definition of a "political subdivision" for purposes of state action immunity.<sup>20</sup> Specifically, *Bankers Insurance Co.* concerned Florida's reaction to the state's post-Hurricane Andrew insurance crisis.<sup>21</sup> Pursuant to state law, all Florida residential-property insurers were required to form an association to write "involuntary" insurance for citizens who could not obtain coverage in the

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13. See, e.g., *Famous Brands, Inc. v. David Sherman Corp.*, 814 F.2d 517, 523-24 (8th Cir. 1987).

14. *Southern Card & Novelty*, 138 F.3d at 875. Line forcing arrangements thus differ from tying arrangements for which per se illegality is sometimes warranted. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). Courts have used principles of tying law to evaluate full-line forcing arrangements. See, e.g., *Unijax, Inc. v. Champion Int'l, Inc.*, 683 F.2d 678, 684-85 (2d Cir. 1982); *Pitchford Scientific Instruments Corp. v. PEPI, Inc.*, 531 F.2d 92 (3d Cir. 1976).

15. 138 F.3d at 876.

16. *Id.* at 876-77.

17. *Id.* at 877.

18. *Id.* at 878.

19. 137 F.3d 1293 (11th Cir. 1998).

20. *Id.* at 1296. See *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 44 (1985). See generally Michael Eric Ross & Jeffrey S. Cashdan, *Antitrust*, 48 MERCER L. REV. 1389, 1390-91 (1997).

21. 137 F.3d at 1294.

“voluntary” insurance market.<sup>22</sup> After the association implemented competitive bidding for contracts to service policies written by the association, one of the unsuccessful bidders sued the association and four individuals who worked for it claiming that the association’s bid process violated section 1 of the Sherman Act.<sup>23</sup> The district court granted defendants’ judgment on the pleadings based on the state immunity doctrine of *Parker v. Brown*<sup>24</sup> and the intra-enterprise conspiracy doctrine of *Copperweld Corp. v. Independence Tube Co.*<sup>25</sup>

The Eleventh Circuit affirmed.<sup>26</sup> Regarding the *Copperweld* issue, the court ruled that the individual defendants were agents of the association and, thus, had an alignment of interests such that the “plurality of persons” needed for a section 1 claim was missing.<sup>27</sup> The court recognized this issue was “more difficult” for the association itself, but it declined to reach the issue because of its state action immunity holding.<sup>28</sup>

As for the state action issue, the court held that the association had sufficient “government-like attributes” and “public-entity trappings” to be treated as a political subdivision.<sup>29</sup> Among other things, the court observed that the association was subject to Florida’s open records (“sunshine”) laws, had certain tax exemptions, and operated under a plan approved by the Department of Insurance.<sup>30</sup> Moreover, although the association’s members were private, competing insurers, the court noted that these members did not compete in the “involuntary” insurance market and, in fact, such members participated in the association only because the law required them to do so.<sup>31</sup> Because the association is a political subdivision, and the court found the association to have acted pursuant to a clearly articulated legislative policy permitting it to select its contracting parties as it saw fit, the court held the association’s conduct to be immune from antitrust liability.<sup>32</sup>

*Colsa Corp. v. Martin Marietta Services, Inc.*<sup>33</sup> affirmed the Eleventh Circuit’s prior pronouncement that the Sherman Act is not a panacea for

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22. *Id.* at 1294-95.

23. *Id.* at 1295.

24. 317 U.S. 341 (1943).

25. 467 U.S. 752 (1984).

26. 137 F.3d at 1298.

27. *Id.* at 1295-96.

28. *Id.* at 1296.

29. *Id.* at 1296-97.

30. *Id.* at 1297.

31. *Id.*

32. *Id.* at 1298.

33. 133 F.3d 853 (11th Cir. 1998).

all alleged business wrongs.<sup>34</sup> In *Colsa* plaintiff sued Martin Marietta under section 2 of the Sherman Act for allegedly seeking to create or maintain a monopoly. *Colsa's* claim arose from Martin Marietta's termination of *Colsa's* subcontract for services in connection with a government contract awarded to Martin Marietta. The district court granted Martin Marietta summary judgment on the ground that *Colsa* failed to properly define the relevant market.<sup>35</sup>

The Eleventh Circuit affirmed.<sup>36</sup> Rather than relying on the failure to prove a relevant market, however, the court focused on a more fundamental deficiency—the lack of any alleged anticompetitive conduct.<sup>37</sup> The Eleventh Circuit observed that “*Colsa* cannot claim that Martin Marietta monopolized—or attempted to monopolize—its own contract by terminating a subcontract.”<sup>38</sup> The Eleventh Circuit correctly determined that *Colsa's* claims, if any, sounded in contract rather than antitrust law.<sup>39</sup>

*Johnson v. University Health Services, Inc.*<sup>40</sup> related to another offbeat antitrust claim. Plaintiff, Dr. Johnson, asserted a variety of claims, including claims under sections 1 and 2 of the Sherman Act, arising out of a hospital's alleged promise to provide Dr. Johnson with financial assistance to start her own practice.<sup>41</sup> Plaintiff's antitrust claims boiled down to the assertion that defendant hospital was somehow obligated to subsidize her practice and its failure to do so harmed competition.<sup>42</sup> The district court granted defendant's summary judgment on all counts, including the antitrust counts.<sup>43</sup>

The Eleventh Circuit affirmed.<sup>44</sup> The court held that Dr. Johnson's claimed injuries were not the type of harms that the antitrust laws were intended to prevent and, thus, plaintiff lacked antitrust injury.<sup>45</sup> The better approach would have been to hold that Dr. Johnson's claim failed to state a cause of action under the antitrust laws because the alleged injury did not, and could not, involve harm to competition and consum-

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34. *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1573 (11th Cir. 1991) (citation omitted).

35. *Colsa Corp.*, 133 F.3d at 855-56.

36. *Id.* at 856.

37. *Id.* at 855-56.

38. *Id.* at 856.

39. *Id.*

40. 161 F.3d 1334 (11th Cir. 1998).

41. *Id.* at 1336-37.

42. *Id.* at 1337.

43. *Id.*

44. *Id.*

45. *Id.* at 1338.

ers generally, as opposed to mere injury to Dr. Johnson.<sup>46</sup> Regardless, the outcome was manifestly correct.

Three years ago, Aquatherm Industries—a manufacturer of solar-powered heating systems for swimming pools—convinced the Eleventh Circuit to reject Florida Power & Light's *res judicata* defense and to allow Aquatherm to proceed with its federal antitrust claim.<sup>47</sup> On its second trip to the Eleventh Circuit, *Aquatherm Industries, Inc. v. Florida Power & Light Co.*,<sup>48</sup> plaintiff had less success.<sup>49</sup> Aquatherm claimed that defendant Florida Power & Light ("FPL")—the exclusive provider of electric power for approximately two-thirds of Florida—violated sections 1 and 2 of the Sherman Act by promoting, through direct mailing and advertising, the use of electric pool-heating pumps as an economical way to heat residential swimming pools.<sup>50</sup> FPL did not sell pool-heating pumps or any other swimming pool equipment.<sup>51</sup> According to Aquatherm, FPL's conduct violated the antitrust laws because, by such conduct, FPL either (1) "wrongly attempted to prevent erosion of its own electric power monopoly or (2) wrongly interfered with the pool-heater market in order to increase its profits."<sup>52</sup> The district court granted FPL's Rule 12(b)(6) motion to dismiss the antitrust counts for failure to state a claim.<sup>53</sup>

The Eleventh Circuit affirmed.<sup>54</sup> First, the court addressed the section 2 claims.<sup>55</sup> The court explained that the alleged conduct in the two proffered relevant markets—the alleged market for sale of electric power and the alleged market for sale of pool heaters—did not support a claim in this case. Regarding the former, the court noted the absence of any allegation that FPL's actions increased its market share or erected any kind of barrier to entry into the electric power market.<sup>56</sup> Regarding the latter, the court observed the lack of any allegation that FPL held or attempted to create a monopoly in the pool-heater market—indeed, FPL did not even compete in this alleged market.<sup>57</sup> With

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46. See *Levine v. Central Fla. Med. Affiliates*, 72 F.3d 1538, 1545 (11th Cir. 1996) (declining to reach standing issue because of lack of meritorious antitrust claim).

47. *Aquatherm Indus. v. Florida Power & Light Co.*, 84 F.3d 1388 (11th Cir. 1996).

48. 145 F.3d 1258 (11th Cir. 1998).

49. *Id.* at 1260.

50. *Id.*

51. *Id.*

52. *Id.* at 1261.

53. *Aquatherm Indus. v. Florida Power & Light Co.*, 971 F. Supp. 1419 (M.D. Fla. 1997).

54. 145 F.3d at 1260.

55. *Id.* at 1260-61.

56. *Id.* at 1261.

57. *Id.*

no allegation of any other relevant market improperly monopolized by FPL or in which FPL's conduct raised a "dangerous probability" of achieving a monopoly, the court held that Aquatherm's monopolization and attempted monopolization claims were doomed.<sup>58</sup>

Aquatherm's conspiracy to monopolize and monopoly leveraging claims met a similar fate.<sup>59</sup> The conspiracy claim suffered from several defects. First, the court held that plaintiff's conspiracy allegations were vague and conclusory.<sup>60</sup> The complaint lacked facts supporting the general suggestion of a conspiracy between FPL and manufacturers and suppliers of electric pool-heat pumps.<sup>61</sup> Second, the court explained that FPL's alleged desire to "increase its sales" or "increase its market share" merely described "normal business goals," and such allegations failed to support a claim of specific intent to achieve a monopoly in a relevant market, as required to support a conspiracy to monopolize claim.<sup>62</sup> Finally, the court discounted Aquatherm's claim that FPL conspired to monopolize the pool-heater market because "no authority exists holding [that] a defendant can conspire to monopolize a market in which it does not compete."<sup>63</sup> For that same reason, the court rejected plaintiff's section 2 monopoly leveraging claim, observing that FPL did not seek any competitive advantage in the alleged pool-heating market because it did not compete in such market.<sup>64</sup>

Aquatherm's section 1 claims met with equal skepticism—and rightfully so.<sup>65</sup> The court rejected Aquatherm's basic conspiracy to restrain trade claim because of the lack of any alleged harm to competition.<sup>66</sup> The court explained that Aquatherm's charge that FPL acted unfairly by disseminating false information, to the detriment of Aquatherm, was insufficient to support a section 1 claim without allegations of harm to competition generally.<sup>67</sup> For this basic reason, plaintiff's tying and group boycott claims also failed to state a claim.<sup>68</sup> Accordingly, the court affirmed the dismissal of Aquatherm's complaint.<sup>69</sup>

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58. *Id.*

59. *Id.* at 1261-62.

60. *Id.* at 1261.

61. *Id.*

62. *Id.* at 1261-62.

63. *Id.* at 1262 n.4.

64. *Id.* at 1262.

65. *Id.*

66. *Id.*

67. *Id.* at 1262-63.

68. *Id.*

69. *Id.* at 1264.

In *Technical Resource Services v. Dornier Medical Systems*,<sup>70</sup> the Eleventh Circuit affirmed two jury verdicts rejecting plaintiff's claim that defendant restrained trade and monopolized or attempted to monopolize the market for servicing lithotripter machinery (machines that use shock waves to destroy kidney stones without invasive surgery).<sup>71</sup> According to plaintiff, defendant refused to provide it with replacement parts, diagnostic software, and service manuals, and defendant allegedly tied the purchase of the lithotripter machinery to the purchase of unwanted service contracts, all in an effort to control the aftermarket for servicing lithotripter machinery.<sup>72</sup> Ultimately, two juries rejected the core elements of each of plaintiff's claims—although some confusion surrounded the juries' answers to the special interrogatories.<sup>73</sup> The district court entered judgment for defendant, and the Eleventh Circuit affirmed.<sup>74</sup> The case on appeal largely turned on interpretation of the jury's answers to the special interrogatories, which the court held reasonably and fairly could be harmonized to support the judgment.<sup>75</sup>

*All Care Nursing Service, Inc. v. High Tech Staffing Services, Inc.*<sup>76</sup> concerned an alleged per se unlawful price fixing arrangement and group boycott. In response to a severe nursing shortage in southern Florida in the mid-1980s and quality control problems with the nursing services provided, the South Florida Hospital Association ("SFHA") enlisted twelve hospitals in Palm Beach County to set up a "Preferred Provider Program" ("PPP"). Under this program, the hospitals solicited bids from temporary nursing agencies for selection as preferred providers. Selection criteria included competence, services provided, quality, and bid prices. All participating hospitals agreed to seek nurses from preferred providers before considering nonpreferred agencies. Each hospital was free to decide with which of the preferred agencies it would contract, and the hospitals did not agree to a uniform price or a price range for such services.<sup>77</sup>

All nursing agencies were invited to participate in the bidding. Sixteen did so, and eight of them were selected as preferred providers. The hospitals began operating under the PPP in November 1988,

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70. 134 F.3d 1458 (11th Cir. 1998). One of the authors represented a defendant in a related section 1 action brought by Technical Resource Services, Inc.

71. *Id.* at 1460.

72. *Id.*

73. *Id.* at 1461.

74. *Id.* at 1462.

75. *Id.* at 1464-67.

76. 135 F.3d 740 (11th Cir. 1998).

77. *Id.* at 744.

entering into individual contracts with each of the preferred providers at their separate bid prices. The agencies agreed to other conditions in these contracts, such as treating their nurses as employees in order to shift some of the cost burden associated with independent contractors to the agencies. While the contracts were for one-year terms, each agency could terminate its contract with a particular hospital upon thirty-days notice, thus providing a mechanism to account for market changes.<sup>78</sup>

Several nonpreferred nursing care providers, some of whom submitted failed bids, filed suit against the participating hospitals, the SFHA, and the preferred agencies claiming violations of sections 1 and 2 of the Sherman Act and their Florida counterparts.<sup>79</sup> In essence, these claims asserted that the formation and operation of the PPP constituted a per se unlawful price fixing arrangement and a group boycott.<sup>80</sup> After a four-week jury trial, a verdict was entered in favor of defendants on all claims, and the district court rejected plaintiffs' posttrial motions for judgment as a matter of law.<sup>81</sup>

The Eleventh Circuit affirmed.<sup>82</sup> The antitrust issue on appeal turned on whether the PPP was per se unlawful, for the Eleventh Circuit made it clear that if the rule of reason applied, it would defer to the jury's determination that plaintiffs had failed to prove a relevant market.<sup>83</sup> First, the court considered whether the PPP constituted per se unlawful price fixing.<sup>84</sup> The court laudably focused its inquiry on objective evidence of price fixing, rather than intent evidence.<sup>85</sup> While the PPP has some impact on price, the court noted that there was no direct price agreement among the competing hospitals or among the preferred agencies, and that the preferred agency agreements allowed agencies on thirty-days notice to terminate their contract if they thought conditions warranted re-entry to the market.<sup>86</sup> In other words, the PPP contracts had an escape clause that allowed the market to dictate price.

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78. *Id.*

79. *Id.* In response, defendants filed RICO claims against plaintiff All Care Nursing Services, Inc. and its operator. *Id.* The Eleventh Circuit affirmed a jury verdict for defendants on the RICO claims. *Id.* at 745.

80. *Id.* at 745-46.

81. Early in the case, plaintiffs sought to preliminarily enjoin the implementation of the PPP. The district court granted the injunction, but the Eleventh Circuit vacated it because of the lack of an evidentiary hearing. *All Care Nursing Serv. v. Bethesda Memorial Hosp., Inc.*, 887 F.2d 1535 (11th Cir. 1989). The request for an injunction was never reinstated.

82. 135 F.3d at 749.

83. *Id.* at 747 n.12, 749.

84. *Id.* at 747.

85. *Id.* ("anticompetitive effects—not intent—is the focal point of antitrust legislation").

86. *Id.* at 744.

The court explained that the “key to per se treatment is whether the conduct is of the kind that can only be anticompetitive,” and it concluded that the PPP could not be labelled that way.<sup>87</sup> Accordingly, the court refused to condemn the PPP as a per se unlawful price fixing arrangement.<sup>88</sup>

The court likewise refused to label the PPP a per se unlawful group boycott.<sup>89</sup> Again, the court properly was guided by consideration of whether the PPP was the type of practice “which history has shown [has] only anticompetitive effects.”<sup>90</sup> The court reasoned that the PPP did not constitute any refusal to deal at all, much less a group boycott.<sup>91</sup> All agencies were able to participate in the bidding to become preferred providers and the hospitals remained able and willing to deal with nonpreferred agencies if the preferred agencies did not meet their needs.<sup>92</sup> Moreover, the evidence showed that other medical facilities relied upon the services of the nursing agencies, thus ensuring that competition thrived among the preferred and nonpreferred agencies.<sup>93</sup> Therefore, the court declined to condemn the PPP as unlawful per se.<sup>94</sup> The jury found that no relevant market was shown (a threshold step to prove a violation based on the rule of reason), and because that finding was not clearly erroneous, the Eleventh Circuit affirmed the jury’s verdict against plaintiffs.<sup>95</sup>

In *Tuscaloosa v. Harcros Chemicals, Inc.*,<sup>96</sup> thirty-nine Alabama municipal entities brought an antitrust suit against five chemical companies and distributors for allegedly conspiring to fix prices for repackaged chlorine used for the treatment of drinking water, sewage, and swimming pools.<sup>97</sup> Defendants allegedly submitted sealed bids for government contracts in various parts of Alabama based on prearranged “list prices,” thereby allocating the repackaged chlorine contracts as they wished. The Alabama municipalities charged violations of sections 1 and 2 of the Sherman Act, as well as violations of Alabama’s equivalent of

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87. *Id.* at 748.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* (noting that the nonpreferred agencies had received more than a “trifling” of nursing business from hospitals even after operation of the PPP).

93. *Id.*

94. *Id.* at 749.

95. *Id.*

96. 158 F.3d 548 (11th Cir. 1998).

97. *Id.* at 553. Repackaged chlorine is liquid chlorine stored in containers for delivery to, and use by, chlorine consumers. *Id.*

section 1 and a state fraud claim.<sup>98</sup> Following discovery, the district court granted defendants' motion for summary judgment.<sup>99</sup> Crucial to this decision by the district court was its exclusion of certain evidence as hearsay and exclusion of much of plaintiffs' expert testimony.<sup>100</sup> Plaintiffs appealed the district court's evidentiary and summary judgment rulings.<sup>101</sup>

The Eleventh Circuit affirmed in part and reversed in part, on the whole granting a victory for the plaintiffs.<sup>102</sup> First, the Eleventh Circuit reinstated much of the excluded lay and expert testimony, including testimony regarding an alleged admission by the late chairman of one of the defendants (Jones Chemicals) that the company fixed chlorine prices in the Southeast, and testimony by plaintiffs' experts concerning pricing behavior, defendants' costs, and contract incumbency rates in the relevant markets.<sup>103</sup>

The court then considered whether the record supported plaintiffs' antitrust claims.<sup>104</sup> As to defendant Jones Chemicals, the testimony concerning its former chairman's alleged admission was enough by itself, "[i]n the absence of overwhelming evidence to the contrary," to warrant a trial.<sup>105</sup> As to two other defendants, the court held that it was irrational to assume they participated in any conspiracy because they had garnered "zero or near-zero market share" from the alleged enterprise.<sup>106</sup> With no other evidence linking these defendants to the alleged conspiracy, the court affirmed summary judgment for them.<sup>107</sup>

As to the remaining defendants, the court stated that the documentary evidence, by itself, was insufficient to withstand summary judgment because such evidence at best was in "equipoise," and thus would be insufficient to meet plaintiffs' burden of proof.<sup>108</sup> The improperly excluded expert testimony, however, tipped the balance towards plaintiffs.<sup>109</sup> Plaintiffs' experts presented evidence of price parallelism—that is, interdependent pricing by defendants that uniformly rose

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98. *Id.* at 554-55.

99. *Id.* at 555-56. See *Tuscaloosa v. Harcros Chems., Inc.*, 877 F. Supp. 1504, 1521-24, 1532-38 (N.D. Ala. 1995).

100. 158 F.3d at 556-57.

101. *Id.* at 556.

102. *Id.* at 557.

103. *Id.* at 557-67.

104. *Id.* at 569.

105. *Id.* at 568.

106. *Id.*

107. *Id.* at 568-69.

108. *Id.* at 569.

109. *Id.*

and fell during the relevant period.<sup>110</sup> Such conscious parallelism, by itself, is insufficient to prove an antitrust conspiracy.<sup>111</sup> So-called “plus factors”—such as proof that the defendants, if acting unilaterally, would be acting contrary to their economic self-interest—are necessary to ensure “that unilateral or procompetitive conduct is not punished or deterred.”<sup>112</sup> Here, however, the court observed a “plus factor,” extremely high contract incumbency rates that the court thought were too high to be explained by chance or innocent conduct alone.<sup>113</sup> As the court explained:

[t]he odds that [defendants] could achieve a price and profit increase *and* maintain incredibly high incumbency rates—that is, maintain the very same distribution of municipal contracts year after year—are minuscule . . . unless the oligopolists were communicating with one another. In sum, this combination of high profits and high incumbency would not be likely to occur if the defendants either were vigorously competing with each other or were engaging in competitive price leadership.<sup>114</sup>

Accordingly, the court reversed summary judgment for the remaining defendants and remanded the case for trial.<sup>115</sup>

#### CONCLUSION

None of the antitrust opinions published by the Eleventh Circuit this year forged a new path in the law. Rather, these opinions applied rather mundane procedural or substantive antitrust principles, and many turned on rules of evidence. This is not meant as a criticism. Rather, it is a welcome sign that antitrust jurisprudence in the Eleventh Circuit is continuing its recent mainstream approach. This down-the-middle jurisprudence will aid competition and consumers by providing businesses reliable law to guide their practices and by further deterring meritless actions that clog the courts and waste valuable resources.

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110. *Id.* at 571-72.

111. *Id.* See *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 n.30 (11th Cir. 1991).

112. 158 F.3d at 571-72.

113. *Id.* at 572.

114. *Id.* at 577-73.

115. *Id.* at 573.