

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FAIRFAX COUNTY WATER AUTHORITY,)	
)	
Plaintiff,)	
)	
v.)	
)	
CITY OF FALLS CHURCH,)	CL-2008-16114
)	
Defendant/Third-Party Plaintiff,)	
)	
FAIRFAX COUNTY and BOARD OF)	
SUPERVISORS OF FAIRFAX COUNTY, VA.,)	
)	
Third-Party Defendants.)	

**FAIRFAX WATER'S BRIEF IN SUPPORT OF ITS
CROSS-MOTION TO BIFURCATE LIABILITY AND DAMAGES**

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PRELIMINARY STATEMENT

Although the damages that Fairfax Water seeks as a result of Falls Church's antitrust violations are not speculative, there is one aspect of the damages case that is uncertain -- whether the Court will award injunctive relief. If the Court enjoins Falls Church from blocking the Halstead Developer from connecting to Fairfax Water's system, Fairfax Water's damages will be much smaller, limited to the delay caused by the City's obstruction of the project. But if the jury does not know whether the Court will order injunctive relief, it will not know whether to award the full amount of damages associated with Fairfax Water's loss of revenues for all four buildings, or damages only for the delay in its receipt of those revenues.

To avoid prejudice to Fairfax Water and potentially shorten the trial considerably, the Court should bifurcate liability and damages. If the City prevails at the liability phase, it will save as many as five trial days on the damages question. If Fairfax Water prevails and is awarded injunctive relief, its damages case will be significantly smaller in scope. Either way, bifurcating will avoid undue prejudice to Fairfax Water, will be fair to the City, and will promote judicial economy.

STATEMENT OF THE CASE

Falls Church once had a lawful monopoly on water service in the eastern portion of Fairfax County under a 1959 Agreement with Fairfax Water that gave the City an exclusive service area. That agreement expired in 1989, however. After Fairfax Water began offering water service to new development in competition with the City, Falls Church filed suit in federal court, arguing that federal law gave the City a water monopoly. The federal courts rejected that claim and ruled that "Virginia law permits Fairfax Water to provide service to customers anywhere in Fairfax County." *City of Falls Church v. Fairfax County Water Auth.*, 2007 U.S. Dist. LEXIS 36004 *9 (E.D. Va. May 15, 2007), *aff'd*, 272 Fed. Appx. 252, 2008 U.S. App. LEXIS 7285 (4th Cir. Apr. 4, 2008).

Despite losing that case, Falls Church continued to block Fairfax Water in order to preserve its original monopoly. Those actions included misrepresenting to developers that the City *still* had an exclusive service area and threatening that they would be tied up in litigation if they switched to Fairfax Water. In the case of the Halstead Developer, which proffered in October 2007 to connect its four-building property to Fairfax Water's system, the City blocked the project completely by refusing to permit its existing water lines and easements to be relocated unless the developer promised to connect only to the City's water system, not Fairfax Water's.

The Halstead developer has testified that the City's position was the "show-stopper" for the project. Halstead has also accused the City of holding it "hostage" and trying to "blackmail" it. Indeed, the City's position forced Halstead in May 2009 to seek a proffer condition amendment from the Board of Supervisors in order to *cancel* its earlier promise to connect to Fairfax Water's system. Halstead's application will not be considered by the Planning Commission or the Board of Supervisors until long after the trial in this case, which is set for September 14, 2009.

Counts I and II of the Amended Complaint allege that Falls Church has violated the Virginia Antitrust Act by seeking to exclude Fairfax Water from providing water service in the eastern portion of Fairfax County, including to the Halstead project. Count IV alleges that Falls Church tortiously interfered with Fairfax Water's business expectancy in the Halstead project. Fairfax Water seeks treble damages and injunctive relief under Counts I and II, and compensatory and punitive damages under Count IV. On March 13, 2009, Judge Thacher overruled the City's demurrers on all grounds.

Halstead had planned to construct four mixed-use buildings, involving approximately 1,000 residences and a hotel, near the Dunn Loring Metro station. Fairfax Water's damages case is based on the loss of "tap fees" Halstead would pay to connect the buildings to Fairfax Water's system, as well as the lost "commodity charges" that the occupants will pay for water. Prof. John W. Mayo, an

antitrust economist and the former dean of the Georgetown Business School, will testify that Fairfax Water's damages for the loss of net revenues associated with all four buildings will range from \$1.9 million to \$6 million, depending on the discount rate applied to future payments. If Halstead is permitted to connect to Fairfax Water's system, however, Fairfax Water will ultimately receive those tap fees and commodity charges, eventually, but they will be delayed. Prof. Mayo will testify that, in that situation, the delay damages to Fairfax Water will range from \$174,000 to \$245,000, depending (again) on the discount rate applied.

The City has identified *five* experts who will attack various aspects of Prof. Mayo's damages analysis; only one of the them -- William Taylor -- addresses Prof. Mayo's opinions on antitrust liability. Another of the City's experts, Kenneth Metcalfe, agrees that the 13% discount rate is the right one to use. (Using that rate results, not coincidentally, in damages at the *low* end of Prof. Mayo's estimates.) Three of the City's five experts will address only damages issues.

The damages portion of the trial will be long and complex. It will involve such things as the many different types of water fees at issue, factual testimony about the developer's plans and the dates on which it wanted to undertake different activities, the assumptions used for water consumption, and which of the discount rates should be applied to future payments. Falls Church's five experts will address such things as whether the downturn in the economy was responsible for delaying the project, the dates when the developer would have paid the fees, and when the developer's Hotel and mixed-use buildings would have reached their forecasted occupancies.

Because of that complexity, the damages portion of the trial alone will consume up to five days, involving testimony from various fact witnesses, Prof. Mayo, and the City's *five* experts. Moreover, if the jury gets the case without knowing *whether* the Court will enjoin the City from blocking the project, it will not know whether to award damages based on the loss of water revenues for all four buildings, or damages simply for the delay in the receipt of those revenues.

**BIFURCATION IS WARRANTED TO AVOID PREJUDICE
TO FAIRFAX WATER AND TO PROMOTE JUDICIAL ECONOMY**

“A determination in a civil trial regarding the bifurcation of a jury’s consideration of issues is a matter for the trial court’s discretion and requires consideration of whether any party would be prejudiced by granting or not granting such request, as well as the impact on judicial resources, expense, and unnecessary delay.” *Allstate Ins. Co. v. Wade*, 265 Va. 383, 392, 579 S.E.2d 180, 185 (2003). The Supreme Court of Virginia recently reminded the bench and bar of the importance of bifurcating liability and damages when it would be useful to avoid prejudice to the parties and to promote judicial economy. *Centra Health, Inc. v. Mullins*, 277 Va. 59, 670 S.E.2d 708 (2009).

In *Centra Health*, the parties disputed whether the plaintiff’s decedent was killed as a result of the defendant’s medical malpractice, or whether he died from unrelated causes. If the malpractice killed him, the plaintiff had a claim for wrongful death. If he died from other causes, the estate had only a “survival action” for the damages incurred before death. The Court conceded that a defendant would be prejudiced if the plaintiff were permitted to put on “wrongful death” damages -- such as the family members’ sorrow and loss of solace -- if the defendant’s conduct did not cause the death. *Id.* at 78, 670 S.E.2d at 718. The Court said that this situation would have justified bifurcating liability and damages if any party had requested it:

We are of opinion . . . that a defendant can obviate this potential for prejudice by requesting that the trial be *bifurcated into separate proceedings to determine liability and damages*. Indeed, in a case *where there is any doubt* as to when compelling an election would be proper, *bifurcation is the most practical means* to assure that each party receives a fair opportunity to present their case to the jury without prejudice to the other. *Id.* (Emphasis added).

This is an analogous case where bifurcating liability and damages is necessary to avoid prejudice to one party, and it will create the added prospect of greatly shortening the trial. Assume the jury finds for Fairfax Water on antitrust liability. If the jury does not know whether this Court will award injunctive relief -- allowing the Halstead project to connect to Fairfax Water’s system --

the jury will not know whether to award the full damages sought for the loss of all four buildings, or only delay damages. This uncertainty will prejudice Fairfax Water, particularly because the City has made clear that it will argue that Fairfax Water's damages are speculative.

The uncertainty of whether injunctive relief will be awarded is easily cured through bifurcation. Bifurcating liability and damages will allow the jury first to determine *whether* Falls Church has violated the Virginia Antitrust Act and tortiously interfered with Fairfax Water's business expectancy in the Halstead project. If the jury finds no liability, the damages case will be moot, saving up to five days of unnecessary trial time. If the jury finds for Fairfax Water, the judge can then determine whether injunctive relief is appropriate. If so, Fairfax Water's compensatory damages case will be limited to delay damages.

Falls Church can claim no prejudice from bifurcation. To the contrary, it will be required to respond to Fairfax Water's damages claim only if it loses the verdict on liability. The other parties, Fairfax County and the Board of Supervisors, will also benefit from bifurcation. The damages phase of the trial -- in which they have no stake at all -- will either be eliminated or shortened.

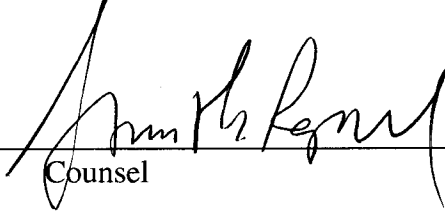
This is a classic case for bifurcation. It is plainly warranted under *Centra Health* and *Wade*. Indeed, bifurcation in this type of situation has been ordered before. *See Roscigno v. DeVille*, 28 Va. Cir. 96, 97 (Fairfax County 1992) (granting complainant's motion to bifurcate "the liability issues and the request for equitable relief from the claims for monetary damages").

CONCLUSION

Bifurcating liability and damages will avoid undue prejudice to Fairfax Water associated with whether the Court will award injunctive relief upon a finding of liability. Bifurcation poses no harm to the City, benefits all the other parties, and has the potential to reduce the trial by up to five days. Fairfax Water's motion should be granted.

Respectfully submitted,

FAIRFAX COUNTY WATER AUTHORITY

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CERTIFICATE OF SERVICE

I certify that on August 7, 2009, a copy of the foregoing Brief was sent by both e-mail and U.S. first-class mail to the offices of the following counsel:

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