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ANTITRUST LAW SURVEY

I. INTRODUCTION

This Survey examines three recent Tenth Circuit opinions that interpret and apply the federal antitrust laws. These cases were selected either because they contained unclear analysis or because the standards articulated were contrary to decisions reached in other courts.

In the first case, *Sharp v. United Airlines, Inc.*,[1] the court of appeals held that employees of an airline allegedly driven into bankruptcy by a competitor lacked standing to assert antitrust claims against the competitor. The court determined that the employees did not establish antitrust injury by their loss of employment and that any possible injury was indirect.

The second case, *City of Chanute v. Williams Natural Gas Co.*,[2] addressed tying arrangements and the essential facilities doctrine as a means of showing antitrust violations in the retail natural gas industry. The Tenth Circuit held that several cities, which had purchased natural gas from the defendant gas company, failed to show a "severe handicap" for purposes of recovery under the essential facilities doctrine. Also, the cities could not prevail on a theory of an illegal tying arrangement between the use of the pipeline and the purchase of gas since they did not show that the gas company had acted in concert with any other entity.

The third case, *TV Communications Network, Inc. v. Turner Network Television, Inc.*,[3] analyzes the proper definition of the relevant market in the monopolization context. The court of appeals held that a cable television programmer could not violate the Sherman Act by virtue of the natural monopoly that it held over its own product. The court refused to accept the plaintiff's characterization of the relevant market as one cable television channel.

This Survey also discusses the implications of the Supreme Court's recent decision, *Eastman Kodak Co. v. Image Technical Services, Inc.*,[4] for these Tenth Circuit cases. In particular, the Survey will focus on the impact of the *Kodak* decision on the standards articulated in *Chanute* regarding tying arrangements, and in *TV Communications Network* regarding the relevant product market.

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1. 967 F.2d 404 (10th Cir.), *cert. denied*, 113 S. Ct. 464 (1992).

2. 955 F.2d 641 (10th Cir.), *cert. denied*, 113 S. Ct. 96 (1992) (*Chanute IV*). This case was part of a series of cases between these parties, which included: City of Chanute v. Williams Natural Gas Co., 678 F. Supp. 1517 (D. Kan. 1988) (*Chanute I*); City of Chanute v. Williams Natural Gas Co., 1990-1 Trade Cas. (CCH) ¶ 68,967 (D. Kan. Feb. 16, 1990) (*Chanute II*); and City of Chanute v. Williams Natural Gas Co., 743 F. Supp. 1437 (D. Kan. 1990) (*Chanute III*). *Chanute IV* affirmed *Chanute II* and *Chanute III*.

3. 964 F.2d 1022 (10th Cir.), *cert. denied*, 113 S. Ct. 601 (1992).

4. 112 S. Ct. 2072 (1992).

II. ANTITRUST STANDING

In *Sharp v. United Airlines, Inc.*,[5] the Tenth Circuit analyzed the ability of employees to obtain relief under the antitrust laws for alleged illegal behavior directed at their employer by a competitor. The court rejected such a suit against the competitor primarily because the employees were unable to show antitrust injury, and therefore, lacked standing.[6]

Section 4 of the Clayton Act permits the recovery of damages by any person "injured in his business or property by reason of anything forbidden in the antitrust laws."[7] Section 16 of the Clayton Act entitles any person threatened with "loss or damage by a violation of the antitrust laws" to obtain an injunction.[8] These sections confer on private parties the power to enforce the federal antitrust laws, which primarily consist of the Sherman and Clayton Acts.[9]

Despite the broad language of the Clayton Act, a plaintiff's standing to sue for monetary damages is subject to several limitations. First, the plaintiff must show injury to his business or property.[10] Second, the plaintiff must establish an antitrust injury.[11] Third, the plaintiff's injury must not be too remote.[12] The Supreme Court and the Tenth Circuit have incorporated these general limitations into a multi-factor standard. Courts should consider: the causal connection between the alleged antitrust violation and the harm; the defendant's intent or motivation; whether the claimed injury is one sought to be redressed by antitrust laws; the directness of the connection between the plaintiff's injury and the market restraint resulting from the alleged antitrust violation; the speculative nature of the damages claimed; and the risk of duplicative recoveries or complex damages apportionment.[13] These requirements are questions of law the court must analyze before determining that a plaintiff has standing to sue for antitrust damages.[14]

5. 967 F.2d 404 (10th Cir.), *cert. denied*, 113 S. Ct. 464 (1992).
6. *Id.* at 407.
7. 15 U.S.C. § 15(a) (1988).
8. *Id.* § 26.
9. The term "any person" includes individuals, partnerships, corporations and associations. *Id.* § 12(a). A successful plaintiff may recover treble damages, costs, reasonable attorney fees, and possibly prejudgment interest. *Id.* § 15(a).
10. *Id.* § 15(a). The Court has construed the term "business" broadly to mean "commercial interests or enterprises." *See* Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972).
11. *Sharp*, 967 F.2d at 407 n.2.
12. *Id.*
13. *Id.* at 406-07; *see also* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 122 (1986) (showing of damage or loss "due merely to increased competition does not constitute" antitrust injury); Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 544 (1983) (risk of duplicative recoveries and the complexity of apportionment of damges); Blue Shield v. McCready, 457 U.S. 465, 476 (1982) (injury must not be too remote); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (plaintiff must show more than the alleged injury's causal link to the market violation).
14. 955 F.2d 641 (10th Cir.), *cert. denied*, 113 S. Ct. 96 (1992) (*Chanute IV*). Antitrust standing differs from Article III standing, which requires an injury in fact sufficient to satisfy the constitutional jurisdictional requirements. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 502-08 (1975) (a plaintiff seeking to challenge exclusionary zoning practices must

Although the Tenth Circuit has recently begun to consider the multi-factor standards, it still essentially utilizes a two-prong test to determine standing in antitrust cases.[15] To meet the first prong, the plaintiff must allege an antitrust injury,[16] which is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[17] Injury requires a reduction in competition. Thus the Supreme Court has denied relief to plaintiffs whose claimed injury resulted from heightened rather than lessened competition.[18] Courts have found antitrust injury lacking in cases where the plaintiff's injury was deemed to be wholly unrelated to the alleged antitrust violation,[19] or where the defendant's conduct injured the plaintiff but had no effect on competition.[20] Moreover, a violation of antitrust laws without injury to the plaintiff has not been sufficient to confer standing.[21]

Even with the requisite injury, a party may still not be a proper plaintiff under section 4 of the Clayton Act if the injury is too remote.[22] Thus, under the second prong of the Tenth Circuit's antitrust standing test, the plaintiff must show that the antitrust injury resulted *directly* from defendant's violation of antitrust laws.[23] This standard has mainly

allege specific, concrete facts demonstrating that such practices actually harmed the plaintiff). *See generally* William E. Mooz, Jr., *Tenth Circuit Antitrust Law: Recent Developments and Possible Future Trends*, 69 DENV. U. L. REV. 807, 807-08 (1992) (Article III standing requirements must be satisfied before court can address antitrust standing).

15. *Chanute IV*, 955 F.2d at 652; *see also Sharp*, 967 F.2d at 407 n.2 (the multi-factor standard validates, but gives more specificity to, the inquiry of the Tenth Circuit's two-part test).

16. *Sharp*, 967 F.2d at 407 n.2. Professors Phillip Areeda and Herbert Hovenkamp state that requiring antitrust injury serves two important functions:

> [First, it] forces the parties and the court to reason closely about the nature of the antitrust violation alleged in order to test whether the injury and damages claimed by the plaintiff match the rationale for finding any violation in the first place. . . . The second, and more particular, function of the antitrust injury requirement is to make clear that injuries resulting from [increased] competition will not support either damage or equity actions by private parties under the antitrust laws.

PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 334.2a (Supp. 1992).

17. *Brunswick Corp.*, 429 U.S. at 489. The Court reiterated this requirement in a later decision in which it held that the antitrust injury requirement must be satisfied in private equity suits as well as in damage actions. *Cargill, Inc.*, 479 U.S. at 110-12.

18. *See, e.g.*, Atlantic Richfield Co. v. USA Petroleum Co., 110 S. Ct. 1884, 1891-92 (1990); *Cargill, Inc.*, 479 U.S. at 116; *Brunswick Corp.*, 429 U.S. at 488.

19. *See, e.g.*, Fischer v. NWA, Inc., 883 F.2d 594, 600 (8th Cir. 1989) (losses resulted from elimination of schedule redundancy, not Northwest Airline's acquisition of market power), *cert. denied*, 495 U.S. 947 (1990).

20. *See* ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 652 (3d ed. 1992) (hereinafter ABA ANTITRUST SECTION).

21. Central Nat'l Bank v. Rainbolt, 720 F.2d 1183, 1187 (10th Cir. 1983).

22. *Cargill, Inc.*, 479 U.S. at 110 n.5.

23. *Sharp*, 967 F.2d at 407 n.2; *see also* Reazin v. Blue Cross & Blue Shield, Inc., 899 F.2d 951, 962 n.15 (10th Cir.) ("An injury which is merely causally linked in some way to an alleged antitrust violation is insufficient."), *cert. denied*, 497 U.S. 1005 (1990). The requisite causality requirement has customarily been analyzed under either of two alternative tests: (1) was the plaintiff's injury direct or (2) was the plaintiff within the target area of the defendant's violation. AREEDA & HOVENKAMP, *supra* note 16, ¶ 334a. The target area test required the plaintiff to show that he was within the area of the economy which was endangered by a breakdown of competitive conditions in a particular industry. Confer-

served to deny standing to a plaintiff whose injury was indirect; for instance, when the injury was to a separate party, who was the more immediate victim of the defendant's violation.[24]

Given the Supreme Court's multi-factor considerations for antitrust standing, the Tenth Circuit has recently begun to consider, in addition to the two-prong test, the potential for duplicative or speculative damages and the complexity of apportioning damages.[25] However, while these criteria have been listed and evaluated separately, most decisions turn on the question of antitrust injury,[26] and to a lesser extent, the directness of the injury.

A. *Antitrust Standing in the Employment Context*: Sharp v. United Airlines, Inc.[27]

1. Facts

A group of former pilots, flight attendants, and other employees of Frontier Airlines brought antitrust claims, alleging that United Airlines drove Frontier into bankruptcy. The plaintiffs argued that United had engaged in anticompetitive behavior which caused Frontier to fail, thereby injuring plaintiffs.[28]

Frontier and United were competitors in the volatile airline industry. Each had hub operations at Stapleton International Airport in Denver, Colorado. As part of its operations, United maintained a computerized reservation system (CRS), which enabled travel agents to book and sell tickets on various airlines.[29] Frontier participated in United's CRS, which was one of a number of such systems used in the airline industry.[30]

The employees alleged that United had monopoly power in the Denver CRS market, overcharged Frontier for its participation in the system, and caused the CRS to operate unfairly in its ticket sales to the

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ence of Studio Unions v. Loew's Inc., 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952); *see also* Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073, 1076 (9th Cir. 1970) (plaintiff who sold films to defendant for percentage of subsequent distribution revenues had standing under target area test), *cert. denied*, 402 U.S. 923 (1971). The Sixth Circuit abandoned both the direct injury and target area tests and instead required that the plaintiff allege injury in fact and that "the interest sought to be protected by the complainant was arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1151 (6th Cir. 1975). The Supreme Court has yet to adopt any one of the tests. *See McCready*, 457 U.S. at 476 n.12 (noting the varying standing tests developed by the circuits, including "directness of injury," "zone of interests" and "target area" tests, but declining to evaluate or adopt any particular approach); *Associated Gen. Contractors*, 459 U.S. at 536 n.33 (noting different standing tests but refusing to adopt any of them).

24. AREEDA & HOVENKAMP, *supra* note 16, ¶ 334c.

25. *See Sharp*, 967 F.2d at 409-10.

26. ABA ANTITRUST SECTION, *supra* note 20, at 663.

27. 967 F.2d 404 (10th Cir.), *cert. denied*, 113 S. Ct. 464 (1992).

28. *Id.* at 405.

29. *Id.* This particular system consisted of computer terminals located in subscribing travel agencies, was available to these travel agents for a fee and permitted ticket sales on both Frontier and United. *Id.*

30. *Id.*

detriment of Frontier.[31] Plaintiffs also alleged that the decision of United to buy Frontier's assets and to renege on its purchase of Frontier stock[32] caused the airline to fail, costing the plaintiffs their jobs. The plaintiffs asserted that United's conduct violated sections 1 and 2 of the Sherman Act and sections 2 and 3 of the Clayton Act.[33] The trial court granted defendant's motion to dismiss for failure to state a claim upon which relief could be granted.[34]

2. Majority Opinion

On appeal, United argued that the plaintiffs lacked standing to pursue their antitrust claims. The Tenth Circuit agreed, concluding that the employees failed to satisfy the two-prong test, primarily the injury requirement, as well as the other factors associated with antitrust standing.

In attempting to show antitrust injury, the plaintiffs relied on *Adams v. Pan American World Airways, Inc.*[35] In that case, former employees of a defunct airline, Laker Airways, brought antitrust claims alleging that a group of airlines and an airline manufacturer conspired to drive Laker out of business, thereby depriving them of their jobs.[36] The *Adams* court concluded that plaintiffs had alleged an antitrust injury; however, it held that the other relevant factors compelled a finding of no standing.[37]

In *Sharp*, the Tenth Circuit declined to follow the portion of the *Adams* decision supporting the finding that similarly situated airline employees had suffered antitrust injury.[38] The *Adams* decision conflicted with Tenth Circuit precedent. In *Reibert v. Atlantic Richfield Co.*,[39] the Tenth Circuit decided that salaried employees were "not within the area of competitive economy protected against unlawful mergers".[40] In *Jones v. Ford Motor Co.*,[41] the Tenth Circuit indicated that it was settled law that employees did not have standing to sue for antitrust violations

31. *Id.* at 405-06.

32. *Id.* at 406. In particular, plaintiffs argued that the asset sales were distress sales made by Frontier at less than fair market value, and that United purposefully failed to fulfill the stock purchase agreement. *Id.*

33. Plaintiffs also asserted state antitrust claims, breach of contract claims, and a claim that United had intentionally interfered with plaintiffs' prospective business by diverting passengers away from Frontier to United through improper manipulation of the Apollo CRS system. *Id.*

34. *Id.*

35. 828 F.2d 24 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 961 (1988).

36. *Id.* at 24.

37. *Id.* at 26-27. The *Adams* court noted that not only were the employees' injuries one step removed from those of Laker, the immediate victim of the antitrust violation, but that Laker was a superior plaintiff and had in fact brought and settled its own antitrust suit against the same defendants. *Id.* at 29-30.

38. *Sharp*, 967 F.2d at 407.

39. 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973). In *Reibert*, an employee sought treble damages under the Clayton Act for his loss of employment following an allegedly unlawful merger between his employer, Sinclair Oil, and Atlantic Richfield. *Id.* at 727-28.

40. *Id.* at 732.

41. 599 F.2d 394 (10th Cir. 1979).

which had injured their employer.[42]

The plaintiffs in *Sharp* tried to distinguish these cases, arguing that they applied only to employee suits against an employer. The court of appeals rejected this proposition, however, indicating that no such limitation existed. Instead, they stood for the broad proposition that employees could not establish an antitrust injury when they lost their employment "as a result of some allegedly anticompetitive activity directed at or involving their employer."[43] The court concluded that, due to the tangential nature of the injury, the plaintiffs had not established an antitrust injury based on their loss of employment.[44]

Even had the employees established antitrust injury, the *Sharp* court determined that the other factors relevant to standing were not present. Under the second prong of the antitrust standing test, the court analyzed the directness of the connection between the plaintiffs' injuries and the market restraint which had resulted from the alleged antitrust violations.[45] Relying on *Adams*, in which the D.C. Circuit held that the injury the employees suffered was indirect because it was one step removed from the harm to Laker,[46] and prior Tenth Circuit[47] and Supreme Court[48] decisions, the *Sharp* court decided that the plaintiffs' injuries were at most indirect.[49]

Finally, the court analyzed several of the other factors relevant to

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42. *Id.* at 397.

43. *Sharp*, 967 F.2d at 408. The court recognized that a different result may have been reached if the plaintiff-employees were "in essence 'quasi-businessmen operating in a market carved out by their own aggressiveness and salesmanship qualities. Thus when their employers engaged in anti-competitive practices, the employees were directly injured by these violations.'" *Id.* at 408 n.4 (quoting *Reibert*, 471 F.2d at 730). The court concluded that this exception did not apply since plaintiff's injury was "tangential to the direct injury allegedly suffered by Frontier." *Id.* Areeda and Hovenkamp state that they would support antitrust standing where the right of employment is a protected interest within the substantive antitrust violation. "The employment interest is protected by the substantive rules concerned with competition in the plaintiff's labor market but not necessarily by, say, antimerger or price-fixing rules addressed to a product market that is not very closely linked to the plaintiff's labor market." AREEDA & HOVENKAMP, *supra* note 16, ¶ 338a.

44. *Sharp*, 967 F.2d at 408 n.4.

45. *Id.* at 407 n.2, 408-09.

46. Adams v. Pan American World Airways, Inc., 828 F.2d 24, 28 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 961 (1988). The *Adams* court observed that the conspirators allegedly forced the firm to its knees. "Whenever that happens to a firm, the web of contracts and relationships which form the essence of the firm will be dismantled. Astute counsel should not be able, merely by feats of characterization, to confer standing on all participants in that web." *Id.*

47. *See* Jones v. Ford Motor Co., 599 F.2d 394, 397 (10th Cir. 1979) (direct injury does not include the loss of a job with a corporation or a reduction in an investment in stock); Reibert v. Atlantic Richfield Co., 471 F.2d 727, 731 (10th Cir.) ("If there is any antitrust violation, it is directed toward the petroleum industry. . . . The first element, causal connection between violation and injury, is lacking because [plaintiff] cannot show that any antitrust violations directly injured him."), *cert. denied*, 411 U.S. 938 (1973).

48. *See* Air Courier Conference of Am. v. American Postal Workers Union, 111 S. Ct. 913, 920 n.5 (1991) ("Employees have generally been denied standing to enforce competition laws because they lack competitive and direct injury."); Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 541 n.6 (1983) (Court observed that "a number of decisions have denied standing to employees with merely derivative injuries.")

49. *Sharp*, 967 F.2d at 409.

antitrust standing: the potential for duplicative or speculative damages and the complexity of apportioning damages. In the exceptionally volatile airline industry, characterized by frequent mergers and bankruptcies, an airline's survival or the continued employment of employees was too indefinite to calculate damages.[50] In addition, allowing employees to have standing would risk duplicative recoveries or the necessity of apportioning damages.[51] In summation, the *Sharp* decision indicated that employees, who lost their employment as the result of some anticompetitive activity directed at or involving their employer, lacked standing in the Tenth Circuit to assert federal and state antitrust claims against their former employer's competitor.

3. Analysis

In *Sharp*, the court correctly rejected plaintiffs' claim that antitrust injury resulted from their loss of employment. Although not explicitly articulating its rationale, the court apparently decided that the alleged antitrust violation occurred in the air transportation and CRS markets, but that the alleged injury was in the employment market. As members only of the employment market, the plaintiffs were unable to establish antitrust injury because the violation occurred in the air transportation and CRS markets, not the employment market. Rather than broadly holding that employees never have standing, this decision actually indicates that as long as the alleged antitrust violation occurred in another market, employees will not be able to establish antitrust injury, regardless of the severity of their actual injury. If in fact the violation occurred in the employment market, it is probable that employees would have standing.

The motivating factor behind the court's decision appears to be a concern for unlimited plaintiffs and rampant litigation. The court noted that if it were to permit standing in this case, "there would be no principled way to cut off a myriad of other indirect claimants, such as suppliers of Frontier Airlines or creditors, each of whom could claim that their business was somehow impacted or adversely affected by Frontier's demise."[52] Moreover, the court's outcome is consistent with other decisions, which generally deny standing to employees, officers or stockholders of a corporation injured by an antitrust violation.[53] Since the injury to the plaintiffs was merely derivative of the injury to their

50. *Id.* The wholeness of each plaintiff would have depended on the length of their employment, future salary level, and ability to obtain comparable employment in the airlines industry. *Adams*, 828 F.2d at 30.

51. *Sharp*, 967 F.2d at 410. In addition, the court rejected plaintiffs' argument that, despite dismissal of their complaint for lack of standing under the federal antitrust laws, the court should permit their state law antitrust claims to proceed. *Id.*

52. *Id.* at 409.

53. *See, e.g.*, Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n, 830 F.2d 1374, 1378 (7th Cir. 1987) (officer of corporation); Eagle v. Star-Kist Foods, Inc., 812 F.2d 538, 541-42 (9th Cir. 1987) (employees); Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910) (stockholder); Weatherby v. RCA Corp., 1988-1 Trade Cas. (CCH) ¶ 68,078 (N.D.N.Y. May 9, 1986) (shareholders, employees).

employer, the court correctly held that such employees lacked standing to sue their employer's competitor for an alleged antitrust violation.

III. Refusals to Deal and Restraints of Trade

The Tenth Circuit analyzed the elements of tying arrangements and the essential facilities doctrine in *City of Chanute v. Williams Natural Gas Co.*[54] The court held, in a proposition unique to the Tenth Circuit, that a contract involving only a customer and the seller cannot constitute an illegal tying arrangement.[55] In addition, the court applied the essential facilities doctrine and concluded that the natural gas purchasers did not suffer a "severe handicap" since the gas company offered the gas at federally approved prices.[56]

Congress enacted the Sherman Act as a means of safeguarding general competitive conditions rather than protecting specific competitors.[57] This concern was reiterated in the language of the Sherman Act. Section 1 prohibits contracts, combinations and conspiracies in restraint of trade.[58] Section 2 of the Sherman Act proscribes certain monopolies, attempts to monopolize and conspiracies to monopolize.[59] These two sections focus on different problems: section 1 deals with concerted activity; section 2 concerns unilateral activity.[60]

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54. 955 F.2d 641 (10th Cir.), *cert. denied*, 113 S. Ct. 96 (1992) (*Chanute IV*).

55. *Id.* at 650.

56. *Id.* at 648-49.

57. *See, e.g.*, Oahu Gas Serv., Inc. v. Pacific Resources Inc., 838 F.2d 360, 370 (9th Cir.), *cert. denied*, 488 U.S. 870 (1988). The Supreme Court has succinctly stated the purpose of the Sherman Act:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

58. 15 U.S.C § 1 (1988). Section 1 of the Sherman Act states, in relevant part, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *Id.* Both criminal and civil sanctions may be imposed for § 1 violations. In addition, violations of § 1 may be enjoined pursuant to § 16 of the Clayton Act, 15 U.S.C. § 25 (1988), and persons injured in their business or property by reason of a violation may recover treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15 (1988).

59. *Id.* § 2. Section 2 of the Sherman Act states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 (1988).

60. Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 540-41 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1603 (1992).

A. *Restraints of Trade: Tying Arrangements*

Section 1, read literally, would prohibit all concerted activity in restraint of trade.[61] The Supreme Court, however, has construed this section to condemn only those restraints that unreasonably restrict competition.[62]

Tying arrangements represent one form of restraint that can violate section 1. A tying arrangement is "an agreement by a party to sell one product [the tying product] but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier."[63] A form of exclusive dealing, a tying arrangement restricts the purchaser's freedom to buy products from sources other than the seller.[64] Usually the seller requires the buyer to purchase or lease a different product as a condition of the purchase. The product may be complementary or supplementary to the originally supplied item or may be completely unrelated.[65]

An element of an illegal tying arrangement requires proof of two separate and distinct products.[66] The availability of one product or service must be conditioned upon the purchase of another.[67] The seller must also have the market power to "force" the purchaser to act differently than it would in a competitive market.[68]

61. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 687-88 (1978).

62. Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).

63. *Northern Pac. Ry. Co.*, 356 U.S. at 5-6. This decision has met with recent approval by the Supreme Court in Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S. Ct. 2072, 2079 (1992).

64. The *Northern Pacific* court articulated the competitive harm resulting from tying arrangements:

> [Tying arrangements] deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forgo their free choice between competing products.

Northern Pac. Ry. Co., 356 U.S. at 6.

65. 2 LOUIS ALTMAN & RUDOLF CALLMANN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 10.18, at 104 (4th ed. 1985 & 1992 Supp.). Often tying arrangements are employed to boost the sales of a particular product that lacks demand. *Id.*

66. Jefferson Parish Hosp. v. Hyde, 466 U.S. 2, 21 (1984) (it is "clear that a tying arrangement cannot exist unless two separate product markets have been linked."). Altman lists four criteria used in determining the relation or distinction of two products: (1) trade usage or practice in the field; (2) sale of a consistently homogeneous combination of the two products; (3) lump sum billing for the combination; and (4) existence of other related products not included in the unit. 2 ALTMAN & CALLMAN, *supra* note 65, § 10.18, at 106.

67. United States v. Loew's Inc., 371 U.S. 38, 45 (1962); *see Northern Pac. Ry. Co.*, 356 U.S. at 6 n.4 ("where the buyer is free to take either product by itself there is no tying problem.").

68. *Jefferson Parish Hosp.*, 466 U.S. at 13-14; *see also Eastman Kodak Co.*, 112 S. Ct. at 2079 (noting that a violation occurs "if the seller has 'appreciable economic power' in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market") (citations omitted); Fox Motors, Inc. v. Mazda Distributors, Inc., 806 F.2d 953, 957 (10th Cir. 1986) (finding that tying arrangement violates the antitrust laws when a dominant seller exploits his control over a market to force buyers to purchase an unwanted product).

Generally, courts will decide that a tying arrangement violates the antitrust laws if: (1) the probable effect is to "substantially lessen competition or tend to create a monopoly in any line of commerce;"[69] (2) if it results in an unreasonable restraint that effects a substantial amount of interstate commerce;[70] or (3) if it is shown to be "in conflict with the basic policies" of the antitrust laws.[71] Courts have generally found anticompetitive tying arrangements unlawful per se.[72]

B. *Refusals To Deal: Essential Facilities Doctrine*

While section 1 of the Sherman Act prohibits only contracts, combinations and conspiracies in restraint of trade, section 2 prohibits unilateral monopolization and attempted monopolization, as well as monopolization by combination or conspiracy.[73] To enforce this prohibition in refusal to deal cases, courts have looked to the essential facilities doctrine.[74] Established by the Supreme Court only twenty-two

69. A violation of section 3 of the Clayton Act, 15 U.S.C. § 14 (1988). Section 3, in relevant part, forbids any person:

> [T]o lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, *where the effect* of such lease, sale, or contract for sale or such condition, agreement, or understanding *may be to substantially lessen competition or tend to create a monopoly in any line of commerce.*

Id. (emphasis added).

Because § 3 of the Clayton Act only applies when both the tying and tied products are "goods, wares, merchandise, machinery, supplies or other commodities," tying arrangements involving such intangibles as medical services, credit, business and personal services, and trademarks or franchises cannot be challenged under § 3, although they still may be challenged under § 1 of the Sherman Act and § 5 of the FTC Act. ABA ANTITRUST SECTION, *supra* note 20, at 133-34.

70. A violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1988).

71. A violation of section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1988). Section 5, in relevant part, provides: "(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." *Id.*

72. *See, e.g.*, Fortner Enters. v. United States Steel Corp., 394 U.S. 495, 503 (1969) (tying arrangements "generally serve no legitimate business purpose that cannot be achieved in some less restrictive way."); Standard Oil Co. v. United States, 337 U.S. 293, 305-06 (1949) (such arrangements "serve hardly any purpose beyond the suppression of competition."); International Salt Co. V. United States, 332 U.S. 392, 396 (1947) ("it is unreasonable, *per se*, to foreclose competitors from any substantial market.") The American Bar Association Antitrust Section notes that while tying arrangements are classified as per se illegal, "the test used to determine whether the per se rule should be applied to a particular arrangement is in practice very similar to a rule of reason inquiry, because a number of market related inquiries must be conducted before the per se rule is applied." ABA ANTITRUST SECTION, *supra* note 20, at 134.

73. 15 U.S.C. § 2 (1988).

74. 955 F.2d 641 (10th Cir.), *cert. denied*, 113 S. Ct. 96 (1992) (*Chanute IV*). A second, unrelated test that courts use in refusal to deal cases under § 2 of the Sherman Act is the intent test, which states that a "business is free to deal with whomever it pleases so long as it has no 'purpose to create or maintain a monopoly.'" Byars v. Bluff City News Co., 609 F.2d 843, 855 (6th Cir. 1979) (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919)); *see also* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) (applying the intent test when considering the circumstances under which a firm with mo-

years after Congress enacted the Sherman Act,[75] the essential facilities doctrine acknowledges that a business controlling a scarce resource has a duty or obligation to allow reasonable access to the facility, even for competitors.[76] Monopolists must make their facilities available on a nondiscriminatory basis where a competitor cannot, in an economically feasible manner, duplicate the facility.[77]

The Tenth Circuit and other courts of appeals have adopted standards to determine whether a monopolist's action violates the essential facilities doctrine. An antitrust plaintiff must show: "(1) control of the essential facilities by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the facility; (3) the denial of the use of the essential facilities to a competitor; and (4) the feasibility of providing the facility."[78] The plaintiff must demonstrate the presence of each element; if even one element is missing, the doctrine is unavailing.[79] This test differs from traditional monopolization analysis by de-emphasizing intent and instead focusing on the surrounding market conditions.[80]

C. *The Essential Facilities Doctrine and Tying Arrangements in the Natural Gas Industry*: City of Chanute v. Williams Natural Gas Co.[81]

1. Facts

The plaintiffs, eight cities in Kansas (Cities) that operate their own natural gas distribution systems, sued the defendant, Williams Natural Gas Company, asserting antitrust violations. Specifically, the Cities protested Williams' termination of a temporary program that allowed the purchase of gas from third-party suppliers, which Williams transported over its pipeline.[82]

Williams owned and operated the only interstate pipeline serving the Cities. Each of the Cities had "full requirements" contracts with the pipeline company. These contracts required the Cities to purchase all of their natural gas from Williams, which in turn agreed to ensure the avail-

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nopoly power has a duty to continue a joint marketing arrangement with a smaller competitor).

75. *See* United States v. St. Louis Terminal R.R. Ass'n, 224 U.S. 383, 410 (1912). The Court found the practice of fourteen railroads, which denied access to certain railway bridges crossing the Mississippi, violated the antitrust laws as a restraint of trade. The defendants were required to allow competing railroads use of their facilities which were, as a practical matter, impossible to duplicate. *Id.*

76. Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1519 (10th Cir. 1984), *aff'd on other grounds*, 472 U.S. 585 (1985).

77. McKenzie v. Mercy Hosp., 854 F.2d 365, 369 (10th Cir. 1988).

78. *Id.* (citing MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983)).

79. *McKenzie*, 854 F.2d at 370; *see id.* at 371 (essential facilities doctrine unavailing since doctor failed to demonstrate the first element: that hospital controls facilities essential to his medical practice).

80. City of Chanute v. Williams Natural Gas Co., 678 F. Supp. 1517, 1531 (D. Kan. 1988) (*Chanute I*).

81. 955 F.2d 641 (10th Cir.), *cert. denied*, 113 S. Ct. 96 (1992) (*Chanute IV*).

82. *Id.* at 645.

ability of a sufficient supply to meet the Cities' demands.[83] Initially, Williams only transported its own gas over the pipeline, pursuant to the full requirements contract. In December 1986, however, the gas company sought regulatory approval from the Federal Energy Regulatory Commission (FERC) to permit the transportation of gas from third-party suppliers on a permanent basis. While awaiting approval, Williams initiated a temporary program to transport third-party gas for the Cities, which then negotiated with, and entered into agreements for, gas from other suppliers. The temporary program was allowed by FERC.[84]

While the temporary program was in effect and the Cities were purchasing third-party gas, Williams experienced difficulty paying its suppliers.[85] Williams ended the program and closed its pipeline to the alternate suppliers in August 1987, although it continued to transport certain third-party gas.[86] In July 1988, FERC approved Williams' permanent plan, which enabled the Cities to purchase gas from any third-party supplier. Thereafter, the Cities negotiated with other suppliers to obtain gas, which Williams transported over its pipeline.

The Cities brought suit under sections 1 and 2 of the Sherman Act, alleging that Williams' conduct in closing its pipeline was an exercise of its monopoly power, which injured the Cities by preventing them from receiving transportation of a long-term, dependable supply of low-cost natural gas from third-party suppliers over the pipeline.[87] The Cities sought antitrust damages for the time period, from August 1987 until July 1988, during which Williams had closed its pipeline to the transportation of third-party gas until approval of the permanent plan.

Specifically, the Cities claimed that Williams' refusal to transport gas unless the Cities purchased Williams' gas constituted an illegal tying arrangement.[88] The Cities asserted that the requirements contracts tied natural gas transportation (tying product) to natural gas sales (tied product).[89] They also contended that Williams had the market power to

83. *Id.* at 646. The Cities purchased natural gas at wholesale and resold it to customers located in or near the Cities. *Id.*

84. *Id.* Otherwise the full requirements contracts would have precluded the Cities from purchasing gas from third party suppliers even if Williams agreed to transport the gas over its pipeline. The waiver did not release Williams from its obligation to serve the Cities' full requirements on demand. *Id.*

85. *Id.* Apparently Williams had take-or-pay provisions in its contracts with the natural gas suppliers. These provisions obligated Williams to pay for certain volumes of gas even though it was unable to sell that amount to its customers. *Id.* at 646 n.4.

86. *Id* at 646. The Cities presented evidence concerning Williams' decision to close the pipeline. One expert testified that Williams closed its pipeline to control access to the pipeline, to maintain a large portion of its sales function, and to increase profits. Another economist stated that Williams experienced a significant erosion in its sales of natural gas as customers converted to transported gas, that Williams earned a higher margin on sales than it did on transportation, and that Williams ended its open access "in order to prevent this loss of market share, and in order to prop up the price that it received for its product." *Id.* at 654. Even though Williams ended the temporary program, FERC required Williams to transport certain third-party gas that was still available to the Cities. *Id.* at 646 n.5.

87. City of Chanute v. Williams Natural Gas Co., 743 F. Supp. 1437, 1440 (D. Kan. 1990) (*Chanute III*).

88. *Chanute IV*, 955 F.2d at 649-50.

89. *Id.* at 650.

"force" the Cities to do something they would not have done in a competitive market.[90] The district court granted summary judgment for Williams, deciding that the Cities failed to show any agreement between two or more parties and that Williams did not force the Cities to buy its natural gas.[91]

The Cities also alleged that Williams' decision to close the pipeline violated section 2 of the Sherman Act under the essential facilities doctrine.[92] The Cities contended: that Williams was a monopolist in control of the pipeline that was essential to competition in the retail natural gas market; that the Cities were unable to duplicate, practically or reasonably, the pipeline access; that Williams denied the Cities use of the pipeline; and that it was feasible for Williams to have provided the Cities with access to the pipeline.[93] The district court granted summary judgment for Williams, holding that the Cities were unable to establish the second and third elements: the Cities' inability to duplicate the facility, and Williams' denial of use of the facility to the Cities.[94]

2. Majority Opinion

The Cities appealed the district court's granting of summary judgment. In particular, the Cities alleged that Williams' actions violated section 1 of the Sherman Act as an illegal tying arrangement and section 2 of that act under the essential facilities doctrine.[95]

With respect to the tying claim, the Cities asserted that the district court erred by not finding the existence of the necessary agreement between parties. They contended that the requirements contracts between Williams and the Cities constituted the necessary agreement. The Cities also argued that the approved third-party suppliers' gas did not provide a defense to Williams forcing the sale of its natural gas.[96]

The Tenth Circuit rejected these arguments. Rather, the court of appeals reaffirmed its decision in *McKenzie v. Mercy Hospital*,[97] that section 1 of the Sherman Act did not prohibit a tying arrangement imposed by a single entity.[98] In *McKenzie*, the plaintiff asserted that an arrangement which linked two separate and distinct product markets together was sufficient proof of a tying arrangement. The *McKenzie* court disagreed, deciding that the plaintiff must make a preliminary showing of a

90. *Id.*; *see* Jefferson Parish Hosp. v. Hyde, 466 U.S. 2, 13-14 (1984).
91. City of Chanute v. Williams Natural Gas Co., 1990-1 Trade Cas. (CCH) ¶ 68,967, 63,206 (D. Kan. Feb. 16, 1990) (*Chanute II*).
92. *Chanute IV*, 955 F.2d at 647.
93. *Id.*
94. *Id.* at 648.
95. *Id.* The Cities also contended that the full requirements contracts themselves violated the antitrust laws, thereby entitling the Cities to treble damages under § 4 of the Clayton Act. *See id.* at 651-53. In addition, the Cities asserted a monopolization claim under § 2 of the Sherman Act. *Id.* at 653-56.
96. *Id.* at 650.
97. 854 F.2d 365 (10th Cir. 1988). In *McKenzie*, the court acknowledged that a single entity could establish a tying arrangement; however, the court decided that such an arrangement was not proscribed by section 1 of the Sherman Act. *Id.* at 368.
98. *Chanute IV*, 955 F.2d at 650.

conspiracy between two persons.[99] The Tenth Circuit applied this standard and indicated that the Cities needed to show that the alleged tying arrangement resulted from concerted activity between separate parties.[100]

The Cities did provide evidence to establish that Williams tied its natural gas to its transportation facilities. They did not, however, show that Williams acted in concert with any other entity. In fact, the Cities named only themselves as the other party to the alleged conspiracy. Therefore, the court of appeals decided that summary judgment was appropriate because the Cities failed to make the requisite preliminary showing of a conspiracy necessary for their section 1 tying claim.[101]

With respect to the essential facilities doctrine, the court of appeals held that the Cities failed to meet their burden since they failed to establish the second and third elements of the test.[102] They did not show that Williams provided access to the pipeline on such unreasonable terms as to constitute a denial of access.[103] The Cities did not suffer a severe handicap as a result of Williams having provided the Cities' full requirements of natural gas rather than transporting third-party gas.[104] The court reasoned that Williams' supply of gas at FERC approved prices provided the Cities with reasonable access to the pipelines. Such reasonable access defeated the second element of the test since reasonable access was equivalent to practical duplication.[105] Reasonable access also defeated the third element — denial of use of the facilities. Since the Cities failed to prove the second and third elements, they did not meet their burden of presenting evidence that Williams denied or limited access to its pipeline solely to gain a competitive edge. Thus the Tenth Circuit upheld the decision to grant summary judgment for Williams on the section 2 claim.[106]

99. *McKenzie*, 854 F.2d at 367-68. According to the *McKenzie* decision, a violation of section 1 required " 'unlawful conduct by two or more parties pursuant to an agreement. . . . Solely unilateral conduct, regardless of its anticompetitive effects, is not prohibited by Section 1.' " *Id.* at 367 (quoting Contractor Utility Sales Co. v. Certain-Teed Prods. Corp., 638 F.2d 1061, 1074 (7th Cir. 1981), *cert. denied*, 470 U.S. 1029 (1985)).

100. *Chanute IV*, 955 F.2d at 650.

101. *Id.* at 650-51.

102. *Id.* at 648. The Cities asserted as error that the district court ignored its own findings made at the preliminary hearing, that the evidence showed the facility could not be physically duplicated and that the approved third-party suppliers' gas was not a feasible substitute for other third-party gas. The Tenth Circuit rejected these arguments. The fact the Cities prevailed at the preliminary injunction stage was not determinative in a summary judgment proceeding. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 649.

106. *Id.* In addition, the court of appeals granted summary judgement in favor of Williams on all other causes of action. The court determined that: (1) the Cities failed to establish a monopolization claim in light of Williams' showing that its action was the result of a legitimate business decision, *id.* at 653-56; and (2) the Cities failed to show antitrust injury for purposes of standing, since Williams was not obligated to provide access to the other suppliers in the first place, *id.* at 651-53.

3. Concurrence

Judge Seymour, in her concurrence, disagreed with the majority's reliance on *McKenzie* as support for the proposition that section 1 did not apply to a tying arrangement imposed by a single entity.[107] Rather, under the case law of the Tenth Circuit and other circuits, a buyer alleging that he had been coerced or forced by a seller into an illegal tying arrangement stated the requisite combination or conspiracy under the Sherman Act.[108] The concurrence pointed to several cases to support this position. In *Black Gold, Ltd. v. Rockwool Industry*,[109] the Tenth Circuit Court of Appeals stated that a plaintiff who contended that a seller unlawfully refused to deal as a means of enforcing an anticompetitive practice, such as tying or price-fixing, could have established the requisite combination or conspiracy by showing that he himself unwillingly complied with the practice.[110] On rehearing, where the defendant urged the court to reconsider its conclusion that the record contained evidence of a tying conspiracy, the court indicated that a combination occurs between a seller and buyers whose acquiescence in the seller's firmly enforced restraints was induced by "the communicated danger of termination."[111]

The concurrence noted that the Cities alleged that Williams illegally tied the purchase of natural gas to its transportation and that they were forced to accept the arrangement because they had no alternative source. However, since Williams' gas was sold at FERC approved prices, and given that the Cities could have obtained cheaper third-party gas throughout this period, Williams could not have forced the Cities to acquiesce.[112] Only because the Cities failed to state facts from which the trier could have found forcing did the concurrence conclude that summary judgement was appropriate on the tying claim.

4. Analysis

In rejecting the Cities' tying claim, the majority held that a tying arrangement imposed by a single entity did not violate section 1 of the Sherman Act since there was no conspiracy between independent parties. This statement misinterprets the section 1 contract, combination or conspiracy requirement. Most courts that have considered the issue have found agreement between the seller and the buyer sufficient to es-

107. *Id.* at 658 (Seymour, J., concurring). Judge Seymour indicated that *McKenzie* was factually distinguishable, and therefore not controlling, because in that case the plaintiff himself did not and could not agree to the illegal arrangement. *Id.* at 658 n.1. Judge Seymour agreed with most of the majority opinion, including the decision reached under the essential facilities doctrine. However, she disagreed with the majority's analysis of the antitrust standing and antitrust injury issue. *See id.* at 659-60.

108. *Id.* at 658-59.

109. 729 F.2d 676, 686 (10th Cir. 1984).

110. *Id.* The *Black Gold* court relied on United States v. Parke, Davis and Co., 362 U.S. 29 (1960), for this statement.

111. *Chanute IV*, 955 F.2d at 659.

112. *Id.*

tablish the requisite conspiracy.[113] They have not required evidence that a separate third party conspired with the seller. As the concurring opinion noted, even Tenth Circuit precedent indicated that a single entity could prove the requisite combination or conspiracy "by showing that he himself *unwillingly complied* with the practice, or by showing that although he refused to acquiesce, other buyers agreed to the arrangement under threat of termination."[114]

A subsequent district court opinion underscored the problem with *Chanute* and *McKenzie*. By requiring proof of the "archetypical conspiracy to maintain a Section 1 claim . . . [these cases] seemingly erase the words 'contract' and 'combination' . . . from Section 1. Contracts in restraint of trade [between a customer and seller] are thereby effectively removed from Section 1's reach, even though embraced by its express terms."[115]

Applying the more recognized standard could have resulted in a different outcome if the Cities had alleged sufficient facts to support the finding of a tying arrangement. Whereas the plaintiff in *Black Gold* refused to buy goods under the alleged unlawful tying arrangement, and could not base the requisite combination or conspiracy on any agreement it had with the defendant,[116] the Cities potentially bought goods under the alleged tying arrangement and, therefore, could base the requisite combination or conspiracy on an agreement they had with Williams.

The recent Supreme Court decision, *Eastman Kodak Co. v. Image Technical Services, Inc.*,[117] supports the conclusion that a buyer who alleges that he has been forced by a seller into an illegal tying arrangement has stated the requisite combination or conspiracy under section 1 of the Sherman Act.[118] The Supreme Court determined that a reason-

113. *Black Gold, Ltd.*, 729 F.2d at 686; *see* Smith Mach. Co. v. Hesston Corp., 878 F.2d 1290, 1294 (10th Cir. 1989) (noting that although a dealer refused to accede to manufacturer's request, the dealer could have shown an agreement between manufacturer and other dealer), *cert. denied*, 493 U.S. 1073 (1990); *see also* Perma Life Mufflers Inc. v. International Parts Corp., 392 U.S. 134, 142 (1968) ("petitioner can clearly charge a combination between Midas and himself, as of the day he unwillingly complied with the restrictive franchise agreements . . . ."); Albrecht v. Herald Co., 390 U.S. 145, 150 n.6 (1968) ("petitioner could have claimed a combination between respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price."); Will v. Comprehensive Accounting Corp., 776 F.2d 665, 670 (7th Cir. 1985) (finding that "unwilling compliance" between franchisees and franchisor satisfied the joint action requirement of section 1), *cert. denied*, 475 U.S. 1129 (1986). *But cf.* Systemcare, Inc. v. Wang Lab., Inc., 787 F. Supp. 179 (D. Colo. 1992) (court constrained to follow Tenth Circuit's erroneous requirement of concerted action between separate parties).

114. *Chanute IV*, 955 F.2d at 659 (Seymour, J., concurring) (citing *Black Gold, Ltd.*, 729 F.2d at 686) (emphasis in original).

115. *Systemcare, Inc.*, 787 F. Supp. at 182.

116. *Black Gold, Ltd.* 729 F.2d at 686.

117. 112 S. Ct. 2072 (1992).

118. *See Chanute IV*, 955 F.2d at 658-59 (Seymour, J., concurring). In *Eastman Kodak Co.*, after independent service organizations began servicing copying and micrographic equipment manufactured by Kodak, Kodak adopted policies to limit the availability to the independent service organizations of replacement parts for its equipment and to make it more difficult for those companies to compete with Kodak in servicing such equipment.

able trier of fact could find, first, that service and parts were two distinct products in light of evidence indicating that each had been, and continued in some circumstances to be, sold separately; and second, that Kodak tied the sale of the two products in light of evidence indicating that it sold parts to third parties only if they agreed not to buy service from the independent service organizations.[119] The Court rejected Kodak's characterization of the sale as a unilateral refusal to deal.[120] Implicit in the analysis, third-party conspirators could bring a tying claim based on an agreement between Kodak and themselves. *Eastman Kodak Co.*, therefore, supports the proposition that a buyer who was forced into an illegal tying arrangement can state the requisite combination or conspiracy by showing that he himself complied with the practice.

With respect to the essential facilities claim, the *Chanute* court purported to apply the four-part test. However, the court actually relied on a separate severe handicap standard to analyze both the second and third elements: the Cities' inability to reasonably duplicate the pipeline access; and Williams' denial of access to the pipeline. Since the Cities suffered no severe handicap they failed to establish both the second and third elements.[121]

The court's analysis, and the four-part test itself, would have been more accurate if the severe handicap standard had been applied to the second element only, not the third. The first element, the monopolist's control of the essential facility, and the third element, the denial of access to the essential facility, focus on the nature of the conduct itself. Under the second element, the competitor's inability to duplicate access to the facility, and the fourth element, the feasibility of providing the competitor access to the facilities, the court analyzes the effect of that conduct on competition. As a practical way to analyze the detrimental effect on competition, the severe handicap standard asks whether the inability to duplicate the facilities imposed a severe handicap on competition.[122] Because it focuses on the effect the described conduct has on competition, not on the nature of the conduct itself, the severe handicap standard really only answers the questions posed in the second and fourth elements. By limiting its use of the severe handicap standard to these elements, the Tenth Circuit would clarify its analysis under the essential facilities doctrine.

The independent service organizations brought suit, alleging that Kodak had unlawfully tied the sale of service for its machines to the sale of parts, in violation of section 1 of the Sherman Act. *Eastman Kodak Co.*, 112 S. Ct. at 2077-78.

119. *Eastman Kodak Co.*, 112 S. Ct. at 2079-80.

120. *Id.* at 2080 n.8.

121. *Chanute IV*, 955 F.2d at 648-49.

122. Other circuits have applied a severe handicap standard to determine the effect of denial of access. *See* Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536 (1991) (holding that a successful essential facilities plaintiff must prove that denial of access caused it "severe handicap"), *cert. denied*, 112 S. Ct. 1603 (1992); Twin Laboratories, Inc. v. Weider Health & Fitness, 900 F.2d 566 (2nd Cir. 1990); Hecht v. Pro-Football, Inc., 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

IV. MONOPOLIZATION - THE RELEVANT MARKET

In *TV Communications Network, Inc. v. Turner Network Television, Inc.*,[123] the Tenth Circuit Court of Appeals determined that the plaintiff could not establish section 2 monopolization claims because of its failure to define properly the relevant market. Because it defined the relevant market as a single product, the plaintiff failed, as a matter of law, to allege a relevant market that the defendant was capable of monopolizing.[124]

The Supreme Court usually defines the offense of unlawful monopolization as the possession of monopoly or market power, plus deliberate conduct intended to acquire, use, or preserve that power.[125] The primary dilemma facing courts is that many of the same methods that may be used to acquire or maintain monopoly power, such as charging lower prices, exercising discretion when choosing customers, and introducing new products, are also the kinds of competitive strategies that the antitrust laws are designed to encourage.[126]

Traditionally, the Supreme Court has defined monopoly or market power as "the power to control market prices or to exclude competition."[127] In the Tenth Circuit, however, monopoly power requires both control over prices *and* the ability to exclude competition.[128] Since the ability to control prices ultimately depends on the absence of competition, the distinction is probably more theoretical than real.[129]

An essential step to determining a company's market power is to define the relevant market in which the power over prices or competition is to be appraised.[130] The relevant market is the "area of effective competition" within which the defendant operates.[131] The purpose in defining the relevant market is "to identify the firms that compete with each other in a given product and geographic area in order to determine

123. 964 F.2d 1022 (10th Cir.), *cert. denied*, 113 S. Ct. 601 (1992).
124. *Id.* at 1025.
125. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596 n.19 (1985).
126. ABA ANTITRUST SECTION, *supra* note 20, at 196.
127. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956); *see also* NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 109 n.38 (1984) (stating that market power is the "ability to raise prices above those that would be charged in a competitive market").
128. Shoppin' Bag, Inc. v. Dillon Cos., 783 F.2d 159, 164 (10th Cir. 1986); *accord* Reazin v. Blue Cross & Blue Shield, 899 F.2d 951, 966-67 (10th Cir.), *cert. denied*, 497 U.S. 1005 (1990). The Third, Fifth, Sixth, Eighth and D.C. Circuits have also required both elements. *See* ABA Antitrust Section, *supra* note 20, at 196-97 n.8 (citing Borough of Lansdale v. Philadelphia Elec. Co., 692 F.2d 307, 311 (3d Cir. 1982); Deauville Corp. v. Federated Dep't Stores, Inc., 756 F.2d 1183, 1188 (5th Cir. 1985); Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 826 (6th Cir. 1982); National Reporting Co. v. Alderson Reporting Co., 763 F.2d 1020, 1024 (8th Cir. 1985); Neumann v. Reinforced Earth Co., 786 F.2d 424, 430 (D.C. Cir.), *cert. denied*, 479 U.S. 851 (1986)).
129. ABA ANTITRUST SECTION, *supra* note 20, at 196-97.
130. City of Chanute v. Williams Natural Gas Co., 955 F.2d 641, 654 (10th Cir.) *cert. denied*, 113 S. Ct. 96 (1992) (*Chanute IV*); *see also* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965) ("Without a definition of that market there is no way to measure [an alleged monopolist's] ability to lessen or destroy competition.")
131. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327-28 (1961).

whether other firms can effectively constrain the price of the alleged monopolist."[132] A properly defined relevant market normally identifies both the relevant product market and the relevant geographic market.[133]

The relevant product market includes those products that are "reasonably interchangeable by consumers for the same purposes."[134] In determining the reasonable interchangeability of products, courts consider the cross-elasticity of demand, which measures "the responsiveness of the sales of one product to price changes of the other."[135] For example, a relevant market defined in terms of user substitutes includes "producers of identical products, of products with physical or brand differences entirely disregarded by consumers, and of products regarded by consumers as such close substitutes that a slight relative price change in one will induce intolerable shifts of demand away from the other."[136] The latter products have a high cross-elasticity of demand and are presumptively in the same relevant product market.[137]

Relevant product markets generally cannot be limited to a manufacturer's own products, or to a single class of purchasers.[138] In *United*

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132. ABA ANTITRUST SECTION, *supra* note 20, at 198. Professors Areeda and Hovenkamp indicate that courts generally define the relevant market in terms of the legal issue before the court: whether a defendant firm possesses monopoly power; whether a merger of competitors creates a substantial risk that the resulting firm will either acquire power over price or may be able to coordinate prices with its rivals at non-competitive levels; or whether a transaction will reinforce any such threats to competition. AREEDA & HOVENKAMP, *supra* note 16, ¶ 518.1.

133. *Chanute IV*, 955 F.2d at 654.

134. Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 893 (10th Cir. 1991); *see E.I. du Pont de Nemours & Co.*, 351 U.S. at 404 ("That market is composed of products that have reasonable interchangeability for the purposes for which they are produced - price, use and qualities considered.")

135. *E.I. du Pont de Nemours & Co.*, 351 U.S. at 400; *see also* Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1220-21 (10th Cir. 1986) (analyzing cross-elasticity of demand), *cert. denied*, 486 U.S. 1005 (1988). Elasticity and inelasticity of demand relate to the freedom of demand within the relative product market. In an elastic market, buyers are able to chose freely what products they wish to buy. In an inelastic market, buyers are limited in their choices due to inadequate selections and excessive prices. These factors are important with respect to the court's determination of the relevant product market and the optimum cross-elasticity of demand, which is the extent to which a consumer is able to shift freely between two or more products. 16A JULIAN O. VON KALINOWSKI, BUSINESS ORGANIZATIONS: ANTITRUST TRADE LAWS AND TRADE REGULATION § 6G.04[1], 6G-37 (1991).

136. AREEDA & HOVENKAMP, *supra* note 16, ¶ 525a.

137. *Id.*

138. Many courts have determined that the relevant market cannot consist of a single manufacturer's product. *See, e.g.*, Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468 (3d Cir.) (finding that in an alleged tying arrangement, the relevant market was all automobiles manufactured in the United States, not merely the automobile manufacturer's own brand), *cert. denied*, 113 S. Ct. 196 (1992); International Logistics Group v. Chrysler Corp., 884 F.2d 904 (6th Cir. 1989) (Chrysler's own brands not relevant market), *cert. denied*, 494 U.S. 1066 (1990); Telex Corp. v. IBM, Corp., 510 F.2d 894 (10th Cir.) (relevant market was all peripheral computer equipment, not merely those that were plug-compatible with IBM central processing units), *cert. dismissed*, 423 U.S. 802 (1975); Christianson v. Colt Indus. Operating Corp., 766 F. Supp. 670 (C.D. Ill. 1991) (M16 assault rifle not a relevant market since there were numerous competing products); Sun Dun, Inc. v. Coca-Cola Co., 740 F. Supp. 381 (D. Md. 1990) (rejecting claim that defendant could be guilty of monopolizing the distribution of its own brand of soft drink); Carlock v. Pillsbury Co., 719 F. Supp. 791 (D. Minn. 1989) (manufacturer's own brand of ice

States v. E.I. du Pont de Nemours & Co., the Court indicated that manufactures should not ordinarily be deemed to have monopolized their own products.[139] However, some courts have found the relevant product market to be limited to the products of a single supplier where they are so unique as to have no reasonably interchangeable substitutes.[140]

The relevant geographic market is defined as "the narrowest market which is wide enough so that products from adjacent areas . . . cannot compete on substantial parity with those included in the market."[141] This fact-intensive determination involves an analysis of how far consumers are willing travel to obtain the product at a lower price.[142]

Both the relevant geographic and product markets "can be determined only after a factual inquiry into the 'commercial realities' faced by consumers."[143] It is the plaintiff's burden to prove the relevant market, and the evidence must set forth some basis to support the plaintiff's defi-

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cream not a relevant market); Disenos Artisticos E Industriales, S.A. v. Work, 714 F. Supp. 46 (E.D.N.Y. 1989) (manufacturer's brand of porcelain figurines could not be relevant market); Theatre Party Assocs. v. Shubert Org., 695 F. Supp. 150 (S.D.N.Y. 1988) (Broadway theatre's own popular show not a relevant market; relevant market likely included all Broadway shows, ballet, and perhaps even sporting events); Hendricks Music Co. v. Steinway, Inc., 689 F. Supp. 1501 (N.D. Ill. 1988) (refusing to recognize "concert and artist" pianos, in which only Steinway and Yamaha pianos participated, as a distinct market).

139. 351 U.S. 377, 393 (1956). The *du Pont* Court noted that:

> [O]ne can theorize that we have monopolistic competition in every nonstandardized commodity with each manufacturer having power over the price and production of his own product. However, this power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product.

Id. (citations omitted).

140. Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S. Ct. 2072, 2090 (1992); *see also* Parts and Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228 (7th Cir. 1988) (finding market power in own brand of electric motors for tie-in purpose), *cert. denied*, 493 U.S. 847 (1989); National Ass'n of Pharmaceutical Mfrs., Inc. v. Ayerst Lab., 850 F.2d 904 (2d Cir. 1988) (suggesting that a particular branded drug, Inderal, could be a relevant market); Bushie v. Stenocord Corp., 460 F.2d 116, 121 (9th Cir. 1972) (defendant's own differentiated products can constitute a relevant market if they are "so unique or so dominant in the market in which they compete that any action by the manufacturer to increase his control over his product virtually assures that competition in the market will be destroyed."); *cf.* Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715 (3d Cir. 1991) (although a single brand could conceivably be a relevant market, plaintiff did not meet burden of showing that Ford tractors were not reasonably interchangeable with the tractors of competitors), *cert. denied*, 112 S. Ct. 3034 (1992).

141. *Westman Comm'n Co.*, 796 F.2d at 1222 (citations omitted). The outer boundary of the relevant geographic market is reached, "if one were to raise the price of the product or limit its volume of production, while demand held constant, and supply from other sources beyond the boundary could not be expected to enter promptly enough and in large enough quantities to restore the old price or volume." Satellite Television & Assoc. Resources, Inc. v. Continental Cablevision, Inc., 714 F.2d 351, 356 (4th Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984) (citations omitted). The Supreme Court noted that: "The geographic market selected must . . . both 'correspond to the commercial realities' of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area." Brown Shoe Co. v. United States, 370 U.S. 294, 336-37 (1962) (citations omitted).

142. *See Westman Comm'n Co.*, 796 F.2d at 1222.

143. *Eastman Kodak Co.*, 112 S. Ct. at 2090 (*quoting* United States v. Grinnell Corp., 384 U.S. 563, 572 (1966)). Each market is defined from the perspective of the buyer, not the seller. *See Westman Comm'n Co.*, 796 F.2d at 1221.

nition of the relevant product market.[144] The proper definition is generally a question for the trier of fact, and summary judgment is typically inappropriate because the pertinent economic facts are usually disputed. In some instances, however, the relevant market may be determined as a matter of law, particularly in cases where the relevant economic facts are not in dispute.[145] Properly defining the relevant market is often the key to a plaintiff's case under the Sherman Act.[146]

A. *The Relevant Market in Denver Cable Television*: TV Communications Network, Inc. v. Turner Network Television, Inc.[147]

1. Facts

Plaintiff, TV Communications Network (TVCN), provided cable television for a fee to subscribers in metropolitan Denver, Colorado. While most cable television operators distributed their programming through coaxial cable, TVCN was a wireless cable operator that utilized microwave transmission technology.[148] Defendant Turner Network Television (TNT) manufactured, produced and supplied video programming, including National Premium Sports Programming.[149] Since 1988, TNT has refused to allow TVCN to receive its programming in order for TVCN to offer it to its subscribers.[150] TVCN discovered that

144. *See* Tarabishi v. McAlester Regional Hosp., 951 F.2d 1558, 1568 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 2996 (1992).

145. *See, e.g.*, Key Fin. Planning Corp. v. ITT Life Ins. Corp., 828 F.2d 635, 643 (10th Cir. 1987); Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 487 (5th Cir. 1984).

146. ABA ANTITRUST SECTION, *supra* note 20, at 197-98. Over the past two decades, the courts have expanded the requirement that an antitrust plaintiff engage in a proper market power analysis, which means that virtually all antitrust cases now require some proof of market power. Mooz, *supra* note 14, at 811. *See, e.g.*, Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 294-95 (1985) (market power analysis required for rule of reason analysis in horizontal group boycott); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12-18 (1984) (market power analysis required for tying arrangements); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58-59 (1977) (non-price vertical restraints analyzed under rule of reason, which requires a determination of market power); United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966) (section 2 monopolization and attempt to monopolize claims require a properly defined relevant market). However, market power analysis is not required for per se violations of the antitrust laws. *See* Reazin v. Blue Cross & Blue Shield, 899 F.2d 951, 968 n.24 (10th Cir.), *cert. denied*, 497 U.S. 1005 (1990).

147. 964 F.2d 1022 (10th Cir.), *cert. denied*, 113 S. Ct. 601 (1992).

148. *Id.* at 1023. Cable Television was "deregulated" in 1984. Cable Communications Policy Act of 1984, 47 U.S.C. § 521 (1988). For an article regarding cable industry franchise agreements, see Daniel L. Brenner, *Was Cable Television a Monopoly?*, 42 FED. COMM. L.J. 365 (1989).

149. *TV Communications Network, Inc.*, 964 F.2d at 1023. There were several other original defendants, including ESPN, Capital Cities/ABC, Tele-Communications, United Artists Entertainment Co., American Television and Communications Corp., Scripps Howard Cable Company, Scripps Howard Communications, and Mile High Cable Co., all of which settled out of court. *Id.* at 1023 n.1.

150. *Id.* at 1024. TVCN alleged that TNT refused to let it carry TNT programming because the wireless system posed a competitive threat to conventional cable systems. TVCN claimed cable programmers and system owner conspired to squeeze it out of business because it encroached on some systems' franchise areas. Adriel Bettelheim, *High Court Rejects Cable TV Lawsuit*, DENV. POST, Dec. 1, 1992, at C1.

many potential subscribers would not subscribe until TVCN made the TNT channel available. In addition, existing subscribers threatened to terminate their subscription if the TNT channel was not made available.[151]

TVCN filed the complaint to force TNT to make its programming available to TVCN. The district court dismissed the plaintiff's complaint for failure to state a claim upon which relief could be granted.[152]

2. Majority Opinion

TVCN appealed, asserting monopolization, attempt to monopolize, and conspiracy to monopolize claims under section 2 of the Sherman Act.[153] To establish a monopolization claim, TVCN must have shown "the possession of monopoly power in the relevant market" and "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[154] An actionable attempt to monopolize claim required a properly defined relevant market, a dangerous probability of success in monopolizing the relevant market, the specific intent to monopolize, and conduct in furtherance of such an attempt.[155] A conspiracy to monopolize required the existence of a combination or conspiracy to monopolize the relevant market.[156] Therefore, all three of the section 2 claims required a properly defined relevant market.[157]

In defining the relevant market, TVCN's complaint alleged that TNT monopolized the market for the TNT channel in Denver. TVCN claimed that TNT had complete control and a 100% market share of the TNT market.[158] The Tenth Circuit rejected this market definition. Relying on *E.I. du Pont de Nemours & Co.*,[159] the court of appeals deter-

151. *TV Communications Network*, 964 F.2d at 1024.

152. *Id.*

153. *Id.* at 1024-27. The plaintiff also sought relief under § 1 of the Sherman Act for the alleged conspiracy between TNT and other cable operators. *Id.* at 1027. The court rejected the § 1 claim, holding that TVCN could not establish § 1 claims against TNT based on price fixing, a group boycott, or refusal to deal. *Id.* at 1027-28. In addition, the court dismissed the plaintiff's state law claims without prejudice following the dismissal of the federal claims. *Id.* at 1028.

154. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

155. *TV Communications Network*, 964 F.2d at 1025.

156. *See id.* at 1026. In addition to proving the existence of a combination or conspiracy to monopolize, a plaintiff must prove three other elements in order to establish a claim for conspiracy to monopolize: overt acts done in furtherance of the combination or conspiracy; an effect upon an appreciable amount of interstate commerce; and a specific intent to monopolize. *Id.*

157. In addition to defining a relevant market for section two claims, a section one plaintiff, utilizing the rule of reason standard, who cannot prove actual detrimental effects on competition must properly define the relevant market. *See* Reazin v. Blue Cross & Blue Shield, 899 F.2d 951, 968 n.24 (10th Cir.), *cert. denied*, 497 U.S. 1005 (1990) ("there must be sufficient evidence supporting the jury's finding of an agreement which unreasonably restrained trade *in the relevant market*") (emphasis added) (footnote omitted); *see also* Kaplan v. Burroughs Corp., 611 F.2d 286, 291 (9th Cir. 1979) ("Proof that the defendant's activities had an impact upon competition in a relevant market is an absolutely essential element of the rule of reason case."), *cert. denied*, 447 U.S. 924 (1980).

158. *TV Communications Network*, 964 F.2d at 1025.

159. 351 U.S. 377, 393 (1956). The court also relied on Key Fin. Planning Corp. v.

mined that TVCN failed to allege a relevant market which TNT was capable of monopolizing because "a company does not violate the Sherman Act by virtue of the natural monopoly it holds over its own product."[160]

TVCN's definition of the relevant product market as one cable programmer's channel was defective as a matter of law.[161] Because it did not allege a relevant market that TNT was capable of monopolizing in violation of the antitrust laws, TVCN could not prove that TNT had a dangerous probability of success of monopolizing the relevant market. Based on the improperly defined market, the court affirmed the district court's dismissal of the monopolization, attempt to monopolize, and conspiracy to monopolize claims.[162]

3. Analysis

While the *TV Communications Network* court's holding that a relevant product market cannot be a single manufacturer's product is consistent with many other decisions, a recent Supreme Court decision indicates that a single brand of a product can constitute a relevant product market in certain circumstances.[163] In *Eastman Kodak Co.*, the Court disagreed with Kodak's contention that, as a matter or law, a single brand of a product or service could never be a relevant market under the Sherman Act.[164] Rather, the relevant market "is determined by the choices available to Kodak equipment owners,"[165] who were the consumers. The Supreme Court concluded that, since services and parts for Kodak equipment were not interchangeable with those of other manufacturers, the relevant market from the Kodak equipment owner's perspective was

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ITT Life Ins. Corp., 828 F.2d 635, 643 (10th Cir. 1987), in which the Tenth Circuit held that the defendant's life insurance policies did not constitute a relevant market, even though the defendant paid higher advances to its agents than other insurers. The *Key Financial Planning Corp.* court reasoned that nothing restrained competing insurers from increasing their advances, if they needed to do so in order to retain good agents or make more sales. *Id.*

160. *TV Communications Network*, 964 F.2d at 1025; *see Key Fin. Planning Corp.*, 828 F.2d at 643.

161. *TV Communications Network*, 964 F.2d at 1025. On appeal and contrary to the allegations in its amended complaint, TVCN asserted that the market for the TNT channel was not the relevant market to consider. Rather, TVCN alleged that the relevant product market was subscription television programming or sports programming. However, the court, stating that the amended complaint must stand or fall on its own, rejected this assertion as a futile mischaracterization of the allegations in the amended complaint. *Id.*

162. *Id.* at 1028. Although not specifically rejecting the section 2 conspiracy to monopolize claim for failure to properly define the relevant product market, the court mentioned the improperly defined market as a factor in the dismissal of the conspiracy to monopolize claim. *Id.* Under its conspiracy to monopolize claim, TVCN alleged that the overt acts and specific intent to monopolize were evidenced by denial of access to essential facilities for the relevant TNT channel market in Denver, fixing prices, a group boycott, unreasonable territorial allocations and exclusionary measures. *Id.* at 1026. The court decided that TVCN failed on its conspiracy claim since the compliant did not provided facts to support a conspiracy claim and did little more than recite the relevant antitrust laws. *Id.* at 1026-27.

163. Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S. Ct. 2072, 2090 (1992).

164. *Id.*

165. *Id.* (citations omitted).

composed of only those companies that serviced Kodak machines.[166]

Moreover, *Eastman Kodak Co.* essentially repudiated the *TV Communications Network* court's reliance on *E.I. du Pont de Nemours & Co.* as justification for invalidating a relevant market comprised of a single brand of a product. In a footnote, the Court implicitly discouraged such use of *du Pont*. It pointed out that the *du Pont* Court did not *reject* the notion that a relevant market could be limited to one brand. "The Court simply held in *du Pont* that one brand does not *necessarily* constitute a relevant market if substitutes are available. Here respondents contend there are no substitutes."[167] Thus the recent Supreme Court decision invalidated the basis for part of the *TV Communications Network* holding and likely abrogated the Tenth Circuit's decision that a single product cannot, as a matter of law, constitute a relevant market.[168]

Factually, *TV Communication Network* would be similar to *Eastman Kodak Co.* if TVCN, like the respondents in *Eastman Kodak Co.*, provided sufficient evidence that there were no substitutes for the TNT channel. But unlike *Eastman Kodak Co.*, where Kodak equipment owners were forced to purchase only Kodak replacement parts, TVCN was not forced into a situation where it had to buy TNT. Moreover, there was no evidence that other sport programming was unavailable or unsatisfactory to potential subscribers. Therefore, the two cases are factually distinguishable and, although the Tenth Circuit's broad statement that a single product cannot as a matter of law constitute the relevant market is clearly not true, summary judgment was probably still appropriate.

V. CONCLUSION

In *Sharp*, the Tenth Circuit determined that employees of an airline allegedly driven into bankruptcy by another airline lacked standing to assert antitrust claims against the competitor. In evaluating antitrust standing, the Tenth Circuit utilized its two-part test, which required antitrust injury resulting directly from the antitrust violation, and for the first time, analyzed the other elements mentioned in the Supreme Court's multi-factor standard. The court held that the employees did not establish antitrust injury by their loss of employment because any injury was indirect, the damages were speculative, and there was risk of duplicative recoveries if the employees were allowed standing. Essentially the case indicated that as long as the alleged antitrust violation occurred in a market other than the employment market, the employees could not establish antitrust injury.

The *Chanute* case addressed the use of the essential facilities doc-

166. *Id.*

167. *Id.* at 2090 n.30 (citations omitted) (emphasis in original).

168. *Cf.* Smalley & Co. v. Emerson & Cuming, Inc., 808 F. Supp. 1503 (D. Colo. 1992) (recognizing that a single product might constitute the relevant product market, but declining to extend *Eastman Kodak Co.* to allow a single product sold to a single customer, given uncontested evidence of other consumers of that product, to represent the relevant product market).

trine and tying claims in the natural gas industry. The court held that several cities which purchased natural gas from the gas company failed to show "severe handicap" and therefore could not recover under the essential facilities doctrine. To make its analysis of the four-part essential facilities test less confusing, the court should have only applied the severe handicap standard to the second element of the test: the inability to duplicate reasonably access to the facility.[169]

The majority in *Chanute* also stated that section 1 of the Sherman Act did not prohibit a tying arrangement imposed by a single entity. However, as the concurrence noted, the requisite conspiracy, or combination could exist between the seller and a buyer when the buyer was forced to agree to the arrangement. The Tenth Circuit needs to reevaluate its position and recognize the possibility that acquiescence by the buyer establishes the requisite conspiracy.

Finally, in *TV Communications Network*, the Tenth Circuit invalidated the plaintiff's definition of the relevant product market. Section 2 monopolization, attempt to monopolize, and conspiracy to monopolize claims require the plaintiff to properly define the relevant markets, which include both product and geographic markets. The plaintiff defined the relevant product market as a single cable television channel. The court rejected such a narrow definition as a matter of law, holding that "a company does not violate the Sherman Act by virtue of the natural monopoly it holds over its own product."[170] However, a recent Supreme Court decision that a single brand can constitute a relevant product market if there are no available substitutes limits this broad Tenth Circuit precedent. While the result in the *TV Communications Network* decision would probably have been the same after *Eastman Kodak Co.*, the Tenth Circuit should allow for the possibility that a single product could constitute the relevant product market under the right circumstances.

Mark D. Williamson

169. This standard should also be applied to the fourth element, however, the court did not analyze this element.

170. TV Communications Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1025 (10th Cir.), *cert. denied*, 113 S. Ct. 601 (1992) (citations omitted).