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Tenth Circuit Antitrust Law: Recent Developments and Possible Future Trends

William E. Mooz Jr.

TENTH CIRCUIT ANTITRUST LAW: RECENT DEVELOPMENTS AND POSSIBLE FUTURE TRENDS

WILLIAM E. MOOZ, JR.*

I. INTRODUCTION

The nation's principal antitrust laws were enacted over a century ago. Since then, the sophistication of our economy has increased, requiring the application of antitrust laws to a variety of circumstances that were not contemplated by the drafters. Economic thinking has also changed during this time, and many types of conduct that were once automatically considered anticompetitive are now considered to be procompetitive. In the 1970's, these combined factors led to a revolution in antitrust jurisprudence. Spearheaded by Robert Bork's *The Antitrust Paradox*,[1] courts began to subject antitrust claims to a heightened level of scrutiny to foster the overriding goal of protecting consumer welfare. This phase of the revolution produced substantial restrictions on who had standing to sue,[2] when vertical restraints would be declared illegal per se,[3] and even when horizontal collusion would be condemned.[4]

The revolution gathered momentum during the 1980's with both the federal courts (including the Tenth Circuit) and the Department of Justice leading the charge. Some of the areas most affected during this decade include: (a) standing;[5] (b) market and monopoly power;[6] and (c) the concerted action requirement of sections 1 and 2 of the Sherman Act.[7] As we enter the 1990's, the movement is going strong and there are indications that Congress may join the movement. This Article examines the Tenth Circuit's most recent decisions in some of the charged areas of the past decade and discusses the course of future developments.

II. ANTITRUST STANDING

"Antitrust standing" differs from Article III standing. Article III

* William E. Mooz, Jr., Associate, Holland & Hart, Denver, CO; B.A. 1981, Colorado College; J.D. 1985, University of Colorado School of Law.

1. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

2. *E.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

3. *E.g.*, Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

4. *E.g.*, Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979).

5. *E.g.*, Cargill, Inc. v. Monfort, Inc., 479 U.S. 104 (1986); Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983); *see infra* section II.

6. *E.g.*, Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co. 472 U.S. 284 (1985); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984); *see infra* section III.

7. *E.g.*, Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984); *see infra* section IV.

standing requires an injury in fact sufficient to satisfy the Constitution's jurisdictional requirements.[8] Before a court can address antitrust standing, it must first find the plaintiff has satisfied the Article III standing requirements. To demonstrate antitrust standing, the plaintiff must subsequently show an injury within the zone of interests protected by sections 4 and 16 of the Clayton Act.[9] These two sections respectively provide private rights of action to seek damages and injunctive relief.[10] A two-tiered process is used to show whether one falls within the zone of interests protected by these sections. First, the plaintiff must demonstrate an "antitrust injury," that is, an injury of the sort proscribed by the antitrust laws.[11] Then, the plaintiff must show the action would be brought in an efficient and effective manner.[12] This latter inquiry has been labeled both the "standing" and the "proper plaintiff" requirement. The concepts of antitrust injury and proper plaintiff are closely related and both must be satisfied.[13]

A. *Antitrust Injury*

Emphasis on antitrust injury began in the 1970's when the United States Supreme Court voiced its concern that plaintiffs were using the antitrust laws to stifle, rather than promote, competition.[14] Consequently, the Court introduced the now-famous requirement that the plaintiff demonstrate that the injury "flows from that which makes defendants' acts unlawful."[15] Under this standard, the plaintiff must show that an activity prohibited by the antitrust laws, namely a reduction in competition, caused the injury. Mere injury to a competitor[16] or "injury which is merely causally linked in some way to an alleged antitrust violation" will not suffice.[17] The Tenth Circuit has applied the antitrust injury requirement consistently since the late 1970's[18] and its recent

8. *See, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975).

9. 15 U.S.C. §§ 15, 26 (1988).

10. *See generally* Cargill, Inc. v. Monfort, Inc., 479 U.S. 104, 109-11 (1986). The Tenth Circuit has yet to take a position on whether the absence of antitrust standing can be waived by the parties. Reazin v. Blue Cross & Blue Shield, Inc., 899 F.2d 951, 961-62 (10th Cir.)(noting split between circuits and declining to take a position), *cert. denied*, 110 S. Ct. 3241 (1990).

11. *E.g.*, *Cargill*, 479 U.S. at 109-11 & n.6 (1986). This standard applies to the plaintiff who seeks damages. A plaintiff who seeks injunctive relief only need demonstrate a threat of antitrust injury. *Id.*

12. *Id.* at 122.

13. *See generally Reazin*, 899 F.2d at 960 ("Standing and antitrust injury are essential elements in a private antitrust damages action brought under section 4 of the Clayton Act."); Board of Regents v. NCAA, 707 F.2d 1147, 1151 (10th Cir. 1983) (antitrust injury and standing issues treated as identical), *aff'd*, 468 U.S. 85 (1984).

14. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977).

15. *Id.* at 489; *accord* Holly Sugar Corp. v. Goshen County Coop. Beet Growers Ass'n, 725 F.2d 564, 567-68 (10th Cir. 1984).

16. Injury to a competitor may be enough to vest the plaintiff with standing to sue under the Robinson-Patman Act. *See, e.g.*, Alan's, Inc. v. Minolta Corp., 903 F.2d 1414, 1418 n.6, 1427 (11th Cir. 1990)(cataloging the debate on this point).

17. *Reazin*, 899 F.2d at 962 n.15; *see, e.g.*, *Brunswick*, 429 U.S. at 487.

18. *See* Natrona Serv., Inc. v. Continental Oil Co., 598 F.2d 1294, 1297-98 (10th Cir. 1979)(citing *Brunswick*, 429 U.S. 477); Farnell v. Albuquerque Publishing Co., 589 F.2d 497, 501 (10th Cir. 1978).

decisions show no indication of change.[19]

B. *Proper Plaintiff*

During the 1980's, the Court took the teachings of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[20] one step further by ruling that, even if the plaintiff demonstrates antitrust injury, standing still may be denied for reasons of efficiency.[21] The plaintiff must demonstrate an ability to prosecute the action in an efficient and effective manner. The Supreme Court set out somewhat conflicting standards for making this analysis. In *Associated General Contractors, Inc. v. California State Council of Carpenters*,[22] the Court formulated a laundry list of factors to consider. These factors, as summarized by the Tenth Circuit, include the following:

> 1. "the directness or indirectness of the connection between the plaintiff's injury and the allegedly unlawful market restraint;"
> 2. "the speculativeness of the plaintiff's damages;"
> 3. " 'the 'risk of duplicative recoveries . . . or the danger of complex apportionment of damages[;]' " and
> 4. "the defendant's intent[.]"[23]

The Court cautioned that, although these factors are to be applied on a case-by-case basis, competitors and direct consumers[24] will be the only parties likely to satisfy the inquiry.[25]

Just one year earlier, the Court set out a more nebulous and lenient

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19. *See* Instructional Sys. Dev. Corp. v. Aetna Casualty and Sur. Co., 817 F.2d 639, 650 (10th Cir. 1987); Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1522-23 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985); *cf.* Cargill, Inc. v. Monfort, Inc., 479 U.S. 104, 113-22 (1986)(reversing Tenth Circuit for failing to require a showing of impending antitrust injury in proceeding for injunctive relief).

20. 429 U.S. 477 (1977).

21. The genesis of this second requirement actually occurred in 1977 when the Court held that indirect purchasers did not have standing in all but the most exceptional cases, even though they clearly had suffered antitrust injury. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). This situation-specific decision did not evolve into a general principle of standing until 1983. *See generally Cargill*, 479 U.S. at 110 n.5 ("A showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4 [of the Clayton Act, 15 U.S.C. § 15 (1988)], because a party may have suffered antitrust injury but may not be a proper plaintiff under § 4 for other reasons.")(citing William H. Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445, 1483-85 (1985)); Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983).

22. 459 U.S. 519, 543-44 (1983).

23. *Reazin*, 899 F.2d at 962 n.15 (quoting *Associated Gen. Contractors*, 459 U.S. at 544). This formulation of the *Associated Gen. Contractors* criteria differs from that of some other circuits. *Compare Reazin*, 899 F.2d at 962 n.15 (listing defendant's intent as a factor) *with* Adams v. Pan Am. World Airways, 828 F.2d 24, 26 & n.4 (D.C. Cir. 1987) (intent is an element of the offense and not a factor to be considered in the standing analysis), *cert. denied*, 485 U.S. 961 (1988).

24. Indirect purchasers stand virtually no chance of being proper plaintiffs under any analysis. *See, e.g., Illinois Brick*, 431 U.S. at 735-36 (indirect purchaser cannot bring antitrust claim unless it has a preexisting cost-plus contract with the direct purchaser); *In re* Wyoming Tight Sands Antitrust Cases, 866 F.2d 1286, 1290 (10th Cir. 1989)(same), *aff'd*, 110 S. Ct. 2807 (1990).

25. *See Associated Gen. Contractors*, 459 U.S. at 537-45.

standard in *Blue Shield v. McCready*.[26] In *McCready*, the Court found that standing exists where the plaintiff's injury is inextricably intertwined with or an integral aspect of the illegal plot.[27] Contrary to its intimations in *Associated General Contractors*, the Court specifically stated that persons who are neither competitors nor consumers may be able to make this showing.[28] A number of courts have resolved this conflict by eschewing *McCready* (at least implicitly) in favor of the *Associated General Contractors* factors.[29]

The Tenth Circuit's most recent standing decision, *Reazin v. Blue Cross & Blue Shield*,[30] takes a contrary approach. The court indicated that *McCready*, rather than *Associated General Contractors*, predominantly governs the determination of who is a proper plaintiff. In *Reazin*, the Tenth Circuit made no attempt to reconcile the holdings of *Associated General Contractors* and *McCready*. Rather, it unceremoniously buried the *Associated General Contractors* factors in a footnote without discussion or any attempt to apply them to the facts of the case.[31] This task left uncompleted, the court turned almost exclusively to the nebulous statements in *McCready* and declared that the plaintiffs had standing.[32]

The court in *Reazin* may well have reached the right result, but its analytical path is a troubling one. The plaintiffs were at least perceived competitors of the defendant and, in all likelihood, could have satisfied the *Associated General Contractors* factors had they been put to the task by the Tenth Circuit. The court did not need to bury *Associated General* to reach its result, and its failure to discuss the *Associated General Contractors* factors or to explain why it was not applying them creates confusion as to how it may act in future cases. Given the plaintiffs' apparent ability to satisfy the *Associated General Contractors* factors, and the court's failure to repudiate the factors overtly, *Reazin* probably should not be read as placing the *Associated General Contractors* analysis beyond resurrection in the Tenth Circuit.

III. MARKET POWER

The area of antitrust law most affected by the events of the past two decades is market power analysis. In 1977, the Court thrust the concept of market power into the limelight when it examined challenges to nonprice vertical restraints under the rule of reason and effectively required a market power analysis in all such cases.[33] Then in the 1980's, the Court took aim at a number of types of horizontal restraints, holding them free from per se condemnation unless defendants were first shown

26. 457 U.S. 465 (1982).
27. *Id.* at 479, 484.
28. *Id.* at 472.
29. *See, e.g.*, Adams v. Pan Am. World Airways, Inc., 828 F.2d 24 (D.C. Cir. 1987)(rigorously applying *Associated Gen. Contractors* criteria), *cert. denied*, 485 U.S. 961 (1988).
30. 899 F.2d 951 (10th Cir.), *cert. denied*, 110 S. Ct. 3241 (1990).
31. *Id.* at 962 n.15.
32. *Id.* at 962-63.
33. Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59 (1977).

to have market power.[34] This increasing emphasis on market power means virtually all antitrust cases now require some showing of market power.[35] As we enter the 1990's, all courts, including the Tenth Circuit, are grappling with how to define and measure market power.

A. *Definition of Market Power and Monopoly Power*

The Tenth Circuit defines market power as " 'the ability to raise prices above those that would be charged in a competitive market.' "[36] Market power differs from monopoly power in that market power exists where the defendant has the power to either exclude competitors *or* control prices, while the defendant with monopoly power is able to do both.[37] Simply put, monopoly power is substantial market power.[38] The Tenth Circuit's definition, though, does not reflect its actual meaning or practice. Virtually every firm has some ability to raise prices without losing all of its customers. When a firm has a downward sloping demand curve, some increase in price will be accepted by customers before they seek substitute products. Almost all firms have a downward sloping demand curve. Similarly, virtually every firm has some ability to exclude competitors, because, as a practical matter, the cost of entering and exiting a market rarely is zero. Thus, when applied literally, the Tenth Circuit's tests—similar to those used in all other circuits—are meaningless.[39]

The real focus of the Tenth Circuit and other circuits is the *degree* of the defendant's market power.[40] A defendant's market power threatens

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34. *See, e.g.*, Northwest Wholesale Stationers Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 294-95 (1985)(group boycott); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12-18 (1984)(tying arrangements); Smith Mach. Co. v. Hesston Corp., 878 F.2d 1290, 1295-98 (10th Cir. 1989)(line forcing), *cert. denied*, 493 U.S. 1073 (1990). *But cf.* Reazin v. Blue Cross & Blue Shield, 899 F.2d 951, 968 n.24 (10th Cir.)(absence of market power will not justify a naked restriction on price or output absent some competitive justification), *cert. denied*, 110 S. Ct. 3241 (1990).

35. *See, e.g.*, Bright v. Moss Ambulance Serv., Inc., 824 F.2d 819, 823 (10th Cir. 1987)(monopolization); Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1229 (10th Cir. 1986)(vertical refusal to deal), *cert. denied*, 486 U.S. 1005 (1988); Shoppin' Bag of Pueblo, Inc. v. Dillon Cos., Inc., 783 F.2d 159, 161-63 (10th Cir. 1986)(attempt to monopolize).

It is unclear to what extent Robinson-Patman claims have been affected by this development. *Compare* Alan's, Inc. v. Minolta Corp., 903 F.2d 1414, 1418 n.6 (11th Cir. 1990)(ability to injure a single competitor is all that law requires in Robinson-Patman case) *with* Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1143-44 (Starr, J.) *and* 1149-1152 (Williams, J., concurring)(D.C. Cir. 1988)(Robinson-Patman Act requires showing of injury to competition and market power).

36. *Westman Comm'n*, 796 F.2d at 1225 (quoting NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 109 n.38 (1984)); *see also Reazin*, 899 F.2d at 966-67.

37. *Reazin*, 899 F.2d at 967; Key Fin. Planning Corp. v. ITT Life Ins. Corp., 828 F.2d 635, 643 (10th Cir. 1987); *Bright*, 824 F.2d at 824; *Westman Comm'n*, 796 F.2d at 1225; *Shoppin' Bag*, 783 F.2d at 163-64.

38. Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 894 (10th Cir. 1991); *Reazin*, 899 F.2d at 967.

39. All of the circuits' tests for market and monopoly power emanate from the Court's holding in United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 391 (1956), that "[m]onopoly power is the power to control prices or exclude competition."

40. *See, e.g.*, *Reazin*, 899 F.2d at 966-72; PHILLIP AREEDA & DONALD F. TURNER, ANTI-

to injure competition only when it is substantial. Unfortunately, Tenth Circuit law currently provides little guidance as to when a firm's power is substantial enough to be troubling. The point at which "market power" graduates to "monopoly power" is even less clear. Hopefully, the Tenth Circuit will act during the 1990's to provide more guidance in this area. One possibility would be to adopt the test for market power contained in the Department of Justice's merger guidelines: Does the firm in question have sufficient power that it can profitably raise its prices by 5% for more than a transitory period of time?[41]

B. *The Relevant Market*

The first step in evaluating a firm's market power is to define the relevant market.[42] This is a question of fact.[43] The relevant market has two elements—the relevant product market and the relevant geographic market.[44] Each is defined by analyzing the market from the perspective of the buyer and not the seller.[45] The relevant product market includes all products that are " 'reasonably interchangeable by consumers for the same purposes.' "[46] Exactly where to draw the line between including or excluding a product is unclear, since rarely are different products perfect substitutes for one another. The Tenth Circuit, quite properly, directs its focus to the cross-elasticities of demand for the various products[47] but has not stated what degree of elasticity is required to justify including a product in the market. The court may well be persuaded by the elasticity standard set out in the Department of Justice Merger Guidelines: The product market includes all products that consumers would turn to when faced with a non-transitory five percent increase in the price of the defendant's product.[48]

TRUST LAW, ¶ 505 (1978)("The significance of market power depends not only on its degree but also on its durability.")

41. Department of Justice Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,103, § 2.11 (June 14, 1984) [hereinafter DOJ Guidelines]. Because the Tenth Circuit's current test for market power follows that mandated by the Supreme Court in *duPont*, it probably would have to treat the merger guidelines as a mere method for applying the current test in order to preserve the fiction that *duPont* still controls.

42. *E.g.*, *Bacchus*, 939 F.2d at 893 ("Without a definition of the relevant market for the product involved, there is no way to measure the defendant's ability to lessen or destroy competition.") (citing Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965)).

43. Westman Comm'n Co. v. Hobart Int'l Inc., 796 F.2d 1216, 1220 (10th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988); Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1514 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985); Telex Corp. v. International Bus. Machs. Corp., 510 F.2d 894, 915 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975).

44. *Bacchus*, 939 F.2d at 893; *see also Westman Comm'n*, 796 F.2d at 1221-22.

45. *See Westman Comm'n*, 796 F.2d at 1221; Key Fin. Planning Corp. v. ITT Life Ins. Corp., 828 F.2d 635, 643 (10th Cir. 1987).

46. *Westman Comm'n*, 796 F.2d at 1221 (quoting United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 395 (1956)); *accord Bacchus*, 939 F.2d at 893; *Telex Corp.*, 510 F.2d at 917; *see Key Fin.*, 828 F.2d at 643.

47. *Westman Comm'n*, 796 F.2d at 1220-21.

48. DOJ Guidelines, *supra* note 41. *See also* National Association of Attorneys General Horizontal Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,405, § 3.1 (Mar. 10, 1987) [hereinafter NAAG Guidelines] ("A comparably priced substitute will be deemed suitable

As a second element, the relevant "geographic market is the narrowest market which is wide enough so that products from adjacent areas . . . cannot compete on substantial parity with those included in the market."[49] Evidence of how far consumers are willing to travel to obtain the product at a lower price will be significant.[50] This approach, similar to that employed by all other circuits,[51] is fact-intensive.

C. *Proving Market Power and Monopoly Power*

Once the market is properly defined, the parties then attempt to prove or disprove the existence of market power. Market power is typically determined by estimating the defendant's market share. Next, the structural characteristics of the market establish whether that market share allows a rise in price for a nontransitory period of time without loss of so many customers that the price increase becomes unprofitable. In *Reazin*, however, the Tenth Circuit suggested a deviation from the typical analysis in two potentially significant ways.

First, the Tenth Circuit indicated that the strength of the showing of market power may vary with the nature of the challenged restraint.[52] The more naked the restraint, the less elaborate need be the analysis of market power. Second, the court stated that detailed proof that the defendant *possessed* market power may not be necessary if substantial evidence indicates the defendant in fact *exercised* market power.[53] In other words, if it is clear that output has been reduced and prices raised, there is no need to debate whether the defendant has the power to accomplish such results.

The significance of these statements is difficult to assess, however, because the *Reazin* court ultimately applied a traditional market power analysis. These statements also apparently conflict with the Tenth Circuit's subsequent proclamation that " '[a]t the very least it must be shown how much of the relevant market a defendant controls if market power is to be evaluated.' "[54] This latter statement appears to apply only to cases of monopolization or attempt to monopolize where the plaintiff must demonstrate monopoly power or a likelihood that the defendant will obtain monopoly power. Such cases face higher standards

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and thereby expand the product market definition if, and only if, considered suitable by at least 75% of [the customers who purchase the particular product in question.]")

49. *Westman Comm'n*, 796 F.2d at 1222 (internal quotations omitted); *see also Bacchus*, 939 F.2d at 893 ("geographic market consists of the area of effective competition").

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

51. *See, e.g.*, Satellite Television & Associated Resources, Inc. v. Continental Cablevision, Inc., 714 F.2d 351, 356 (4th Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984); LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 12 (1977).

52. Reazin v. Blue Cross & Blue Shield, 899 F.2d 951, 966, 968 n.24 (10th Cir.), *cert. denied*, 110 S. Ct. 3241 (1990).

53. *Id.* at 968 n.24 (quoting FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61 (1986)).

54. Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 894 (10th Cir. 1991)(quoting Shoppin' Bag of Pueblo, Inc. v. Dillon Cos., Inc., 783 F.2d 159, 161-62 (10th Cir. 1986)).

than the mere existence of market power required in a Sherman Act section 1 case.

In the Tenth Circuit, like all others, the traditional market power inquiry begins with an analysis of the defendant's market share. Market share provides important, but not conclusive, evidence of market power.[55] A low market share gives rise to a presumption that market (or monopoly) power does not exist and a high market share creates the opposite presumption.[56] In addition to market share, the Tenth Circuit considers how the structural characteristics of the relevant market may impact upon a firm's ability to exercise power. These factors include: trends in the market; barriers to entry; the substitutability of other available products; the number and strength of existing and potential competitors;[57] the cross elasticity of demand for the relevant product; and regulatory or contractual limits on the amount or duration of the defendant's power.[58]

Under current economic thinking, barriers to entry are by far the most important of these factors, because, in their absence, one can expect potential entrants to flood the market if the defendant restricts output or raises prices. Barriers to entry can take many forms, including: high capital costs;[59] regulatory or legal requirements such as patents or licenses; control over an essential or superior resource; entrenched buyer preferences; and capital market evaluations imposing higher capital costs on new entrants.[60] These various structural characteristics can enhance or diminish a firm's market power.[61] Which effect they have, if any, is determined by a fact-specific examination.

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55. *Bacchus*, 939 F.2d at 894; *Reazin*, 899 F.2d at 967; *Shoppin' Bag*, 783 F.2d at 162; *see* Colorado Interstate Gas Co. v. Natural Gas Pipeline Co., 885 F.2d 683, 695 n.20 (10th Cir. 1989), *cert. denied*, 111 S. Ct. 441 (1990).

56. *Reazin*, 899 F.2d at 968 ("market share percentages may give rise to presumptions, but will rarely conclusively establish or eliminate market or monopoly power"); *Colorado Interstate Gas*, 885 F.2d at 694 n.18 (monopoly power generally will not exist absent a market share of at least 70% to 80%).

57. One factor that the Tenth Circuit has yet to consider is the impact of actual or potential competition from abroad. The practical approach taken by the court in *Reazin* indicates that the Tenth Circuit will evaluate such claims (which often carry a tinge of xenophobia) closely and not overlook the very real difficulties that foreign competitors may have in entering the domestic market, such as transportation costs, tariffs and other regulatory barriers, exchange rate fluctuations, etc.

58. *See, e.g.*, *Bacchus*, 939 F.2d at 894; *Reazin*, 899 F.2d at 968-72; *Colorado Interstate Gas*, 885 F.2d at 694-96 & n.21; Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1226 (10th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988).

59. High capital costs should be considered a barrier to entry only to the extent that they cannot be recouped if the firm decides to exit the market. For example, the need to invest in a fleet of trucks is not likely to create a serious barrier to entry into the widget market because trucks are readily available and can be sold or rented to persons other than the competing widget manufacturers in the event that the new entrant does not succeed. An investment in a custom piece of tooling machinery, by contrast, probably cannot be put to any other use outside of the widget industry and would be a barrier to entry.

60. *Reazin*, 899 F.2d at 968 (quoting *Colorado Interstate Gas*, 885 F.2d at 695-96 n.21); *Westman Comm'n*, 796 F.2d at 1225-26 n.3; SULLIVAN, *supra* note 51, ¶ 23; AREEDA & TURNER, *supra* note 40, ¶ 409.

61. *Compare Reazin*, 899 F.2d at 966-68 (factors enhanced market power) *with Colorado Interstate Gas*, 885 F.2d at 695-97 (duration of contracts prevented defendant from acquiring monopoly power).

The rigor of this examination in the Tenth Circuit has varied from case to case. In *Reazin*, the court critically examined each of the factors raised by the parties as potentially impacting the defendant's market power. The court only gave weight to those factors proven to exist and proven to have a significant effect on the defendant's ability to exercise control over prices or to exclude competitors.[62] By contrast, the court's examination in *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*,[63] was cursory and purely theoretical. There, the court simply noted that contractual terms limited the defendant's ability to exercise market power to six years and held that this fact precluded any likelihood of the defendant achieving monopoly power.[64] The court's failure to consider the defendant's power during that six-year period, which most authorities consider to be more than transitory,[65] is highly surprising and unlikely to be followed in other cases.[66]

Reazin and *Colorado Interstate Gas* demonstrate that the Tenth Circuit looks beyond market share to consider structural attributes of the market impacting a defendant's ability to control prices or exclude competition. The degree of scrutiny placed on these purported power-enhancing or power-reducing factors, however, is likely to vary from case to case.

IV. CONSPIRACY—PROOF

The Supreme Court has long recognized that purely unilateral conduct does not violate section 1 of the Sherman Act.[67] The requirement of concerted action under sections 1 and 2, however, received unprecedented emphasis during the 1980's.[68] As a result, plaintiffs find it much more difficult to prove concerted action, an essential element of every case brought under section 1 of the Sherman Act and of claims for conspiracy to monopolize under section 2. The Tenth Circuit has followed the Supreme Court's lead in this area, and recent precedent indicates that it will continue to do so—at least until Congress legislates otherwise.[69]

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62. *See Reazin*, 899 F.2d at 968-72.

63. 885 F.2d 683 (10th Cir. 1986).

64. *Id.* at 695-97.

65. *See, e.g.*, DOJ Guidelines, *supra* note 41, § 3.3 (potential entry won't be considered unless it is likely to happen within two years); NAAG Guidelines, *supra* note 48, § 5.1 (potential entry must occur within one year to be relevant).

66. The Department of Justice has strongly criticized this aspect of the *Colorado Interstate Gas* opinion. *See* Amicus Curiae Brief of Department of Justice at 18-19, Colorado Interstate Gas v. Natural Gas Pipeline Co., 885 F.2d 683 (10th Cir. 1989)(No. 89-1508), *cert. denied*, 111 S. Ct. 441 (1990).

67. *See, e.g.*, United States v. Colgate & Co., 250 U.S. 300 (1919).

68. *See* Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

69. *See, e.g.*, Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 895 (10th Cir. 1991)(rejecting conspiracy to monopolize claim for failure to establish combination or conspiracy); McKenzie v. Mercy Hosp., 854 F.2d 365, 367 (10th Cir. 1988)("Solely unilateral conduct, regardless of its anticompetitive effects, is not prohibited by Section 1.");

A. *Capacity to Conspire*

In 1984, the Supreme Court held a parent corporation legally incapable of conspiring with its wholly-owned subsidiary because they were under common control and, hence, merely a single actor for purposes of antitrust analysis.[70] Its decision upheld a long line of Tenth Circuit precedent requiring a threshold demonstration that alleged conspirators have the legal capacity to conspire for antitrust purposes.[71] The legal capacity of particular parties to conspire with one another is a question of fact hinging largely on the degree to which the parties are subject to a common source of control.[72] Applying this analysis, the Tenth Circuit has found the following parties legally incapable of conspiring with one another: a company and its owner/president;[73] a real estate broker and its sales agents where state law made their relationship one of superior and subordinates;[74] economically integrated affiliated business entities;[75] and an insurance company and insurance agents who were part of the company structure.[76] Recent Tenth Circuit precedent indicates this line of decisions will continue to expand.[77]

B. *Proof Required*

Recent Supreme Court decisions have also raised the showing a plaintiff must make to establish the existence of concerted action.[78] The Tenth Circuit, in keeping with these developments, now employs a two-pronged test to evaluate the plaintiff's evidence of concerted action:

> (1) [I]s the plaintiff's evidence of conspiracy ambiguous, *i.e.*, is it as consistent with the defendants' permissible independent interests as with an illegal conspiracy; and, if so, (2) is there any evidence that tends to exclude the possibility that the defendants were pursuing these independent interests.[79]

Although this test was developed in the context of a motion for sum-

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Blankenship v. Herzfeld, 661 F.2d 840, 845 (10th Cir. 1981)(rejecting claims under both section 1 and section 2 for want of proof of concerted action).

Congress has considered legislation which would overturn much of the Court's recent conspiracy decisions. *See infra* text accompanying notes 88-95.

70. *Copperweld*, 467 U.S. at 752.

71. *See, e.g.*, Card v. National Life Ins. Co., 603 F.2d 828, 834 (10th Cir. 1979).

72. *See, e.g.*, Blankenship v. Herzfeld, 721 F.2d 306, 309 (10th Cir. 1983)(*Blankenship II*)(capacity of related parties to conspire is a question of fact).

73. United States v. Suntar Roofing, Inc., 897 F.2d 469, 474 (10th Cir. 1990)("the law will not recognize a conspiracy when the only possible 'conspirators' are a company and its employee, officer or owner")(citing *Copperweld*, 467 U.S. at 769).

74. Holter v. Moore & Co., 702 F.2d 854, 856 (10th Cir.) (recognizing that officers and employees of corporation are generally incapable of conspiring with the corporation or each other), *cert. denied*, 464 U.S. 937 (1983).

75. *Blankenship II*, 721 F.2d at 309-10.

76. *Card*, 603 F.2d at 834.

77. *See Suntar Roofing*, 897 F.2d at 474 (10th Cir. 1990)(following *Copperweld*, 467 U.S. at 752).

78. *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

79. Key Fin. Planning Corp. v. ITT Life Ins. Corp., 828 F.2d 635, 639 (10th Cir. 1987)(quoting Gibson v. Greater Park City Co., 818 F.2d 722, 724 (10th Cir. 1987)).

mary judgment,[80] it comes into play at the motion to dismiss stage and at trial as well.[81] This test makes it more difficult for plaintiffs to prove concerted action by way of circumstantial evidence due to its susceptibility of ambiguious or differing inferences.[82] This does not mean, however, that circumstantial evidence never can suffice to establish the requisite concerted action.[83] The plaintiff should expect to come forward with at least some direct evidence, which can be supplemented by logical inferences, in order to establish concerted action.[84]

C. *Types of Concerted Action Required*

In addition to tightening the quantum of proof required to establish conspiracies, recent Supreme Court precedent further narrows the types of conspiracy that will satisfy the concerted action requirement.[85] The Tenth Circuit has carried this trend even further. For example, in *McKenzie v. Mercy Hospital*,[86] a tying claim brought under section 1 was dismissed for lack of concerted action even though the alleged tying arrangement constituted a contract that many circuits consider within the ambit of section 1's requirement of a "contract, combination or conspiracy" in restraint of trade.[87] The extent to which this trend continues

80. *Id.*

81. *See* Reazin v. Blue Cross & Blue Shield, 899 F.2d 951, 963-64 (10th Cir.)(trial), *cert. denied*, 110 S. Ct. 3241 (1990); Monument Builders v. American Cemetery Ass'n, 891 F.2d 1473, 1481 n.8 (10th Cir. 1989)(motion to dismiss), *cert. denied*, 110 S. Ct. 2168 (1990).

82. *See* Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1361 (10th Cir. 1989)(conspiracy can be established by circumstantial evidence, but parallel business behavior alone is not enough and claim of conspiracy "will fail if there is an independent business justification which explains the alleged conspirators' conduct"); Dreiling v. Peugeot Motors of Am., Inc., 850 F.2d 1373, 1380 (10th Cir. 1988)(evidence at best ambiguous and consistent with defendants' permissible interests); *Key Fin.*, 828 F.2d at 639-40 (evidence ambiguous and equally indicative of legitimate conduct); *Gibson*, 818 F.2d at 724-25 (each action cited subject to plausible nonconspiratorial explanation). Compare with the earlier cases of King & King Enters. v. Champlin Petroleum Co., 657 F.2d 1147, 1153 (10th Cir. 1981)(conspiracy may be inferred from course of conduct and other circumstantial evidence), *cert. denied*, 454 U.S. 1164 (1982); Cackling Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242, 244-45 (10th Cir. 1976)(same), *cert. denied*, 429 U.S. 1122 (1977).

83. *See Reazin*, 899 F.2d at 963-64 (circumstantial evidence of conspiracy sufficient to support jury's finding of conspiracy); *Monument Builders*, 891 F.2d at 1481 n.8 ("The Court did not intend to end reliance on circumstantial proof of conspiracy, but rather to avoid reliance exclusively on evidence which is as consistent with permissible competition as with illegal conspiracy.") (internal quotation omitted).

84. *See* United States v. Suntar Roofing, Inc., 897 F.2d 469, 474-77 (10th Cir. 1990)(upholding finding of conspiracy at trial based on mixture of direct and circumstantial evidence); Instructional Sys. Dev. Corp. v. Aetna Casualty & Sur. Co., 817 F.2d 639, 644-46 (10th Cir. 1987)(direct evidence supported by logical inference sufficient to establish conspiracy).

85. *See, e.g.*, Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988)(plaintiff must show that defendants agreed not only that plaintiff should be terminated for discounting, but also that they acted jointly to set the prices or price levels that were being enforced).

86. 854 F.2d 365 (10th Cir. 1988).

87. *Id.* at 367-68; *see also* Smith Mach. Co. v. Hesston Corp., 878 F.2d 1290, 1294-95, 1298-99 (10th Cir. 1989)(indicating that court may have been willing to dismiss tying claim on this basis had it been raised by the defendant and later finding general dealership agreement containing line forcing requirement to be insufficient to establish a "contract

is likely to be determined by the Supreme Court or Congress.

V. FUTURE TRENDS

Virtually all of the recent developments in antitrust jurisprudence stem from actions taken by the Supreme Court. In its handful of annual antitrust opinions, the Court has steered antitrust jurisprudence down a fairly predictable path that emphasizes economic efficiency over just about all else. Recent appointments to the Court indicate that it will not deviate from this course.[88]

But antitrust jurisprudence can move in directions other than those mandated by the Supreme Court. Congress, in theory at least, retains the power to reset the course of the law. Since the 1970's, certain members of Congress have attempted to derail the antitrust revolution, albeit unsuccessfully. In 1991, the Senate passed just such a bill, S. 429,[89] which would reverse cases like *Business Electronics Corp. v. Sharp Electronics Corp.*[90] and *Monsanto Co. v. Spray-Rite Service Corp.*[91] and make it easier for plaintiffs in vertical restraint cases to establish the concerted action element of section 1 of the Sherman Act, and reaffirm the per se invalidity of resale price maintenance arrangements.

While S. 429 mirrors many of the earlier "turn back the clock" bills, its counterpart in the House, H.R. 1470,[92] indicates that Congress' approach to antitrust law may be turning in the same direction as the Court's. Like S. 429, H.R. 1470 contains provisions directed at making it easier to establish section 1's concerted action requirement. H.R. 1470, however, limits per se condemnation of resale price maintenance to cases where defendants possess market power. These changes, if enacted into law, would keep the Supreme Court's antitrust jurisprudence headed in the same direction, but with a much firmer underpinning.

For years, leading antitrust jurists have felt that per se condemnation of resale price maintenance was inconsistent with the policies underlying the antitrust laws.[93] Long-standing precedent[94] and fear of a congressional backlash operated to keep the courts from overtly abandoning per se condemnation in favor of the rule of reason. Instead, courts covertly achieved this result by pushing section 1's concerted action requirement to contorted extremes.[95] H.R. 1470, in its current

for sale" as required by section 3 of the Clayton Act), *cert. denied*, 493 U.S. 1073 (1990); *cf.* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984)(indicating that contract imposing tie on the purchaser is also sufficient to satisfy Section 1).

88. See, for example, Justice Thomas's opinion in United States v. Baker Hughes, Inc., 908 F.2d 981 (D.C. Cir. 1990).

89. 102d Cong., 1st Sess. (1991).

90. 485 U.S. 717 (1988).

91. 465 U.S. 752 (1984).

92. 102d Cong., 1st Sess. (1991).

93. *See, e.g.*, Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981).

94. *See, e.g.*, Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

95. *See, e.g.*, Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 721-25 (1988); McKenzie v. Mercy Hosp., 854 F.2d 365, 367-68 (10th Cir. 1988).

form, would allow the courts to reach an economically correct result via a superior path.

Conference between the Senate and the House has not yet begun. Which of the two competing bills, if either, actually gets passed and signed into law remains to be seen. If H.R. 1470 ultimately prevails, one can expect the antitrust revolution to continue unabated. If S.B. 429 becomes law, tension will continue to exist between the Court and Congress creating additional uncertainties in antitrust law.

VI. CONCLUSION

The antitrust law of the Tenth Circuit, like that of the Supreme Court, has changed dramatically over the past few decades. One can expect the Court to continue its emphasis on economic efficiency and consumer welfare for the foreseeable future. The Supreme Court shows no inclination of diverting the Tenth Circuit from this course, and, while somewhat less clear, neither does Congress.