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ANTITRUST

Behagen v. Amateur Basketball Association, 884 F.2d 524
Author: Judge Tacha

Defendant, Amateur Basketball Association ("ABA"), denied plaintiff, Behagen, a travel permit to play amateur basketball outside the United States because he had previously been reinstated to amateur status and the ABA followed a "no-second-reinstatement" rule. A jury awarded Behagen treble damages under federal antitrust laws, as well as damages for violation of due process. The ABA appealed.

The Tenth Circuit reversed, holding that the antitrust issue should not have been heard by the jury because the Amateur Sports Act makes clear that Congress intended the ABA, as the national governing body of amateur basketball, to exercise monolithic control. This includes controlling amateur eligibility for Americans participating in basketball. Therefore, the defendant's actions were exempt from coverage by federal antitrust law. The court further held that the actions by the ABA did not constitute state action; thus, Behagen's fifth amendment due process claim should not have gone to the jury.

Cayman Exploration Corp. v. United Gas Pipeline Corp., 873 F.2d 1357
Author: Judge McKay

Plaintiff, Cayman Exploration ("Cayman"), appealed the district court's dismissal of its claim under FED. R. CIV. P. 12(B)(6), against United Gas Pipeline Corporation ("United"), for violation of the Sherman Antitrust Act and Racketeer Influenced and Corrupt Organizations Act ("RICO"). The district court held that Cayman failed to allege facts sufficient that, if proved, would entitle Cayman to relief.

The Tenth Circuit upheld the district court's ruling. The court held that Cayman failed to establish that United practiced unreasonable restraint on trade. Cayman also did not establish that United was guilty of vertical or horizontal price-fixing. The court reasoned that Cayman failed to allege facts showing that the parties agreed to set a price at which the other would resell to third parties. The court also held that there were insufficient facts to show a conspiracy to establish horizontal price-fixing. Cayman did not identify the alleged conspirators. Cayman also did not establish that any companies had acted in a way contrary to the best interests of their business. In addition, the court found that Cayman's RICO claim failed. The court stated that a RICO claim must allege conduct of an enterprise through a pattern of racketeering activity. Cayman failed to allege racketeering activity with sufficient particularity.

Colorado Interstate Gas Co. v. Natural Gas Pipeline Co., 885 F.2d 683
Author: Judge Moore

Plaintiff, Colorado Interstate Gas Company ("CIG"), was awarded damages against defendant, Natural Gas Pipeline Company ("Natural"), for breach of contract, attempt to monopolize in violation of the Sherman Act, and tortious interference with CIG's contractual relations. Natural appealed the district court's refusal to grant judgment notwithstanding the verdict or a new trial.

The Federal Energy Regulatory Commission ("FERC") had modified the contract terms between CIG and Natural, and these modified terms were in fact honored by Natural. The Tenth Circuit reversed the breach of contract verdict, reasoning that FERC's modification of the contract preempted any breach of contract claim. The court affirmed the tortious interference with contract verdict, finding that the FERC modification of the contract did not preclude CIG's right to bring a tort action. The evidence showed that provisions in the modified contract rendered CIG vulnerable to manipulations by Natural which drew away business from CIG to a competitor business owned by Natural, and while Natural's conduct itself was technically lawful, motive is a determinative factor in converting otherwise lawful behavior into conduct for which defendant will be liable. The court reversed the antitrust verdict because CIG failed to prove all elements necessary for a successful claim under the statute—specifically, that Natural's predatory scheme had the capacity to result in a high enough market share for CIG's competitor to be classified as a monopoly.

Fox v. Mazda Corp. of America, 868 F.2d 1190
Author: Judge Barrett

In *Fox I*, plaintiffs, automobile dealers, were awarded damages for violation of federal antitrust laws and the Automobile Dealer's Day in Court Act ("Dealer's Act"). On appeal, the Tenth Circuit reversed the judgment against the defendants, automobile distributors, under antitrust laws, but affirmed the liability of defendant Gulf under the Dealer's Act. Accordingly, the court remanded for a new trial on the issue of damages. On remand, the district court, in accordance with the Tenth Circuit's directive, limited the plaintiffs' proof of damages to those losses attributable to Gulf's discriminatory allocation of vehicles. In *Fox II*, plaintiffs appealed the decision to limit damages.

The Tenth Circuit held that the district court properly excluded the expert witness' testimony and damage model, which attempted to quantify the plaintiffs' lost profits and loss of dealership market value from the date of discriminatory allocation, rather than to include only those losses attributable to Gulf's discriminatory allocation of vehicles. The court concluded that the district court properly followed the law of the case doctrine in deciding that the expert's testimony and damage model did not comply with the Tenth Circuit's holding and remand in *Fox I*.

In re Wyoming Tight Sands Antitrust Cases, 866 F.2d 1286
Author: Judge Brorby

The states of Kansas and Missouri ("States"), asserted *parens patriae* claims on behalf of their residents who purchased gas from public utilities at inflated prices. The district court dimissed the claims based on the rule that only public utilities or direct purchasers may sue for an illegal cover charge. Consequently, residential consumers, the indirect purchasers of natural gas, could not maintain an antitrust suit. The States appealed, alleging that both the cost-plus and control exceptions to this rule would allow them to bring suit on behalf of residential consumers.

The Tenth Circuit ruled that neither exception to the general rule governing antitrust suits would allow the States to sue on behalf of their residents. Under the cost-plus exception, the court held that the direct purchasers of natural gas, the public utilities, did not have fixed fee contracts with consumers for fixed quantities of natural gas, as required under the exception. Furthermore, the control exception only applies where the direct purchaser is owned or controlled by its customers. The court held that the States' regulation of utility rates does not give the States or its citizens ownership or control of the utilities. Consequently, the requirements of this exception were not met. The judgment of the district court was, therefore, affirmed.

Kaw Valley Electric Cooperative Co. v. Kansas Electric Power Cooperative, Inc., 872 F.2d 931
Author: Judge Seymour

Plaintiff, Kaw Valley, alleged that defendants, Kansas Electric Power Cooperative ("KEPCO") and Kansas Electric Cooperatives ("KEC"), had conspired to violate federal and Kansas antitrust laws. Because the four-year statute of limitations for federal antitrust actions had run, the district court granted summary judgment for KEPCO and KEC.

Affirming the district court's decision, the Tenth Circuit ruled that an antitrust cause of action accrues and the statute of limitations begins to run when a defendant commits an act that injures a plaintiff's business. Kaw Valley's first injury occurred when KEPCO adopted a policy against providing power to nonmembers. Kaw Valley alleged subsequent injury because of a continuing conspiracy by KEPCO and KEC to violate antitrust laws. If a continuing conspiracy exists, the statute of limitations is restarted with each new independent and injurious act. Whether a continuing refusal to deal is one cause of action, accruing with the initial refusal, or separate causes of action, accruing with each instance of refusal, depends on whether the initial refusal is final. If the initial refusal is final, subsequent refusals do not restart the statute of limitations. The court found that KEPCO's initial decision was final because its form and language clearly indicated its finality, even though KEPCO subsequently offered service to Kaw Valley. Offers to compro-

mise, within the context of litigation, do not destroy the initial finality sufficiently to restart the statute of limitations.

Monument Builders, Inc. v. American Cemetery Association, 891 F.2d 1473
Author: Judge Seymour

Plaintiffs, a trade association of independent grave marker builders and dealers ("Monument Builders"), brought an antitrust action against numerous cemeteries, cemetery associations, and a bronze monument manufacturer. Monument Builders contended that defendants conducted anti-competitive practices in violation of the Sherman Act, 15 U.S.C. §§ 1-2. The district court dismissed Monument Builders' claims for lack of venue and failure to state a claim under Fed. R. Civ. P. 12(b)(6). Monument Builders subsequently appealed.

First, the Tenth Circuit held that venue was proper in Kansas, finding that the claim could rationally be said to have arisen in Kansas as well as Missouri. The court noted that special venue statutes, such as section 12 of the Clayton Act, are supplemented by the general venue provisions applicable to all civil cases. Second, the court reversed the district court's dismissal for failure to state a claim. The court could not say beyond doubt that Monument Builders could prove no set of facts supporting a claim that defendants engaged in a per se illegal tying arrangement. The court stated further that the complaint did state a claim for conspiracy to monopolize.

Smith Machinery Co. v. Hesston Corp., 878 F.2d 1290
Author: Judge Logan

Plaintiff, Smith Machinery ("Smith"), brought this antitrust action against defendant, Hesston Corporation ("Hesston"). Smith, a farm equipment dealer, claimed that Hesston's requirement that Smith carry Hesston's tractors if it wanted to carry Hesston's other products was an illegal tying arrangement under the Sherman Act and the Clayton Act. The district court granted summary judgment in Hesston's favor, and Smith appealed.

The Tenth Circuit, affirming the dismissal, held that Hesston's line requirement was not a per se violation of the Sherman Act because it did not foreclose choice to the consumer. Moreover, the court held that what existed between Smith and Hesston was not a contract for sale of the "tied" goods, but rather a general distributorship. A franchise agreement, defining general terms and obligations of the relationship, is not an executed contract for sale as required by section 3 of the Clayton Act.