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ANTITRUST LAW

OVERVIEW

In two decisions rendered during the past survey period,[1] the Tenth Circuit Court of Appeals addressed several issues of antitrust law. In *Instructional Systems Development Corp. v. Aetna Casualty & Surety Co.*,[2] the court examined claims of conspiracy and predatory practices in violation of the Sherman Act, and applied the per se rule and the rule of reason in its examination of alleged market division and anticompetitive marketing arrangements. In *Motive Parts Warehouse v. Facet Enterprises*,[3] the court reviewed employer-employee conspiracy under the Sherman Act, and competitive injury and the concept of a relevant market in the context of the Robinson-Patman Act.

I. *INSTRUCTIONAL SYSTEMS DEVELOPMENT CORP. V. AETNA CASUALTY & SURETY CO.*

A. *Facts*

Beginning in 1956, Aetna Casualty & Surety Company (Aetna) licensed a series of manufacturers to produce a driving simulation system under its trademark, "Aetna Drivotrainer." In 1974 Aetna discussed the possibility of a manufacturing arrangement with both Instructional Systems Development Corporation (ISDC) and Doron Precision Systems, Incorporated (Doron) when its current manufacturer decided to leave the business. ISDC was founded in 1974. Doron had manufactured driving simulation equipment for Allstate from 1973 (when it acquired production capabilities and an Allstate film library) until 1974, when Allstate discontinued its driving simulation program and stopped making films.

In 1975, Aetna and Doron signed a joint venture agreement. According to the terms of this agreement,[4] Doron was exclusively licensed to manufacture driving simulator hardware under Aetna's trademark. Doron was required to provide service and parts, continue development, take primary responsibility for marketing, replace Allstate films it then owned and marketed with Aetna films, and purchase all future films from Aetna except when Aetna declined to produce a particular film.

1. A third antitrust case heard by the circuit court in this review period, Cinelli v. American Home Prod., 785 F.2d 264 (10th Cir. 1986) will not be discussed in this article. In *Cinelli*, the court reviewed a forfeiture clause in an employment contract which became operative on plaintiff's subsequent employment by defendant's competitor. In determining that the clause did not constitute an unreasonable restraint of trade under the Sherman Act, the court upheld the distinction between "restrictions which actually seek to interdict post-termination employment and those which merely make such employment unpalatable." *Id.* at 266.

2. No. 82-2105, (10th Cir. Mar. 31, 1986) (petition for rehearing pending).

3. 774 F.2d 380 (10th Cir. 1985).

4. *Instructional Sys. Dev. Corp.*, slip op. at 5-6.

Aetna agreed to provide promotional services such as advertising, domestic customer referrals, participation in educational programs, teacher training, and systems software expertise. The agreement permitted Aetna to sell films and provide promotional assistance to companies other than Doron. At the time of the agreement, Doron was the only active manufacturer and Aetna the only active film producer in the simulator field.

In late 1975, Aetna sold films to ISDC to be used in the production and development of a driving simulator system. ISDC began marketing such a system in the spring of 1976 and at the same time entered into an agreement with Aetna to acquire and sell Aetna films. Assistance with promotions and sales, such as that provided by Aetna to Doron, was not offered to ISDC although it was requested by them repeatedly.[5]

In 1978, ISDC ceased operations and filed suit against Aetna and Doron. ISDC alleged that Aetna and Doron had conspired in violation of sections one[6] and two[7] of the Sherman Act, and that Doron had individually violated section 2 by certain pricing activities and other acts.[8] The district court awarded the defendants summary judgment on all claims.

B. *The Tenth Circuit Decision*

The Tenth Circuit noted that "summary judgment should be used sparingly in antitrust litigation."[9] In reversing and remanding all issues, the court discussed the conspiracy claims under sections one and two and monopolization under section two.

1. Section One Conspiracy Claim

In regard to ISDC's section one conspiracy claim, the Tenth Circuit found that violations could reasonably be inferred from the facts on the basis of either the per se rule or the rule of reason.[10] The court determined that the 1975 joint venture agreement, although not violative of

5. *Id.* at 6.

6. 15 U.S.C. § 1 (1982) states in 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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared illegal shall be deemed guilty of a felony. . . .

7. 15 U.S.C. § 2 (1982) states in part:
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. . . .

8. *Instructional Sys. Dev. Corp.*, slip op. at 6-7.

9. *Id.* at 7.

10. *Id.* at 10. Per se antitrust violations are those business agreements, such as price-fixing, which are considered inherently anticompetitive and injurious to the public regardless of any inquiry by the court into the reasonableness of the agreement or any determination that the agreement has actually injured market competition. Under the rule of reason, the legality of restraints on trade is determined by the factfinder after weighing all the facts and circumstances of a case, including, for example, the economic condition of

section one in its grant of an exclusive license, "on its face appears to contain" an agreement to divide a product market, a per se violation.[11] Evidence of this market division could be inferred from the provision that Doron would cease film production and Aetna would thereafter be the sole producer of simulator films. Other evidence of an intent to divide the market was found in a letter from Aetna to Doron acknowledging Doron's surrender of its production rights in exchange for Aetna's promotion of Doron hardware.[12] Further evidence was contained in an interoffice memo written by an Aetna administrator discussing the negative implications for Aetna of a possible decision by Doron to "go into film production."[13]

The court held that even if the factfinder rejected a per se violation, the defendants might be found to be in violation from a rule of reason perspective. According to the court, the existence of marketing arrangements in the joint venture agreement beyond those necessary to effectuate the license constituted a violation under the rule of reason,[14] as did the existence of concerted activity beyond the scope of the agreement which would have an anticompetitive impact.[15] The court found that both could be inferred from the activity of the defendants. The division of the product market could be found to be an agreement beyond that necessary to effect the license, and Aetna's referral to Doron of all foreign accounts could constitute concerted activity outside the scope of the agreement. Whether the impact of these acts was anticompetitive, and whether the acts in regard to overseas accounts were pursuant to an agreement between the defendants, were questions of fact.[16]

2. Section Two Conspiracy Claims

In assessing ISDC's section two conspiracy claim, the court again found sufficient evidence to support the inference of a violation. While recognizing that the plaintiff must prove the existence of an agreement to monopolize and overt activity in furtherance of that agreement as well as specific intent, the court reaffirmed its attitude expressed in *Perington Wholesale, Inc. v. Burger King Corp.*[17] that the gravamen of an offense is the intent to achieve the unlawful result. Requisite intent was found by the court in the deposition testimony of Doron's national sales manager who stated that his goal was to put ISDC out of business.[18]

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the industry and the effect on competition. For a textual discussion of the per se and rule of reason doctrines, see L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 72 (1977).

11. *Instructional Sys. Dev. Corp.*, slip op. at 9.

12. This letter was written in response to Aetna's decision to end its promotion of a joint film curriculum containing Doron's Allstate films which ISDC was unable to obtain. The letter emphasized Doron's surrender of a "valuable right" in exchange for a "special relationship" with and "cooperation" from Aetna. Aetna subsequently proceeded with the joint curriculum. *Id.* at 10-11.

13. *Id.* at 10.

14. *Id.*

15. *Id.* at 11.

16. *Id.*

17. 631 F.2d 1369, 1377 (10th Cir. 1979).

18. *Instructional Sys. Dev. Corp.*, slip op. at 12.

Evidence which indicated that Aetna and Doron made joint decisions in furtherance of this intent was found by the court in the implementation of the joint venture.[19] For example, Aetna administrators, who were aware of Doron's intentions regarding ISDC, directed Aetna sales personnel to follow instructions from Doron, and acknowledged that Aetna did not have complete control of the decision making process under the joint venture agreement.[20] There was also some evidence that Doron had influenced Aetna's agreement with ISDC to ISDC's disadvantage.[21]

The element of agreement was found by the court in the sum of the evidence.[22] The court did not point to specific instances indicating that Doron and Aetna agreed to monopolistic acts.[23]

3. Section Two Monopolization Claim

In accepting ISDC's claim against Doron for section two monopolization, the court concluded that ISDC had presented sufficient evidence of predatory pricing and other predatory acts[24] to support the inference of a plan to achieve a monopoly.[25] Noting the lack of an authoritative consensus regarding standards by which predatory pricing is established,[26] the court reiterated its own guidelines set forth in *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*[27] In that case the court determined that unreasonably anticompetitive behavior may warrant a finding of predatory pricing even though sales have been above average variable costs.[28] In examining the record, the court found evidence of some behavior that it felt could be construed as unreasonably anticompetitive. First, the court noted that Doron's pricing pattern was predatory in and of itself in the opinion of ISDC's testifying expert. On both occasions when Doron was the sole hardware manufacturer[29] Doron's prices went up dramatically. Doron's prices, however, had dropped when ISDC entered the market. Second, the court noted evidence that Doron priced the product below its self-determined minimum price when bidding against ISDC. Finally, an Aetna supervisor stated in deposition testimony that the national sales manager intended to price the

19. *Id.* at 12-13.
20. *Id.* at 13 n.2.
21. *Id.* at 12-13.
22. *Id.* at 13.
23. *Id.* at 13-14.
24. A predatory practice is one by which the alleged discriminator sacrifices present revenues for the purpose of driving a competitor from the market while expecting to recoup losses through subsequent higher prices. For a textual discussion of predatory prices and conduct, see L. SULLIVAN, *supra* note 10, at §§ 220-21.
25. *Instructional Sys. Dev. Corp.*, slip op. at 16, 18.
26. *Id.* at 14-15 (citing J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 10.01-03 (1985)).
27. 551 F.2d 790, 797 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).
28. Doron's prices were below full cost but above average variable cost. *Instructional Sys. Dev. Corp.*, slip op. at 15. For a discussion of cost measurement see P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 712-15c (1978).
29. Doron was the sole manufacturer when Aetna's previous licensee went out of business and ISDC left the market.

product below the price at which a profit could be made in order to take business away from ISDC, and that "Doron could outlast ISDC in an underbidding situation."[30]

With regard to other acts the court identified three instances which could support the conclusion that Doron's conduct was predatory: Doron bribed public purchasing officials, disparaged ISDC's product, and delayed payments to ISDC by filing lawsuits against purchasers when it lost a bid to ISDC.[31]

Finally, the court quoted hornbook law[32] and delineated standards for the identification of predatory practices. In general, practices are predatory and illegal if they impair opportunities of rivals or are more restrictive than necessary to compete.[33] In contrast, normal practices in response to market conditions and practices fostering competition on the merits are not illegal. It is not necessary that conduct involve the use of monopoly power; conduct may be predatory by virtue of the contribution made to the acquisition or maintenance of monopoly power.[34] The final test to show a violation of section 2 is that the conduct "must appear reasonably capable of contributing significantly to creating or maintaining monopoly power."[35]

II. *MOTIVE PARTS WAREHOUSE V. FACET ENTERPRISES*

A. *Facts*

Facet Enterprises was created in 1976 to compete with Bendix Corporation in the automotive aftermarket[36] as a result of a litigation settlement between Bendix and the Federal Trade Commission. Prior to the settlement, Bendix had both manufactured and sold P&D brand auto parts. As part of the settlement the sales component of the P&D operation was transferred to Facet. Loss of the profit margin associated with manufacture caused the P&D sales division to lose money under Facet.

In an attempt to make the P&D sales operation profitable, Facet in-

30. *Instructional Sys. Dev. Corp.*, slip op. at 16.

31. *Id.* at 18-19. The court also discussed in conjunction with this claim Doron's contention that its attempts to bribe public officials were immune from attack under the antitrust laws because of the Noerr-Pennington Doctrine. The court summarily dismissed the possibility that this doctrine could protect bribery, misuse, or corruption of governmental processes. The Noerr-Pennington Doctrine exempts activity to influence legislative and administrative bodies from antitrust challenge.

32. *Id.* at 17 (citing L. SULLIVAN, *supra* note 10, §§ 35, 43 and P. AREEDA & D. TURNER, ANTITRUST LAW (1978)).

33. P. AREEDA & D. TURNER, *supra* note 28 at ¶ 625b.

34. *Id.* at ¶ 626c.

35. *Instructional Sys. Dev. Corp.*, slip op. at 18. The court, in a third section of the opinion, considered Aetna's argument that ISDC had failed to prove antitrust injury. The court determined that injury could be inferred. *Id.* at 19-20 (citing World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467, 1478 (10th Cir.), *cert. denied*, 106 S. Ct. 77 (1985)). *See generally* Note, *Twelfth Annual Tenth Circuit Survey: Antitrust Law*, 63 DEN. U.L. REV. 183, 193-94 (1986) (discussing the Tenth Circuit's holding in *World of Sleep* regarding injury under the Robinson-Patman Act).

36. The automotive aftermarket is the market for replacement parts of the same brand as the original equipment. Motive Parts Whse. v. Facet Enter., 774 F.2d 380, 383 (10th Cir. 1985).

stituted in 1980 a franchise marketing program called the Wagon Master Plan to replace its system of warehouse distribution used since 1976.[37] Under the program a limited number of high turnover products were to be distributed through franchisees directly to dealer markets, bypassing the warehouses. Termination of warehouse business was expected to occur through uncompelled attrition and the trimmed operation was expected to cut costs.[38] Following approval of the plan by Facet management, sales employees were offered the opportunity to franchise and were involved in discussions regarding pricing and other details.[39]

Motive Parts Warehouse (MPW) had been a P&D customer previous to Facet's acquisition of P&D and was one of many distributors used by Facet in its warehouse marketing program. MPW operated thirteen warehouses in the Gulf Coast area. Facet supplied P&D products to six of these and the other seven were supplied with Standard brand products by Standard Motor Products (Standard). Upon learning of Facet's franchise plan, MPW contracted with Standard to supply the six warehouses formerly supplied by Facet and to replace MPW's P&D inventory with Standard products.

This action arose when Facet filed suit against MPW to collect on an open account for goods sold. MPW counterclaimed, alleging Facet had violated the Sherman Act and the Robinson-Patman Act in establishing its Wagon Master Plan.[40] MPW alleged that a conspiracy existed between Facet and its franchisees to fix prices and boycott MPW in violation of section 1 of the Sherman Act.[41] MPW also alleged that Facet discriminated against MPW and other warehouse distributors in violation of sections 2(a),[42] 2(d),[43] and 2(e)[44] of the Robinson-Patman Act by offering Facet's franchisees lower prices, better terms, and more services.

Furthermore, MPW alleged violations of the Robinson-Patman Act

37. Under the previous warehouse system, Facet distributed P&D parts to warehouse distributors who would then resell the merchandise to jobbers. *Id.* at 384.

38. *Id.*

39. *Id.* at 387.

40. *Id.* at 385. MPW also asserted claims for intentional infliction of economic harm and breach of contract. A discussion of these claims is outside the scope of this note.

41. 15 U.S.C. § 1 (1982). *See supra* note 6. MPW's claims were based on both the per se rule and the rule of reason. *Motive Parts Warehouse*, 774 F.2d at 385. For a discussion of these antitrust rules, see *supra* note 10.

42. 15 U.S.C. § 13(a) (1973) states in part:

> It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly.

43. 15 U.S.C. § 13(d) (1973) provides that it is unlawful to pay or to accept anything of value for promotional services or facilities furnished "unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution. . . ."

44. 15 U.S.C. § 13(e) (1973) provides that it is unlawful—

> to discriminate in favor of one purchaser against another purchaser . . . of a commodity bought for resale . . . by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

in connection with Facet's treatment of MPW vis-à-vis Keystone Automotive Warehouse (Keystone), a competitor of MPW's warehouse in Kansas City (MPW-KC).[45] MPW cited the following facts as evidence of Facet's antitrust violations.[46] Keystone had become a Facet customer in 1976. Under its agreement with Facet, Keystone was allowed to pay for its initial stock over a period of four years and to return an unlimited amount of unsold stock during the same period of time. Keystone also received discounts of up to fifty percent, special promotional considerations, and the services of a full-time sales representative. MPW-KC in contrast, was allowed three months to pay for stock orders and was limited to returns of five percent of its annual purchases. MPW asserted that neither MPW-KC nor its customers received benefits comparable to those offered Keystone and that this discrimination put MPW-KC at a distinct and substantial disadvantage in the P&D resale market. MPW alleged that by these activities Facet violated the Robinson-Patman Act. The trial court, however, refused to accept MPW's claims and Facet prevailed on all antitrust claims.

B. *The Tenth Circuit Decision*

The Tenth Circuit first reviewed the directed verdicts which were awarded Facet in response to MPW's claims of Sherman Act and Robinson-Patman Act violations stemming from the Wagon Master franchise program. The court's assessment of these verdicts was based upon the standard that "a directed verdict is justified 'only if the proof is all one way or so overwhelmingly preponderant in favor of the movant as to permit no other rational conclusion.' "[47] The court upheld directed verdicts in Facet's favor on the claims that Facet and its franchisees conspired to boycott MPW,[48] and that Facet discriminated between competitors in its treatment of MPW vis-à-vis the franchisees.[49] The court reversed each of the other directed verdicts on the antitrust claims, and remanded the only antitrust claim submitted to a jury — MPW's claim that Facet discriminated against MPW by its treatment of Keystone Automotive Warehouse in Kansas City.[50]

1. Employer-Employee Conspiracy

Facet had asserted a two-level defense to the charges of conspiracy under the Sherman Act: that its actions constituted permissible unilateral conduct, and that only this interpretation is possible under the gen-

45. *Motive Parts Warehouse*, 774 F.2d at 393.

46. *Id.* at 393.

47. *Id.* at 386 (quoting Kiner v. Northcut, 424 F.2d 222, 223 (10th Cir. 1970) (quoting Fischer Constr. Co. v. Fireman's Fund Ins., 420 F.2d 271, 275 (10th Cir. 1969))).

48. *Id.* at 389 (finding no evidence of any refusal to deal with MPW).

49. *Id.* at 389-90. The court found that since there was no evidence of competition between MPW and the franchisees, an allegation of discrimination between competitors could not stand.

50. *See infra* notes 60-74 and accompanying text.

eral rule that an employer cannot conspire with its employees.[51] The Tenth Circuit noted that there exists a right to independently undertake to change one's business practices to improve one's profit position.[52] Such unilateral conduct does not constitute a conspiracy and is not violative of the Sherman Act regardless of any anticompetitive effect.[53] The court, however, rejected Facet's argument that the employer-employee conspiracy rule was applicable and found instead that the facts could reasonably be inferred to fit an exception to the rule. This exception is that employees are capable of conspiring with their employer when they have an independent stake in the restraint of trade afforded by the conspiracy.[54] The court found that the franchisees' potential benefit from setting their own prices below those paid by warehouse distributors was sufficient to support the inference that they dealt with Facet in their own self-interest as independent businessmen.[55] The unilateral nature of Facet's decision, although supported by the manner in which Facet management made the initial commitment to franchise, was brought into question by evidence that franchisees participated in negotiations to work out these details regarding pricing and other matters.[56]

In sum, the court found sufficient evidence of an "independent personal stake" on the part of the franchisees to support the possibility of a conspiracy.[57] The court also found support for the inference, under the per se rule, of an agreement between Facet and its franchisees to stabilize prices and effect a horizontal restraint of trade.[58] Additionally, the court noted that the evidence supported an inference of unreasonable restraint of trade under a rule of reason analysis.[59]

2. Robinson-Patman Act Violations

MPW's allegations that Facet violated the Robinson-Patman Act[60] in its dealings with Keystone was submitted to a jury; the verdict returned was in Facet's favor. On appeal MPW asserted that the trial court erred in two respects. First, MPW argued that the trial court erred in its instructions regarding the element of competitive injury in the context of the price discrimination claim.[61] Second, they argued that error was

51. *See* Holter v. Moore & Co., 702 F.2d 854, 855 (10th Cir. 1983), *cert. denied*, 104 S. Ct. 347 (1983) (cited by the court for the general rule).

52. *Motive Parts Warehouse*, 774 F.2d at 386.

53. *Id.*

54. *See* Holter v. Moore & Co., 702 F.2d 854, 857 n.8 (10th Cir. 1983).

55. *Motive Parts Warehouse*, 774 F.2d at 387.

56. *Id.*

57. *Id.* at 388.

58. A horizontal restraint of trade exists where agreements are made between producers, wholesalers or retailers relating to sale or resale terms. *See* L. SULLIVAN, *supra* note 10, at §§ 79-80.

59. *Motive Parts Warehouse*, 774 F.2d at 388. The court also set forth in its opinion, in response to Facet's defense that MPW lacked standing by virtue of never having purchased from Facet at the alleged fixed prices, the applicable test for antitrust standing. *Id.* at 388-89 (citing Farnell v. Albuquerque Publishing Co., 589 F.2d 497, 500 (10th Cir. 1978) and remanding issue of standing to trial court).

60. 15 U.S.C. § 13 (1973). *See supra* notes 42-44.

61. *Motive Parts Warehouse*, 774 F.2d at 393.

made initially in permitting evidence of Facet's behavior toward warehouses outside the Kansas City area, and then was compounded by the court's failure to give curative instructions to the jury.[62]

Price discrimination under the Robinson-Patman Act is illegal when it substantially lessens competition.[63] In its instructions the court directed the jury to consider the effect of the alleged discrimination in light of Keystone's position as a new customer, and to consider both the possibility that special discounts to new customers might lessen competition and the possibility that such discounts might foster competition.[64] The Tenth Circuit denied that these instructions imply that new and existing accounts are to be treated differently.[65] The court cited the lower court's reference to a case from the Second Circuit[66] in which the fact that the customer was new was central to the rationale of the decision that competitive injury had not occurred. The Tenth Circuit interpreted the lower court's instructions as properly focusing on the requirement that discriminatory pricing is illegal only when it tends to lessen competition in the marketplace generally.[67]

The other aspect of competitive injury on which MPW claimed the jury was improperly instructed was in regard to the presumption that injury occurs when price discrimination is of substantial magnitude. The Tenth Circuit, however, met this objection not by considering the magnitude of the discrimination but by pointing out that the defendant had rebutted the presumption by breaking the causal connection between the price discrimination and the competitive injury.[68] This rebuttal was accomplished by presentation of evidence that MPW-KC was subject to competition not only from Keystone but also from eight to ten other warehouses in the area. This evidence created an inference of injury from other sources. Furthermore, to establish competitive injury arising from Facet's support of Keystone, the (court) held that MPW would need not only to establish the causal connection between its own injury and Keystone's advantage but also a connection between Keystone and injury to other warehouses. This requirement stems from the fact that the Robinson-Patman Act prohibits injury to competition and not injury to a particular competitor.[69]

MPW's second argument concerned the admissibility of evidence regarding offers of promotional services which Facet made to MPW warehouses outside the Kansas City area. This evidence was submitted to bear on the discrimination between MPW-KC and Keystone in Kansas City. The trial court admitted the evidence as relevant to the nature of

62. *Id.*
63. 15 U.S.C. § 13(a) (1973). *See supra* note 42.
64. *Motive Parts Warehouse*, 774 F.2d at 394.
65. *Id.*
66. Interstate Cigar Co. v. Sterling Drug, 655 F.2d 29 (2d Cir. 1981).
67. *Motive Parts Warehouse*, 774 F.2d at 394.
68. *Id.* at 395.
69. *Id.* (citing Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 548 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1315 (1984).

promotional services offered by the industry to new customers in general.[70] The trial court acknowledged that the Kansas City market area was the only market location relevant to an assessment of MPW's Robinson-Patman Act claims, but since no other "new customer" existed in the relevant area the court felt justified in admitting evidence of offers in other locations.[71]

The Tenth Circuit Court of Appeals disagreed. Citing Supreme Court precedent[72] and the express terms of the Robinson-Patman Act,[73] the court held that the admission of evidence from an irrelevant market could not be reconciled with the intent of the Robinson-Patman Act to prohibit discrimination particularly and solely among those existing in a competitive relationship to one another, that is, between competitors in the same market.[74]

CONCLUSION

The Tenth Circuit has not broken any new ground with its decisions in *Motive Parts Warehouse* and *Instructional Systems Development Corporation*. It has, however, sent to the trial courts a strong message regarding the use of directed verdicts and summary judgments in antitrust litigation. Despite the temptation to use these means to dispense with complex litigation they are to be used in the antitrust area only when there is essentially no evidence to support the claim.[75]

Martha Ely

70. *Id.* at 396.
71. *Id.*
72. Federal Trade Comm'n v. Simplicity Pattern Co., 360 U.S. 55 (1959).
73. *Motive Parts Warehouse*, 774 F.2d at 397 (citing 15 U.S.C. § 13 (d)-(e) (1973)).
74. *Id.*
75. *See supra* notes 48-49 and accompanying text.