Denver Law Review

Volume 63
Issue 2 *Tenth Circuit Surveys*

Article 6

February 2021

Antitrust Law

David E. Doran

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Recommended Citation
David E. Doran, Antitrust Law, 63 Denv. U. L. Rev. 183 (1986).

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ANTITRUST LAW

OVERVIEW

Three Tenth Circuit antitrust decisions rendered during the past survey period will be discussed in this article.[1] These cases involved several issues in antitrust law. In *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*,[2] the court reviewed claims made by Aspen Highlands that the Aspen Skiing Company had monopolized the market for skiing services in the Aspen area, thereby violating section 2 of the Sherman Act.[3] The Tenth Circuit applied both the "intent" doctrine and the "essential facilities" doctrine to conclude that the Ski Company had violated a "duty to deal" with the Highlands Corporation.[4] This was the Tenth Circuit's first use of the essential facilities doctrine, a recent development in antitrust law which is being applied by the courts as an avenue of analysis parallel to the intent doctrine in analyzing section 2, Sherman Act claims.[5] The application of the essential facilities doctrine to monopolists will be a subject of focus in this survey.

In *World of Sleep, Inc. v. La-Z-Boy Chair Co.*,[6] the court ruled on the admissability of conspiracy evidence, the continued application of the per se rule in vertical price fixing conspiracies, the proof of damages required in antitrust cases and, finally, the proof of injury required in a Robinson-Patman Act case. Finally, in *Monfort of Colorado, Inc. v. Cargill, Inc.*,[7] the court reviewed the issue of when a company has standing, pursuant to section 16 of the Clayton Act, to seek injunctive relief against its competitor's horizontal acquisition of a competing firm.

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1. In a fourth antitrust case, City of Chanute v. Kansas Gas & Elec. Co., 754 F.2d 310 (10th Cir. 1985), the issue on appeal was the propriety of a district court grant of a preliminary injunction. Little substantive antitrust law was discussed in the Tenth Circuit's opinion, and therefore it will not be addressed in this survey.

   In a fifth case, however, the court, in Rural Elec. Co. v. Cheyenne Light, Fuel & Power Co., 762 F.2d 847 (10th Cir. 1985), ruled, consistent with the Supreme Court's decision in Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713 (1985), that municipalities are protected by the "state action" immunity to federal antitrust laws when state legislation or constitutional provisions authorize the challenged municipal action. But the Tenth Circuit's decision in *Cheyenne Light* has lost much of its force because of the enactment of the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (1984), which states in pertinent part: "No damages, interest on damages, costs, or attorneys fees may be recovered under section 4, 4A or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity." Therefore, *Cheyenne Light*, and *Town of Hallie* for that matter, retain validity only for claims arising before September 24, 1984. *See* Pub. L. No. 98-544, § 6, 98 Stat. 2750 (1984).
2. 738 F.2d 1509 (10th Cir. 1984), *aff'd*, 105 S. Ct 2847 (1985).
3. 15 U.S.C. § 2 (1982).
4. *Aspen*, 738 F.2d at 1520-22.
5. *See generally* Note, *Unclogging the Bottleneck: A New Essential Facility Doctrine*, 83 COLUM. L. REV. 441, 446-47 (1983).
6. 756 F.2d 1467 (10th Cir.), *cert. denied*, 106 S. Ct. 77 (1985).
7. 761 F.2d 570 (10th Cir. 1985), *cert. granted*, 106 S. Ct. 784 (1986).

I. A Monopolist's Duty to Deal and the Intent and Essential Facilities Doctrines: *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*

In *Aspen Highlands Skiing Corporation v. Aspen Skiing Company,*[8] the Tenth Circuit affirmed the district court's finding of monopolization based upon the defendant's refusal to deal with the plaintiff, Aspen Highlands. In doing so, the court applied both the intent and essential facilities doctrines in finding a section 2, Sherman Act violation.

A. *Background*

Aspen Highlands Skiing Corporation (Aspen Highlands) owns and operates Aspen Highlands, a skiing facility located near Aspen, Colorado. Aspen Skiing Company (Aspen Skiing) operates three skiing facilities, Ajax Mountain, Buttermilk and Snowmass, in the same vicinity.[9] From the 1962-63 skiing season until the 1971-72 season, Aspen Highlands and Aspen Skiing offered joint multi-day lift tickets which enabled skiers to ski any of the four mountains. This joint ticket was discontinued in 1972 but was reinstituted in 1973 until the end of the 1976-77 season.[10] Profits from the joint tickets were allocated between the companies based on actual use at the four ski areas. Before the 1977-78 season, Aspen Skiing offered to continue the joint ticket sales if Aspen Highlands would accept a fixed percentage of 13.2 percent of revenues, a figure equal to that received by Aspen Highlands in the 1976-77 season, but below the percentage received in previous years. Aspen Highlands objected, claiming that the poor 1976-77 season upon which the figure was based was a result of external circumstances not likely to recur. The parties eventually settled on a fixed percentage of fifteen percent.[11] The following season, 1978-79, Aspen Skiing proposed a fixed percentage of 12.5 percent. Aspen Highlands again preferred to divide revenues based on the former system of actual usage. Aspen Skiing declined and the parties ultimately failed to reach an agreement on joint ticket sales.[12]

Subsequently, Aspen Skiing offered a multi-day joint ticket for use only at the three mountains which it operated. In an attempt to offer skiers a product more marketable than a single mountain lift ticket, Aspen Highlands introduced a package which included vouchers that were theoretically negotiable at the Aspen Skiing mountains.[13] Aspen Skiing refused to accept the vouchers. Aspen Highlands unsuccessfully attempted to negotiate with Aspen Skiing to remove all objections to the vouchers. Aspen Skiing eventually raised single day ticket prices to the point where it was no longer economically feasible for Aspen Highlands

8. 738 F.2d 1509 (10th Cir. 1984), *aff'd*, 105 S. Ct. 2847 (1985).
9. *Id.* at 1512.
10. *Id.*
11. *Id.*
12. *Id.* at 1513.
13. *Id.* at 1521.

to offer the voucher package.[14] Additionally, Aspen Skiing initiated a national advertising campaign that implied that there were only three skiing mountains in the Aspen area.[15]

Based on these facts, Aspen Highlands brought suit against Aspen Skiing under section 4 of the Clayton Act,[16] alleging unlawful monopolization in violation of section 1 of the Sherman Act,[17] and conspiracy to restrain trade in violation of section 2 of the Sherman Act.[18] The jury found in favor of Aspen Skiing on the section 1 claim and in favor of Aspen Highlands on the section 2 claim.[19]

The Tenth Circuit, after disposing of an important procedural issue,[20] affirmed the decisions that Aspen Skiing was guilty of monopolization. The primary issue which the court addressed was the validity of the theory that Aspen Skiing had a duty to deal with Aspen Highlands. It determined that Aspen Skiing was guilty of monopolization and agreed that a duty to deal was properly imposed based on two alternative theories: the intent doctrine, which determines whether the defendant had a purpose to create or maintain a monoply; and the essential facilities doctrine, which is applied when a business or group of businesses control a scarce facility. The Tenth Circuit affirmed the lower court based on both theories.[21] By the actions of Aspen Skiing, the court determined that Aspen Skiing did, in fact, have an intent to mo-

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14. *Id.*

15. *Aspen*, 105 S. Ct. at 2852.

16. 15 U.S.C. § 15 (1982) provides in pertinent part:

> Except as provided in subsection (b) of this section [pertaining to foreign persons], any person *who shall be injured* in his business by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover *threefold* the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Id. (emphasis added).

17. 15 U.S.C. § 1 (1982) provides in pertinent 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.

18. 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.

19. 738 F.2d at 1513.

20. The defendant, Aspen Skiing Company, argued that the district court erred in its instructions to the jury concerning the relevant market. The objection made by the defendant to the trial court in the pre-trial conference, however, was not that the market definition was incorrectly defined but that the market definition should be determined by the court as a matter of law and should not be submitted to the jury as a question of fact. In response, the plaintiff, Aspen Highlands, asserted that the defendant could not raise on appeal the issue of market definition because that particular question was never raised by objection at the trial level. The Tenth Circuit agreed with Aspen Highlands and held that Aspen Skiing's proposed instructions would also not suffice to preserve the issue. Finally, the circuit court concluded that in light of the above facts Aspen Skiing did not adequately apprise the trial court of the grounds for the objection which it wished to raise on appeal. 738 F.2d at 1513-16.

21. 738 F.2d at 1520-22.

nopolize. Further, by defining the joint lift ticket as a scarce facility, it held that Aspen Skiing's refusal to participate with Aspen Highlands resulted in monopolization and again, affirmed a duty to deal. Interestingly, the Supreme Court, Justice Stevens writing for the majority, affirmed the Tenth Circuit, but based its decision exclusively on the interest doctrine.[22] According to the Court, Aspen Skiing's actions did constitute an intent to monopolize. However, the Court did not address the issue of the possible application of the essential facilities doctrine.

B. *The Intent Doctrine and the Essential Facilities Doctrine*

Since the Supreme Court's decision in *United States v. Colgate*,[23] in 1919, courts have not imposed antitrust liability for a single monopolist's refusal to deal with a particular party unless the refusal was based upon an intent to increase or preserve the monopoly.[24] Lawful monopolists — those who, for example, have obtained market power through superior skill, foresight, and industry[25]— have been accorded wide discretion in choosing with whom they wish to do business.[26] This principle has come to be known as the *Colgate* doctrine.[27] The monopolist's discretion, however, is not unlimited. The refusal to deal may not be motivated by an intent to monopolize. The intent test, derived from dicta in the *Colgate* case,[28] and more recently expressed in *United States v. Grinnel Corporation*,[29] is one of two theories under which a duty to deal can be imposed on a monopolist.

A second theory for imposing a duty to deal upon a monopolist is the "essential facilities" or "bottleneck" doctrine. Under this theory, a business or group of businesses cannot limit access to a facility or product, if that facility or product is scarce and essential to the manufacture or provision of a secondary product or service.[30] The elements necessary to the establishment of liability under the essential facilities doctrine are: 1) control of the essential facility by a monopolist; 2) a competitor's inability to duplicate the facility; 3) denial of the use of the

22. Aspen Highlands v. Aspen Skiing Co., 105 S. Ct. 2847, 2861-62 (1985).

23. 250 U.S. 300 (1919).

24. Note, *The Monopolist's Refusal to Deal: An Argument for a Rule of Reason*, 59 TEX. L. REV. 1107 (1981).

25. *See* United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945).

26. Note, *supra* note 5, at 443.

27. Note, *supra* note 5, at 461; Note, *supra* note 24, at 1107.

28. *Colgate*, 250 U.S. at 307 ("In the absence of any *purpose* to create or maintain a monopoly, the act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.") (emphasis added).

29. 384 U.S. 563, 570-71 (1966) ("The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) 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.").

30. *See* Note, *Refusals To Deal By Vertically Integrated Monopolists*, 87 HARV. L. REV. 1720, 1722 (1974).

facility to a competitor; and, 4) the feasibility of providing the facility.[31] Noticeably, there is not an expressed element of intent; the essential facilities doctrine focuses on the detrimental effect on competitors.[32]

There has been considerable confusion in the application of the essential facilities doctrine. Many courts apply the doctrine to section 1, Sherman Act concerted activity cases, while others apply it to section 2 monopolization cases.[33] In the seminal essential facilities case, *United States v. Terminal Railroad Association*,[34] the Supreme Court considered the actions of a group of competitors who owned a single corporation which in turn owned the only terminal for rail traffic coming into the city of St. Louis from the west. The Court held that the company had a duty to deal with non-proprietor railroads on reasonable terms and to provide access to the terminal. However, the Court did not specify whether its ruling was based on section 1 or section 2 of the Sherman Act.

Some courts have strained to find some combination which permits application of the essential facilities doctrine to section 1 claims.[35] It is not difficult to understand the application of the essential facilities theory to section 1 claims involving a group of persons who control a facility.[36] In such cases, any limitation to access by a group of persons without a business justification should be construed as a conspiracy to restrain trade or limit competition.

The appropriateness of the essential facilities analysis becomes doubtful, however, when applied to a single firm's refusal to deal. Section 1 of the Sherman Act speaks only to concerted action. To apply an essential facilities analysis to a single firm, courts must base their application on section 2 of the Sherman Act. However, proof of a section 2 violation has traditionally been a two element process. The plaintiff must first establish that the defendant possesses monopoly power in the relevant market. Second, that power must have been derived as a consequence of the willful acquisition or maintenance of the monopoly power and not from "a superior product, business acumen, or historic accident."[37] By applying the essential facilities theory to a single firm monopolist, a court may impose a duty to deal on single firm monopolists without consideration as to the intent of that monopolist. This would be in direct contravention of the *Colgate/Grinnel* section 2 intent requirement.

In *Aspen*, the Tenth Circuit first determined with respect to satisfaction of the traditional section 2 elements that the first element, market power, was not at issue. The court held that Aspen Skiing did not pres-

31. *Aspen*, 738 F.2d at 1520 (citing MCI Communications, Inc. v. AT & T, 708 F.2d 1081, 1133 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983)).

32. Byars v. Bluff City News Co., 609 F.2d 843, 856 (6th Cir. 1979) (but suggesting this neat theoretical dichotomy may be somewhat blurred in practice).

33. Note, *supra* note 5, at 452.

34. 224 U.S. 383 (1912).

35. *See* Note, *supra* note 5, at 453 and cases cited therein.

36. *See, e.g., Byars*, 609 F.2d 843, 854 (6th Cir. 1979).

37. *Grinnel Corporation*, 384 U.S. at 571.

ent an issue as to the sufficiency of the evidence on the district court's definition of the market.[38] The court then needed only to address the possible misuse of that monopoly power. For this, the court relied on both the intent theory and the essential facilities doctrine.

The question must be asked whether the essential facilities doctrine should be a basis, either alone or in conjunction with an intent analysis, for imposing a duty to deal on a single firm if that doctrine does not include a finding of intent as a necessary element. The answer according to *Colgate* and its progeny is no. As discussed above, *Colgate* and *Grinnel* mandate a finding of intent.

The Tenth Circuit treated the two duty-to-deal theories as overlapping but potentially alternate independent theories of liability.[39] However, the essential facilities analysis in the section 2 context is unnecessary and inconclusive because a court will be required to find intent before a duty to deal is appropriately imposed.[40]

The Tenth Circuit relied on *MCI Communications, Inc. v. AT&T* for the elements necessary to establish liability under the essential facilities doctrine.[41] The Seventh Circuit in *MCI* cited *Hecht v. Pro-Football, Inc.*,[42] in which the District of Columbia Circuit reversed the district court for failing to give the essential facilities instruction to the jury. The instruction was to be given with respect to claims of violations of sections 1 and 3 of the Sherman Act, both of which require a contract or combination restraining trade or commerce. In *Hecht*, the illegal contract was the agreement between the defendants, Pro-Football, Inc., operator of the Washington Redskins, and the District of Columbia Armory Board, operator of Robert F. Kennedy Stadium. The Seventh Circuit, in *MCI*, subsequently applied the analysis of *Hecht* to *MCI*, which was not a Sherman Act section 1 or section 3 case, but a section 2 case. Thus, the Seventh Circuit's reliance on *Hecht*, and the Tenth Circuit's subsequent reliance on *MCI*, were misplaced.

Furthermore, it is doubtful whether the Supreme Court would affirm a duty to deal based exclusively on an essential facilities analysis. The Supreme Court affirmed the *Aspen* holding based exclusively on the Tenth Circuit's intent doctrine analysis. The Court specifically declined to address the essential facilities issue.[43]

II. Conspiracy Evidence, the Per Se Rule, Measure of Damages, and Injury Under the Robinson-Patman Act: *World of Sleep v. La-Z-Boy*

The Tenth Circuit addressed a variety of antitrust issues in *World of*

38. 738 F.2d at 1513-16.
39. *Id.* at 1520 n.13 (citing *Byars*, 609 F.2d at 857).
40. 738 F.2d at 1520 n.13.
41. *See supra* note 31 and accompanying text.
42. 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).
43. 105 S. Ct. at 2862 n.44.

Sleep v. La-Z-Boy.[44] After disposing of an argument by the defendant, Montgomery Ward, regarding the timeliness of the appeal,[45] the court considered the admission of hearsay evidence to establish a conspiracy under the Sherman Act, the per se rule of analysis of a vertical price fixing charge, lost profits as an element of damages under section 4 of the Clayton Act, and proof of damages for recovery for a Robinson-Patman Act violation.

A. *Background*

World of Sleep, Inc. is a high-volume price discounter of retail bedding products, located in Denver, and controlled and operated by Thomas Hansen.[46] In 1975 and 1976, Hansen purchased television and newspaper advertisements which highlighted World of Sleep's lower prices in comparison to prices for La-Z-Boy chairs sold by Montgomery Ward and La-Z-Boy Showcase Shoppe. Montgomery Ward was displeased with World of Sleep's promotion strategy and complained to La-Z-Boy. Hansen testified that the vice president of sales and marketing for La-Z-Boy, Gary Schroeder, telephoned him to request that the ads be discontinued. Schroeder could not recall making this call.[47] La-Z-Boy then notified World of Sleep that it was past due on its account and requested a current financial statement, which Hansen refused to provide.[48] La-Z-Boy subsequently placed various credit restrictions on World of Sleep, and eventually severely limited the number of chairs which could be sold to World of Sleep. World of Sleep discontinued the La-Z-Boy line in August, 1977.[49]

Based on these events, World of Sleep filed suit alleging a violation of section 1 of the Sherman Act[50] by defendants La-Z-Boy Chair Company, Montgomery Ward, and Art Mauldin, owner of La-Z-Boy Showcase Shoppe, for allegedly conspiring to maintain the retail price of La-Z-Boy chairs.[51] Additionally, World of Sleep claimed that La-Z-Boy Chair Company had violated section 2(e) of the Robinson-Patman Act[52]

44. 756 F.2d 1467 (10th Cir.), *cert. denied*, 106 S. Ct. 77 (1985).

45. Id. at 1471. Montgomery Ward contended that even though notices of appeal were filed by both World of Sleep and La-Z-Boy within thirty days of the district court order awarding attorneys fees, their failure to file a notice of appeal within thirty days of the order denying motions for new trial should have rendered the appeals untimely. The court applied the rationale of Gurule v. Wilson, 635 F.2d 782 (10th Cir. 1980), wherein the court held that a decision on the merits which does not dispose of an outstanding request for attorneys fees is not final for purposes of appeal. The court noted that *Gurule* had been subsequently overruled by its recent decision in Cox v. Flood, 683 F.2d 330 (10th Cir. 1982). However, the court held that the *Cox* decision was rendered after the appeals were filed in *World of Sleep* and the *Cox* rationale would not be retroactively applied. *World of Sleep*, 756 F.2d at 1471 (citing E.E.O.C. v. Gladdis, 733 F.2d 1373 (10th Cir. 1984)).

46. 756 F.2d at 1472.

47. *Id.*

48. *Id.*

49. *Id.* at 1472-73.

50. 15 U.S.C. § 1 (1982). *See supra* note 17.

51. 756 F.2d at 1470.

52. 15 U.S.C. § 13(e) (1982).

by discriminating in its advertising allowances.[53]

The district court granted summary judgment for Mauldin. The jury found in favor of the remaining defendants on the Sherman Act claim, and returned a verdict in favor of World of Sleep on the Robinson-Patman Act claim.[54]

B. *The Price Fixing Conspiracy Claims*

1. Evidence of Conspiracy

The Tenth Circuit affirmed the summary judgment for the defendant, Mauldin Corporation. The court held that, pursuant to the federal rules of evidence governing hearsay,[55] a co-conspirator's hearsay testimony is inadmissable in the absence of sufficient independent evidence of a conspiracy involving the defendant.[56] The words or actions of a co-conspirator are admissable only after the court has established the existence of a conspiracy with independent evidence of that conspiracy.[57] In the instant case, World of Sleep wished to present, as hearsay evidence against the Mauldin Corporation, tapes of telephone calls made by a La-Z-Boy representative to Hansen in which the La-Z-Boy representative told Hansen that Mauldin had been requested to "hold the line" on La-Z-Boy chair prices.[58] World of Sleep presented, as independent evidence of the conspiracy, surveys which indicated that Mauldin's advertising became less price-oriented after this request. The Tenth Circuit agreed with the trial court that these survey results did not constitute evidence sufficient to establish a conspiracy. Therefore, the trial court had properly excluded the tapes of the telephone conversations and granted summary judgment in Mauldin's favor.[59]

The Tenth Circuit reached a similar conclusion regarding World of Sleep's conspiracy claim against Montgomery Ward. Montgomery Ward claimed on appeal that the trial court had erred in not granting it a directed verdict because the evidence relating to the price fixing charge was insufficient to raise a jury issue. The court merged the hearsay analysis applied to Mauldin with the rule addressing the quantum of conspiracy evidence necessary to raise a jury issue, as recently established in *Monsanto Co. v. Spray Rite Service Corp.*[60]

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53. 756 F.2d at 1470. La-Z-Boy unsuccessfully raised a counter claim under the Colorado Unfair Practice Act, COLO. REV. STAT. § 6-2-105 (1973), alleging that World of Sleep had unlawfully sold La-Z-Boy chairs below cost. The jury found against this claim and the Tenth Circuit affirmed. 756 F.2d at 1480-81.

54. *Id.* at 1470.

55. FED. R. EVID. 104, 801.

56. 756 F.2d at 1474.

57. *See* United States v. Peterson, 611 F.2d 1313, 1330 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980). *Peterson* set forth a test whereby the court must determine, prior to the admission of hearsay, that the party seeking admission of the hearsay statement has shown by independent evidence that it is more likely than not that: 1) the conspiracy existed; 2) the declarant and defendant were members of the conspiracy; and 3) the statement was made during the course of and in furtherance of the objects of the conspiracy.

58. 756 F.2d at 1474.

59. *Id.*

60. 104 S. Ct. 1464 (1984). The Tenth Circuit held that although the *Monsanto* case

A plaintiff seeking relief under section 1 of the Sherman Act bears the burden of introducing evidence sufficient to support a finding of an unlawful contract, combination, or conspiracy.[61] The Supreme Court, in *Monsanto*, held that a jury may not infer a conspiracy agreement merely from complaints by a buyer, or even from the fact that the seller terminated his business with the buyer due to the complaints.[62] The Tenth Circuit, in *World of Sleep*, noted that the district court's determination that the taped telephone conversations were admissable against Montgomery Ward was based solely on the type of evidence held to be insufficient by *Monsanto* to raise a factual issue of conspiracy— complaints by the seller, Montomery Ward, who competes with the price-cutting plaintiff, World of Sleep.[63] Therefore, the trial court had improperly admitted the co-conspirator hearsay evidence. Furthermore, Montgomery Ward's complaints, standing alone, were insufficient to raise a jury question, in accordance with *Monsanto*. Therefore, the Tenth Circuit held that the trial court improperly allowed the Sherman Act claim against Montgomery Ward to be submitted to the jury.[64]

With respect to the Sherman Act claim against La-Z-Boy, however, the taped telephone conversations which were inadmissable as to Mauldin and Montgomery Ward were held to be admissable by the court. The tapes were not co-conspirator hearsay, but rather were party admissions by La-Z-Boy.[65] The holding regarding Mauldin was not that a conspiracy with La-Z-Boy did not exist, but that evidence of the alleged conspiracy was inadmissable against Mauldin. Hence, La-Z-Boy could still be accused of conspiring with Mauldin.[66] The court stated that evidence, including the tapes and the fact that although World of Sleep refused to agree to price fixing other buyers had agreed to the arrangement, was sufficient to submit the conspiracy issue to the jury regarding La-Z-Boy.[67]

2. The Per Se Rule of Vertical Price Fixing

After affirming the trial court's decision that the evidence was sufficient to send the section 1 Sherman Act claim against La-Z-Boy to the jury, the Tenth Circuit considered the instructions given to the jury on that claim. The district court had instructed the jury to consider the

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dealt with the measure of conspiracy evidence sufficient to avoid a directed verdict for a defendant that was a manufacturer, the *Monsanto* analysis is equally applicable in a case where the defendant is not a manufacturer but is a "dealer-competitor." 756 F.2d at 1475.

61. *Id.* at 1475 (quoting *Monsanto*, 104 S. Ct. at 1471 n.8).

62. 756 F.2d at 1475.

63. *Id.*

64. *Id.* Because the jury had found for Montgomery Ward on this claim, it was unnecessary to reverse the trial court as to this part of its decision.

65. *Id.* at 1476 n.2 (citing FED. R. EVID. 801(d)(2)(E)).

66. 756 F.2d at 1476 n.2 (citing United States v. Sangmister, 685 F.2d 1124, 1126-27 (9th Cir. 1982); United States v. Coppola, 526 F.2d 764, 776 (10th Cir. 1975)).

67. 756 F.2d at 1475-76 (citing Black Gold, Ltd. v. Rockwool Industries, Inc., 729 F.2d 676, 685-86 (10th Cir.), *cert. denied*, 105 S. Ct. 178 (1984)). For a discussion of the *Black Gold* decision, see Note, *Eleventh Annual Tenth Circuit Survey: Antitrust*, 62 DEN. U.L. REV. 25, 26-33 (1985).

claim under the rule of reason.[68] Under the rule of reason, courts must balance the anti-competitive and pro-competitive effects of the complained of actions.[69] World of Sleep argued that the per se rule should have been applied instead.[70] According to the per se rule, if a practice falls within a specified category of activities, it is deemed illegal without any inquiry as to pro-competitive effects. The plaintiff must simply prove that the defendant did the proscribed practice.[71]

In 1983, the Tenth Circuit rejected the application of the per se rule in *Mid West Underground Storage, Inc. v. Porter*,[72] a case involving a conspiracy to eliminate competition. This appeared to conform with the judicial trend away from the per se rule and toward the rule of reason.[73] In *World of Sleep* the court noted this trend, citing in particular *Continental T.V., Inc. v. GTE Sylvania*,[74] wherein the Supreme Court ruled that non-price vertical restraints are to be judged under the rule of reason.[75] However, the Tenth Circuit observed that the Supreme Court in *Monsanto* had declined to abrogate the application of the per se rule in vertical price fixing agreement cases.[76] Therefore, *Monsanto* required that the Tenth Circuit apply the per se standard to this case.

La-Z-Boy argued that the per se rule applies only when a specific price has been maintained, and not when an agreement was intended merely to maintain general price levels.[77] The Tenth Circuit rejected this argument, relying in part on *United States v. Socony-Vacuum Oil Co.*[78] In that case, the Supreme Court said that the test is not whether a specific price was intended to be maintained, but whether a dealer had been deprived of the ability to exercise his independent judgment in making pricing decisions.[79]

World of Sleep had introduced evidence that La-Z-Boy intended to pressure Mauldin into maintaining a certain price level.[80] Accordingly, the Tenth Circuit reversed and remanded on this issue, ordering the trial court to instruct the jury that the alleged agreement, if it existed, was illegal per se.[81]

3. Lost Profits from Licensee Sales

World of Sleep, prior to dropping the La-Z-Boy chair line, had licensing agreements with four other stores in the Denver area whereby

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68. 756 F.2d at 1476.
69. *See* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978).
70. 756 F.2d at 1476.
71. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Lipner, *Antitrust's Per Se Rule: Reports of its Death Are Greatly Exaggerated*, 60 DEN. L.J. 593 (1983).
72. 717 F.2d 493 (10th Cir. 1983).
73. *See* Lipner, *supra* note 71, at 593-94.
74. 433 U.S. 36 (1977).
75. *Id.*
76. 756 F.2d at 1476-77. *See also Monsanto*, 104 S. Ct. at 1469.
77. 756 F.2d at 1476-77.
78. 310 U.S. 150 (1940).
79. *Id.* at 221.
80. 756 F.2d at 1477.
81. *Id.*

World of Sleep sold merchandise, including La-Z-Boy chairs, to these licensees and provided them warehouse facilities and advertising.[82] La-Z-Boy had unsuccessfully argued at trial that it should have been awarded the lost profits that it could have realized on sales of La-Z-Boy chairs to its licensee stores. The Tenth Circuit stated that under section 4 of the Clayton Act,[83] a plaintiff must prove an antitrust violation, the fact of damage or injury, and measurable damages.[84] After determining that the injury-in-fact requirement was satisfied by World of Sleep's proof of at least some damage flowing from an unlawful conspiracy, the court considered the question of what level of proof was necessary to support an award of damages. The Tenth Circuit quoted *Story Parchment Co. v. Paterson Parchment Paper Co.*,[85] wherein the Supreme Court concluded that it is enough for a plaintiff to establish the extent of damages "as a matter of just and reasonable inference, although the result may be only approximate."[86] The Tenth Circuit concluded that "[i]f proof of a profit and loss history were required, no plaintiff could ever recover losses resulting from his inability to enter a market."[87]

World of Sleep had proffered evidence of damages through an expert witness, who introduced a method by which lost profits could be calculated.[88] Other evidence tended to prove the unique character of La-Z-Boy chairs and World of Sleep's inability to effectively replace that brand. Therefore, the court ruled that the trial court had improperly excluded evidence of lost licensee sales profits, and ordered that the trial court admit this evidence on retrial.[89]

C. *Injury Under the Robinson-Patman Act*

La-Z-Boy manufactured two very similar lines of chairs. Generally, La-Z-Boy offered a promotional allowance of $2.25 to $3.00 per chair on one line, but provided only advertising aids to stores carrying the other. Montgomery Ward sold the first line and, therefore, received the promotional allowance, while World of Sleep carried the second line and rarely received an advertising allowance.[90] World of Sleep alleged that this constituted a violation of section 2(e) of the Robinson-Patman Act. On appeal, La-Z-Boy argued that the issue should not have gone to the jury. It claimed that World of Sleep had offered no evidence of actual injury as required by section 4 of the Clayton Act.[91]

82. *Id.*
83. 15 U.S.C. § 15 (1976). *See supra* note 16.
84. 756 F.2d at 1478 (citing Danny Kresky Enterprises Corp. v. Magid, 716 F.2d 206, 209 (3d Cir. 1983)).
85. 282 U.S. 555 (1931).
86. *Id.* at 563.
87. 756 F.2d at 1478.
88. *Id.*
89. *Id.* at 1479.
90. *Id.*
91. 15 U.S.C. § 13(e) (1976). The court stated in a footnote that the facts more properly gave rise to a section 2(d) claim than a section 2(e) claim. Section 2(e) applies when a seller performs promotional services for the buyer, while section 2(d) applies when the

The Tenth Circuit held that the Supreme Court, in *J. Truitt Payne Co. v. Chrysler Motors Corp.*,[92] had established the test for damages with respect to violations of section 2(a) of the Robinson-Patman Act.[93] Under section 2(a), the plaintiff must show actual injury arising from an antitrust law violation.[94] Because section 2(e) damages are also governed by section 4 of the Clayton Act, the court extended this test to section 2(e) violations. Therefore, a plaintiff must establish not only that he failed to receive a promotional allowance but also that his ability to compete was adversely affected as a result.[95]

World of Sleep failed to show that its ability to compete was adversely affected in any manner by being denied the promotional allowance. Testimony established that World of Sleep had been very successful with the La-Z-Boy chair line.[96] The Tenth Circuit concluded that World of Sleep had failed to prove injury-in-fact as required by section 4 of the Clayton Act, and the Robinson-Patman jury decision was therefore reversed by the court.

III. Standing to Seek Injunctive Relief to Prevent a Competitor's Merger: *Monfort of Colorado, Inc. v. Cargill, Inc.*

A. *Background*

In *Monfort of Colorado, Inc. v. Cargill, Inc.*[97] the Tenth Circuit affirmed a district court order granting injunctive relief to Monfort of Colorado, Inc., thereby precluding a competitor's horizontal acquisition of a third competing firm. Excel Corporation is a wholly owned subsidiary of the defendant, Cargill, Inc.[98] Monfort is the fifth largest beef packer in the country, and Excel is the second largest.[99] Excel signed an agreement with Land O'Lakes, Inc. to acquire Land O'Lakes' Spencer Beef Division, the country's third largest beef packer.[100] Monfort brought suit pursuant to section 16 of the Clayton Act,[101] to enjoin Excel's acquisi-

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seller pays the buyer a price allowance for the services to be rendered by the buyer. 756 F.2d at 1479 n.6.

92. 451 U.S. 557 (1981).

93. 15 U.S.C. § 13(a) (1976) provides in pertinent part:

> It should 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.

94. 756 F.2d at 1479 (citing *J. Truett Payne*, 451 U.S. at 562).

95. 756 F.2d at 1479 (citing *J. Truett Payne*, 451 U.S. at 563-64 n.4).

96. 756 F.2d at 1480.

97. 761 F.2d 570 (10th Cir. 1985), *cert. granted*, 106 S. Ct. 784 (1986).

98. 761 F.2d at 572.

99. *Id.*

100. *Id.*

101. 15 U.S.C. § 26 (1982) provides in pertinent part:

> [A]ny corporation . . . shall be entitled to sue for and have injunctive relief . . . against *threatened loss or damages* by a violation of the antitrust laws, . . . when and under the same conditions and principles . . . upon . . . a showing that the danger or irreparable loss or damage is immediate, a preliminary injunction may issue . . . [emphasis added].

tion of Spencer Beef. Monfort claimed that the acquisition would violate section 7 of the Clayton Act,[102] and section 1 of the Sherman Act.[103] The district court ruled in favor of Monfort.[104] On appeal, the primary issue was whether Monfort had standing to seek injunctive relief.

B. *Standing to Seek Injunctive Relief Pursuant to Section 16 of the Clayton Act*

The concept of standing in antitrust cases has continued to be a troublesome area for the courts.[105] This has been most evident in cases involving section 4 of the Clayton Act, which provides treble damages to persons injured by violations of the antitrust laws.[106] There is an underlying fear in the federal courts that failure to limit the scope of section 4 standing under the antitrust laws could lead to duplicative or excessive recoveries based on a single violation.[107] In *Monfort*, however, the danger of duplicative or excessive damages did not exist since section 16 injunctive relief was requested.[108]

The court therefore distinguished *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[109] the landmark case which established that plaintiffs in section 4 cases must prove actual injury of the type the antitrust laws were intended to prevent. The Tenth Circuit said that section 16 does not require actual injury and, therefore, does not foreclose claims for which the injury has not yet occurred.[110] The court needed to inquire only into the causal connection between the "threatened injury and the putative antitrust violation."[111] The court likened this inquiry to proximate cause analysis.[112] Based on these conclusions, the court considered whether Excel's acquisition of Spencer Beef would be the proximate cause of a future antitrust injury to Monfort.

In support of the causation argument, Monfort alleged that the acquisition of Spencer Beef by Excel would allow Excel to engage in pred-

102. 15 U.S.C. § 18 (1982). This section provides, in part, that "[n]o corporation engaged in commerce shall acquire, directly or indirectly, the . . . assets of another corporation . . . where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

103. 15 U.S.C. § 1 (1982). *See supra* note 17.

104. 591 F. Supp. 683 (D.Colo. 1983). After discussing its findings and conclusions as to the section 7 Clayton Act claim, the district court declined to reach the question of whether a section 1 Sherman Act violation had taken place. *Id.* at 710.

105. *See* Saul, *Antitrust Standing: Some Light at Last?* 14 U. TOL. L. REV. 521 (1983); *see also* Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809 (1977).

106. 15 U.S.C. § 15 (1982). *See supra* note 16.

107. Saul, *supra* note 105, at 521 n.2; *see also* Note, *Antitrust Injury and Standing: A Question of Legal Cause*, 67 MINN. L. REV. 1011, 1014-15 (1983).

108. *Monfort*, 761 F.2d at 574.

109. 429 U.S. 477 (1977).

110. 761 F.2d at 575 (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969)).

111. 761 F.2d at 574.

112. *Id.* (citing *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 477 (1982)). *See also* Note, *supra* note 107, at 1032-39 (discussing proximate cause analysis with respect to section 4 of the Clayton Act).

atory pricing and thereby drive competitors out of the beef packing and fabricating business. Thus, the acquisition would ultimately lead to a decrease in competition, which would be a violation of section 7 of the Clayton Act.[113] The Tenth Circuit agreed with Monfort. It noted that reaching its decision was made more difficult by the fact that the predatory pricing was only threatened (as would be the case in any case in which injunctive relief was being sought) but said that "Monfort's theory of injury [was] logically related to harm caused by increased concentration of economic power."[114] Since the Clayton Act was intended to be a "prophylactic measure," it was not necessary to await the use of that increased market power before injunctive relief was appropriate.[115] Therefore, the Tenth Circuit held that Monfort had standing to seek an injunction that would block Excel's acquisition of Spencer Beef.

The Tenth Circuit recognized that a potential for abuse exists when competitors have the power to challenge each other's corporate mergers. The court said, however, that to forbid all private challenges to mergers by competitors, as Excel proposed, would be too drastic, inasmuch as "Congress [has] created a private remedy for enforcing section 7 [of the Clayton Act] and hence apparently did not think that all private challenges would be spurious."[116] The court observed that even the Justice Department was only asking that the court engage in a searching scrutiny of private plaintiffs' allegations of injury before granting injunctive relief, but was not suggesting a complete denial of private party standing in such cases.[117]

After disposing of the critical remedial issue of whether section 16 standing was appropriate, the Tenth Circuit easily affirmed the district court's substantive ruling that a section 7 Clayton Act violation had occurred. The court ruled that the product and geographic markets which had been applied by the district court, and its finding of a significant entry barrier were not "clearly erroneous."[118]

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113. *See supra* note 105.

114. 761 F.2d at 576. The court rejected arguments made by Excel that predatory pricing would merely be a manifestation of "pure competition," stating that predatory pricing was an evil that the antitrust laws were intended to prevent. *Id.* at 575.

115. *Id.* at 576.

116. *Id.*

117. *Id.* (citing a Justice Department amicus brief filed in an unrelated case). In successfully urging the Supreme Court to grant certiorari to the *Monfort* case, however, Justice Department lawyers argued that "allowing injunctions in circumstances like [those of the *Monfort* case] would 'increase substantially the likelihood that filing an antitrust suit will become a routine tactic.' " National Law Journal, January 27, 1986, at 28, col. 2.

118. 761 F.2d at 579.