Denver Law Review

Volume 62
Issue 1 *Tenth Circuit Surveys*

Article 8

January 1985

Antitrust Law

Christine O'Connor

Antitrust Law

ANTITRUST LAW

OVERVIEW

The Tenth Circuit's antitrust decisions of the past survey period reflect two trends in national antitrust analysis: confusion regarding what constitutes injury to competition and avoidance of the use of the per se rule in analyzing alleged antitrust violations.[1] In *Black Gold, Ltd. v. Rockwool Industries, Inc.*,[2] the Tenth Circuit examined charges that a manufacturer violated section 1 of the Sherman Act,[3] section 3 of the Clayton Act,[4] and section 2(a) of the Robinson-Patman Act.[5] *Black Gold*, the most significant antitrust case decided during this period, is the subject of extensive analysis in this survey.

Three remaining antitrust cases considered by the Tenth Circuit during the survey period involved charges of conspiracy to eliminate competition in violation of section 1 of the Sherman Act. In *Blankenship v. Herzfeld*,[6] the Tenth Circuit joined the Seventh, Eighth and Ninth Circuits in holding that whether related corporations are capable of conspiring in violation of section 1[7] is a question of fact to be answered by the trier of fact.[8] In *Mid-West Underground Storage, Inc. v. Porter*,[9] the Tenth Circuit examined the per se and rule of reason approaches to conspiracy to eliminate a competitor by unfair means and grappled with the meaning of "injury to competition." Finally, in *United States v. Metropolitan Enterprises, Inc.*,[10] the court upheld a district court's finding of a bidding conspiracy among contractors over several challenges to evidence rulings and to the sufficiency of the indictment.[11] Later in this issue, this article analyzes how the Supreme Court addressed the Tenth

1. Under the per se rule, a horizontal restraint such as price fixing is held to be illegal without any inquiry into surrounding circumstances. It is contrasted with the rule of reason which provides that a restraint should not be condemned if it is reasonable, and that surrounding circumstances should be considered in determining whether a particular act has violated the Sherman Act. See Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911), for the first formulation of the rule of reason.

2. 729 F.2d 676 (10th Cir. 1984), *aff'd on rehearing*, 732 F.2d 779 (1984), *cert. denied*, 105 S. Ct. 178 (1984).

3. 15 U.S.C. §§ 1-7 (1982).

4. 15 U.S.C. §§ 12-27, 44 (1982).

5. 15 U.S.C. §§ 13-13(6), 21(d) (982).

6. 721 F.2d 306 (10th Cir. 1983).

7. 15 U.S.C. § 1 (1982). Section 1 provides, in part, that "[e]very 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."

8. 721 F.2d at 309.

9. 717 F.2d 493 (10th Cir. 1983).

10. 728 F.2d 444 (10th Cir. 1984).

11. The court also dismissed an antitrust claim in Central Nat'l Bank v. Rainbolt, 720 F.2d 1183 (10th Cir. 1983). The claims were brought under sections 7 and 16 of the Clayton Act, 15 U.S.C. §§ 18, 26 (1982), but were dismissed because of failure to prove injury sufficient to meet the Tenth Circuit's requirement that the violations be proven to be the proximate cause of the injury. That injury test was announced in Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir. 1972), *cert. denied*, 411 U.S. 938 (1973).

Circuit's decision in *Board of Regents v. National Collegiate Athletic Association*.[12]

I. *BLACK GOLD*: PRICE DISCRIMINATION, ILLEGAL TYING, AND REFUSAL TO DEAL

In *Black Gold, Ltd. v. Rockwool Industries, Inc.*,[13] the Tenth Circuit reversed a general verdict in favor of Black Gold, the plaintiff, on discrimination charges brought under section 2(a) of the Robinson-Patman Act.[14] The court also affirmed the district court's directed verdict in favor of Rockwool on the tying claims, and reversed the district court's directed verdict in favor of Rockwool on the charge of refusal to deal in violation of section 3 of the Clayton Act,[15] remanding the last issue to the jury.[16]

A. *Background*

Rockwool Industries (Rockwool) is a manufacturer, retailer, and distributor of building insulation material known as rockwool. The material comes in two forms, blown wool and batts. Blown wool is loose rockwool which can be blown into existing buildings as insulation. Batts are made of rockwool formed into thick strips and wrapped in foil or heavy paper. Batts are installed as insulation during the construction of new buildings.[17]

At the time the action arose, Black Gold was an installer of insulation and a purchaser of rockwool from defendant Rockwool. Williams Insulation Company (Williams) competed with Black Gold in the business of installing insulation; it also purchased rockwool from defendant Rockwool.[18]

Black Gold's claims against Rockwool arose in connection with a program run by the Public Service Company of Colorado (PSC). The program, which encouraged home owners to insulate, allowed PSC customers to choose the type of insulation they wanted to add to their homes. PSC maintained a list from which it selected, on a rotating basis, qualified installers to fit the homes with insulation. Both Black Gold and

12. 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 104 S. Ct. 2948 (1984).

13. 729 F.2d 676.

14. 15 U.S.C. § 13(a) (1982). Section 2(a) provides 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 in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .

15. 729 F.2d at 680. Section 3 of the Clayton Act is codified at 15 U.S.C. § 14 (1982).

16. A petition for certiorari filed by Rockwool has been denied by the Supreme Court. For a synopsis of the issues raised on appeal, see 105 S. Ct. 178 (1984).

17. 729 F.2d at 678-79.

18. There was at least one other installer of blown rockwool insulation, but only Williams is mentioned by name because evidence of price discrimination was only available with respect to Williams. *Id.* at 679.

Williams were on the PSC list of qualified installers.[19] The utility controlled the program by setting the prices for the jobs and dictating the brands of insulating materials that the installers could use.[20] Because the only brand of rockwool approved for use in PSC's program was that manufactured by Rockwool, both Black Gold and Williams depended exclusively on Rockwool for their supply of rockwool.[21]

At trial, Black Gold offered evidence supporting charges that it had been forced to refuse PSC jobs and that competition with Williams had been injured because Black Gold could not obtain the necessary rockwool from the defendant.[22] According to Black Gold, Rockwool had initially tried to force Black Gold to buy batts by withholding timely delivery of the blown wool. Black Gold chose not to buy the batts from Rockwool because they were being sold at a lower price to Williams. Black Gold alleged that because it refused to purchase the batts, Rockwool subsequently refused to sell Black Gold blown wool. Rockwool admitted that it did sell blown wool and batts to Williams at a lower price than it sold the same materials to Black Gold;[23] it maintained, however, that this price difference did not tend to lessen competition, an essential element of price discrimination under the Robinson-Patman Act.[24]

B. *The Robinson-Patman Claims*

Black Gold alleged, in its section 2(a) claims, that it was forced to refuse jobs because Rockwool: (1) sold blown wool to Williams at a lower price than to Black Gold, (2) failed to make timely deliveries of blown wool, and (3) eventually refused to sell any blown wool to Black Gold, while continuing sales to other installers. The jury issued a general verdict for Black Gold in the amount of $93,350.[25] The Tenth Circuit reversed this general verdict, adopting Rockwool's argument on appeal that the price difference did not lessen competition as required by the Robinson-Patman Act.[26]

Rockwool also argued, and the Tenth Circuit agreed, that the trial court's instructions to the jury were erroneous.[27] The instructions to the jury stated that price discrimination could include more than dis-

19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* This is an example of secondary-line injury, where price discrimination injures competition with "any person who knowingly receives the benefit of such [price] discrimination." 15 U.S.C. § 13(a) (1982). Primary-line injury refers to anti-competitive effects between suppliers at the same level of the distribution system.
23. 724 F.2d at 679.
24. *Id.* at 680.
25. *Id.* The award was trebled to $280,050 pursuant to section 4 of the Clayton Act which provides that treble damages be made available to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." 15 U.S.C. § 15(a) (1982).
26. 729 F.2d at 682.
27. *Id.*

crimination in the unit price.[28] The instructions also recognized that price competition was not the only type of competition possible between Black Gold and Williams.[29] The court, however, repeatedly denied that there could be harm to competition within the PSC program itself, emphasizing that PSC set the price for installing and applied the price uniformly to all installers.[30] The court refused to affirm the jury's verdict for Black Gold.[31] It did note, however, that during the retrial on the refusal to deal claim, Black Gold should be allowed to establish injury occurring outside the PSC program.[32]

The decision reflects both the Tenth Circuit's increasing reluctance to award damages under section 2(a) and a trend towards limiting the scope of the Robinson-Patman Act in general.[33] It appears, however, that the Tenth Circuit may have gone beyond the Supreme Court's recent holding in *J. Truett Payne Co. v. Chrysler Motors Corp.*[34]

On appeal, Rockwool charged that Black Gold failed to present the jurisdictional elements of a section 2(a) violation[35] or to make out a prima facie case by proving probable injury to competition.[36] The Tenth Circuit found that Black Gold did not prove that the lower price offered by Rockwool to Williams had the requisite potential to substantially affect competition.[37] Because PSC jobs were offered without re-

28. The jury instruction stated, in pertinent part: "The advantage may be given by lower prices, discounts or *other advantages, such as timely delivery given to the favored purchaser and not given to others*." *Id.* at 682 (emphasis by Tenth Circuit).

29. The jury instruction stated, in pertinent part:

> In addition to price competition, you may consider whether Black Gold and Williams engaged in other forms of competition *based on their ability to have the needed insulation on hand to install when required*, or based on their ability to provide the services and quality of services demanded by their customers.

Id. at 682.

"[T]he jury could infer that installers were competing with each other on the basis of their economic ability to participate in the PSC program at all, and to meet PSC installation standards within the margin between price and their cost for rockwool." *See* Black Gold's Consolidated Brief: Response to Rockwool's Opening Brief on Appeal and Reply to Rockwool's Brief on Black Gold's Cross-Appeal at 12.

30. 729 F.2d at 681. That the PSC program could not remove all competition connected with participating in the program is demonstrated by Rockwool's assertion that it had lowered prices to Williams in order to "meet competition." Brief, *supra* note 29, at 12, 21.

31. 729 F.2d at 683.

32. *Id.* The court of appeals also suggested that the court on remand examine the "in commerce" requirement of the Robinson-Patman Act as well. *Id.*

33. *See* Rosner, *A Year Under the Robinson-Patman Act*, 52 ANTITRUST L.J. 435 (1983).

34. 451 U.S. 557 (1981).

35. The jurisdictional elements of a section 2(a) violation require that: (1) the party charged be a person within the meaning of the Sherman Act; (2) the charge arise out of two "consummated and contemporaneous" sales transactions; (3) the same seller must deal with different purchasers; (4) the sales must involve "commodities" within the meaning of section 2(a); (5) the commodities must be of like grade and quality; and (6) interstate commerce must be involved. 4 J. VON KALINOWSKI, BUSINESS ORGANIZATIONS, ANTITRUST LAWS AND TRADE REGULATION § 23.02[1] (1983) (hereinafter *Kalinowski*).

36. *Id.* at § 23.02[1] n.16. The three types of competitive injury include: "(1) substantial lessening of competition; (2) substantial tendency to create a monopoly; and (3) injury to, or destruction or prevention of, competition with any person who either grants or knowingly receives the benefits of the discrimination, or with customers of either of them." *Id.* at § 23.02[2] at n.16, *paraphrasing* 15 U.S.C. § 13(a) (1982).

37. 729 F.2d at 681.

gard to price demands of the installers, it was argued that Williams could not have used its ability to obtain rockwool more cheaply than Black Gold to lower prices within the program. Therefore, the court held, "the price differential on blown wool purchased for use in the PSC program could not have adversely affected competition *within the program*."[38]

This holding implies that price discrimination is not actionable unless it affects competition through the lowering of prices. The Robinson-Patman Act, however, defines unlawful discriminatory pricing not only as the lessening of competition and the tendency to create a monopoly, but also as preventing competition with a person who grants the discriminatory prices, or "knowingly receives the benefit of such discrimination, or with customers of either of them."[39] In response to Black Gold's argument that an effect on competition could be shown even if Williams had not lowered its resale price, the Tenth Circuit recognized that courts have been willing to infer injury to competition in some cases. Citing *J. Truett Payne Co. v. Chrysler Motors Corp.*,[40] the court acknowledged that a competitor *may* be less able to compete as a result of having to pay more for materials.[41] In *Black Gold*, however, the Court found no "sales costs, advertising costs or collection expenses" in connection with the PSC program.[42] Because the PSC program purported to eliminate competition for jobs among installers by fixing prices and offering the jobs on a rotating basis, the Tenth Circuit did not consider the threshold question regarding Black Gold's ability to participate in the program.

Under the Tenth Circuit's analysis, blatant price discrimination in a program such as PSC's is exempt from scrutiny under the Robinson-Patman Act unless it results in lowered prices by the favored competition. Such a result is difficult to accept, both in *Black Gold* and as a general proposition. The factual evidence presented by Black Gold showed that it was unable to obtain sufficient quantities of blown wool on a timely basis, was forced to turn away jobs, and performed 1,252 fewer blown wool jobs than Williams.[43] Ignoring these effects on competition,

38. *Id.* (emphasis in original).

39. Robinson-Patman Act § 2(a), 15 U.S.C. § 13(a). *See supra* note 14.

40. 451 U.S. 557 (1981).

41. "To the extent a disfavored purchaser must pay more for its goods than its competitors, it is less able to compete. It has fewer funds available with which to advertise, make capital expenditures, and the like." 729 F.2d at 681, *citing J. Truett Payne*, 451 U.S. at 564. *See also* Foremost Dairies, Inc. v. FTC, 348 F.2d 674 (5th Cir. 1965), *cert. denied*, 382 U.S. 959 (1965).

42. 729 F.2d at 681. Thus, the Court concluded that competition was not injured. The Tenth Circuit's understanding of competition seems to be limited to price wars. Section 2(a), however, "is concerned with substantial impairment of the vigor or health of the contest for business, regardless of which competitor wins or loses. The competition which is sought to be protected by this section is a contest between sellers for the buyer's business, because "competition is, in its very essence, a contest for trade . . . . Competition . . . is a battle for something that only one can get; one competitor must necessarily lose." Anheuser-Busch v. FTC, 289 F.2d 835, 840 (7th Cir. 1961) (citations omitted).

43. *See* Brief, *supra* note 29, at 6. This ignoring of evidence of injury recalls to mind the Supreme Court's warning in FTC v. Morton Salt Co., 334 U.S. 37 (1948):

the Tenth Circuit concluded that Rockwool's price discrimination and the resultant lower profits could not have produced the "effect on competition" required to find a section 2(a) violation.

The "effect on competition" alluded to by the court was Williams' lowering of its price to the PSC. As the Supreme Court noted in *J. Truett Payne*,[44] the failure of a person to prove that its competitor lowered prices as a result of his favored status does not necessarily defeat recovery.[45] Indeed, the Supreme Court refused to rule as a matter of law whether a plaintiff must prove that the favored competitor used his price advantage to lower his resale price.[46]

J. Truett Payne established that automatic or presumptive damages could no longer be based solely on the showing of a substantial price discrimination. In *J. Truett Payne*, the dealer sought treble damages pursuant to section 4 of the Clayton Act.[47] The Supreme Court held that the dealer, in order to recover, must prove a violation of section 2(a) of the Clayton Act,[48] and antitrust injury.[49] The Supreme Court, however,

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> It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers.

Id. at 50. The Court in *Morton* upheld the Commission's findings of a violation, noting that the Commission "found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay." *Id.* at 46-47.

44. 451 U.S. 557 (1981).

45. "That argument assumes that evidence of a lower retail price is the *sine qua non* of antitrust injury, that the disfavored purchaser is simply not 'injured' unless the favored purchaser has lowered his price . . . . If by reason of the discrimination, the preferred producers have been able to divert business that would otherwise have gone to the disfavored [person], damage has resulted to the extent of the diverted profits." 451 U.S. at 564 n.4.

46. *Id.* at 565 n.4. *See also* Note, *Tracing an Antitrust Injury in Secondary Line Price Discrimination Cases*, 50 FORDHAM L. REV. 909 (1982) (arguing that the Supreme Court left open the possibility that other factors may be considered in establishing a Robinson-Patman Act violation).

47. 451 U.S. at 561-62.

48. The lower court did not deal with the issue of liability under section 2(a); the Supreme Court, therefore, did not consider it proper to rule on the adequacy of the evidence. 451 U.S. at 561-62.

49. 451 U.S. at 561-62 (citing Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)). *Brunswick* held that for a plaintiff's injury to be an antitrust injury it would have to be "of the type the antitrust laws were intended to prevent . . ." and "reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Id.* at 489. The injury would have to be the "type of loss . . . that the claimed violations . . . would be likely to cause." *Id.* (quoting Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125 (1969)). The Supreme Court in *J. Truett Payne* stated that its decision "is virtually governed by our reasoning in *Brunswick*." 451 U.S. at 562.

The Court's clear tightening of the requirement that a plaintiff demonstrate effects on competition may reflect the emerging conflict between the goals of the Robinson-Patman Act and modern economic theory. The Act represented a Congressional decision to protect individual, particularly smaller competitors ahead of the consumer-welfare efficiency goals which emphasize the protection of competition not competitors. *See Tracing Antitrust Injury, supra* note 46, at 914-17. What is frequently forgotten by those advocating the efficiency model is the necessity of protecting competitors in order to safeguard competition.

FTC v. Morton Salt Co., 334 U.S. 37 (1948) described the legislative history of the

did not go so far as to disallow an antitrust plaintiff the opportunity to establish such injury.[50] Thus, the Tenth Circuit's holding that the price discrimination and resultant lower profits could not result in anticompetitive effects without showing a lowering of price goes a step beyond the Supreme Court's requirement that a court consider evidence of plaintiff's injury as evidence of a section 2(a) violation. Based on its unfounded assumption that anticompetitive efforts could not be felt within the PSC program, the Tenth Circuit simply refused to consider the evidence.

After reaching the conclusion that there was no section 2(a) violation based on the price differential, the Tenth Circuit held that section 2(a) is directed at nothing more than price discrimination; hence, the untimely and insufficient deliveries of blown wool did not violate section 2(a).[51] Even if Black Gold's claim was read as a charge of refusal to deal, it would not constitute a section 2(a) violation because the "requisite price discrimination between two buyers is lacking."[52]

Black Gold also charged that the price discrimination by Rockwool amounted to a conspiracy by Rockwool and others violating section 1 of the Sherman Act. The Tenth Circuit held that if the discriminatory sales were legal under the Robinson-Patman Act, they were legal under the Sherman Act.[53] Unfortunately, no case law is cited by the court for this dubious conclusion.[54] As Black Gold argued,[55] the fact that particular discriminatory conduct did not violate the Robinson-Patman Act does not preclude that conduct from violating the Sherman Act as long as the other elements of a Sherman Act violation are established.

Robinson-Patman Act as making it "abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability . . . ." *Id.* at 43. "We think . . . that Congress meant by using the words 'discrimination in price' in § 2 that in a case involving competitive injury between a seller's customers the Commission need only prove that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors." *Id.* at 45 (footnote omitted).

50. *See supra* notes 45-46 and accompanying text.

51. 729 F.2d at 682.

52. *Id.* at 683. 15 U.S.C. § 13(a) (1982) specifically provides that "nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade . . . ." The inapplicability of the Robinson-Patman Act to refusals to deal is also based on case law which has only applied section 2(a) when there have been two actual, completed sales. *See* 4 KALINOWSKI, *supra* note 35, at § 24.03[2]. As Kalinowski points out, however, the legislative history makes it clear that this allows "the selection of customers and not of what shall be sold to them." *Id.* at § 24.03[2] n.36 (quoting Representative Utterback, 80 CONG. REC. H.R. 9418 (daily ed. June 15, 1936) (statement of Rep. Utterback)).

53. "However, discriminatory sales that are legal under the Robinson-Patman Act because they do not tend to substantially lessen competition are likewise legal under Sherman 1." 729 F.2d at 683.

54. The Tenth Circuit cites only 2 P. AREEDA AND D. TURNER, ANTITRUST LAW § 304(a) (1978), for the broad proposition that the same criteria should be used in analyzing "unreasonableness" under the Sherman Act and "substantial lessening of competition" under Robinson-Patman.

55. *See* Brief *supra* note 29 at 46-50.

C. *The Tying Arrangement Claim*

The directed verdict for Rockwool on the tying charges was affirmed by the Tenth Circuit. Black Gold charged that Rockwool tied the sale of blown wool to the sale of batts, violating section 3 of the Clayton Act.[56] The district court directed a verdict for Rockwool, finding no anticompetitive effect as required by section 3.[57] The court of appeals, however, upheld the district court's verdict for a different reason. Because Black Gold had refused to purchase batts from Rockwool,[58] the court found that Black Gold was neither a buyer injured because its freedom of choice was limited nor a seller injured by being foreclosed from sales.[59] Black Gold alleged its injury was caused by Rockwool's refusal to sell blown wool unless Black Gold also bought batts. What was missing, and crucial to a finding of a section 3 violation, was the actual sale to Black Gold made on the condition that Black Gold buy another product.[60]

D. *The Refusal to Deal Claim*

Black Gold also charged that Rockwool's refusal to sell Black Gold blown wool violated section 1 of the Sherman Act.[61] The district court directed a verdict for Rockwool, finding no evidence of a contract, com-

56. 729 F.2d 678. Section 3 of the Clayton Act prohibits a person from leasing or making a sale or contract "on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 14 (1982).

In defining "tying arrangement" the Tenth Circuit stated: "A tying arrangement is an agreement by a party to sell one product only on the condition that the buyer also purchase a different or 'tied' product." *Black Gold*, 729 at 684 (quoting Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 546 (9th Cir. 1983)).

57. 729 F.2d 684. Section 3 of the Clayton Act declares a tying arrangement to be unlawful when the effect of the arrangement "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 14 (1982).

In a footnote, the Tenth Circuit admonished the trial court for incorrectly granting Rockwool's motion for directed verdict on the tying issue. After stating the basic test for properly granting a directed verdict (in the light most favorable . . . .) the Tenth Circuit stated:

> Under this standard, we do not believe the directed verdict could have been sustained on the ground adopted by the trial court. Rockwool had sufficient market power in the tying product, blown wool, because this product was the only one approved for use in the PSC program. Thus the tying product was both unique and desirable. Moreover, construing the evidence and inferences most favorably to Black Gold, the dollar volume of rockwool batts tied to the sale of blown wool cannot be considered de minimis.

729 F.2d at 684 n.6. For a discussion of the two factors that can establish an unlawful tying arrangement, see 3 KALINOWSKI, *supra* note 35, at § 14.03[3].

58. Black Gold had purchased only one test order for $3,919.

59. 729 F.2d at 684-85.

60. *Id.* at 683. Rockwool's *refusal to deal* unless Black Gold bought batts was the cause of Black Gold's injury, and may be a violation of section 1 of the Sherman Act, but is not within the scope of section 3. *See Black Gold*, 729 F.2d at 685 (*citing* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 168, at 488 (1977)).

61. 729 F.2d 678. Section 1 of the Sherman Act provides that "[e]very contract combination . . . or conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal." 15 U.S.C. § 1 (1982).

bination, or conspiracy in restraint of trade.[62] Noting the difficulty in determining when a refusal to deal becomes a section 1 conspiracy or combination, the court attempted to explain the law on this question.

First, the Tenth Circuit recalled *United States v. Colgate*,[63] in which the Supreme Court clearly established that a *unilateral* refusal to deal cannot violate section 1 because the requisite combination or conspiracy is missing. Second, the Tenth Circuit showed that a purported refusal to deal can be an unlawful combination if the producer goes beyond merely refusing to deal.[64] The court stated that an unlawful combination exists "if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy."[65] The court continued, noting that there are two ways to establish such a conspiracy: (1) proof by the customer that he complied with the producer's anticompetitive practice; or (2) showing that *other* buyers complied under fear of termination although the plaintiff refused to comply.[66] Under this second method, the Tenth Circuit found that there was enough evidence to send the issue of a combination between Rockwool and *other* buyers to the jury.[67]

II. TENTH CIRCUIT REJECTS THE *PICK-BARTH* DOCTRINE[68]

In *Mid-West Underground Storage, Inc. v. Porter*,[69] the Tenth Circuit addressed the question of whether a conspiracy to eliminate a competitor by unfair means is a per se antitrust violation or should be analyzed under the rule of reason. Consistent with the general trend set by the Supreme Court, it rejected the per se approach.[70]

A. *Background*

Plaintiff, Mid-West Underground Storage (Midwest), was engaged

62. 729 F.2d at 685.

63. 250 U.S. 300 (1919).

64. The court quotes extensively from United States v. Parke, Davis & Co., 362 U.S. 29 (1960). In that case, Parke Davis induced the retailers to adhere to the suggested retail prices by announcing a policy to sell only to those who did so, and then involving the wholesalers in the scheme by refusing to deal with *them* if the retailers did not comply. *See* 729 F.2d at 685-86.

65. 729 F.2d at 686 (quoting United States v. Parke, Davis & Co., 362 U.S. 29, 43 (1960)).

66. 729 F.2d at 686.

67. "We note evidence that Rockwool communicated its desire to its customers that they purchase both blown wool and batts, and that Rockwool continued to sell blown wool to Williams and another competitor, both of whom bought batts. However, blown wool sales to Black Gold, which refused to buy batts from Rockwool, were terminated." *Id.* What needed to be shown to prove Rockwool's liability under section 1 of the Sherman Act was that Rockwool used the refusal to deal with Black Gold to induce *other* customers to adhere to a tying arrangement. *Id.*

68. The *Pick-Barth* Doctrine is derived from Albert Pick-Barth Co. v. Mitchell Woodbury Corp., 57 F.2d 96 (1st Cir. 1932), *cert. denied*, 286 U.S. 552 (1932). In *Pick-Barth*, the First Circuit held that a conspiracy to deprive a competitor of a substantial factor of commerce with an intent to eliminate that competition by unfair methods is per se an unreasonable restraint of trade.

69. 717 F.2d 493 (10th Cir. 1983).

70. *Id.* at 495. *See supra* note 1.

in the business of storing liquid petroleum gas (LPG) products.[71] Midwest's president, Melland, while still in a fiduciary capacity to Midwest, combined efforts with a former Midwest stockholder (Porter) and set up a competing LPG product storage company.[72] Midwest served a complaint upon the defendants charging: (1) that Melland's conduct constituted a business tort under state law; and (2) that Melland, Porter and various entities controlled by Melland and Porter violated section 1 of the Sherman Act by conspiring to engage in unfair competition for the purpose of eliminating Midwest as a competitor.[73]

At trial, the jury found in favor of plaintiff Midwest on both claims, awarding the company $250,000 on the antitrust claim and $3,911,637 on the state tort claims.[74] The trial court then trebled the antitrust award to $750,000.[75] Three issues were raised on appeal: (1) whether the lower court had erred in denying the defendants' motion for a directed verdict on the antitrust claim; (2) whether the court erred in not ordering a new trial on the state law claims; and (3) whether the court erred in refusing to enter judgment on the state law claims against the defendants other than Porter and in dismissing a third defendant for lack of in personam jurisdiction.[76]

The Tenth Circuit affirmed the judgment against Porter on the state law claims in the amount of $3,911,637.[77] With regard to the antitrust claim, however, the court found that the district court erred in refusing to grant a directed verdict and ordered the district court to enter judgment n.o.v. for the defendants.[78] The court's twofold reasoning deserves careful analysis.

B. *Rejection of the Per Se Approach*

The trial court refused to issue plaintiff's per se instruction to the jury.[79] Plaintiff, Midwest, argued that a conspiracy to eliminate competitors was a horizontal restraint created for the direct purpose of excluding a competitor from business.[80] The jury, based on special interrogatories, found for Midwest on a rule of reason charge.[81] Both parties appealed. Defendants charged that, even under a rule of reason analysis, the plaintiffs failed to prove injury to competition.[82] Midwest

71. 717 F.2d at 495.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 500-503. The court noted several difficulties with the calculation of this damage award but upheld the lower court's refusal to grant a new trial because of strong judicial policy in favor of upholding jury verdicts and the policy against an appellate court finding abuse of discretion on the part of the district court. *Id.* at 502.
78. *Id.* at 498-500.
79. *Id.* at 496.
80. *Id.*
81. Plaintiff's Reply Brief, Addendum.
82. 717 F.2d at 498.

continued to maintain that it should win under either approach.[83]

The Tenth Circuit attempted to answer Midwest's charge that defendant's alleged conspiracy constituted a per se violation.[84] In tracing the origins of the argument that a horizontal conspiracy to suppress competition through the elimination of a competitor by unfair means is a per se violation, the court began at *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.*,[85] outlined the sparse judicial development after *Pick-Barth*,[86] and then announced that the Tenth Circuit had never adopted the *Pick-Barth* doctrine and would not do so in this case.[87] The Tenth Circuit cited Supreme Court cases,[88] a circuit court case,[89] and a treatise demonstrating why the per se rule should not apply.[90]

The court's ruling conforms with the general trend away from the per se rule.[91] Unfair competition is not the kind of business practice that is characterized by a "pernicious effect on competition and lack of any redeeming virtue"[92] so as to warrant the application of a per se rule. Indeed, as the Tenth Circuit pointed out, "such conspiracies may actually have a beneficial effect on competition by facilitating new entry or otherwise decreasing concentration."[93]

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83. *Id.* at 496.

84. Midwest argued that defendants' conspiracy was a per se violation because "it was essentially a horizontal conspiracy which utilized one of the conspirator's powers as president of Midwest to exclude it from the competitive market for sale and leasing of substantial amounts of underground storage [and because] it was also a form of indirect price-fixing, and a per se violation for that reason as well." Brief for Plaintiff-Appellee at 36.

85. 57 F.2d 96 (1st Cir. 1932), *cert. denied*, 286 U.S. 252 (1932).

86. Perryton Wholesale, Inc. v. Pioneer Distrib. Co., 353 F.2d 618 (10th Cir. 1965), *cert. denied*, 383 U.S. 945 (1966), has been cited as the Tenth Circuit's adoption of the *Pick-Barth* doctrine. Although *Perryton* did not use per se language, it did say that conspiracy to eliminate a competitor distributor "destroys rather than maintains competition, is an unreasonable restraint on trade, and violates the statute." *Id.* at 622. *Perryton* specifically distinguished cases where one distributor was substituted for another, thus changing the identity of the competitor but not eliminating competition, and cases such as *Perryton* where the "intent of the conspiracy was to eliminate the competitor predominant in the area." *Id.* In *Midwest*, however, the court of appeals cited Craig v. Sun Oil Co., 515 F.2d 221 (10th Cir. 1975), *cert. denied*, 429 U.S. 829 (1976), which disposed of *Perryton* as "not necessarily a per se case despite the citation of the First Circuit cases." *Id.* at 224.

87. 717 F.2d at 496.

88. *Id.* *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58-59 (1977); United States v. Topco Assocs., Inc., 405 U.S. 596, 607-08 (1972).

89. 717 F.2d at 496. *See* Northwest Power Prods., Inc., v. Omark Indus. Inc., 576 F.2d 83, 90-91 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979).

90. 717 F.2d at 496-97. *See* 3 P. AREEDA & D. TURNER, ANTITRUST LAW § 828b, at 323 (1978).

91. For a recent analysis of the per se rule, see Lipner, *Antitrust's Per Se Rule: Reports of its Death are Greatly Exaggerated*, 60 DEN. L.J. 593 (1983). *See also* Northwest Power Prods., Inc. v. Omark Indus., Inc., 576 F.2d 83, 90 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979) ("We thus reject the per se rule of *Pick-Barth* and adopt a rule of reason to be applied on a case-by-case basis in situations where competitive forces protected by the Sherman Act suffer some palpable injury."); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 561 (1st Cir. 1974) ("Insofar as *Pick-Barth* . . . may be said to stand for the broad proposition that unfair competitive practices accompanied by an intent to hurt a competitor constitute per se violations of the antitrust laws, we do not now accept their teaching."), *cert. denied*, 421 U.S. 1004 (1975).

92. 717 F.2d at 496 (quoting Northern Pac. R.R. v. United States, 356 U.S. 1, 5 (1958)).

93. 717 F.2d at 496 (citing *Northwest Power Prods.*, 576 F.2d 83, 90-91).

The Tenth Circuit then culminated its rejection of the per se rule with five additional reasons why the per se test should not apply: (1) The definition of "unfair means" is so vague as to preclude review under the *Pick-Barth* line of cases because a "bright line of illegality" is a prerequisite to per se analysis;[94] (2) The fundamental conflict between antitrust and unfair competition laws and the necessity of determining, inferentially, whether there is impermissible intent to eliminate competition precludes per se analysis;[95] (3) Congress did not intend antitrust illegality to be determined by the unfair competition laws of the individual states;[96] (4) Only the Federal Trade Commission, not private plaintiffs under the Sherman Act, has the authority to prosecute unfair trade practices;[97] and (5) The ethical arguments against unfair competition "are irrelevant to, or even inconsistent with, the economic considerations on which the antitrust laws are based."[98]

C. *Injury to Competition Under the Rule of Reason*

Having decided that the case should be analyzed under the rule of reason, the Tenth Circuit turned to defendants' charge that the plaintiff had not proved injury to competition.[99] The court reviewed the record and found that the evidence could support a finding of injury to a competitor but could not support a finding of injury to competition as required by the antitrust laws.[100] In short, Midwest had failed to meet the well-established injury tests.[101] Thus, the court of appeals concluded, the district court erred in refusing to enter a directed verdict for the defendants on Midwest's antitrust claim.[102]

III. ADMISSIBILITY OF CO-CONSPIRATOR'S STATEMENTS

In *United States v. Metropolitan Enterprises, Inc.*,[103] the Tenth Circuit affirmed the district court's finding of a bid rigging conspiracy among contractors in violation of section 1 of the Sherman Act.[104] Eighteen contractors had entered bids for the repaving of four sections of an

94. 717 F.2d at 497 (citing *Northwest Power Prods.*, 576 F.2d at 90).

95. 717 F.2d at 497.

96. *Id.* (citing and quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 512 (1940)).

97. 717 F.2d at 497 (citing 1 E. CALLMAN, UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES ¶ 4.3, at 137-42 (3d ed. 1967 & Supp. 1976 at 35) and 15 U.S.C. § 45 (1982)).

98. 717 F.2d at 497 (citing National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 687-92 (1978)).

99. The evidence failed to show that the defendants' conduct "raised entry barriers, increased concentrations or otherwise led to the acquisition or exercise of market power." 717 F.2d at 499.

100. *Id.* at 498. In fact, the court noted that even if it were willing to infer injury to competition had Midwest itself been eliminated from the market or injured severely, that no such injury to Midwest existed. *Id.* at 499.

101. *Id.* at 498 (citing generally George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 562 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975)).

102. The second part of the *Midwest* decision addresses state law claims based on unfair competition, loss of corporate opportunities, self-dealing and fiduciary breaches. *See* 717 F.2d at 500-502.

103. 728 F.2d 444 (10th Cir. 1984).

104. *Id.* at 446.

Oklahoma highway. Broce Construction Company (Broce), after a series of meetings, "worked out a deal" with Metropolitan Enterprises (Metropolitan) whereby Broce was to subcontract the northernmost of the four sections to Metropolitan if Metropolitan agreed to stay out of the bidding. Broce subsequently received all four contracts and subcontracted the northernmost section to Metropolitan.[105]

A. *The Hearsay Rule and the Co-conspiracy Exception*

At trial, following the grand jury indictment charging Metropolitan and its president with conspiracy to rig bids in violation of section 1 of the Sherman Act,[106] the jury found both Metropolitan and its president guilty. Metropolitan's president, Kavanaugh, was sentenced to two years in prison and fined $25,000.[107] Metropolitan was fined $75,000.[108]

On appeal, Kavanaugh and Metropolitan charged that the district court had erred in admitting the testimony of two witnesses, and that the prosecution had failed to prove, by a preponderance of the evidence and independent of the admitted statements of the co-conspirators, that Kavanaugh and others were participants in the conspiracy.[109]

As to the admission of the statements of the co-conspirators, the court of appeals noted that an out-of-court statement is not hearsay if it is offered against a party *and* is a statement by a co-conspirator made during the course and in furtherance of the conspiracy.[110] The court reviewed the record, and held that the district court had been aware of and followed what is known as the "preferred order of proof" procedure[111] in deciding whether to admit hearsay statements of co-conspirators.[112] The court, after examining the evidence, upheld the lower court's finding that Kavanaugh and Metropolitan were guilty of intentionally participating in a conspiracy to rig bids.[113]

On appeal, the appellants, Kavanaugh and Metropolitan, also charged error in the instructions to the jury because the instructions did not sufficiently inform the jury that it is lawful for competitors to obtain

105. *Id.* at 445-46.

106. 15 U.S.C. § 1 (1982). The indictment also contained two counts of mail fraud in connection with the conspiracy.

107. 728 F.2d at 446.

108. *Id.*

109. *Id.*

110. *Id.* at 448 (emphasis added). *See* FED. R. EVID. 801(d)(2)(E).

111. The "preferred order of proof," outlined in United States v. Petersen, 611 F.2d 1313 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980), provides that: (1) the judge determines admissibility of the co-conspirators' statements; (2) the court makes a threshold determination based on independent evidence; (3) where possible, the government must introduce independent proof of the conspiracy first and the defendants' connection with the conspiracy second, before admitting the hearsay; and (4) the court determines whether, independent of the hearsay statements, (a) a conspiracy existed; (b) that co-conspirator and defendant were members of the conspiracy; and (c) the statement was made during course of and in furtherance of the conspiracy. 728 F.2d 448-49.

112. 728 F.2d at 450.

113. *Id.*

or exchange information concerning prospective bids.[114] The Tenth Circuit, reviewing the instructions as a whole,[115] found that the instructions given were adequate to enable the jury to find a violation of section 1 of the Sherman Act.[116]

The last challenge of appellants was that the first count of the indictment failed to allege the requisite anticompetitive intent or knowledge to state an offense under section 1. The court of appeals found that the indictment adequately apprised appellants of their participation in a conspiracy, and that the requisite intent and knowledge was implicit in the charge of conspiracy.[117] The Tenth Circuit thus upheld the lower court, relying on *United States v. Gypsum*.[118] *Gypsum* held that intent is a necessary element of a criminal antitrust violation[119] but that a "requirement of proof not only of this knowledge of likely effects, but also of a conscious desire to bring them to fruition or to violate the law would [be] . . . unduly burdensome. . . . [T]he perpetrator's knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent."[120] Furthermore, in *Schnautz v. United States*,[121] the Fifth Circuit held that the mere failure of the indictment to use the words "unlawfully, knowingly, and willfully" did not render the indictment insufficient.[122] Thus, the Tenth Circuit in *Metropolitan* concluded that the appellants, upon a reading of the indictment outlining the elements of the conspiracy offense charged, should have been able to prepare their defense despite the omission of the word "intent."[123]

IV. Conspiring Entities Under Section 1 of the Sherman Act

In *Blankenship v. Herzfeld (Herzfeld II)*,[124] the Tenth Circuit joined the Seventh, Eighth and Ninth Circuits in holding that the determination of whether related corporations are capable of conspiring in violation of section 1 of the Sherman Act "is a question of fact to be answered under the circumstances of each case."[125] The Tenth Circuit then deferred to the district court's determination that the defendant businesses were not separate business organizations capable of conspiring under the Sherman Act.[126]

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114. *Id.* at 451.

115. This is the standard set forth in several Tenth Circuit cases including United States v. Burns, 624 F.2d 95, 105 (10th Cir.), *cert. denied*, 449 U.S. 954 (1980).

116. 728 F.2d 452.

117. *Id.*

118. 438 U.S. 422 (1978).

119. *Id.* at 443.

120. *Id.* at 446.

121. 263 F.2d 525 (5th Cir. 1959), *cert. denied*, 360 U.S. 910 (1959).

122. 263 F.2d at 529.

123. 728 F.2d at 453.

124. 721 F.2d 306 (10th Cir. 1983). The bulk of this case is set forth and decided in Blankenship v. Herzfeld, 661 F.2d 840 (10th Cir. 1981) (*Herzfeld I*).

125. 721 F.2d 309 (quoting Ogilvie v. Fotomat Corp., 641 F.2d 581, 588 (8th Cir. 1981)).

126. 721 F.2d at 310.

In the earlier *Herzfeld* decision (*Herzfeld I*),[127] the court had noted that the defendants shared common ownership and officers, had no previous history of competition among themselves and essentially "engaged in mutually advantageous business practices."[128] Noting that the other circuit courts of appeal had drawn differing conclusions as to when "legally distinct" but "economically related" units should be considered one actor for section 1 analysis,[129] the court remanded *Herzfeld* for a decision on this issue.[130] On remand, the lower court found that the defendants constituted a single enterprise.

In *Herzfeld II*, the Tenth Circuit soundly followed the trend in other circuits that disregards the "incorporation test,"[131] formerly applied by the Supreme Court, and, instead, favors a less formalistic "functional test."[132] The Tenth Circuit cited one of its former decisions which had noted that "antitrust defendants with separate legal labels . . . are not always capable of conspiring; they must be separate economic entities in substance as well."[133]

Had the Tenth Circuit waited another seven months for the Supreme Court's June 1984 decision in *Copperweld Corp. v. Independence Tube Corp.*,[134] the court's job in *Herzfeld* would have been considerably easier. In *Copperweld*, the Supreme Court held that, as a matter of law, a parent and its wholly owned subsidiary are incapable of conspiring with each other for purposes of section 1 of the Sherman Act.[135] Although the *Herzfeld* defendants do not represent a clean "parent-subsidiary" grouping, the reasoning of the Supreme Court's decision—that a parent and its wholly owned subsidiary have the same objectives, are guided by a single corporate consciousness, and in "agreeing to a course of action," are not joining previously disparate economic resources—would have sustained a finding that the *Herzfeld* defendants were incapable of conspiring with each other.[136]

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127. 661 F.2d 840 (1981).

128. 721 F.2d at 310 (citing Rec., vol. I, at 77).

129. 721 F.2d at 309. *See, e.g.*, Ogilvie v. Fotomat Corp., 641 F.2d 581, 588 (8th Cir. 1981).

130. *Id.* at 308-09.

131. The incorporation test suggests that when corporate subdivisions are incorporated separately, they can be treated as separate entities for the purpose of applying section 1. *See* Comment, *Intraenterprise Antitrust Conspiracy: a Decision-making Approach*, 71 CALIF. L. REV. 1732 (1983). This incorporation test was resoundingly rejected in Copperweld Corp. v. Independence Tube Corp., 52 U.S.L.W. 4821 (June 19, 1984).

132. The functional test examines the relationship between the entities to determine whether they are capable of conspiring to restrain trade. *See* 721 F.2d at 309.

133. 721 F.2d at 309 (*citing* Holter v. Moore & Co., 702 F.2d 854 (10th Cir. 1980), *cert. denied*, 104 S. Ct. 347 (1983)).

134. 52 U.S.L.W. 4821 (June 19, 1984).

135. *Id.* at 4828.

136. As the Supreme Court pointed out in *Copperweld*, "the very notion of an agreement in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning." 52 U.S.L.W. at 4826.