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ANTITRUST LAW

OVERVIEW

During the period of this survey the Tenth Circuit Court of Appeals' antitrust decisions all involved private actions brought pursuant to the Sherman Act.[1] The court was given the opportunity to address the issue of per se versus rule of reason analysis under section 1 of the Sherman Act[2] in *Board of Regents v. National Collegiate Athletic Association.*[3] In other cases surveyed herein the court considered issues involving jurisdiction under the Sherman Act,[4] vertical price restraints,[5] attempted monopolization,[6] and the corporate conspiracy doctrine.[7] Additionally, the court construed the scope of the National Football League's limited antitrust exemption,[8] ruled on the appropriate statute of limitations analysis for claims involving business failures,[9] and articulated the conditions necessary to state an antitrust claim relating to a competitor's purchase of idle production facilities.[10]

I. PER SE ANALYSIS AND INTEGRATED MARKETING ARRANGEMENTS: FOOTBALL POWERS 2, NCAA 0

In *Board of Regents v. National Collegiate Athletic Association*,[11] the Tenth Circuit, over Judge Barrett's dissent, held that exclusive broadcasting contracts between the National Collegiate Athletic Association (NCAA) and three television networks were both per se and rule of reason violations[12] of the Sherman Act.[13] This comment will articulate the reasoning of the Tenth Circuit and the district court, and will briefly consider the Tenth Circuit's per se methodology in light of recent Burger Court decisions.

A. *Facts*

The NCAA, founded in 1905, consists of approximately 800 member

1. 15 U.S.C. §§ 1-7 (1982).
2. 15 U.S.C. § 1 (1982).
3. 707 F.2d 1147 (10th Cir.), *cert. granted*, 104 S. Ct. 272 (1983).
4. *See* Lease Lights, Inc. v. Public Serv. Co., 701 F.2d 794 (10th Cir. 1983).
5. *See* A.A.A. Liquors, Inc. v. Joseph E. Seagram & Sons, Inc., 705 F.2d 1203 (10th Cir.), *cert. denied*, 103 S. Ct. 1903 (1983).
6. *See* Olsen v. Progressive Music Supply, Inc., 703 F.2d 432 (10th Cir.), *cert. denied*, 104 S. Ct. 197 (1983).
7. *See* Holter v. Moore & Co., 702 F.2d 854 (10th Cir. 1983), *cert. denied*, 104 S. Ct. 347 (1983).
8. *See* Colorado High School Activities Ass'n v. National Football League, 711 F.2d 943 (10th Cir. 1983).
9. *See* Curtis v. Campbell-Taggart, Inc., 687 F.2d 336 (10th Cir.), *cert. denied*, 103 S. Ct. 576 (1982).
10. *See id.*
11. 707 F.2d 1147 (10th Cir.), *cert. granted*, 104 S. Ct. 272 (1983).
12. For a discussion of the distinction between per se and rule of reason violations of section 1 of the Sherman Act, *see infra* notes 36-39 and accompanying text.
13. 707 F.2d at 1156, 1160.

colleges and universities.[14] The NCAA exercises control over diverse aspects of intercollegiate athletic competition including playing rules, recruiting regulations, standards of academic eligibility, and amateurism.[15] These functions are consistent with the NCAA's original purposes of preserving college sports on an amateur level and ensuring that student athletics are integrated with a university's educational mission.[16]

The NCAA has regulated football telecasts of member schools since 1953.[17] Regulation was initiated in response to the concern of some NCAA members that live attendance at their games would suffer as a result of competition from televised games.[18] Early regulations included allocation of television revenue, limitation of the number of weekly football telecasts, and limitation of the number of appearances permitted a team during the season.[19]

From 1953 through 1976 the specific television controls imposed upon member schools were subject to approval by direct vote of the entire NCAA membership, only a minority of which were schools having "major" football programs.[20] Since 1976, the specific details of the controls have not been subject to direct vote.[21] Member schools now vote only upon general guidelines, while the controls themselves are formulated through negotiation between the NCAA and the television networks.[22]

By the mid-1970's a majority of the large schools operating successful

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14. Board of Regents v. National Collegiate Athletic Association, 546 F. Supp. 1276, 1282 (W.D. Okla. 1982), *aff'd in part and rev'd in part*, 707 F.2d 1147 (10th Cir.), *cert. granted*, 104 S. Ct. 272 (1983).

15. 546 F. Supp. at 1284.

16. *See* 707 F.2d at 1163-64 (Barrett, J., dissenting).

17. 546 F. Supp. at 1283. Until 1971 authority for the control of football telecasts was derived from the general powers granted to the NCAA in its constitution and bylaws. In 1971 the bylaws were amended to add language specifically granting authority to regulate members' football telecasts. Bylaw 11-1-(aa) provided in pertinent part: "The [Football Television] Committee shall be responsible for the formulation and administration of the Association's football television policy and program, subject to the approval of the membership." 546 F. Supp. at 1284. In 1981 the NCAA issued an "Official Interpretation" of Bylaw 11-1-(aa) reaffirming its exclusive power to control football telecasts. 546 F. Supp. at 1285. Football is the only sport in which the NCAA has completely regulated its members' broadcast rights. *Id.* at 1284.

18. 546 F. Supp. at 1283. From 1952 through 1957 the Football Television Committee of the NCAA retained the services of the National Opinion Research Center at the University of Chicago to study the effects of televised college football games on live gate attendance. The studies supported the belief that football attendance tended to decrease at games being played within the television viewing region. *Id.* In rejecting argument by the NCAA that television controls were necessary to protect live attendance at games, the district court questioned the reliability of the National Opinion Research Center studies because the studies failed to give due consideration to factors other than football telecasts which might have affected attendance at football contests. *Id.* at 1295.

19. *Id.* at 1283. The first controls limited television exposures to one game per week, permitted a team only one television appearance during the season, allowed the sponsors to select the game to be televised, and divided television revenue between the teams playing the game and the NCAA. *Id.* Under the present contracts, television network exposures have increased to 228 games per season, schools are permitted to appear on six network broadcasts every two years, and the number of networks broadcasting games has increased from one to three. *See id.* at 1291-93.

20. *Id.* at 1283. Fewer than 500 of the NCAA's 800 voting members have football programs; of that number only 187 are in Division I, which is comprised of the largest schools. *Id.*

21. *Id.*

22. *See id.* The district court noted that the NCAA's independent negotiation power has

football programs, including the University of Oklahoma and the University of Georgia, had become disenchanted with the inequities of the NCAA television regulatory scheme[23] and joined together to form the College Football Association (CFA) to represent their interests within the NCAA.[24] After attempts by the CFA to lobby within the NCAA proved ineffective, and efforts to negotiate a television contract independent of the NCAA were unsuccessful primarily because of NCAA threats,[25] the Universities of Oklahoma and Georgia brought suit in the United States District Court for the Western District of Oklahoma seeking to enjoin enforcement of the NCAA's television contracts.[26] The universities alleged that the NCAA regulations precluding member schools from independently negotiating the sale of football telecast rights violated the antitrust laws.[27]

B. *District Court Decision*

1. Standing

The District Court held that the plaintiff universities were subject to both direct and threatened antitrust injury, either of which was sufficient to confer standing to seek an injunction.[28] Injury-in-fact existed because the contracts entered into between the NCAA and the television networks for the years 1982-1985 threatened future revenues of the schools and the NCAA had manifested its willingness to enforce its exclusive marketing position by conduct harmful to the plaintiffs.[29] The fact that plaintiffs were seeking increased profits did not prevent characterizing their causal economic injury as antitrust injury.[30] Plaintiffs had therefore alleged both an existing controversy and existing antitrust injury, establishing the justiciability of their antitrust action.[31]

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been demonstrated through its acceptance of contracts contradicting general principles approved by the membership. *Id.*

23. *See id.* at 1285. In particular, the major football schools objected to equal division of television revenues with schools having less prestigious programs. For example, the Oklahoma/University of Southern California and Citadel/Appalachian State games were both broadcast on the same afternoon in 1981. Although the former was shown on over 200 stations and the latter on only four, each school received an identical fee for its broadcast rights. *Id.* at 1291.

24. *Id.* at 1285.

25. In 1981 the CFA contracted with NBC to televise football games. NBC rescinded the contract after most of the CFA members withdrew from participation in the contract under threat of sanctions by the NCAA. *Id.* at 1286.

26. *Id.* at 1286. 15 U.S.C. § 26 (1982) states in pertinent part: "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws."

27. 546 F. Supp. at 1304.

28. *Id.* at 1302.

29. *Id.*

30. *Id.* at 1303. Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977) held that plaintiffs must show they have can suffered "antitrust injury" before they could invoke federal antitrust laws. *See id.* at 489. "Antitrust injury" is a deleterious impact on a plaintiff's ability to reap the rewards of free competition. *See id.* at 486-89. Because the increased profits sought by plaintiffs would result from restoration of competition, the NCAA's restrictions on plaintiffs' current profitability constituted antitrust injury within the meaning of *Pueblo Bowl-O-Mat.* 546 F. Supp. at 1304-05.

31. 546 F. Supp. at 1304.

2. The Sherman Act: Per Se and Rule of Reason Analysis Under Section 1

Section 1 of the Sherman Act 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."[32] The Court recognized early on that Congress did not intend literal construction of section 1, because such a construction could conceivably invalidate all contracts.[33] Instead, courts "were expected to give shape to the statute's broad mandate by drawing on common-law tradition."[34] Responding to Congress' invitation, the Court developed the per se and rule of reason analytical approaches to application of section one.[35]

Per se analysis is applied to "naked" restraints of trade—restraints whose anticompetitive effects are apparent without extended analysis.[36] Proof that a defendant has engaged in a practice condemned by the per se rule establishes a Sherman Act violation; the plaintiff is not required to show that the defendant's use of the practice actually resulted in an unreasonable restraint on competition.[37] Rule of reason inquiry, conversely, mandates examination of whether a restraint in fact promotes, rather than suppresses, competition in a particular market environment.[38] Facts and circumstances surrounding the restraint should be considered in evaluating a restraint's effect.[39]

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32. 15 U.S.C. § 1 (1982).

33. *E.g.*, Board of Trade v. United States, 246 U.S. 231, 238 (1918).

34. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978).

35. *See, e.g., id.* at 692. The per se concept of illegality under the Sherman Act was first articulated in United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). The "rule of reason" stems from early common law, *see* National Soc'y of Professional Eng'rs, 435 U.S. at 687-89 (citing Mitchell v. Reynolds, 24 Eng. Rep. 347 (1711)), and was quickly incorporated into section 1 of the Sherman Act. *See* Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).

36. Northern Pac. Ry. v. United States, 356 U.S. 1 (1958) articulated the essence of the per se rule: "[C]ertain agreements or practices . . . because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Id.* at 5.

37. *Id.* at 5.

38. The classic formulation of the rule of reason was articulated by Justice Brandeis in Board of Trade v. United States, 246 U.S. 231 (1918). Writing for the Court, Justice Brandeis stated:

> [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."

Id. at 238.

39. To determine [the unreasonableness of a restraint] the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular restraint, the purpose or end sought to be attained, are all relevant facts.

Id. at 238. *Accord National Soc'y of Professional Eng'rs*, 435 U.S. at 692.

3. The District Court's Per Se Analysis: Price Fixing

The district court held, as its first ground of decision, that the NCAA's television controls constituted price fixing, a per se violation of section 1 of the Sherman Act.[40] Before examining the merits of the alleged per se violation, however, the court rejected the NCAA's argument that the amateur nature of college football required special antitrust treatment for the NCAA's restrictions.[41] Pointing to the huge sums involved in financing higher education and the intense (and professional) competition for those funds, the court found that it was "cavil to suggest that college football, or indeed higher education itself, is not a business."[42] Hence, the NCAA's conduct was evaluated under general antitrust principles.

Turning to the merits of the price-fixing claims, the district court found that the television package had literally fixed prices in two ways. First, the plan effectively dictated the price the networks would pay for each telecast.[43] Second, the plan dictated the price each school could receive for its telecast rights.[44] The court then observed that not all action literally fixing prices is considered "price fixing" for purposes of per se analysis.[45] In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc*.[46] the Court had emphatically distinguished between literal price fixing and the "categories of business behavior to which the per se rule [against price fixing] has been held applicable."[47] Thus, the relevant inquiry in a case involving literal price fixing is whether the activity resulting in a fixed price for competitors' products is one which, on its face, leads to the reductions in competition and output which are characteristic of condemned price fixing arrangements.[48]

Following the guidelines of *Broadcast Music*, the district court proceeded to analyze the per se nature of the NCAA's marketing program. The NCAA likened its sale of its members' television rights to the blanket licensing agreements *Broadcast Music* excluded from per se treatment.[49] The defendants in *Broadcast Music* served as agents for licensing the performing rights to members' copyrighted material, issuing nonexclusive blanket licenses entitling licensees to unrestricted use of members' material.[50] Licensees were charged a single fee for a blanket license, regardless of the number of compositions used by the licensee and regardless of the number of times a particular composition was performed.[51] The Court declined to apply per se analysis to this licensing arrangement, despite acknowledging the presence of

40. *See* 546 F. Supp. at 1304-09.

41. *See id*. at 1288.

42. *Id*.

43. *Id*. at 1305. The district court's findings of fact detailed how the exclusive features of the plan, in conjunction with a contractually stated minimum total payment, operated to set an identical price for each televised game. *See id*. at 1289-90; 1292-94.

44. *Id*. at 1305. *See also id*. at 1292-94.

45. *Id*. at 1305.

46. 441 U.S. 1 (1979).

47. *Id*. at 9.

48. *Id*. at 20. *See* 546 F. Supp. at 1305.

49. 546 F. Supp. at 1306.

50. 441 U.S. at 5.

51. *Id*.

"literal" price fixing, because use of the blanket licenses did not facially appear to be a practice that would "always or almost always tend to restrict competition and decrease output."[52] The Court found that the blanket license was reasonably necessary to protect the federally-created right of copyright;[53] was necessary to create an efficient market for musical copyrights;[54] was, in a meaningful sense, a unique product;[55] and, importantly, the license did not preclude copyright owners or licensees from negotiating individual licensing arrangements.[56] Broadcast Music's joint license was therefore far from a "naked" restraint of the trade in copyrights; the license, and its "fixed price," were a good faith and facially reasonable response to unique market problems.[57] Per se treatment was therefore inappropriate.[58]

The district court rejected the NCAA's analogy to *Broadcast Music* for several reasons. Significantly, marketing exigencies did not require schools to cooperate beyond agreeing to play a particular game.[59] Joint sale of television rights was therefore not a joint venture necessitated by marketing realities, but was merely a device restricting output by limiting the number of games available for broadcast and fixing the price for those games.[60] Additionally, football telecast rights were not a property right existing as a result of federal law, thereby eliminating any quasi-presumption in favor of the NCAA's restrictions.[61] The most important distinction for the district court, however, was the inability of NCAA members to negotiate individual sales of their television rights.[62] This feature rendered the plan more like a horizontal price fixing agreement than a true joint venture.[63]

Given the overwhelming marketing restrictions created by the NCAA's price fixing program, per se treatment was required.[64] Having found per se treatment appropriate, under *Arizona v. Maricopa County Medical Society*[65] the NCAA's procompetitive justifications for price fixing were not relevant.[66] Quoting *Maricopa County*, the court stated:

The respondents' principal argument is that the per se rule is inap-

52. *See id.* at 20-23.

53. *Id.* at 18-19.

54. *Id.* at 20. The blanket license created an efficient market by eliminating the prohibitive costs forseeable if every copyright use had to be individually negotiated, by minimizing the risk of copyright infringement, and by providing an effective means for enforcing a copyright's exclusivity. *Id.* at 20-21.

55. *Id.* at 21-22.

56. *Id.* at 23-24.

57. *See id.* at 24.

58. *Id.*

59. 546 F. Supp. at 1306.

60. *Id. See also. id.* at 1307 (joint license at issue in *Broadcast Music* was a necessary means for marketing copyrighted musical compositions).

61. *Cf. id.* at 1306 (noting that *Broadcast Music* found it anomalous to characterize a marketing arrangement necessary to protect a federal property right as a per se violation of federal antitrust law; *see Broadcast Music*, 441 U.S. at 18-19).

62. 546 F. Supp. at 1308.

63. *See id. Cf. Broadcast Music*, 441 U.S. at 23 (freedom to sell copyright outside license arrangement indicated that blanket license was not "simple horizontal arrangement among competitors").

64. 546 F. Supp. at 1308.

65. 457 U.S. 332 (1982).

66. 546 F. Supp. at 1308.

> plicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the per se concept. The anticompetitive potential inherent in all price fixing arrangements justifies their facial invalidation even if procompetitive justifications are offered for some. Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its general application.[67]

Having rejected the NCAA's argument that its marketing arrangement was facially legitimate, the district court considered the NCAA's contention that the television controls properly escaped per se analysis because they were merely ancillary to NCAA regulations related to player recruitment, playing rules, amateurism, and player grants-in-aid.[68] According to the NCAA, as ancillary restraints the television marketing controls could not be treated as intrinsically anticompetitive restraints, and were therefore not properly subjected to per se treatment.[69]

The court set forth the elements of the ancillary restraint doctrine as 1) proof that a particular restraint is reasonably necessary to accomplish an arrangement's legitimate purposes, and is no broader than reasonably necessary; 2) the absence of unreasonable anticompetitive effects; and 3) imposition by a party or parties lacking monopoly power.[70] Applying the test it had articulated, the court rejected the NCAA's ancillary restraint argument. As a threshold matter, the NCAA failed to provide any evidence explaining *why* its marketing monopoly was necessary to effect its overall regulatory program.[71] Further, the NCAA enjoyed sufficient noncommercial controls to accomplish its legitimate purposes without regulating football telecasts.[72] Finally, the NCAA could not be permitted to restrain the success of some market participants in order to ensure a viable market for others; the Sherman Act required that free competition rule the marketplace.[73] For all the above reasons, the television plan did not qualify as a permissible "ancillary restraint."[74]

4. The District Court's Per Se Analysis: Group Boycott

The plaintiffs also argued that the NCAA's television controls were illegal as a group boycott.[75] The district court agreed, holding that the controls constituted a group boycott under several theories. First, because coopera-

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67. *Id.* (quoting *Maricopa County*, 457 U.S. at 351).

68. 546 F. Supp. at 1309.

69. *Id.*

70. *Id.* at 1309 (citing United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899); United States v. Columbia Pictures Corp., 189 F. Supp. 153, 185-92 (S.D. N.Y. 1960)). *See generally* Harrison, *Price Fixing, The Professions, and Ancillary Restraints: Coping with* Maricopa County, 1982 U. ILL. L. REV. 926; Louis, *Restraints Ancillary to Joint Ventures and Licensing Agreements: Do* Sealy *and* Topco *Logically Survive* Sylvania *and* Broadcast Music? 66 VA. L. REV. 879 (1980).

71. 546 F. Supp. at 1309.

72. *Id.* at 1310.

73. *Id.*

74. *Id.* at 1311.

75. *Id.*

tion among producers was necessary to compete in the market, the producers' agreement not to trade with non-NCAA producers (non-NCAA schools) constituted a group boycott.[76] Second, the producers' agreement not to trade with networks not selected by the NCAA constituted a horizontal agreement not to deal with specified buyers.[77]

5. District Court's Rule of Reason Analysis

Following its per se analysis of the television controls the court examined the controls under the rule of reason, in the interests of litigation efficiency.[78] As described above, rule of reason analysis is limited to ascertaining whether a restraint either promotes or suppresses competition.[79] A restraint's impact on competitive conditions[80] is evaluated by considering both the nature or character of the restraint and the intent underlying the restraint, as manifested in the history and circumstances surrounding the restraint.[81] Either inquiry may lead to characterization of a restraint as unreasonable.[82] The district court found the television controls unreasonable, and therefore illegal, under both branches of the test.[83]

By regulating the number of games telecast, the price for broadcast rights, and the ability of traders (schools) to choose their trading partners, the NCAA controls were unreasonable in character.[84] Further, the lack of responsiveness to consumer (*i.e.* viewer) preference was highly offensive; this fact clearly illuminated the market restrictions embodied in the controls.[85] Given the NCAA's inability to prove that the restraints in fact had redeeming procompetitive benefits sufficient to mitigate the facial unreasonableness

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76. *Id.* at 1311-12 (citing Associated Press v. United States, 326 U.S. 1 (1945)). *Associated Press* involved an agreement among newspapers (producers) not to sell their product (news) to non-combine newspapers. 326 U.S. at 8-9. The Court found the arrangement illegal under section 1, although the agreement was not explicitly characterized as a per se group boycott. *See id.* at 18-19. *See also* Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., 364 U.S. 656, 659-60 (1961) (conspiratorial refusal to supply necessary competitive input to competitor on same market tier of some conspirators stated per se claim).

77. 546 F. Supp. at 1313. The court recognized that most per se group boycotts involved horizontal conspiracies affecting competitors on the conspirators' market tier, but held that because the effects of the NCAA's exclusive contract were indistinguishable from the effects of a classic horizontal boycott the per se rule was applicable. *Id. Cf.* Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3d Cir. 1979) (per se boycott present because of market effects even though there was no numerosity of actors on either market tier).

78. 546 F. Supp. at 1314.

79. *See supra* notes 38-39 and accompanying text.

80. Noneconomic justifications or effects are irrelevant in evaluating a restraint's reasonableness. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 689-92 (1978).

81. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 690 (1978); Board of Trade v. United States, 246 U.S. 231, 238-39 (1918); Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).

82. *National Soc'y of Professional Eng'rs*, 435 U.S. at 692.

83. 546 F. Supp. at 1315.

84. *Id.* at 1317-19.

85. *See id.* at 1319. The court stated:

> Every witness who testified on the matter confirmed that the consumers, the viewers of college football television, receive absolutely no benefit from the controls. Many games for which there is a larger viewer demand are kept from the viewers, and many games for which there is little if any demand are nonetheless televised.

Id.

of the restraints,[86] the NCAA's television program was illegal under the rule of reason.[87]

Similarly, the intent underlying the controls, as indicated by their historical development and manner of implementation, was anticompetitive, thereby rendering the controls unreasonable.[88] The court concluded that the purpose of the regulations was "to enhance the television revenues of less prominent football-playing schools" at the expense of the major football powers, and to provide income to the NCAA.[89] The court rejected arguments that the primary purpose of restricting telecasts was to maintain live gate attendance,[90] and that the controls were properly ancillary to the NCAA's noneconomic goals.[91] Finally, the NCAA's concern with establishing exclusive power over its members' football television rights was not manifested until CFA members attempted to exercise control over their television rights, shedding further doubt on the NCAA's asserted altruistic purpose in controlling football rights.[92]

6. The Sherman Act: Monopolization Under Section 2

A two-step inquiry was conducted into plaintiffs' allegations that the NCAA had monopolized the college television market in violation of section 2 of the Sherman Act.[93] After defining the relevant product market to be college football television,[94] the court found that the NCAA had monopolized the market.[95]

The NCAA had contended that college football television did not constitute a separate market because the economic characteristics of the alleged market were inconsistent with a monopoly scenario,[96] and because other television programming could be readily substituted for college football telecasts.[97] Within the larger market consisting of all television broadcasts, the NCAA would not have market power, and therefore could not have engaged in monopolization.[98] The court rejected the NCAA's arguments.

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86. The court found that the restraints had enhanced neither live viewership nor competitive balance. *Id.*

87. *Id.*

88. *Id.* at 1317.

89. 546 F. Supp. at 1315.

90. While this purpose may have originally motivated the NCAA, the NCAA's modern television program evinced little concern for protecting live attendance. For example, the latest network contracts provide for up to nine hours of football telecasts on Saturday afternoons, and also require the networks to telecast more games than would be shown in an unrestricted market. *Id.*

91. *Id.* at 1316. The court found that the television restrictions made little, if any, contribution to preserving competitive balance. Further, the television contracts restricted the commercial activities of NCAA members, not the actual specifics of competition. *Id.*

92. *See id.* at 1316-17.

93. 15 U.S.C. § 2 (1982). This section states in relevant 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." *Id.*

94. 546 F. Supp. at 1319-23.

95. *Id.* at 1323-24.

96. *See id.* at 1319-20.

97. *See id.* at 1320-23.

98. *See id.* at 1321.

Expert economic testimony supporting the NCAA was rejected because production in the college televised football market was not a function of marginal cost; games were played regardless of incremental increases in television revenue.[99] Hence, the NCAA's micro-economically based marketing analysis was inherently flawed.[100] Further, the market for televised football had never existed without the presence of NCAA controls. Thus, comparing the actual price and output behavior of televised football with behavior theoretically forseeable in a monopolized market was irrelevant; the significance of actual behavior could not be evaluated except in terms of a controlled market.[101]

Having rejected the NCAA's attempt to theoretically define the relevant market, the court examined evidence of college football's actual interchangeability of with other television programming. The court concluded that televised college football was a separate market because other television programming was not in fact readily interchangeable with college football.[102] The court found that the NCAA was able to increase the price for college football telecasts dramatically without a corresponding increase in output (*i.e.*, the number of games telecast).[103] Similarly, advertisers allocated a disproportionate share of their total advertising budgets to college football broadcasts.[104] These two factors led the court to hold that the relevant market was college football broadcasts.[105]

Once the relevant market was defined, the court had little trouble finding that the NCAA had monopoly power within that market: the NCAA

99. *Id.* at 1319.

100. *Id.* at 1320.

101. *Id.*

102. *Id.* United States v. E. I. Dupont de Nemours & Co., 351 U.S. 377 (1956) held that the relevant market for evaluating monopoly power should be determined by considering the degree to which other products were readily substitutable for the allegedly monopolized product. *See id.* at 393, 400.

103. In 1981, ABC paid $31 million for 24 broadcast exposures. In 1982, ABC and CBS paid $59 million for 28 similar exposures, a 62% price increase in the cost of a broadcast. By 1985, the networks will pay $72 million for 28 exposures. 546 F. Supp. at 1322. The court found that "no other network programming, with the possible exception of professional football, . . . could command such a dramatic price increase with so small an increase in output." *Id.*

104. *See id.* at 1321. The court also noted the networks' belief that they would be able to increase the price of advertising on college telecasts to correspond with the increased cost of purchasing the football rights, and found this an additional indicium of college football's unique market status. *Id.* at 1323.

105. *Id.* at 1323. The court stated:

> In a sense, it is difficult to understand the tremendous appeal of college football to the networks and their advertisers. Certainly the color, pageantry and tradition of the sport, and the interest of alumni in the sport, are significant factors. *Whatever the reason, it is clear that there is no substitute in the minds of the networks and advertisers*. They pay an enormous cost to reach an audience which is small relative to prime time programming. The networks are willing to allow NCAA to substantially dictate the conditions under which they may televise college football. The networks may even be willing to lose money on college football in return for some intangible benefits they believe themselves to derive from merely being associated with the sport. It is clear that college football does not compete with other television programming in any real sense, that it is a market unto itself, and that it is the relevant market for determining whether NCAA exercises monopoly power.

Id. (emphasis supplied).

clearly exercised uncontested control of college television broadcasts.[106] Because the NCAA had used its monopoly power to erect barriers to entry and engaged in other anticompetitive conduct, it had monopolized the college television football market.[107]

C. *Tenth Circuit Decision*

The NCAA appealed the substantive aspects of the district court's decision regarding standing, the illegality of the television controls under per se and rule of reason analysis, and the existence of a group boycott.[108] In a decision written by Judge Logan, the Tenth Circuit held that the Universities of Oklahoma and Georgia suffered the type of injury conferring antitrust standing;[109] that the controls constituted illegal price fixing under both per se[110] and rule of reason analysis;[111] and that the controls did not constitute a per se group boycott.[112] Judge Barrett filed a dissenting opinion.[113]

1. Standing

The court held that the Universities of Oklahoma and Georgia had standing to attack the television controls as a horizontal price fixing conspiracy.[114] Many of the injuries alleged by the plaintiffs related to restrictions on their trading freedom, and were thus more analogous to the injuries flowing from vertical restraints than to the decreased output and price enhancement injuries traditionally associated with cartelization.[115] The court relaxed the rigors of the standing inquiry, however, because the plaintiffs sought only injunctive relief.[116] Given the relaxed procedural posture and the fact that plaintiffs' injuries were "inextricably intertwined" with the alleged horizontal conspiracy, plaintiff's had standing to challenge the NCAA's practices as horizontal price fixing.[117] The Tenth Circuit also found that the plaintiffs had standing to challenge the plan's other provisions.[118]

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106. *Id.* at 1323. *Cf.* United States v. E. I. DuPont de Nemours & Co., 351 U.S. 377, 394 (1956) (monopoly power found in relevant market consisting of single product).

107. 546 F. Supp. at 1323.

108. Board of Regents v. National Collegiate Athletic Association, 707 F.2d 1147, 1150 (10th Cir.), *cert. granted*, 104 S. Ct. 272 (1983). The NCAA also appealed the district court's market definition, but this issue was not addressed by the Tenth Circuit. 707 F.2d at 1159 n.16. Additionally, the Tenth Circuit granted the NCAA's request to modify the scope of the injunctive relief granted by the court. *See id.* at 1162.

109. 707 F.2d at 1152.

110. *Id.* at 1156.

111. *Id.* at 1160.

112. *Id.* at 1161.

113. *Id.* at 1162 (Barrett, J., dissenting).

114. *Id.* at 1152.

115. *Id.* at 1151.

116. *Id.*

117. *Id.*

118. *See id.* at 1152. The court rejected the NCAA's contention that the plaintiffs' participation in the conspiracy barred standing to challenge the legality of the conspiracy's restraints. *Id.* at 1151-52 (quoting Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139-40 (1968)).

2. Per Se Analysis

Like the district court, the Tenth Circuit recognized that under *Broadcast Music* the NCAA's literal price fixing might not be subject to per se treatment.[119] Judge Logan stated, however, that characterizing a horizontal relationship as an integration necessary to effect market efficiencies was not in itself sufficient to invoke rule of reason analysis.[120] Rather, the proper inquiry to determine the appropriateness of per se treatment was whether the marketing integration's restraints, considered facially, would inevitably tend to suppress competition.[121] Under this standard, the television program's price-fixing effect could escape per se treatment only if the program could satisfy two tests. First, the underlying integration must itself be capable of increasing market efficiency.[122] Second, the restraint must be "capable of increasing the effectiveness of [the integration] and no broader than necessary for that purpose."[123]

The court's per se analysis began by addressing the NCAA's argument that the television controls were ancillary to the NCAA's function as a cooperative rulemaking and rule-enforcing body.[124] Essentially, the court treated the NCAA as asserting that its function was to ensure the continued viability of amateur college in order to increase viewership, which was the "output" of the college football industry.[125] Thus, if the television restraints protected or increased viewer interest in college football, they were properly ancillary to the NCAA's rulemaking function.[126]

Viewership "output" allegedly consisted of two discrete products: the right to view a game in person, and the right to televise the game.[127] By limiting the number of broadcasts the live attendance component of output was increased, enhancing the efficiency of the market.[128] The Tenth Circuit disagreed with the NCAA's analysis, concluding that even if viewership was the relevant product, live viewership could not be segmented from overall viewership.[129] No record evidence established that overall viewership was enhanced by the controls.[130] Further, the record showed that serious market distortions accompanied a system enhancing live viewership by restricting

119. 707 F.2d at 1152.

120. *Id.*

121. *Id.* (quoting Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 19-20 (1979)). The Tenth Circuit rejected the United States' amicus argument that facial examination of the ancillary controls under the promotion of/suppression of competition standard was inconsistent with per se inquiry. The potential procompetitive benefits of integrating production activities required some degree of inquiry beyond merely identifying the objective effects of a restraint. Hence, facial consideration of pro-competitive justifications for restraints accompanying an integration was consistent with per se analysis under *Broadcast Music*. 707 F.2d at 1152 n.6.

122. 707 F.2d at 1153. *See Broadcast Music*, 441 U.S. at 21-23.

123. 707 F.2d at 1153 (quoting R. BORK, THE ANTITRUST PARADOX 279 (1978)).

124. *See* 707 F.2d at 1153.

125. *See id.*

126. *See id.*

127. *Id.* at 1154.

128. *Id.*

129. *Id.*

130. *Id.*

television viewership.[131] Thus, the television program's direct viewership effects did not support characterizing the program as an ancillary restraint to an acceptable marketing integration.[132]

Additionally, the asserted purpose of maintaining competitive balance among the various NCAA members' football teams did not enable the television controls to be deemed an ancillary restraint.[133] Noneconomic justifications for restraints were irrelevant in assessing a restraint's competitive consequences.[134] Further, the Sherman Act did not countenance a restriction designed to protect a market by limiting competition.[135] Finally, the court noted that less restrictive means were available to the NCAA for promoting its parity goals.[136]

The NCAA's second argument characterized the television controls as ancillary to an integrated marketing arrangement.[137] Including price and output restraints in the television contracts was allegedly necessary in order to market college football as a television series in competition with entertainment series like "Dallas."[138] In effect, the television controls "restrain[ed] intrabrand competition (competition among football games) in order to stimulate interbrand competition (competition between NCAA football and other entertainment programming)."[139] The court declined to explore this argument, however, because it found that the marketing integration was itself a per se violation;[140] a fortiori, the restraints accompanying the intergration were impermissible.[141]

The joint marketing arrangement was impermissible because of its overwhelming anticompetitive potential. The joint marketing program created no new product similar to the blanket license at issue in *Broadcast Music*: the NCAA license merely provided a single product on an exclusive basis.[142] Also, unlike the license in *Broadcast Music*, the television plan did not permit individual sales by the combination's members,[143] thereby creating a significant risk of cartelization.[144] Finally, the *Broadcast Music* joint license was nonexclusive; the seasonal exclusivity of the NCAA's plan operated to exclude forseeable purchasers for single game rights, potentially permanently foreclosing many broadcasters from entering the televised football market.[145] Taken in its entirety, the NCAA's joint marketing program facially

131. *Id.* The television program reduced output of desired products (by restricting the games which could be televised), and increased consumption of less desirable products (by requiring minor games to be televised). *Id.*

132. *Id.*

133. *Id.*

134. *Id.* (citing *National Soc'y of Professional Eng'rs*, 435 U.S. at 687-96).

135. 707 F.2d at 1154 (citing *National Soc'y of Professional Eng'rs*, 435 U.S. at 689, 696).

136. 707 F.2d at 1154.

137. *Id.* at 1155.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 1155 n.14. *See also supra* note 124 and accompanying text.

142. *Id.* at 1156. *See Broadcast Music*, 441 U.S. at 21-22 (joint license was "truly greater than the sum of its parts").

143. 707 F.2d at 1156.

144. *Id.*

145. *Id.*

tended to reduce competition and output.[146] Hence, the NCAA's price-fixing plan was one of those forms of business behavior constituting a per se violation of the Sherman Act.[147]

2. The Tenth Circuit's Rule of Reason Analysis

Although they found the television program to be invalid per se, the majority examined the program under the rule of reason because of the prospect of Supreme Court review.[148] The analysis, which concentrated on the controls' anticompetitive impact rather than the NCAA's anticompetitive purpose,[149] began by assessing the trading irregularities resulting from the controls.[150] Market concentration resulted because participants were limited to one seller (the NCAA) and three buyers (ABC, CBS, and Turner).[151] The NCAA's contracts also limited price competition among those buyers.[152] The contracts therefore resulted in vertical foreclosure of buyers, and the inability of sellers (NCAA members) to freely sell their television rights.[153] The court found that these obvious results of the NCAA plan were not, however, the plan's only anticompetitive effects.[154]

The horizontal aspect of the NCAA's plan created the risk that, if the NCAA possessed market power, the plan could result in artificial price enhancement.[155] Similarly, the vertical foreclosure aspects of the plan would have anticompetitive consequences among the class of potential purchasers if college football was in fact not a readily interchangeable product.[156] By analyzing the NCAA's market power, the court would be able to assess the full competitive impact of the plan.[157]

NCAA market power was established by pointing to the large audience share and high cost per advertising minute commanded by college football telecasts on Saturday afternoons.[158] The NCAA's plan therefore manifested

146. *Id.*

147. *Id.*

148. *Id.* at 1157.

149. The court agreed that the two-prong rule of reason inquiry, *see supra* notes 79-82 and accompanying text, was proper, but did not investigate the purposes underlying the restraints. *See* 707 F.2d at 1157-60.

150. 707 F.2d at 1157.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *See infra* notes 158-65 and accompanying text.

156. 707 F.2d at 1157.

157. The price enhancement risk would become apparent because market power involves the power to control prices or exclude competition. United States v. E. I. duPont de Nemours & Co., 351 U.S. 377, 391 (1956). The vertical foreclosure risk would become apparent because market power only exists when price rises of a product do not cause significant purchases of a reasonably substitutable product. *Id.* at 404. Thus, if market power existed, vertical foreclosure would be present. *See* 707 F.2d at 1157-58.

158. 707 F.2d at 1158-59. The court observed that even if its definition of the relevant market was underinclusive, the prejudicial impact of that error could be obviated by attributing less significance to market power when evaluating the plan's anticompetitive effects. *Id.* at 1159 (citing L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 17, at 61 (1966)). Similarly, the court noted that the degree of market power necessary to find a violation of section 1 under the rule of reason is less than that necessary under section 2 monopolization analysis. 707 F.2d at 1159.

the anticompetitive risks stemming from a finding of market power.[159] In light of the anticompetitive risks stemming from NCAA market power, the existence of market-neutral means of preserving competitive balance,[160] the elimination of intrabrand price competition,[161] and the NCAA's coercive seizure of its members television rights,[162] the plan was unreasonably anticompetitive and therefore illegal under the rule of reason.[163]

3. The Tenth Circuit's Group Boycott Analysis

The Court of Appeals reversed the lower court on the issue of group boycott. No per se boycott existed with respect to the broadcasters because the broadcasters were not in a horizontal relationship with the NCAA members.[164] Enforcement of NCAA policies through threat of sanctions against NCAA members also was not a per se boycott.[165] The court held that an expulsion imposed as part of associational discipline was not a per se boycott unless the expulsion was "a naked attempt to exclude competition."[166] Absent such a facially anticompetitive purpose, an associational sanction's legality was assessed by examining its competitive reasonableness.[167] Because the NCAA's expulsion mechanism was not facially unreasonable, the lower court's per se ruling was reversed;[168] because the plan had already been held illegal, the court did not consider the reasonableness of the expulsion mechanism.[169]

4. Judge Barrett's Dissent

Judge Barrett would have reversed the district court.[170] He argued that the lower court erred in applying per se analysis because the NCAA's noneconomic purposes[171] required deferential treatment of NCAA regula-

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159. 707 F.2d at 1159. *See supra* note 157.
160. 707 F.2d at 1159.
161. *Id.*
162. *See supra* notes 83-92 and accompanying text.
163. *See* 707 F.2d at 1159.
164. *Id.*
165. *Id.* at 1160-61. The court distinguished the authorities the lower court relied on in finding a group boycott of the networks:

> In Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), a retailer induced wholesalers and manufacturers to refuse to supply its competitor. In Fashion Originators' Guild of America, Inc. v. Federal Trade Commission, 312 U.S. 457 (1941), clothing manufacturers organized a boycott of retailers who dealt in the clothing of competing manufacturers. In Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961), manufacturers of gas heaters coerced an adverse "seal of approval" decision with regard to the product of a competitor. Each of these cases reflects conduct by one firm inducing concerted action to deprive competing firms of necessary trade relationships, *a characteristic absent here*.

707 F.2d at 1161 (emphasis supplied).
166. 707 F.2d at 1161.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 1162 (Barrett, J., dissenting).
171. Judge Barrett found the NCAA's primary purposes to be maintenance of the amateur nature of the NCAA members' sports programs and ensuring that college athletes were integrated into a university's academic life. *Id.* at 1163.

tions affecting its members' commercial activities.[172] Judge Barrett maintained that the television controls should have been analyzed under the rule of reason.[173] The dissent found that the controls were properly ancillary to the noneconomic purposes of the NCAA, and were therefore acceptable under the rule of reason.[174]

Judge Barrett's rule of reason conclusion was based on the lack of proof that the controls injured the consumer public,[175] his finding that overall viewership was increased by the controls,[176] and his finding that the regulations operated to ensure the amateurism of NCAA football programs and the academic achievement of NCAA members.[177] In sum, Judge Barrett found the NCAA to be a joint venture[178] whose division of television revenues among member schools was similar to the division of profits by a law partnership,[179] and whose noneconomic motivations precluded a finding that its television restrictions had the "pernicious effects" on competition condemned by the antitrust laws.[180]

D. *Section 1 Analysis Under the Burger Court*

Burger Court decisions have lacked consistency in their approach to section 1 analysis.[181] In 1972, with virtually no accompanying economic analysis, the Court applied the per se rule to a horizontal allocation of territories in *United States v. Topco Association, Inc.*[182] Topco was a cooperative buying association for small and medium sized independent grocery store chains which granted its retailer members exclusive territories in which to sell Topco's private-label products.[183] The Court characterized the arrangement as a horizontal restraint, and therefore a per se violation of section 1, without first considering the potential impact on competition.[184]

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172. *See id.* at 1164 (distinguishing between amateur and professional sports); *id.* at 1165 (trial court's characterization of NCAA as business failed to recognize NCAA's primarily noneconomic purpose); *see also id.* at 1167 (per se rule has only been held applicable to business enterprises operated exclusively for profit; NCAA rules not within per se category because not designed to "render greatest profit for *business purpose*") (emphasis in original).

173. *Id.* at 1165.

174. *Id.* at 1167 (Barrett, J., dissenting).

175. *Id.* at 1168.

176. *Id.* at 1167. *But see id.* at 1154 (Logan, J.) (no evidence plan enhanced overall viewership).

177. *Id.* at 1167.

178. *Id.* at 1168.

179. *Id.*

180. *Id.*

181. *See generally Recent Antitrust Developments*, 80 COLUM. L. REV. 1, 13-26 (1980). *See also* Gehart, *The Supreme Court and Antitrust Analysis: The (Near) Triumph of the Chicago School*, 1982 SUP. CT. REV. 319. Professor Gehart's thesis is that the Supreme Court came close to embracing the Chicago school's approach to antitrust analysis following United States v. Topco Assoc., Inc., 405 U.S. 596 (1972), but pulled back in Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982). Gehart, *supra*, at 319-20. Under the Chicago school's analysis, per se rules should only be applied after scrutinizing the consumer welfare effect of challenged behavior. *Id.* at 321.

182. 405 U.S. 596 (1972).

183. *Id.* at 601-03.

184. *See id.* at 608-09. Chief Justice Burger, in dissent, stated that "the Court does not tell us what 'pernicious effect on competition' the practices here outlawed are perceived to have; nor

Chief Justice Burger did not agree that merely characterizing Topco's conduct as a horizontal restraint justified application of a per se rule.[185] In a vigorous dissent, he rebuked the majority for failing to apply economic analysis, stating that "the judicial convenience and ready predictability that are made possible by per se rules are not such overriding considerations in antitrust law as to justify their promulgation without careful prior consideration of the relevant economic realities in the light of the basic policy and goals of the Sherman Act."[186]

Following *Topco*, the Supreme Court decided a series of cases in which the per se rule either was not applied, or was applied only after injection of economic analysis. *National Society of Professional Engineers v. United States*[187] is representative of that line of cases.[188] At issue in *Professional Engineers* was whether a provision in the Society's Code of Ethics was unlawful suppression of competition under section 1 of the Sherman Act.[189] The provision prohibited member engineers from negotiating the price of a project until a prospective client had selected an engineer, rendering price comparison by the client impossible.[190] The Society justified the restriction on the grounds that price competition would result in inferior work, ultimately endangering the public.[191] The Court rejected the public safety argument, reasoning that the only permissible inquiry was economic, and involved examination of a practice's competitive impact.[192] Following a cursory economic analysis of the restraint,[193] the Court held that the Code of Ethics restrained competition in violation of the rule of reason.[194]

The Court's next major treatment of the role of economic analysis was in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*[195] *Broadcast Music* explicitly cautioned against applying per se characterization without examining the economic reality of a challenged restraint.[196] Only after extensive economic analysis[197] did the Court conclude that per se treatment was inappropriate.[198]

Then, in *Arizona v. Maricopa County Medical Society*,[199] the Court appar-

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does it attempt to show that those practices 'lack. . .any redeeming virtue.' " *Id.* at 622 (Burger, C.J., dissenting).

185. *Id.* at 614 (Burger, C.J., dissenting).

186. *Id.* at 614-15.

187. 435 U.S. 679 (1978).

188. Other cases include Catalano, Inc. v. Target Sales, Inc., 466 U.S. 63 (1980); Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

189. 435 U.S. at 683. Section 11 of the Code provided in part that: "The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding." *Id.* at 683 n.3.

190. 435 U.S. at 684.

191. *Id.* at 684-85.

192. *Id.* at 692.

193. *See id.* at 692-93.

194. *See id.* at 681, 696.

195. 441 U.S. 1 (1979).

196. *Id.* at 8-9.

197. *See id.* at 10-24.

198. *See id.* at 23-24.

199. 457 U.S. 332 (1982).

ently applied the per se rule in a manner reminiscent of *Topco*. Approximately seventy percent of the doctors in Maricopa County were members of the Maricopa Foundation for Medical Care, and agreed to abide by the Foundation's schedule of maximum fees for providing services to policyholders of specific insurance plans.[200] In reversing denial of Arizona's motion for summary judgment, the Supreme Court held that the maximum fee agreements were per se unlawful price fixing, despite the fact that discovery was incomplete.[201] In apparent retreat from *Broadcast Music*, the Court declined to consider competitive impact once the fee schedule was characterized as price fixing.[202] *Broadcast Music* was distinguished as a case involving joint effort creating a new product, rather than as establishing a new methodology for examining the per se nature of a combination among horizontal market participants.[203]

Justice Powell dissented, joined by Chief Justice Burger and Justice Rehnquist.[204] Arguing that a sufficient factual record had not been developed, Justice Powell rebuked the majority's failure to engage in the economic analysis required by *Broadcast Music*.

> Before characterizing an arrangement as a per se price fixing agreement meriting condemnation, a court should determine whether it is a 'naked restrain(t) of trade with no purpose except stifling of competition.' . . . Such a determination is necessary because 'departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing.'[205]

In light of the Burger Court's fluctuating approach to economic analysis, the Tenth Circuit's holding that the television controls are per se illegal cannot be said to reflect an inconsistency with the Burger Court's line of cases. In *Board of Regents*, the Tenth Circuit's depth of economic analysis prior to invoking the per se rule exceeded that found in *Maricopa County*, following more closely the *Broadcast Music* methodology. On review, the Supreme Court will have an opportunity to clarify whether the somewhat mechanical *Maricopa County* approach has supplanted the more flexible analysis of *Broadcast Music*. Even if the Court chooses to rely on *Maricopa County*'s relative trivialization of *Broadcast Music*,[206] *Board of Regents* clearly provides the Court with an opportunity to clarify the scope of the ancillary restraint doctrine and the per se rule in the context of an integrated marketing arrangement involving horizontal competitors.

Two additional aspects of *Board of Regents* deserve mention. First, it is unlikely that the Court will adopt Judge Barrett's "partial exemption" approach to NCAA activities;[207] the Burger Court's decisions indicate an intent to require Congress to make exceptions to the operation of the antitrust

200. *Id.* at 339.
201. *Id.* at 356.
202. *Id.* at 351.
203. *Id.* at 355-56.
204. *Id.* at 357 (Powell, J., dissenting).
205. *Id.* at 362 (citations omitted).
206. *See supra* note 203 and accompanying text.
207. *See supra* notes 171-72 and accompanying text.

laws.[208] Second, the Supreme Court has hinted that rule of reason analysis may be appropriate where buyer and seller have comparable market power.[209] If the Court finds that the television networks comprised a monopsony, perhaps the television controls will escape per se condemnation through a new modification of the per se rule.

II. Discount Funding and Resale Price Maintenance: The Coercive Essential

Midwest, the exclusive Denver area distributor for Joseph E. Seagram and Sons, Inc.,[210] independently decided to discount the price of Seagram products to selected high volume liquor retailers in an effort to increase the competitiveness of Seagram products.[211] Seagram subsequently agreed to Midwest's request for reimbursement of the discounts, stipulating, however, that the discounts be passed through to the participating high volume retailers.[212] On appeal,[213] nineteen small retailers who were not permitted to participate in the discount program alleged that Seagram's agreement with Midwest constituted illegal vertical price fixing (resale price maintenance), which was a per se violation of section 1 of the Sherman Act.[214] Appellants argument, in its essence, was that because the record established that participants on two levels of a market had entered into an agreement affecting resale prices, a per se violation had been established as a matter of law.[215]

The Tenth Circuit began its analysis by explaining that although resale price maintenance agreements were per se unlawful, not every vertical agreement with a resale price effect constituted resale price maintenance.[216] The sine qua non of a resale price maintenance agreement was coercive action by the manufacturer or other upper tier market participant.[217] Unless the lower tier participant was coerced into selling at a price dictated by the upper tier participant, resale price maintenance was not present.[218]

Appellants argued that the coercion element was satisfied because Seagram required Midwest to pass the funded discount through to its customers.[219] The Tenth Circuit disagreed because the passthrough requirement

208. *See, e.g., Maricopa County*, 457 U.S. at 355, *National Soc'y of Professional Eng'rs*, 435 U.S. at 692.

209. *Maricopa County*, 457 U.S. at 354 n. 29. *See also* Harrison, *Price Fixing, The Professions, and Ancillary Restraints: Coping with* Maricopa County, 1982 U. ILL. L. REV. 925, 943.

210. AAA Liquors, Inc. v. Joseph E. Seagram & Sons, Inc. 705 F.2d 1203, 1204 (10th Cir.), *cert. denied*, 103 S. Ct. 1903 (1983).

211. 705 F.2d at 1204.

212. *Id.* at 1205.

213. The district court found that Seagram's conduct constituted neither a per se nor rule of reason violation of section 1 of the Sherman Act. *Id.* at 1204, 1208.

214. *Id.* Combinations between suppliers and distributors setting resale prices have long been recognized to be a per se violation of section 1 of the Sherman Act. Albrecht v. Herald Co., 390 U.S. 145, 153 (1968). *See* Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 408-09 (1911).

215. *See* 705 F.2d at 1205.

216. *Id. Cf.* Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 9 (1979) (all horizontal agreements literally fixing prices are not per se price fixing violations).

217. *See* 705 F.2d at 1206.

218. *Id.*

219. *Id.*

did not, in and of itself, force Midwest to set a specific resale price.[220] Midwest was not precluded from setting a price reflecting a discount greater than that Seagram had agreed to support, nor was Midwest required to offer a discounted price.[221] Further, there was no evidence that retailers receiving Midwest's discount were required or forced to sell at a certain price.[222] Hence, Seagram had not engaged in retail price maintenance.[223]

Plaintiffs then argued that even if the discount agreement did not constitute resale price maintenance, it was nonetheless a per se violation under *United States v. Socony-Vacuum Oil Co.*,[224] which held that a per se violation of its antitrust laws is present when a combination is formed "for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity."[225] In rejecting this argument, the court limited *Socony-Vacuum* to agreements arising in the context of a horizontal conspiracy.[226] Vertical arrangements between manufacturers and wholesalers or wholesalers and retailers which affected price did not manifest the anticompetitive dangers found in horizontal agreements, and thus were not per se violations.[227]

Having rejected the asserted bases for per se characterization, the Tenth Circuit held that the lower court's rule of reason analysis properly found that the discount program was acceptable.[228] Evidence showed that the intent and effect of the program were to increase interbrand competition by lowering retail prices.[229] Because the restraints created by the program tended to increase interbrand competition and were not manifestly anticompetitive,[230] the trial court had correctly ruled that no section 1 violation was present.[231]

III. ELEMENTS OF SECTION 2 OFFENSES: TENTH CIRCUIT DEFINITIONS

Olsen was a retailer of musical instruments who brought an action against competing retailers, suppliers, and manufacturers of musical instruments, alleging a conspiracy to restrain trade, fix prices, boycott Olsen, and commit other unfair practices in violation of section 1 of the Sherman Act, and attempted monopolization and conspiracy to monopolize in violation of section 2 of the Act.[232] The trial court allowed recovery only on claims that

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220. *Id.*

221. *Id.* at 1206-07. The court pointed out that Seagram had guaranteed a gross margin on certain products, not a net margin. *See id.* at 1206. Thus, Midwest was not coerced into offering discounted prices by the lure of a net margin exceeding that which Seagram would have guaranteed. *See id.*

222. *Id.* at 1207.

223. *Id. Accord* Lewis Serv. Center, Inc. v. Mack Trucks, Inc., 714 F.2d 842, 846-47 (8th Cir. 1983). *See also* Butera v. Sun Oil Co., 496 F.2d 434 (1st Cir. 1974).

224. 310 U.S. 150 (1940).

225. *Id.* at 223.

226. 705 F.2d at 1207.

227. *See id.*

228. *Id.* at 1208.

229. *Id.*

230. *Id.* The court observed that even several of the appellants had sustained increases in sales of Seagram's products during the discount program. *Id.*

231. *Id.*

232. Olsen v. Progressive Music Supply, Inc., 703 F.2d 432, 435 (10th Cir.), *cert. denied*, 104 S. Ct. 197 (1983).

a competing music store (Progressive) had conspired to restrain trade[233] and engaged in a boycott to deprive plaintiff of CBS brand instruments.[234] The opinion is primarily devoted to an analysis of the propriety of the trial court's factual conclusions, which the Tenth Circuit concluded were tenable.[235] The remainder of this section is therefore limited to a survey of the general antitrust principles set forth in the opinion.

A. *Attempted Monopolization*

In denying plaintiff's section 2 claims, the Tenth Circuit set forth the elements necessary to establish both an attempt to monopolize and a conspiracy to monopolize. To establish an attempt to monopolize, a plaintiff must demonstrate a dangerous probability that the defendant will successfully achieve the power to control prices or exclude competition,[236] prove acts in furtherance of the attempt,[237] demonstrate specific intent to monopolize,[238] and establish the relevant market within which the attempted monopolization occurred.[239] Olsen's attempt claim failed because his continued successful competition despite the conspiracy precluded a finding of dangerous probability of success,[240] and because he presented no evidence of a relevant market.[241]

B. *Conspiracy to Monopolize*

The elements of conspiracy to monopolize are the existence of a combination or conspiracy to monopolize,[242] overt acts done in furtherance of the combination or conspiracy,[243] effect upon an appreciable amount of interstate commerce,[244] and specific intent to monopolize.[245] The court also stated that proof of a relevant market is not required to establish a conspir-

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233. 703 F.2d at 434. This victory was hollow because the trial court found that Olsen was not injured by the conspiracy and did not award damages. *Id.*

234. *Id.*

235. *See id.* at 435-41 (passim).

236. *Id.* at 436 (citing Lorain Journal Co. v. United States, 342 U.S. 143, 153 (1951); American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946); Swift & Co. v. United States, 196 U.S. 375, 396 (1905)).

237. 703 F.2d at 436 (citing Lorain Journal Co. v. United States, 342 U.S. 143, 153 (1951)).

238. 703 F.2d at 436 (citing Times Picayune Publishing Co. v. United States, 345 U.S. 594, 626 (1953); E. J. Delaney Corp. v. Bonne Bell, Inc., 525 F.2d 296, 306 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976)). Specific intent may be inferred from the anti-competitive nature of the defendant's acts. *E.g.*, Union Leader Corp. v. Newspapers of New Eng., Inc., 180 F. Supp. 125, 140 (D. Mass.), *modified*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961).

239. 703 F.2d at 437 & n.1 (listing cases). *See also* E. J. Delaney Corp. v. Bonne Belle, Inc., 525 F.2d 296, 307 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976).

240. 703 F.2d at 437. Another factor indicative of the failure to show a dangerous probability of obtaining monopoly power was the absence of evidence that the defendant had a "controlling position" in the relevant market. *Id.*

241. *Id.*

242. *Id.* at 438 (citing American Tobacco Co. v. United States, 328 U.S. 781, 788 (1946)).

243. 703 F.2d at 438 (citing Cullum Elec. & Mechanical, Inc. v. Mechanical Contractors Ass'n, 436 F. Supp. 418, 425 (D.S.C. 1976), *aff'd*, 569 F.2d 821 (4th Cir. 1978)).

244. 703 F.2d at 438 (citing United States v. Yellow Cab Co., 332 U.S. 218, 225 (1947); Times Picayune Publishing Co. v. United States, 345 U.S. 594, 611 (1953)).

245. 703 F.2d at 438 (citing American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946)).

acy to monopolize.[246] Because Olsen did not show that the alleged conspiracy had the requisite effect on interstate commerce, or that the defendant had specific intent to monopolize, there was no conspiracy violating section 2.[247]

C. *Group Boycott: Rejection of the Literal Approach*

The trial court found that Progressive conspired with CBS in order to prevent the plaintiff from receiving CBS products.[248] This boycott was incident to Progressive's plan to maintain its high mark-up on CBS products by preventing low cost sales by the plaintiff.[249] Progressive argued that plaintiff was excluded from the market for CBS products as a necessary incident of a legitimate joint marketing effort between Progressive and CBS.[250] Thus, even if the defendants had literally engaged in a "group boycott," their boycott was not of the type condemned as a per se violation of the Sherman Act.[251]

Although the Tenth Circuit accepted defendant's premise that not all activities literally characterizable as "boycotts" were per se violations,[252] it disagreed with the defendant's conclusions about the boycott of Olsen. The trial court determined that the motivations behind the boycott were either to protect high profit margins or harm Olsen.[253] Given those findings, and the absence of evidence of any procompetitive impacts flowing from the boycott, the Tenth Circuit affirmed the trial court's conclusion that Progressive had engaged in a per se violation.[254]

D. *Price-Fixing Damages and Duplication of Damages*

The final issue antitrust issue was the trial court's refusal to award damages for Progressive's price fixing behavior.[255] The trial court originally refused to award damages because it found that plaintiff's ability to sell below the fixed prices precluded a finding of damages.[256] The Tenth Circuit disagreed with this conclusion,[257] but held that damages could not be awarded under the price-fixing claim because such damages would merely duplicate the award under the boycott claim.[258]

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246. 703 F.2d at 438 (citing Salco Corp. v. General Motors Corp., 517 F.2d 567 (10th Cir. 1975)).
247. 703 F.2d at 438.
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.* E. A. McQuade Tours, Inc. v. Consol. Air Tour Manual Comm., 467 F.2d 178 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973) provides a thorough summary of the Supreme Court decisions analyzing the anticompetitive risks found in those business arrangements constituting a per se violation as a "group boycott." *See* 467 F.2d at 185-87.
252. 703 F.2d at 438-39.
253. *Id.* at 439.
254. *Id.*
255. *See id.* at 440.
256. *Id.*
257. *Id.*
258. *Id.*

IV. Application of the Sherman Act to Intrastate Activity

In *Lease Lights, Inc. v. Public Service Co.*[259] the Tenth Circuit reversed the trial court's conclusion that the commercial effects of plaintiff's business were too localized to permit invocation of Sherman Act protections.[260] Plaintiff was engaged in providing commercial outdoor lighting services, and alleged that Public Service Company of Oklahoma monopolized and attempted to monopolize a local market for commercial outdoor lighting services.[261] The trial court concluded that the outdoor lighting business engaged in by both plaintiff and defendent was essentially the "rental of illumination," which was a purely intrastate business.[262] The trial court also concluded that although plaintiff's customers were involved in interstate commerce and that although plaintiff's lighting services were supplied with materials purchased in interstate commerce, plaintiff had failed to introduce evidence that defendant's challenged activities had adversely affected either the interstate business of plaintiff's customers or the interstate flow of the materials used by plaintiff.[263] Hence, because the Sherman Act could only be invoked when the threatened business activity was itself "in interstate commerce," or when the challenged activities adversely affected a meaningful amount of interstate commerce,[264] plaintiff had not stated a claim cognizable under the Sherman Act.[265]

Reversing the trial court's dismissal for lack of jurisdiction, the Tenth Circuit held that the trial court had improperly required proof of an *adverse* effect on interstate commerce.[266] The court emphasized that the Supreme Court has consistently held that the Sherman Act's jurisdictional requirements are satisfied when a defendant's activities merely have a *substantial* effect on interstate commerce.[267] Because the lighting business involved annual interstate purchases of hundreds of thousands of dollars worth of lighting components,[268] the defendant's activities involved a substantial effect on interstate commerce.[269] Accordingly, the Sherman Act afforded protection to plaintiff's business.[270]

Lease Lights also rejected two other jurisdictional deficiencies asserted by the defendant. First, plaintiff's uncontroverted evidence showed that the nexus between interstate commerce and defendant's activities was concrete,[271] vitiating defendant's contention that plaintiff had alleged only a

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259. 701 F.2d 794 (10th Cir. 1983).
260. *Id.* at 798.
261. *Id.* at 796.
262. *Id.*
263. *Id.* at 797.
264. *Id.*
265. *Id.*
266. *Id.* at 798-99 (quoting from McClain v. Real Estate Bd., 444 U.S. 232 (1980); Hospital Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)).
267. 701 F.2d at 796.
268. *Id.* at 799.
269. *Id.*
270. Uncontroverted evidence showed that the majority of outdoor lighting installations were made with products purchased in interstate commerce. *Id.* at 799-800.
271. *Id.*

speculative connection between defendant's activities and interstate commerce.[272] Second, the fact that plaintiff's injuries may have been self-inflicted[273] did not eliminate the public injury inhering in monopolistic activities.[274] Hence, the Sherman Act requirement of public injury[275] was present.[276]

V. Intracorporate Conspiracy and Licensed Agents

The Tenth Circuit upheld a summary judgment for the defendants in *Holter v. Moore & Co.*,[277] finding that Colorado's statutory regulation of the real estate brokerage business precluded the conclusion that real estate sales personnel were economically distinguishable from their employing broker.[278] Accordingly, the plurality of economic actors necessary to support a section 1 claim was lacking, and summary judgment was proper.[279]

Holter involved a claim that the standard seven percent commission Moore and Company paid its real estate agents constituted both resale price maintenance by Moore and its agents and horizontal price fixing by the sales agents.[280] The trial court held that Moore and its agents constituted a single indivisible economic entity, and that Moore and its agents were therefore incapable of conspiring among themselves.[281] The Tenth Circuit began its review by noting that because corporations can only act through their employees, as a general rule a corporation's employees cannot conspire with the corporation or with each other when corporate matters are involved.[282] Further, legal labels characterizing the nature of an employment relationship in non-antitrust contexts are not determinative in antitrust analysis; the actors must be "separate economic entities in substance."[283] Because the question of a party's separate economic status is a question of fact,[284] the Tenth Circuit's inquiry was limited to whether the record created an issue of economic separateness for jury consideration.[285]

The Tenth Circuit's first step in the analysis was an examination of state laws requiring the defendants to conduct their business in a specified manner.[286] Although characterizing an agent's status as independent ultimately remained a question of federal law,[287] "state laws limiting the scope

272. *See generally* Crane v. Intermountain Health Care, Inc., 637 F.2d 715 (10th Cir. 1980) (en banc).
273. Defendant asserted that plaintiff's business reversal was due to internal mismanagement. 701 F.2d at 800.
274. *Id.* (quoting Mishler v. St. Anthony's Hosp. Sys., 694 F.2d 1225, 1228 (10th Cir. 1981)).
275. *E.g.*, Klor's v. Broadway-Hale Stores, Inc., 359 U.S. 207, 210 (1959).
276. 701 F.2d at 800.
277. 701 F.2d 854 (10th Cir.), *cert. denied*, 104 S. Ct. 347 (1983).
278. *Id.* at 856-57.
279. *Id.* at 857.
280. *Id.* at 855.
281. *Id.*
282. *Id.*
283. *Id.* (citing Blankenship v. Herzfeld, 661 F.2d 840, 846 (10th Cir. 1981)).
284. 702 F.2d at 855.
285. *Id.* at 856.
286. *Id.* at 856 & n.5.
287. *Id.* at 856.

of a person's professional actions may effectively place that person under an employer's supervision and control, in which event the employer will be the only independent economic actor."[288]

Relevant Colorado statutory law provided that every real estate agent must be licensed;[289] that a precondition to being licensed is securing an agreement to work for a broker;[290] that an agent is issued only one license[291] which must be kept in the custody of his broker,[292] thereby precluding the agent from simultaneously working for more than one broker. Additionally, real estate services must be performed only in the broker's name;[293] compensation for the agent's services must be paid directly to the broker;[294] and a broker may not relinquish his authority to supervise his agents.[295] Moreover, a broker's failure to reasonably supervise its agents may result in the revocation of a broker's license.[296] Weighing these statutory controls over an agent's freedom against the proffered indicia of independence,[297] the court found that Colorado's real estate laws created an employer-employee relationship between brokers and agents.[298] Accordingly, the defendants were legally incapable of conspiring with each other.[299]

VI. MEANING OF "GAME SITE" IN TELEVISED FOOTBALL EXEMPTION

The National Football League enjoys a statutory exemption from the antitrust laws for its broadcast of football contests as long as the broadcasts do not interfere with local college and high school games played during specified time periods.[300] To invoke this limitation on the antitrust exemption, by August 1 of each year schools are required to give notice of the "game sites" for local contests.[301] *Colorado High School Activities Association v. National Football League*,[302] a case of first impression, required construction of the phrase "game site" as used in the limitation to the antitrust exemption.[303]

In 1977, 1978, and 1979, National Football League games were telecast into the Denver market at the same time that the state high school football championship contests were being played.[304] The Colorado High School Activities Association conceded that it had not given notice of the exact geo-

288. *Id.*
289. COLO. REV. STAT. § 12-61-102 (Supp. 1983).
290. *Id.* § 12-61-103(5).
291. *Id.* § 12-61-109(4).
292. *Id.* § 12-61-104(1) (1978).
293. 4 COLO. ADMIN. CODE 725-1E-9 (1983).
294. COLO. REV. STAT. § 12-61-117 (1978).
295. 4 COLO. ADMIN. CODE § 725-1E-9 (1983).
296. COLO. REV. STAT. § 12-61-113(1)(o) (1978).
297. Real estate agents set their own hours, paid their own taxes, and only received commission income. 702 F.2d at 856.
298. *Id.* at 857. *Accord* Faith Realty & Dev. Co. v. Indus. Comm., 170 Colo. 215, 220, 460 P.2d 228, 230 (1969).
299. 702 F.2d at 857.
300. *See* 15 U.S.C. §§ 1291, 1293 (1982).
301. *See id.* § 1293.
302. 711 F.2d 943 (10th Cir. 1983).
303. *Id.* at 945.
304. *Id.* at 944.

graphic location of the championship game sites.[305] The association noted that its practice of playing the championship game at a site determined following an elimination tournament precluded such notice,[306] and that designation of championship game sites as "Denver" or "the Denver metropolitan area" was the best possible notice which could be provided.[307] The association then argued that, given the statutory purpose of protecting high school game receipts, its geographic designations constituted compliance with the statute.[308]

Both the Tenth Circuit and the district court disagreed with the association.[309] The Tenth Circuit resolved the dispute by concluding that the legislative history evinced no intent to give the phrase "game site" other than its plain, ordinary meaning.[310] That ordinary meaning was determined to be the "particular football field or stadium where the game is to be played."[311] Because the association had not provided the NFL with the statutory game sites, the NFL's challenged broadcasts did not violate the terms of the antitrust exemption.[312]

VII. Statute of Limitations Analysis for Business Failure and Purchase of Production Facilities

Curtis v. Campbell-Taggart, Inc.[313] affirmed a summary judgment ruling against a plaintiff who had alleged the existence of anticompetitive conspiracies in portions of Oklahoma's baking business.[314] In affirming the summary judgment, the Tenth Circuit set forth the ingredients necessary to recover on a Sherman Act claim alleging that a competitor's purchase of production facilities was anticompetitive.[315] Additionally, *Campbell-Taggart* addressed the application of the Sherman Act's four-year statute of limitations[316] to a claim involving destruction of the plaintiff's business.[317]

Curtis, the plaintiff in *Campbell-Taggart*, had been a professional baker since 1947.[318] His dispute with the defendants arose out of two bakery closings. The first involved the closing of Curtis' own bakery in 1969, allegedly as the result of the defendants' conspiratorial activities.[319] The second closing involved a bakery owned by Curtis' employer, and gave rise to two antitrust claims. The first claim was that the defendants' conspiracy had forced the closing of Curtis' employer's bakery in 1977; the second claim alleged that defendants had conspired to prevent Curtis' purchase of the closed facil-

305. *Id.* at 945.
306. *Id.*
307. *Id.*
308. *Id.*
309. *See id.* at 945.
310. *Id.* at 945-46.
311. *Id.* at 945.
312. *Id.* at 946.
313. 687 F.2d 336 (10th Cir.), *cert. denied*, 103 S. Ct. 576 (1982).
314. *Id.* at 337.
315. *See id.* at 338.
316. *See* 15 U.S.C. § 15b (1982).
317. *See* 687 F.2d at 337.
318. *Id.*
319. *Id.*

ity, which defendants eventually purchased for themselves.[320]

Plaintiff's claim relating to the forced closure of his bakery was brought more than four years after the bakery closed.[321] Defendants therefore sought summary judgment based upon the four-year statute of limitations applicable to private Sherman Act claims.[322] Plaintiff argued that the forced closure of his plant resulted in a continuing violation, and that the claim was therefore timely.[323] The Tenth Circuit disagreed. Because the applicable statute of limitations runs from the date a defendant's acts cause injury to a plaintiff,[324] the relevant statute of limitations inquiry when seeking to bar a claim entirely is the *last* date a defendant's acts cause injury to the plaintiff. The Tenth Circuit held that when a claim is based on the destruction of a plaintiff's business, the last day of business is the final date upon which a defendant's acts cause injury to the plaintiff.[325] Hence, plaintiff's first claim was barred by the statute of limitations.[326]

The court also summarily dismissed Curtis' claim that he was entitled to recover for the closing of his employer's plant. Because Curtis was a salaried employee at the time of the plant closing, he lacked standing to seek redress for anticompetitive practices harming his employer.[327]

Finally, the Tenth Circuit upheld dismissal of Curtis' claim relating to the alleged conspiracy to prevent his purchase of his employer's closed plant.[328] The court recognized that Curtis could potentially have standing to assert this claim,[329] but held that Curtis had not, as a matter of law, satisfied the requirements for such "excluded entrant" standing.[330] The two elements necessary for "excluded entrant" standing are a manifested intent to enter a particular business, and a demonstrable preparedness to effect that entry.[331] No specific indicia of the necessary intent were set forth in *Campbell-Taggart*, but the court did set forth the following indicia of preparedness: current financial ability to enter and operate the proposed business; existing contractual obligations concerning purchase of the business; other affirmative acts taken towards entry; and the proposed entrant's background and experience.[332] Although Curtis' evidence showed an intention to enter and showed extensive bakery experience, his inability to demonstrate a present financial ability to purchase the plant precluded a finding that Curtis was

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320. *Id.*

321. *Id.*

322. *Id. See* 15 U.S.C. § 15b (1982).

323. 687 F.2d at 337.

324. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971).

325. 687 F.2d at 337 (citing Poster Exch., Inc. v. National Screen Serv. Corp., 517 F.2d 117, 126 (5th Cir. 1975), *cert. denied sub nom.* Exhibitors Poster Exch., Inc. v. National Screen Serv. Corp., 423 U.S. 1054 (1976)).

326. 687 F.2d at 337.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.* (quoting Hecht v. Pro-Football, Inc., 570 F.2d 982, 987 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978)).

332. 687 F.2d at 338 (citing Martin v. Phillips Petroleum Co., 365 F.2d 629, 633-34 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966)).

prepared to enter the business.[333] Accordingly, Curtis lacked standing to bring a federal antitrust action based on the defendants' activities surrounding the final disposition of the closed plant.[334]

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333. *See* 687 F.2d at 338.
334. *Id.*