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ANTITRUST

OVERVIEW

The Tenth Circuit Court of Appeals this year was given the opportunity to address issues of recent import in the field of antitrust, many of which have been the subject of United States Supreme Court decisions. Among those Supreme Court pronouncements which influenced the appellate court were decisions that increased the scope of activities in interstate commerce,[1] barred suits by indirect purchasers,[2] limited antitrust immunity under the state-action doctrine,[3] and prohibited contribution among antitrust defendants.[4] The legacy of these Supreme Court decisions, including one which reversed a Tenth Circuit opinion,[5] is the Tenth Circuit's adherence to established Supreme Court antitrust sentiment.

This article will discuss the trend of Tenth Circuit decisions which espouse the antitrust mandates of the Supreme Court. The court's other decisions will be briefly reviewed.

I. THE "EFFECTS TEST" OF INTERSTATE COMMERCE AND THE HEALTH CARE INDUSTRY

The Tenth Circuit Court of Appeals addressed a long-standing jurisdictional issue in *Mishler v. St. Anthony's Hospital Systems*,[6] where a physician challenged a hospital's refusal to include his name on a referral list as being a restraint of trade under the Sherman Act.[7] In its holding, the court confronted, both expressly and implicitly, two barriers traditionally raised against physicians asserting claims under the federal antitrust laws in the health care industry: 1) whether members of learned professions are subject to the antitrust laws, and 2) whether a substantial enough effect on interstate commerce has been shown to invoke federal antitrust jurisdiction.

The court, in conformity with the modern trend, broadened the scope of the federal antitrust laws by implicitly recognizing application of the antitrust laws to the learned profession of medicine, and by expressly finding that local hospital activities bear a substantial enough relationship to interstate commerce to invoke the jurisdiction of the federal antitrust laws. In so holding, the court maintained its established position that to invoke federal jurisdiction, it is the effect of the defendant's allegedly illegal conduct on

1. McLain v. Real Estate Bd., 444 U.S. 232 (1980).
2. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).
3. Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982).
4. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981).
5. Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40 (1982), *rev'g* 630 F.2d 704 (10th Cir. 1980). The Supreme Court held that an ordinance enacted pursuant to Colorado's "home rule" authority did not constitute state action exempting Boulder from antitrust scrutiny because the city's action did not promote a clearly articulated state policy. *See Supreme Court Review, Eighth Annual Tenth Circuit Survey*, 59 DEN. L.J. 399 (1982).
6. [1981-2] Trade Cas. (CCH) ¶ 64,342 (10th Cir. 1981).
7. 15 U.S.C. §§ 1-7 (1976).

interstate commerce that must be substantial, not the effect of the defendant's overall business activities.[8]

A. *Learned Professions Doctrine*

Legal rules which have protected certain professions or their practices from the antitrust laws have been eroding in recent years. For example, the "learned profession" exemption that insulated lawyers and physicians from antitrust liability was struck down by the Supreme Court in *Goldfarb v. Virginia State Bar*.[9] The Supreme Court recently reemphasized its adherence to the principles espoused in *Goldfarb* in *Arizona v. Maricopa County Medical Society*.[10]

In *Goldfarb*, the Court refrained from strictly applying antitrust regulation to lawyers and physicians by recognizing that some "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession."[11] Chief Justice Burger, writing for the majority, noted in *Goldfarb* that some professional practices that promote valid health or welfare goals might be beyond the purview of antitrust enforcement.[12] The same principle was recognized in *Maricopa*.[13] Despite the health profession's admirable goal of promoting quality health care, the growing volume of litigation indicates that some practices of the health care industry may be regulated by antitrust laws.[14]

The customary practice of hospitals allocating staff privileges to physicians who are deemed qualified to use the hospital facility had been unfet-

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8. [1981-2] Trade Cas. (CCH) ¶ 64,342, at 74,586.

9. 421 U.S. 773 (1975). The Court struck down a state bar association's minimum fee schedule that discouraged price competition among lawyers who examined titles. The opinion made clear that "certain anticompetitive conduct by lawyers [was] within the reach of the Sherman Act . . . ." *Id.* at 793.

10. 102 S. Ct. 2466 (1982). The Court struck down an agreement by two county medical societies which established maximum fees that participating doctors would accept for services performed under specified health insurance plans. The Court held the agreement was a *per se* violation under the Sherman Act as price fixing. *Id.* at 2475. *See also* Halper, Arizona v. Maricopa County: *A Stern Antitrust Warning to Healthcare Providers*, HEALTHCARE FIN. MGMT., Oct. 1982, 38.

11. 421 U.S. at 792 (citing United States v. Oregon Medical Soc'y, 343 U.S. 326, 336 (1952); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608, 611-13 (1935)).

12. 421 U.S. at 792.

13. 102 S. Ct. 2466 (1982). The Court stated:

> In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 778 n.17 (1975), we stated that the "public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." *See National Society of Professional Engineers v. United States*, 435 U.S. 679, 696 (1978). The price fixing agreements in this case, however, are not premised on public service or ethical norms. The respondents do not argue, as did the defendants in *Goldfarb* and *Professional Engineers*, that the quality of the professional service that their members provide is enhanced by the price restraint.

Id. at 2475.

14. *See generally* Borsody, *The Antitrust Laws and the Health Industry*, 12 AKRON L. REV. 417 (1979); Groseclose, *Hospital Privilege Cases: Braving the Dismal Swamp*, 26 S.D.L. REV. 1 (1981); Halper, *The Health Care Industry and the Antitrust Laws: Collision Course?*, 49 ANTITRUST L.J. 17 (1980); Rosoff, *Antitrust Laws and the Health Care Industry: New Warriors Into an Old Battle*, 23 ST. LOUIS U.L.J. 446 (1979). Weller, *The Antitrust Swamp: How Can Healthcare Professionals Avoid It?* HEALTHCARE FIN. MGMT., Oct. 1982, 26.

tered by antitrust regulation.[15] In recent years, however, disputes between physicians and hospitals over hospital privileges increasingly have been considered "in terms of their possible anticompetitive effect."[16] In fact, recent antitrust challenges to activities in the health care industry are recognized as dominating a growing number of antitrust cases and have prompted suggestions that the trend toward antitrust law enforcement in the health care industry will grow.[17] Significantly, competition among physicians has been exacerbated by the increasing number of medical school graduates entering the health care field,[18] the spiraling cost of health care, and pressures for a more efficient health care delivery system.[19]

As physicians become more competitive,[20] the endorsement conferred by hospital privileges and hospital referral lists gains importance to doctors.[21] Hospital policies which exclude some physicians but sanction others may legitimately promote quality medical care, but those policies based solely on thwarting competition will not go unchallenged. Courts are being asked to consider the possible anticompetitive effects of staffing decisions that hospitals once considered to be within their exclusive realm.[22] One potential anticompetitive practice stems from a hospital's use of referral lists.

Referral lists contain the names of physicians who are recommended to treat the specialized needs of hospital emergency room or clinic patients. In theory, a referral list serves to channel patients only to those physicians sanctioned by the hospital.[23] The Sherman Act[24] offers the remedial measure of

15. Rich, *Medical Staff Privileges and Antitrust Laws*, 2 WHITTIER L. REV. 667 (1980). *See also* Goldsmith & Bertolet, *The Present Status of Physician Privileges*, 1981 MED. TRIAL TECH. Q. 121.

16. Council of Medical Specialty Societies, EXECUTIVE REPORT, Dec. 1981.

17. As stated in a review of the United States Supreme Court's business law decisions during its 1981-82 term: "Drugs and the medical profession received an unusual amount of attention . . . in the business-related decisions handed down by the 1981-82 U.S. Supreme Court. Three of the six major antitrust decisions, for example, dealt with the health-care industry." 51 U.S.L.W. 3109 (Aug. 24, 1982). *See also Federal Antitrust Regulations' Effects on Medicine Seen Growing*, AMER. MED. NEWS, Oct. 9, 1981, at 12, col. 1; Meadows, *Bold Departures in Antitrust*, FORTUNE, Oct. 5, 1981, 180-88.

18. *U.S. Report Projects Oversupply of Doctors by 1990*, N.Y. Times, Apr. 14, 1980, at A16, col. 1.

19. "The classical model of collegial physician control over health care delivery is being replaced rapidly by a view of health care providers (institutional as well as individual) as intense competitors for a limited health care dollar." Norris & Szabo, *Communication Between the Antitrust and the Health Law Bars: Appeals for More Effective Dialogue and a New Rule of Reason*, 7 AM. J.L. & MED. i, ii (1981). *See also* Lave & Lave, *Medical Care and Its Delivery: An Economic Appraisal*, 35 LAW & CONTEMP. PROBS. 252 (1970).

20. "The prime reason for the increased competition among doctors is a 31% surge in their numbers, to 437,000 from 334,000 between 1970 and 1978, a period when the population grew by 6.4%." Levin, *Doctors Sue Hospitals for Staff Privileges as Competition Rises*, Wall St. J., Sept. 29, 1981, at 1, col. 1.

21. "[I]t has become increasingly necessary for physicians to obtain and retain staff privileges with at least one hospital in order to survive professionally." Goldsmith & Bertolet, *supra* note 15, at 121.

22. Calvani & James, *Antitrust Law and the Practice of Medicine*, 2 J. LEGAL MED. 75 (1980).

23. Hospital staff privileges permit a physician to practice medicine at the hospital, while referral lists contain names of some, but perhaps not all, of the physicians who have been awarded staff privileges.

For a discussion of tactics physicians may use to thwart competition among themselves, see Note, *Application of the Antitrust Laws to Anticompetitive Activities by Physicians*, 30 RUTGERS L. REV. 991, 1006-09 (1977).

24. 15 U.S.C. §§ 1-7 (1976).

treble damages to physicians who believe that the omission of their names from referral lists unreasonably restrains competition. It was in this setting that the case of *Mishler v. St. Anthony's Hospital Systems*[25] arose.

In *Mishler*, Denver neurosurgeon Alan J. Mishler believed that his emergency neurosurgery practice had been restrained by a local hospital, which excluded his name from its referral list. The neurosurgeon filed suit against one of the region's largest trauma hospitals and its emergency room director,[26] alleging that the defendants had conspired to destroy competition[27] and to monopolize[28] neurosurgery in Colorado and nearby states.

The district court dismissed the complaint for lack of jurisdiction, concluding that the neurosurgeon had failed to establish that the alleged conspiracy diminished interstate commerce.[29] Therefore, the lower court held, the challenged activities did not invoke the federal antitrust laws.

B. *Local Business Activities, Interstate Commerce, and the Required Nexus*

Since the expansion of the commerce power in the 1940's, it has been difficult for most businesses, including community-oriented ones, to escape the reach of the Sherman Act.[30] The Supreme Court has expressed a liberal policy in determining Sherman Act jurisdiction. "[I]f it is interstate commerce that feels the pinch, it does not matter how local the operation which

25. [1981-2] Trade Cas. (CCH) ¶ 64,342 (10th Cir. 1981).

26. *Id.* at 74,585.

27. 15 U.S.C. § 1 (1976). This key section of the Sherman Act, which remains substantially unchanged since its enactment in 1890, requires concerted activity between two or more persons before a restraint on trade can be found. Section 1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be guilty of a felony . . . .

28. 15 U.S.C. § 2 (1976). Section 2 defines three separate crimes: monopolization, combination and conspiracy to monopolize, and attempts to monopolize. The distinction between section 1 and section 2 is that section 1 requires concerted action, whereas section 2 may be violated unilaterally.

Section 2 provides: "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 . . . ."

29. [1981-2] Trade Cas. (CCH) ¶ 64,342, at 74,585 (10th Cir. 1981).

30. Congress had a narrow view of its power under the commerce clause when it passed the Sherman Act in 1890. *See, e.g.*, H.R. REP. NO. 1707, 51st Cong., 1st Sess. 1 (1890).

The Supreme Court shared the view that the power underlying the commerce clause was limited. In the first antitrust case considered by the Supreme Court, United States v. E. C. Knight Co., 156 U.S. 1 (1895), the Court narrowly interpreted the term "interstate commerce" by ruling that manufacturing did not impinge upon interstate commerce activities. In that decision, the Court found that a monopoly of the sugar refining industry related only to local manufacturing activities and therefore was not subject to the Sherman Act, despite the refiner's importation of raw materials and shipment of sugar out of state. This decision was overruled by Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948).

The limited construction of interstate commerce was put to rest in Wickard v. Filburn, 317 U.S. 111 (1942). The Court expanded its interpretation of interstate commerce by finding that raising wheat, even though intended for the farm family's consumption, was within the congressional commerce power because it affected the wheat supply and distribution throughout the nation.

applies the squeeze."[31] Hospitals, which primarily serve intrastate needs, have now fallen within the ambit of antitrust regulations because of this judicial enlargement of the commerce power.[32]

Historically, hospitals have been labelled "local" businesses having an insignificant impact on interstate commerce. Without a significant nexus with interstate commerce to trigger federal antitrust jurisdiction, hospitals have not fallen prey to the scrutiny of federal antitrust statutes. As a result, until 1976, most courts had refused to find an implicating nexus between interstate commerce and hospital decisions regarding staff privileges.[33] The Tenth Circuit Court of Appeals acquiesced in this national hesitancy to invoke the commerce connection when it held that the decision by two Oklahoma hospitals to deny staff privileges had a mere "insubstantial effect upon interstate commerce."[34] But a year later, the United States Supreme Court in *Hospital Building Co. v. Trustees of Rex Hospital*[35] relaxed the showing of "substantial effects" on interstate commerce which the Tenth Circuit and other federal appellate panels had required for jurisdiction in medical antitrust cases.[36]

In its ruling in *Hospital Building*, the Supreme Court pointed out that the local acts of the hospital may have a substantial effect upon interstate commerce for the purpose of establishing federal antitrust jurisdiction.[37]

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31. United States v. Women's Sportswear Ass'n, 336 U.S. 460, 464 (1949).

32. *See* Fried & Rabinowitz, *Antitrust May Pose New Legal Issues for Hospitals*, HOSPITALS, June 1, 1982, at 66. *See also supra* note 14.

The commerce power is found in the U.S. CONST. art. I, § 8, cl. 3. An antitrust plaintiff may establish the necessary connection with interstate commerce in one of two ways: by demonstrating that the challenged anticompetitive activity occurred in interstate commerce or by showing that the activity, although wholly intrastate, had a substantial effect on interstate commerce. McLain v. Real Estate Bd., 444 U.S. 232 (1980).

33. The Supreme Court skirted the issue of whether professional services such as the practice of medicine fell under the umbrella of "trade or commerce." In 1952, the Court endorsed a district court's conclusion that the sale of medical services did not fall within the scope of trade or commerce of the Sherman Act. United States v. Oregon State Medical Soc'y, 343 U.S. 326 (1952). For other decisions which denied relief under the antitrust laws for lack of a "substantial effect" on interstate commerce in the health care industry, see Riggall v. Washington County Medical Soc'y, 249 F.2d 266 (8th Cir. 1957), *cert. denied*, 355 U.S. 954 (1958); Spears Free Clinic and Hosp. v. Cleere, 197 F.2d 125 (10th Cir. 1952); Elizabeth Hosp., Inc. v. Richardson, 167 F. Supp. 155 (W.D. Ark. 1958), *aff'd*, 269 F.2d 167 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959). *But see* Doctors, Inc. v. Blue Cross, 490 F.2d 48 (3d Cir. 1973).

34. Wolf v. Jane Phillips Episcopal-Memorial Medical Center, 513 F.2d 684, 687 (10th Cir. 1975). *See also* Note, *The Medical Profession and the Sherman Act:* Wolf v. Jane Phillips Episcopal-Memorial Medical Center, 1976 UTAH L. REV. 196.

35. 425 U.S. 738 (1976).

36. The Tenth Circuit's decision in Wolf v. Jane Phillips Episcopal-Memorial Medical Center, 513 F.2d 684, 687 (10th Cir. 1975) ruled that allegedly illegal conduct must have a substantial effect upon interstate commerce to invoke federal jurisdiction under the antitrust laws. This decision conformed with earlier pronouncements by the court that "[t]o come within the purview of the Sherman Act the restraint of commerce or the obstruction of commerce must be direct and substantial and not merely indirect or remote." Spears Free Clinic and Hosp. v. Cleere, 197 F.2d 125, 126 (10th Cir. 1952). The Supreme Court upheld the "substantial effects" test in *Hospital Building*, but relaxed the criteria necessary to establish substantial effects. Thus, both *Wolf* and *Spears Free Clinic* followed prior decisions which rejected arguments that an allegation that antitrust activities reduced the flow of patients from out-of-state could meet the "substantial effects" test. The Court, however, in *Hospital Building* looked to that very factor in finding that the defendants' activities had a substantial effect on interstate commerce.

37. The Court held that a local hospital could complain of efforts made by the defendants

The decision in *Hospital Building* set the tone for courts to extend the reach of the Sherman Act to hospital activities. Despite federal court opinions to the contrary,[38] the Supreme Court in *Hospital Building* decided that the plaintiff had shown a substantial connection with interstate commerce even if no restraints purposely directed towards interstate commerce were shown.[39] The Court was satisfied that a sufficient contact with interstate commerce existed through allegations that the hospital purchased eighty percent of its supplies outside the state, treated a "substantial" number of out-of-state patients, received significant revenues from out-of-state insurance companies and federal health programs, and was financially tied to an out-of-state parent corporation and a lending institution.[40]

The elimination of the "direct and purposeful" effects test on interstate commerce was reinforced by the Court's decision four years later in *McLain v. Real Estate Board*.[41] In *McLain*, the Court concluded that purely local business restraints invoked the Sherman Act's jurisdiction.[42] This holding seemingly rejected the narrower view that the alleged violation itself must impact interstate commerce, and suggested that Sherman Act jurisdiction could be invoked if the defendant's general business activities had an effect upon interstate commerce.[43] The *McLain* decision paved the way for a Tenth Circuit reversal on rehearing en banc of its initial decision in *Crane v. Intermountain Health Care, Inc.*[44] denying Sherman Act jurisdiction for alleged antitrust violations similar to those complained of by Dr. Mishler.

In *Crane*, a pathologist alleged that the defendants had restrained his practice at a hospital they owned. A Tenth Circuit three-judge panel originally held that the complaint did not invoke antitrust jurisdiction because of its failure to show the substantial effect of the defendants' activities on interstate commerce.[45] In light of *McLain*,[46] the en banc review of *Crane* found jurisdiction anchored in the defendants' activities, which paralleled those

to block the hospital's expansion. The district court had dismissed the hospital's complaint on jurisdictional grounds and the dismissal was upheld by the Fourth Circuit. Hospital Bldg. Co. v. Trustees of Rex Hosp., 511 F.2d 678 (4th Cir. 1975), *rev'd*, 425 U.S. 738 (1976).

38. *See supra* note 33.

39. 425 U.S. at 745.

40. *Id.* at 741.

41. 444 U.S. 232, 242, 246 (1980).

42. The interstate effect on activities was not obvious in *McLain*. The plaintiffs charged that the local real estate brokers had conspired to fix prices on the purchase and sale of homes by an agreement to honor established brokerage commissioned rates. The Court found sufficient effect on interstate commerce because "[u]ltimately, whatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the demand for financing and title insurance, those two commercial activities . . . are shown to have occurred in interstate commerce." 444 U.S. at 246.

The Court accepted as an indication of interstate activities the affidavits that out-of-state depositors backed local lending institutions who, in turn, financed the sales of local homes; that mortgages were often insured by federal programs; and that many mortgages were conditioned on title insurance furnished by interstate corporations.

43. 444 U.S. at 244-45.

44. 637 F.2d 715 (10th Cir. 1980) (Breitenstein, J.), *rev'd on reh'g en banc*, 637 F.2d 715, 719 (10th Cir. 1981) (Seymour, J.).

45. 637 F.2d at 718. The Tenth Circuit followed its reasoning used in Wolf v. Jane Phillips Episcopal-Memorial Medical Center, 513 F.2d 684 (10th Cir. 1975). *See supra* text accompanying note 34. For a more complete discussion of *Crane*, see *Antitrust, Eighth Annual Tenth Circuit Survey*, 59 DEN. L.J. 221-23 (1982).

that had also established the requisite effect on interstate commerce in *Hospital Building*.[47] Receiving medical insurance from out-of-state, treating out-of-state patients, and buying supplies from out-of-state companies "adequately [met] *McLain's* call for identification of relevant channels of interstate commerce and their relationship to the challenged activities."[48] The Tenth Circuit continued to maintain in *Crane* that the plaintiff was required to demonstrate not that the defendants' general business activities had a substantial effect on interstate commerce, but that the allegedly illegal activities had a substantial effect on interstate commerce.[49]

The Tenth Circuit in *Mishler*, more attuned than in *Crane* to the ease with which the Supreme Court established interstate commerce connections, permitted Dr. Mishler to proceed with his antitrust claim. The suit alleged that interstate commerce resulted from the defendants' out-of-state medical insurance payments, out-of-state supply purchases, and treatment of out-of-state patients.[50]

The Tenth Circuit disagreed with the district court's requirement that the alleged conspiracy must diminish interstate commerce[51] and instead pinned antitrust jurisdiction to a more provable allegation: the hospital's illegal activity had occurred within the flow of interstate commerce or had substantially affected interstate commerce.[52] In its reversal and remand to the trial court, the Tenth Circuit displayed sensitivity to the language of the Supreme Court's most recent expansion of Sherman Act jurisdiction through *McLain*.

The appellate court in *Mishler* found that "although Dr. Mishler must eventually prove a not insubstantial effect on interstate commerce," his complaint had met the requirements of merely identifying the "relevant channels of interstate commerce and their relationship to the challenged activities."[53] In remanding the case, the court noted that "even at trial, Dr. Mishler [was] not required to show that the flow of interstate commerce [was] diminished; an unreasonable burden on commerce may exist even though the anticompetitive conduct may increase interstate commerce."[54] In so holding, the court again maintained that the allegedly illegal activities, rather than the defendants' overall business activity, must substantially af-

46. The Supreme Court decided *McLain* on the same day the Tenth Circuit panel affirmed the dismissal of Dr. Crane's complaint. *Crane*, 637 F.2d at 720.

47. *Id.* at 725 (citing Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 741 (1976)).

48. 637 F.2d at 725.

49. *Id.* at 723-24.

50. Mishler v. St. Anthony's Hosp. Sys., [1981-2] Trade Cas. (CCH) ¶ 64,342, at 74,586 (10th Cir. 1981).

51. *Id.* at 74,585.

52. *Id.* at 74,586 (citing McLain v. Real Estate Bd., 444 U.S. 232, 246 (1980)).

53. [1981-2] Trade Cas. (CCH) at 74,586.

54. *Id.* (citing Harold Friedman, Inc. v. Thorofare Markets, Inc., 587 F.2d 127, 132 & n.14 (3d Cir. 1978); P. MARCUS, ANTITRUST LAW AND PRACTICE 86 (1980)).

After winning the appeal, the plaintiff decided not to return his case to the trial court. Telephone interview with Sidney W. DeLong, attorney for the plaintiff-appellant Dr. Mishler (July 23, 1982). Mr. DeLong withdrew as counsel for Dr. Mishler in the spring of 1982. *Id.*

fect interstate commerce.[55]

Judge Holloway concurred in the opinion but took issue with the reasoning used by the court. He noted that the en banc opinion of *Crane* had misconstrued the jurisdictional showing required to establish antitrust authority.[56] Judge Holloway urged the court to consider the nature of the defendants' overall business activities, rather than the unlawful conduct of the defendants' activities, to establish the jurisdictional showing.[57] Although Judge Holloway agreed that Dr. Mishler's complaint should not have been dismissed by the lower court, he stated that the Tenth Circuit had deviated from the intent of *McLain* by requiring a jurisdictional "showing that the unlawful conduct itself had an effect on interstate commerce."[58] Commentators, however, have criticized this broad interpretation of *McLain*, under which a defendant's overall business activities, rather than the challenged conduct, would be sufficient to invoke federal antitrust jurisdiction if the activities bore a substantial effect on interstate commerce.[59]

The impact of the extension of the Sherman Act to hospitals, which in the past were shielded from federal antitrust enforcement because of their "local" or intrastate activities, serves as a warning that the "threat of this kind of litigation must not be overlooked."[60] The antitrust implications of the expanded jurisdictional authority resulting from *McLain* have caused confusion among the circuits.[61] A federal judge who presided over a six-year legal battle between a cardiothoracic surgeon and the Pennsylvania hospital

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55. [1981-2] Trade Cas. (CCH) at 74,586.

56. *Id.* (Holloway, J., concurring).

57. *Id.* (citing McLain v. Real Estate Bd., 444 U.S. 232, 242 (1980)).

58. *Id.* (citing McLain v. Real Estate Bd., 444 U.S. 232, 243 (1980)).

59. "Unfortunately, there also is language in *McLain* which suggests that a plaintiff need only show that a defendant's total activities, independent of the alleged violation, have a substantial effect upon interstate commerce—if that language is read outside the context of the full opinion." Kissam, Webber, Bigus & Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 CALIF. L. REV. 595, 632 (1982).

The result of such a broad interpretation of *McLain* would eliminate the interstate commerce test from federal antitrust law, according to critics, because virtually all activities, no matter how local, are likely to have effects on interstate commerce. *Id.* at 632-33.

A number of lower courts have followed the broad interpretation advocated by Judge Holloway. *See* Williams v. St. Joseph Hosp., 629 F.2d 448 (7th Cir. 1980); Western Waste Serv. Sys. v. Universal Waste Control, 616 F.2d 1094 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980); Feldman v. Jackson Memorial Hosp., 509 F. Supp. 815 (S.D. Fla. 1981). The Tenth Circuit has been consistent in its position that such a broad reading of *McLain* is improper.

60. Kopit, Gerson & Moses, *Hospitals Must Consider Antitrust Implications of Multi-Institutional Arrangements*, 82 HOSPITALS, Mar. 1, 1982.

> Antitrust litigation can be long and costly. This is particularly true because the responsible officers and directors may be subject to civil or criminal liability as a result of a corporation's anticompetitive activities. The prevailing party might be awarded its attorney fees, and the amount of the actual damages is tripled in settlements under the antitrust laws.

Id. at 1.

61. The Fourth and Fifth Circuits have upheld the dismissal of hospital privilege antitrust suits on the ground that the plaintiffs failed to meet the interstate commerce requirement. *See* Capili v. Shott, 620 F.2d 439 (4th Cir. 1980); Moles v. Morton F. Plant Hosp., Inc., 617 F.2d 293 (5th Cir.), *cert. denied*, 449 U.S. 919 (1980).

In Cardio-Medical Assoc. v. Crozer-Chester Medical Center, 536 F. Supp. 1065 (E.D. Pa. 1982), a federal court held that a physician could not establish antitrust jurisdiction by alleging the hospital had interstate activities. The court rejected the allegation that the hospital's overall business had a substantial effect on commerce. It also noted that any implied allegation involv-

that denied him staff privileges said that "Congress did not pass the antitrust laws in order to ensure that every young surgeon can perform the type and number of procedures that he considers to be most satisfying."[62]

The implication in the Tenth Circuit is that many businesses, once considered local in nature, will now be vulnerable to antitrust challenges by plaintiffs whose requisite showing of "substantial effects" on interstate commerce is now an easier burden of proof. The impact could be far-reaching on antitrust defendants because nearly all businesses have some tangential involvement in interstate commerce. But a more somber message may be the one suggested by an antitrust scholar who has questioned that "with interstate connections so readily found, is the insistence upon 'substantial and adverse' interstate effects . . . but [a] meaningless charade?"[63]

II. NEW APPLICATION FOR *ILLINOIS BRICK*

A. *Indirect Sellers Equated to Indirect Purchasers*

The Tenth Circuit seized an opportunity to extend a recent Supreme Court doctrine in the appellate court's review of a class action brought by wheat farmers in Oklahoma, Texas, and New Mexico. In *Zinser v. Continental Grain Company*,[64] the wheat producers claimed six large grain exporters and a former Department of Agriculture official violated sections 1 and 2 of the Sherman Act,[65] and sought relief under sections 4 and 12 of the Clayton Act.[66] The lawsuits arose from the so called "great grain robbery" involving

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ing the payment of patients' medical bills by out-of-state insurance companies and the federal government would be insufficient grounds to invoke the Sherman Act.

Other courts have embraced the more relaxed interstate commerce test used by the Tenth Circuit in *Mishler*. *See* McDonald v. St. Joseph's Hosp., 524 F. Supp. 122 (N.D. Ga. 1981); Malini v. Singleton & Assoc., 516 F. Supp. 440 (S.D. Tex. 1981); Feldman v. Jackson Memorial Hosp., 509 F. Supp. 815 (S.D. Fla. 1981); Denver v. Santa Barbara Comm. Dialysis Center, [1981-1] Trade Cas. (CCH) ¶ 63,946 (C.D. Cal. 1981). *See also* Everhart v. Jane C. Stormont Hosp., [1982-1] Trade Cas. (CCH) ¶ 64,703 (D. Kan. 1982) in which the court relied on the Tenth Circuit's opinions in *Mishler* and in *Crane* upon the rehearing en banc to find that a cardiologist who claimed he was denied staff privileges at three Kansas hospitals had alleged sufficient interstate commerce connections.

62. Robinson v. Magovern, 521 F. Supp. 842, 891 (W.D. Pa. 1981). In *Robinson* the district court refused to dismiss the surgeon's antitrust suit against a hospital and a group of cardiothoracic surgeons on the basis that the complaint failed to establish the interstate commerce connection. *Id.* at 876-77. Yet, the court ultimately held that the hospital had legitimate competitive goals which created valid reasons for preferring certain surgeons over others. *Id.* at 923-24.

63. P. AREEDA, ANTITRUST ANALYSIS 133 (3d ed. 1980).

64. 660 F.2d 754 (10th Cir. 1981), *cert. denied*, 455 U.S. 941 (1982).

65. *See supra* notes 27 and 28.

66. Private antitrust actions are brought under § 4 of the Clayton Act, 15 U.S.C. § 15 (1976 & Supp. V 1981). It provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides . . . without respect to the amount in controversy and shall recover threefold the damages by him sustained in the cost of the suit, including a reasonable attorney's fee. The court may award . . . simple interest on actual damages . . . .

Section 12 of the Clayton Act, 15 U.S.C. § 22 (1976) permits venue in suit against a corporation in a district in which the corporation is not subject to service of process. It provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any

the sale of over one billion dollars of United States wheat to the Soviet Union in 1972.[67]

Edgar W. Cleveland, an Altus, Oklahoma wheat farmer, sought $150 million in damages in the first of three class action suits which listed Continental Grain Company and its vice president, former Assistant Secretary of Agriculture, Clarence Palmby, as defendants.[68] Two other farmers, Joe Zinser of Texas and John Spearman of New Mexico, filed similar class action suits which were later consolidated with Cleveland's by order of the Judicial Panel on Multi-District Litigation.[69]

Cleveland's suit alleged that Palmby conspired with Continental Grain Company and five other large grain companies to suppress the news of an impending wheat sale to the Russians.[70] As a result, wheat farmers contended that they sold their grain at prices lower than wheat would have commanded had the public known about the Russian wheat deal.[71] The suit charged that Palmby knew when he went to the Soviet Union in 1972 to negotiate terms for the wheat sale that he was going to leave the agriculture department for a job with Continental Grain Company.[72] In subsequent hearings before the House Livestock and Grain Subcommittee, Palmby refuted any conflict of interest and denied that agriculture department officials had leaked information to Continental enabling the grain company to cover the Russian orders before a rise in the domestic wheat price.[73]

The investigation into Palmby "simply faded away for lack of evidence,"[74] but the wheat farmers were not dissuaded from pursuing their claim under the expansive remedial treble damages provision of the antitrust laws.[75] During discovery, however, a fatal flaw in the class action suits was disclosed.

Most of the class members in the suit had sold their wheat to "middle-

district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

67. Langway & Gram, *The Big Five*, NEWSWEEK, Aug. 4, 1975, at 59.

68. *Continental Grain Got Soviet Wheat Order 3 Days Before the U.S.-Russia Grain Accord*, Wall St. J., Sept. 20, 1972, at 2, col. 3 [hereinafter cited as *Continental Grain Order*].

69. In re Wheat Farmers' Antitrust Class Action Litigation, 366 F. Supp. 1087 (J.P.M.D.L. 1973). The three class action suits were:

Cleveland v. Palmby, in which named plaintiff Edgar W. Cleveland represented a class of approximately 43,000 Oklahoma wheat farmers. In addition to Continental and Palmby, five other grain companies were named as defendants.

Zinser v. Palmby, in which named plaintiff Joe Zinser represented a class of approximately 12,000 wheat farmers in 34 counties in the Panhandle and northern Texas.

Spearman v. Palmby, in which named plaintiff John Spearman represented between 600 and 1,500 wheat farmers in Curry County, New Mexico.

Continental Grain Co. and Palmby were named as defendants in all three suits.

70. *Continental Grain Order*, *supra* note 68, at 2.

71. *Id.*

72. *Oklahoma Farmer Sues 6 Firms for $150 Million in Russian Wheat Sale*, Wall St. J., Oct. 25, 1972, at 4, col. 2.

73. Askey, *Conflict-of-Interest Laws Face Review in Grain Deal*, Rocky Mountain News, Oct. 16, 1972, at 4, col. 3.

74. *Id.*

75. The Clayton Act, 15 U.S.C. § 12 (1976) refers to antitrust laws which include the Sherman Act, 15 U.S.C. §§ 1-7 (1976), and the Clayton Act, 15 U.S.C. §§ 12-27 (1976 & Supp. V 1981).

men" such as farmer-owned cooperatives and county grain elevators. Those middlemen, in turn, sold the grain either to one of the defendant companies or to someone else in the distribution chain.[76] Documents obtained during the discovery process showed that very few wheat farmers had dealt directly with the named defendants in their suits. For example, the trial court found that less than 100 farmers among the 43,000 Oklahoma wheat producers represented in the Cleveland suit sold directly to Continental Grain Company. Only 212 of the 12,000 farmers represented in Zinser's suit and sixty-two members of the Spearman class of between 600 and 1,500 New Mexico farmers dealt directly with the company.[77]

The wheat farmers' nine-year litigation was punctuated by a Supreme Court decision which diminished the possibility of recovery by the wheat producers. *Illinois Brick Co. v. Illinois*[78] precluded the claims of indirect purchasers, those who bought from middlemen rather than directly from the named defendants.

For many antitrust law scholars, *Illinois Brick* came as no surprise. In light of the Court's unanimous decision nearly a decade earlier in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,[79] the Court in *Illinois Brick* either had to approve or overrule *Hanover*'s rejection of the defensive pass-on theory for illegal overcharges to indirect purchasers.[80]

In *Hanover Shoe*, the plaintiff shoe manufacturer alleged the defendant's lease arrangement of its shoe manufacturing equipment created a monopoly which resulted in illegal "overcharges."[81] In defense, the defendant United Shoe Machinery (United) asserted that Hanover Shoe suffered no legal injury because it had passed on the illegal overcharges to shoe customers.[82] The thrust of United's argument was that indirect purchasers, rather than direct purchasers, had been injured, and that Hanover Shoe could not recover for their injury. The Court rejected this defense, but was faced with the flip side of the argument in *Illinois Brick*.

The plaintiffs in *Illinois Brick* included the state of Illinois and 700 local municipalities who sued a concrete block manufacturer.[83] The plaintiffs did not buy the concrete blocks directly from the manufacturer, but purchased them through building contractors once the blocks were incorporated into

76. *Zinser*, 660 F.2d at 757.

77. *Id.* at 758.

78. 431 U.S. 720 (1977).

79. 392 U.S. 481 (1968). This case resulted from the lease system United Shoe Machinery Corp. (United) used in marketing its shoe manufacturing equipment. Hanover Shoes, Inc. (Hanover) brought an antitrust action for treble damages against United. Hanover claimed that United leased, but refused to sell, its shoe manufacturing equipment to Hanover. Hanover alleged the lease arrangement created a monopoly and, in addition, an illegal overcharge resulted from the difference between what Hanover paid for its machine rentals and what it would have paid had United been willing to sell its machines.

80. The Court decided to accept *Hanover* because to set it aside would "cut back or abandon" precedent and thus forget the hallowed doctrine of stare decisis in the "area of statutory construction where Congress is free to change this Court's interpretation of its legislation." 431 U.S. at 736.

81. 392 U.S. at 483-84.

82. *Id.* at 488.

83. 431 U.S. at 726.

the masonry structure.[84] The plaintiffs claimed that the defendant had fixed prices and as a result, illegal overcharges were passed on through the middlemen for the plaintiffs to bear.[85]

The Supreme Court held that, having rejected the defensive use of the pass-on theory of illegal overcharges in *Hanover Shoe*, it was required to reject the plaintiffs' effort to invoke the pass-on theory offensively.[86] The Court ruled that direct purchasers may have had a cause of action, but the plaintiffs, as indirect purchasers, did not.[87]

The District Court for the Western District of Oklahoma, relying on the Supreme Court's analysis in *Illinois Brick*, laid to rest any notion of recovery by the wheat farmers, who were by then considered "indirect" sellers.[88] The three class representatives, Cleveland, Zinser, and Spearman, had not sold wheat directly to any of the defendants. In fact, not more than 366 farmers in all three classes had direct dealings with the defendants.[89] The trial court dismissed the actions "without prejudice."[90]

The Tenth Circuit Court of Appeals was asked to determine whether the principles of *Illinois Brick* were properly applied to indirect sellers in the wheat farmers' suits. Judge McWilliams, writing for the court, traced the progeny of *Hanover Shoe*[91] and concluded that "[f]rom *Illinois Brick*, we learn[ed] that in an antitrust treble damage case involving price-fixing the plaintiff must have dealt directly with the alleged violator."[92] Although the plaintiff farmers were indirect sellers, and not indirect purchasers as in *Illinois Brick*, the court found that this distinction did not preclude application of the *Illinois Brick* rule to the wheat farmers' allegations that the depressed wheat prices were passed along by middlemen.[93]

The Tenth Circuit found support for its position in the Fifth Circuit, which had applied the general rule of *Illinois Brick* to a situation similar to

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84. *Id.*

85. *Id.* at 727.

86. *Id.* at 730-46.

One of the major concerns expressed by the Court was the difficulty in tracing damages. The Court believed the judiciary would face an insurmountable task if called upon to trace and apportion damages. *Id.* at 740-41. Another concern was the possibility of duplicate recovery by exposing the antitrust defendant to treble damage suits instigated by a multitude of both indirect and direct purchaser plaintiffs. *Id.* at 730-31.

87. *Id.* at 746-47. The private treble damage actions brought by masonry contractors, general contractors, and private builders ultimately were settled. Illinois v. Ampress Brick Co., 536 F.2d 1163, 1164 (7th Cir. 1976).

88. *Zinser*, 660 F.2d at 758.

89. *Id.*

90. The trial court later amended its order to provide that the claims of all members who did not sell directly to any defendant were dismissed with prejudice, and that the claims of those who did sell directly to a defendant were dismissed without prejudice. *Id.* at 759.

The Tenth Circuit court considered the appeal of a second group of wheat farmers seeking class action certification in *In re* Wheat Farmers Antitrust Class Action Litigation No. II, No. 81-1745 (10th Cir. Sept. 3, 1981). The wheat producers appealed the district court's refusal to certify their cases as class actions pursuant to FED. R. CIV. P. 23. The Tenth Circuit dismissed the appeal and held that the district court's order denying certification to the plaintiffs was neither final nor appealable. *In re Wheat Farmers'*, No. 81-1745, slip op. at 4.

91. *Zinser*, 660 F.2d at 759.

92. *Id.* at 760.

93. *Id.*

that of the wheat farmers. *In re Beef Industry Antitrust Litigation*[94] was a suit in which cattlemen alleged that retail food chains had conspired to depress the prices they paid to meat packers for beef, with the packers presumably passing those lower prices back to the cattlemen. The Fifth Circuit held that the plaintiff sellers, who were ranchers or cattle feeders, had no right to recover in an antitrust action against the defendant retail food chains unless the plaintiffs had dealt directly with the food chains.[95]

The line of cases upon which the Tenth Circuit relied to preclude the wheat farmers' recovery has been criticized as displaying insensitivity by permitting the wrong people to recover damages.[96] Legislation to overrule the Supreme Court's decision in *Illinois Brick* has been introduced, but has failed.[97]

The "bizarre result" of *Illinois Brick* and its progeny, as one commentator has suggested, is that the direct purchaser or seller of a monopolist may have a cause of action to sue for the monopolist's under- or overcharge, while the consumer who actually bears the brunt of that illegal charge has no right of recovery.[98] This rule, if used to insulate the monopolist, would be an

94. 600 F.2d 1148 (5th Cir. 1979), *cert. denied sub nom.* Safeway Stores, Inc. v. Meat Price Investigators Ass'n, 449 U.S. 905 (1980).

95. Although the ranchers in *In re Beef Industry Antitrust Litigation* were permitted to recover damages because they fell within a narrow exception to *Illinois Brick*, no such exception was found in the wheat growers' case. That exception recognized that if the plaintiffs had a pre-existing cost-plus contract with the middlemen, then the plaintiffs would have a cause of action against the defendants with whom they had had no direct dealings. The exception was first recognized in *Hanover Shoe* where there was "an overcharged buyer [who] has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged . . . ." Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968). The Court in *Illinois Brick* mentioned that another exception might be permitted where the direct purchaser is owned or controlled by its customer. 431 U.S. at 736 n.16.

The pre-existing cost-plus contract found by the Fifth Circuit arose from the practice of the middlemen, the meat packers, applying a set formula to a "Yellow Sheet" reflecting the defendants' wholesale beef prices. This formula determined the price meat packers would pay the plaintiffs for their cattle. The Tenth Circuit found no comparable cost-plus contract to enable it to find that the wheat producers fell within an exception to the application of the *Illinois Brick* rule.

The Tenth Circuit indicated that it could apply exceptions to *Illinois Brick* sparingly: "[E]xceptions to *Illinois Brick* are exceedingly narrow in scope, and we believe, should be few in number. . . . [A]ny exception should not be given an expansive application, lest it swallow the rule and become the rule itself." *Zinser*, 660 F.2d at 761.

96. *See, e.g.*, Carrafiello, *A Search for Symmetry: The "Pass-on" Issue in Quest of Determination*, 24 ANTITRUST BULL. 187 (1979); Watson, *Bad Economics in the Antitrust Courtroom:* Illinois Brick *and the Single "Pass-on" Problem*, 9, No. 4 ANTITRUST L. & ECON. REV. 69 (1977).

97. A bill that would permit indirect purchasers to sue for antitrust damages was backed by consumer groups and introduced as S. 598, 96th Cong., 1st Sess. (1979). The bill was reported out of the Senate Judiciary Committee by a bare nine-to-eight margin, but failed on the floor. Legislative attempts to overturn *Illinois Brick* have continued, but to this date have not been successful. The main criticism of the proposed legislation is that it would burden the courts and possibly result in double liability for defendants.

98. Watson, *supra* note 96, at 76. *But see* Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323 (9th Cir. 1980) (*Illinois Brick's* concern with possible multiple damage recovery against price-fixers did not bar suit for treble damages by printing company against manufacturer where "middleman" was the wholesaling division of another manufacturer); Fontana Aviation, Inc. v. Cessna Aircraft Co., 617 F.2d 478 (7th Cir. 1980). (*Illinois Brick* did not apply where manufacturer and middlemen were both alleged to be co-conspirators in a common illegal enterprise with intended injury to buyer); Dart Drug Corp. v. Corning Glass Works, 480 F. Supp. 1091 (D. Md. 1979). (*Illinois Brick* did not bar recovery, even though plaintiff was not a direct

anathema to the intent of antitrust laws, enacted to combat the inequities resulting when farmers, shippers, and other suppliers have been overcharged and underpaid.[99] However, in opting to stand firmly with *Illinois Brick* in the wheat farmers' suit, the Tenth Circuit has maintained a policy consistent with that expressed in *Illinois Brick*, thereby recognizing and addressing the concerns expressed by the Supreme Court.

III. THE STATE ACTION EXEMPTION

In *Pueblo Aircraft Service, Inc. v. City of Pueblo*,[100] the court declined to impose antitrust liability on the defendant because of a state statute which set forth state policy regarding municipal operation of airports, thereby immunizing the municipality against antitrust claims regarding that operation.[101] The court, in affirming the district court's grant of the city of Pueblo's motion for summary judgment, paid particular attention to the Supreme Court's reversal of its decision in *Community Communications Co., Inc. v. City of Boulder*.[102]

In *Pueblo Aircraft*, the city of Pueblo had assumed the exclusive responsibility for the local airport and its operation, including the maintenance of hangars and storage of aviation fuel, after acquiring the facility from the federal government in 1948. The plaintiff, Pueblo Aircraft, ran an aviation refueling, repairing, and storage business, called a fixed-base operation, at the city-owned airport. When Pueblo Aircraft's lease at Pueblo's municipal airport expired, the city awarded the bid for the lease to another fixed-base operator. Pueblo Aircraft filed suit against the city under section 1 of the Sherman Act[103] and section 3 of the Clayton Act,[104] alleging that the city

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purchaser from the manufacturer. The court permitted recovery because the plaintiff's injury was not based on any overcharge that had been passed on to it by entities between it and the manufacturer).

99. H. THORELLI, THE FEDERAL ANTITRUST POLICY 143-44 (1955).

100. 679 F.2d 805 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 762 (1983).

101. COLO. REV. STAT. § 41-4-101 (1973) provides:

> The acquisition of any lands for the purpose of establishing airports or other air navigation facilities; the acquisition of airport protection privileges; the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment, and operation of airports and other air navigation facilities; and the exercise of any other powers granted in this part 1 to any county, city and county, city or town are hereby declared to be public governmental functions . . . for a public purpose, and matters of public necessity; and such lands and other property, easements, and privileges acquired and used in the manner and for the purposes enumerated in this part 1 are hereby declared to be acquired and used for public purposes and as a matter of public necessity.

102. 455 U.S. 40 (1982). *See supra* note 5.

103. *See supra* note 27.

104. 15 U.S.C. § 14 (1976). This section is explicitly limited to exclusive dealing restraints upon customers by suppliers. It provides in pertinent part:

> It shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities . . . for use, consumption, or resale within the United States . . . or fix a price charge therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

violated antitrust laws by stipulating in its lease agreement with the fixed-base operators that they buy aviation fuel from the city.

The district court found that Pueblo's home rule status[105] exempted it from antitrust law as a result of the Tenth Circuit Court of Appeals' opinion in *Community Communications Co.*[106] That decision held that the constitutional delegation of powers to the city in local matters through its home rule status conferred the status of state action on a Boulder ordinance.

Nevertheless, as if divining that the Supreme Court would poke a hole in the Tenth Circuit's ruling, the district court "alternatively relied on a specific statutory authorization granted to the city as a further ground for its immunity determination."[107] This alternative rationale relieved the appellate panel from re-engaging in the analysis it had undertaken a year earlier in *Community Communications Co.* in order to conclude that the municipality had license to avoid antitrust penalty.

The tenor of the Tenth Circuit's opinion in *Pueblo Aircraft* suggested a paternalistic approach towards the right of local municipalities to manage their own affairs unencumbered by federal intervention. The enabling legislation found in the Colorado statute[108] gave the Tenth Circuit the modicum of comfort it needed to find that Pueblo's actions were immune from antitrust intervention, yet in accordance with the Supreme Court's ruling in *Community Communications Co.*

The key distinction between the *Pueblo Aircraft* permitted activity and the illegal one in *Community Communications Co.* was that Pueblo's operation of its airport was in furtherance of a clearly articulated state policy,[109] while Boulder's ordinance was not.[110] Justice Brennan, writing for the majority in the five-to-three decision of *Community Communications Co.*, said that for a municipality to invoke antitrust immunity, the challenged activity must consti-

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The allegation of this violation was intended to assail the city's lease agreement, which required the fixed-based operators to purchase the aviation fuel they sold from the city. This practice is commonly known as a tying arrangement.

105. COLO. CONST. art. XX, § 6 gives cities in Colorado with a population of at least 2,000 people the power to adopt a charter authorizing the city to enact legislation in matters of local concern. The constitution provides:

> From and after the certifying to and filing with the secretary of state of a charter framed and approved in reasonable conformity with the provisions of this article, such city or town and the citizens thereof shall have . . . all other powers necessary, requisite or proper for the government and administration of its local and municipal matters . . . .

Id.

106. Community Communications Co., Inc. v. City of Boulder, 630 F.2d 704 (10th Cir. 1980), *rev'd*, 455 U.S. 40 (1982). The appellate court held in *Community Communications Co.* that the city of Boulder, which was a home rule city, had taken actions tantamount to the powers of the state in Boulder's regulation of the cable television. For a discussion of the Tenth Circuit's opinion in this case, see *Antitrust, Seventh Annual Tenth Circuit Survey*, 58 DEN. L.J. 249, 255-64 (1981).

107. *Pueblo Aircraft*, 679 F.2d at 807.

108. *See supra* note 101.

109. 679 F.2d at 808.

110. "The relationship of the [s]tate of Colorado to Boulder's moratorium ordinance is one of precise neutrality." *Community Communications Co.*, 455 U.S. at 55.

tute the action of the state itself in its sovereign capacity,[111] or implement a "clearly articulated and affirmatively expressed state policy."[112]

Thus, the Supreme Court has held that the involvement of a governmental agency is not automatically sufficient to trigger the state action immunity;[113] rather, the courts must find that the state has stamped its approval on the anticompetitive behavior through legislative authorization.[114] Further, the existence of such state authorization and policy must apparently be derived from statutes.[115] The Tenth Circuit sanctioned Pueblo's activities by reference to the statute's express declaration that the operation of the airport facilities was "to be [a] public governmental [function], exercised for a public purpose, and matters of public necessity."[116]

The Tenth Circuit, reproved by the Supreme Court in *Community Communications Co.* for relying on a state position "of mere *neutrality* respecting the municipal actions challenged as anticompetitive,"[117] emphasized the legislative ratification of Pueblo's airport operations activity. The Colorado statute authorizing the operation of municipal airports provided the affirmatively expressed state policy necessary to exempt Pueblo's actions from the federal antitrust laws.

The clear impression left in the wake of *Community Communications Co.* is that municipalities, in order to operate governmental business uninhibited

111. *Id.* at 52 (citing Parker v. Brown, 317 U.S. 341 (1943)).

In *Parker*, the California Agricultural Proration Act mandated that raisin growers participate in a marketing scheme that appeared to violate the antitrust laws by maintaining prices and restricting competition. The Supreme Court held that the antitrust laws were not intended to reach activity required by the state. The Court noted that the legislative history of the Sherman Act contained no suggestion of Congress' intent to restrain state action; the Act was directed towards individuals and corporations. The action of the state was held to be a valid act of government. 317 U.S. at 350-52. Thus, the *Parker* defense protects individuals and associations that engage in anticompetitive conduct mandated by the state.

The defense may be invoked only where the restraining regulation has been promulgated by the state action in its sovereign capacity; the mandate must be of an "active government." The "state action" defense is inapplicable to ministerial regulation, that is, where the state is acting in its advisory capacity. Whether a formal governmental approval reaches the level of a state command is contingent upon the state's role in formulating the restraint, its interest therein, and the nature of the state's action. There has long been debate over the precise scope of this defense. *See, e.g.*, Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693 (1974); Note, *Federal Antitrust Policy v. State Anticompetitive Regulation: A Means Scrutiny Limit for* Parker v. Brown, 1975 UTAH L. REV. 179.

112. 455 U.S. at 52; *see* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), which narrowed the ruling in Parker v. Brown, 317 U.S. 341 (1943). In *Lafayette*, the Court held that a city was a "person" covered by the antitrust laws and could be sued for treble damages for violating antitrust laws in its operation of a municipal utility. The opinion indicated that the doctrine of state action immunity does not exempt all governmental entities simply by reason of their status as such. When the state itself has not directed or authorized an anticompetitive practice, the state's subdivisions must obey the antitrust laws.

113. *See supra* note 111.

114. Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40 (1982); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978).

115. *Cf.* P. AREEDA, ANTITRUST ANALYSIS 130 (3d ed. 1980). Professor Areeda points out that those statutes providing guidance for state authorization may be "far from explicit on the point." *Id.*

116. *Pueblo Aircraft*, 679 F.2d at 811.

117. 455 U.S. at 55 (emphasis in original).

by federal antitrust regulations, must be protected by virtue of express state sanctions, such as statutory provisions.[118] The Tenth Circuit, sensitive to the possibility that denial of antitrust immunity will impede cities in executing local government programs and unduly burden federal courts, can likely be expected to search state statutes for authorization of local government activities.

IV. CONTRIBUTION AMONG ANTITRUST VIOLATORS

An issue of national interest in antitrust litigation is contribution among antitrust defendants. The Tenth Circuit considered this question in a petition for rehearing en banc in *Olson Farms, Inc. v. Countryside Farms, Inc. (Olson II)*.[119] In its reconsideration of a decision rendered by a Tenth Circuit panel nearly a year earlier, the appellate court followed the recent unanimous ruling by the Supreme Court, *Texas Industries, Inc. v. Radcliff Materials, Inc.*,[120] which denied contribution among antitrust co-conspirators.

At common law, contribution among joint wrongdoers was not permitted where the tort was an intentional one.[121] Accordingly, a number of lower federal courts have denied contribution among antitrust defendants because Congress has not created a statute allowing recovery from co-conspirators. However, the Eighth Circuit in 1978 held that contribution was

118. Justice Rehnquist, joined by Chief Justice Burger and Justice O'Connor, dissented in *Community Communications Co.* and said that the majority's decision will "impede, if not paralyze, local governments' efforts to enact ordinances and regulations aimed at protecting public health, safety, and welfare." *Id.* at 60 (Rehnquist, J., dissenting). Justice Rehnquist maintained that the Court's ruling "effectively destroys the 'home rule' movement in this country, through which local governments have obtained, not without persistent state opposition, a limited autonomy over matters of local concern." *Id.* at 71.

Sen. Strom Thurmond, R-S.C., Senate Judiciary Committee Chairman, held a hearing on June 30, 1982, to determine what, if any, legislative response was appropriate to the Supreme Court's rejection of state action immunity for home rule municipalities after *Community Communications Co.* Representatives of local government expressed concern that the uncertainties created by *Community Communications Co.* would impede governmental policies and result in expensive litigation.

William F. Baxter, Assistant Attorney General in charge of the Antitrust Division, said the Administration had not reached a conclusion that legislation would be an appropriate response to local governments' concerns. Mr. Baxter said that when municipal conduct unreasonably restrains commercial competition, there may be strong policies in favor of applying the antitrust laws, absent a statewide policy to replace competition with regulation or monopoly public service. The Justice Department would not seek criminal indictments against municipal officials when the legality of their conduct was uncertain or openly undertaken without intent to violate antitrust laws. 549 TRADE REG. REP. (CCH) 5-6 (July 6, 1982).

The concern that the Supreme Court's ruling would impede cities in executing local governmental programs was addressed by a bill introduced into the Colorado Legislature which would have exempted local governments from antitrust liability. H.B. 1238, 53d Gen. Assembly, 2d Sess. (1982). This bill, along with H.R.J. Res. 1016, 53d Gen. Assembly, 2d Sess. (1982), introduced by Rep. Claire Traylor, R-Wheatridge, was postponed indefinitely.

119. No. 78-1773 (10th Cir., Nov. 8, 1979), *petition on reh'g en banc* (10th Cir., June 30, 1981).

120. 451 U.S. 630 (1981).

121. *See, e.g.*, Cirace, *A Game Theoretic Analysis of Contribution and Claim Reduction in Antitrust Treble Damage Suits*, 55 ST. JOHN'S L. REV. 42 (1980); Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J. L. & ECON. 331 (1980); Floyd, *Contribution Among Antitrust Violators: A Question of Legal Process*, 1980 B.Y.U. L. REV. 183; Polinsky & Shavell, *Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis*, 33 STAN. L. REV. 447 (1981); Sullivan, *New Perspectives in Antitrust Litigation: Towards a Right of Comparative Contribution*, 1980 U. ILL. L.F. 389.

available in antitrust suits under certain circumstances.[122] The Tenth and Fifth Circuits have held otherwise.[123] In *Texas Industries*, the Court found that neither federal statutory law nor federal common law permitted it to fashion a right of contribution.[124] The Tenth Circuit, following this reasoning, ruled in *Olson II* that in the absence of any statutory provision permitting damages contribution in antitrust cases, the antitrust violator has no right to seek contribution from alleged co-conspirators.[125]

The appeal in *Olson II* concerned the question of contribution for damages incurred as a result of continued antitrust violations. *Olson II* was a companion case to *Olson Farms, Inc. v. Safeway Stores, Inc. (Olson I)*.[126] *Olson II*'s appeal concerned the district court's dismissal of Olson Farm's cross-claim against Egg Products Co., Snow White Egg Co., Countryside Farms, Inc., and a third-party complaint against Safeway Stores, Inc., for contribution or indemnity. The Tenth Circuit, with Judge Holloway concurring only in the denial of indemnity, found that an antitrust defendant cannot obtain contribution towards treble damage liability, and as a result, the egg distributor found to have conspired with other distributors to fix prices paid to egg producers was not entitled to contribution from co-conspirators who were not defendants.[127]

In the *Olson I* case, Olson Farms' role as an "intentional" tortfeasor discouraged the court from creating a right to contribution.[128] The Tenth Circuit, in *Olson I*, in declining to fashion contribution rules, held that "the Congress . . . is in a far superior and more appropriate position to gauge the impact on observance and enforcement of the antitrust laws from contribution and its various facets of implementation."[129] This year, the Senate has

122. Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979).

123. Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979), *aff'd sub nom.* Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981); Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir. 1979). The federal courts have recognized the fairness of the right to contribution in other areas of law and have acted to permit such claims. *See, e.g.*, Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106, 111 (1974) (admirality); United States v. Yellow Cab Co., 340 U.S. 543 (1951) (federal tort claim); Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) (aviation law).

In de Hass v. Empire Petroleum Co., 286 F. Supp. 809 (D. Colo. 1968), *aff'd in part, rev'd in part on other grounds*, 435 F.2d 1223 (10th Cir. 1970), the court allowed contribution among intentional wrongdoers, although the statute did not specifically provide for it in this securities case. The court expressed the opinion that there was a policy that contribution was part of the regulatory framework of the securities laws, whether or not specifically stated in the statute.

124. 451 U.S. 630, 647 (1981).

125. No. 78-1773, slip op. at 3-4.

126. [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir. 1979). Olson Farms was found liable for damages, but only an injunction was issued against another co-defendant, Oakdell Egg Farms, Inc. The jury verdict was affirmed in Cackling Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).

In *Olson I*, an antitrust conspiracy was alleged to exist between Olson Farms and Oakdell Egg Farms, Inc. to fix prices and monopolize egg buying from fourteen egg producers. Olson Farms was held liable for damages, but Oakdell Farms escaped damage liability.

127. No. 78-1773, slip op. at 3-4

128. Olson Farms was found guilty of conspiring to monopolize by persuading egg producers to sell eggs at low prices to the co-conspirators. Olson Farms paid a judgment of more than $2,400,000, including interest. [1979-2] Trade Cas. (CCH) at 79,700 n.3.

129. *Id.* at 79,704.

hammered out a contribution bill to "provide for contribution of damages attributable to an agreement by two or more persons to fix, maintain, or stabilize prices under section 4, 4(a), or 4(c) of the Clayton Act."[130]

This Senate bill, the "Antitrust Equal Enforcement Act," is designed to "rationalize the process of allocating damages in an antitrust price-fixing suit, so that price-fixers will pay their fair share of any damages awarded and so that businesses which find themselves in the midst of a price-fixing suit are not left responsible for the liability caused by another's wrongdoing."[131] The passage of this legislation to permit the contribution among antitrust defendants will resolve the conflict between the Tenth and other circuits and will "end the abuse of 'whipsaw tactics' by relieving a defendant of the liability attributable to the defendants who settle and by allowing the defendant to seek contribution from those conspirators who do not settle, or are not sued by the plaintiff."[132]

V. CASE DIGESTS

In *King & King Enterprises v. Champlin Petroleum Co.*,[133] the Tenth Circuit upheld a district court's determination of a statute of limitations issue. The trial court had concluded that evidence indicating that the defendant oil company actively tried to hide its collusive price-fixing activities was fraudulent concealment as a matter of law.[134] The appellate court affirmed this conclusion, holding that the inherently self-concealing nature of price fixing was not a matter for the jury to determine in connection with the statute of limitations. The defendant had contended on appeal that most of the plaintiff's allegations of illegal price fixing were barred by the four-year statute of limitations stipulated in the Clayton Act.[135]

The appellate court recognized that although the issue of fraudulent concealment was ordinarily one for the jury, the evidence indicated that the defendant gasoline retailer's covert collusion with others to set gasoline prices did not put the plaintiff on inquiry of the defendant's price-fixing activities.[136]

In *Montreal Trading Ltd. v. Amax Inc.*,[137] the court denied standing to a Canadian commodities firm that never bought potash from the American potash producers it sued. The Tenth Circuit ruled that a nonpurchaser who had not dealt with producers of potash did not have standing to sue for an alleged price-fixing conspiracy. The court found the injury to the Canadian commodities trading firm was too remote and too speculative to confer

130. S. 995, 97th Cong., 2d Sess. (1982).

131. S. REP. NO. 359, 97th Cong., 2d Sess. 2 (1982).

132. *Id.* at 3.

133. 657 F.2d 1147 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982) (White, J., dissenting).

134. 657 F.2d at 1155-56.

135. 15 U.S.C. § 15b (1976). This section requires that antitrust actions be commenced within four years of the date the cause of action was filed. The plaintiff filed its complaint on Oct. 2, 1975; and the defendant "maintained that . . . the plaintiff's claims [which] arose prior to Oct. 2, 1971 were barred by the statute of limitations or . . . should have been submitted to the jury." 657 F.2d at 1154.

136. *Id.* at 1156.

137. 661 F.2d 864 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982).

standing. The commodities firm had claimed that it was unable to buy potash to sell to its customers because the defendants were engaged in a concerted refusal to deal with Montreal Trading Ltd. The appellate court also held that the action had no more than a speculative effect on the United States' economy, and therefore, federal court jurisdiction was not justified.[138]

The court determined in *Black Gold v. Rockwool Industries, Inc.*[139] that for purposes of appellate review, the trial court and jury rulings on antitrust liability and damages are not final in the absence of a ruling on attorneys' fees. The court looked at appellate decisions in federal civil rights actions, which held that the trial court's failure to address a claim for attorneys' fees rendered the judgment on the merits nonappealable.[140] The Tenth Circuit court found no reason to distinguish antitrust cases for purposes of determining when a judgment was final. The court dismissed the appeal because the award of attorneys' fees was still under advisement.[141]

An Oklahoma beauty and barber supply shop asked the Tenth Circuit court in *Blankenship v. Herzfeld*[142] to determine whether a cosmetics manufacturer's refusal to sell to the supply shop was a conspiracy with another Oklahoma beauty supply shop to restrain the plaintiff's competition.[143] The plaintiff had alleged that Helene Curtis and Herzfeld conspired to cut off Helene Curtis' sales to the plaintiff because of a sales territory dispute between the plaintiff and the Herzfeld beauty supply outlets.[144]

The Tenth Circuit found that antitrust claims against Helene Curtis were properly rejected because the manufacturer had legitimate business reasons for terminating sales to the plaintiff.[145] The case was remanded to the district court for a determination whether the Herzfeld organization consisted of separate corporations which could have been guilty of a horizontal

138. 661 F.2d at 870.

139. 666 F.2d 1308 (10th Cir. 1981).

140. *Id.* at 1309.

141. *Id.*

142. 661 F.2d 840 (10th Cir. 1981).

143. The trial court's decision recognized that a § 1 *per se* violation could result from a conspiracy between single participants on separate tiers of a distribution chain. While the Tenth Circuit did not question this analysis, there is currently a split among circuits as to whether a two-party, two-tier conspiracy can ever result in a *per se* violation. *Compare* Battle v. Lubrizol Corp., 673 F.2d 984, 986 (8th Cir. 1982) (reh'g en banc granted); Donald B. Rice Tire Co. v. Michelin Tire Co., 638 F.2d 15, 16 (4th Cir.), *cert. denied*, 454 U.S. 864 (1981); Alloy Int'l Co. v. Hoover-NSK Bearing Co., Inc., 635 F.2d 1222 (7th Cir. 1980); Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3d Cir. 1979) (accepting possibility of *per se* violation) *with* Ron Tonkin Gran Turismo, Inc. v. Fiat Dist., Inc., 637 F.2d 1376 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981); H. & B. Equip. Co., Inc. v. Int'l Harvester Co., 579 F.2d 239 (5th Cir. 1978) (no *per se* violation without numerosity on one tier); Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir.) (reh'g en banc), *cert. denied*, 439 U.S. 946 (1978).

The First and Eleventh Circuits apparently recognize the *per se* violation. *See* Greyhound Rent-A-Car, Inc. v. City of Pensacola, 676 F.2d 1380 (11th Cir. 1982); Cory v. Look, 641 F.2d 32 (1st Cir. 1981). The Sixth Circuit apparently splits between panels. *Compare* Com-Tel, Inc. v. DuKane Corp., 669 F.2d 404, 413 n.16 (6th Cir. 1982) *with* Dunn & Mavis, Inc. v. Nu-Car Driveway, Inc., 691 F.2d 241 (6th Cir. 1982).

144. 661 F.2d at 842.

145. *Id.* at 845.

Sherman Act conspiracy against the plaintiff, even though Helene Curtis was not involved.

Finally, in *Hydro-Tech Corp. v. Sundstrand Corp.*[146] the Tenth Circuit wrestled with the question of whether a lawsuit, brought without probable cause and for an anticompetitive purpose, could qualify as an antitrust violation. Hydro-Tech, a Colorado corporation, and one of its employees brought an antitrust action against Sundstrand, stemming from a previous lawsuit Sundstrand had filed against Hydro-Tech. Sundstrand alleged in its earlier action that Hydro-Tech had misappropriated trade secrets.

Hydro-Tech sued Sundstrand, claiming that Sundstrand had instituted the earlier lawsuit to drive Hydro-Tech out of business through long and costly litigation. Hydro-Tech alleged that Sundstrand's litigation was "without probable cause," and was a guise to eliminate competition by ousting Hydro-Tech from the centrifugal pump business.[147]

The court, per Judge McWilliams, held that Hydro-Tech's pleadings were inadequate to state a cause of action under an exception to the *Noerr-Pennington* doctrine,[148] which sets forth the general rule that "attempts to influence the government, including petitions to the courts, are exempt from attack under the Sherman Act."[149] Thus, attempts to obtain administrative or judicial action, even if adverse to a competitor, are immune from the antitrust laws, regardless of intent or purpose. Hydro-Tech, however, had sought to invoke the antitrust laws through the "sham exception" to the *Noerr-Pennington* doctrine. That exception applies when the defendant is not making a genuine effort to influence legislation through official action by a government body so that the challenged activities are " 'nothing more' than an attempt to interfere with the business relationships of a competitor."[150]

The Tenth Circuit, noting that the United States Supreme Court had evidenced an intent in *California Motor Transport Co. v. Trucking Unlimited*[151] that the sham exception be applied only upon a finding of some abuse of the judicial process,[152] ruled that the filing of a lawsuit "without probable cause" does not suffice to invoke the exception.[153] As a result of its holding, the court did not address the issue of whether a single sham lawsuit is sufficient to invoke the antitrust laws through the exception.[154]

The court's holding in *Hydro-Tech* demonstrates that pleadings under the sham exception to the *Noerr-Pennington* doctrine will be subject to exact-

146. 673 F.2d 1171 (10th Cir. 1982).

147. *Id.* at 1174.

148. The doctrine was developed in United Mine Workers v. Pennington, 381 U.S. 657 (1965) and Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). *See also* Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977); California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

149. 673 F.2d at 1174.

150. *Id.* at 1175 (citing Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers, 542 F.2d 1076, 1081 (9th Cir.), *cert. denied*, 430 U.S. 940 (1977)).

151. 404 U.S. 508 (1972).

152. 673 F.2d at 1176 n.6. *See also* Semke v. Enid Auto. Dealers Ass'n, 456 F.2d 1361, 1366-67 (10th Cir. 1972), where the court defined the term "sham" as meaning a misuse or corruption of the judicial process.

153. 673 F.2d at 1177.

154. *Id.*

ing scrutiny. The basis for such scrutiny is in the court's conclusion that "the prosecution of a lawsuit, albeit without probable cause and for an anticompetitive purpose, is activity protected by the first amendment . . . ."[155] Therefore, although the court recognized that pleadings are not to be dismissed unless it can be shown beyond a doubt that no claim is stated, the potential chilling effect on first amendment rights by application of the doctrine requires more specific allegations than are normally required when asserting an antitrust violation based on the "sham litigation" exception.[156]

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155. *Id.* at 1172.
156. *Id.* at 1177 n.8.