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ANTITRUST LAW IN COLORADO: BACK ON TRACK

INTRODUCTION

To many lay persons, the term "antitrust" conjures up thoughts of huge corporations and elite corporate lawyers. To many lawyers, antitrust remains a distant and esoteric area of the law.[1] While both of these viewpoints are justified to a certain extent, they are also restrictively narrow, for antitrust law is indeed a broader and more pervasive subject. Most businessmen will, at some time, encounter an antitrust problem.[2] In fact, most of the people who violate the antitrust laws are small businessmen or local field executives of larger corporations.[3] The subject case, *People v. North Avenue Furniture and Appliance, Inc.*,[4] exemplifies this wider notion of antitrust law.

North Avenue is a price-fixing case involving small businessmen in Grand Junction, Colorado. The decision appears destined to assume an important bench-mark status in Colorado's antitrust law for three reasons. First, *North Avenue* is the Colorado Supreme Court's initial construction of the state's modern antitrust statute.[5] Second, state antitrust enforcement has increased dramatically in recent years, both in Colorado and across the nation.[6] *North Avenue*, as the sole source of state judicial precedent, will naturally be a guiding force for this increased antitrust activity in Colorado. Finally, although the holding in *North Avenue* is necessarily narrow, the *reasoning* employed to reach that holding appears to be broadly applicable to future cases construing Colorado's antitrust statute.

This comment begins with a historical overview of Colorado's scant and unsettled[7] antitrust law. This background helps prepare for a discussion of the *North Avenue* decision and an analysis of its major issues. The comment concludes by outlining some of the possible ramifications of this important case.

I. BACKGROUND OF ANTITRUST LAW IN COLORADO

Colorado originally recognized a cause of action under the common law doctrine of "restraint of trade."[8] The legislature enacted this doctrine into the first antitrust statute in 1913.[9] After some brisk application in the early

1. Ducker, *Antitrust and the Lay Lawyer*, 44 DEN. L.J. 558, 558 (1967).
2. *Id.*
3. *Price Fixing: Crackdown Underway*, BUS. WEEK, June 2, 1975, at 34, Col. 1.
4. 645 P.2d 1291 (Colo. 1982).
5. *Id.* at 1294. *See* COLO. REV. STAT. §§ 6-4-101 to -108 (1973 & Supp. 1982).
6. Burke & Walters, *Antitrust Enforcement in Colorado: New Directions, New Concerns*, 6 COLO. LAW. 1, 1 (1977). *See generally* Rahl, *State Antitrust Symposium*, 4 J. CORP. L. 475 (1979).
7. Note, *Colorado Antitrust Law: Untied and Drifting*, 48 U. COLO. L. REV. 215, 215, 231 (1977).
8. *See* Denver Jobbers Ass'n v. People *ex rel.* Dickson, 21 Colo. App. 326, 122 P. 404 (1912). For general background information on Colorado antitrust law, see generally *North Avenue*, 645 P.2d at 1294; Burke & Walters, *supra* note 6, at 6-7; Ducker, *supra* note 1, at 560-62; Note, *supra* note 7, at 215.
9. 1913 Colo. Sess. Laws, ch. 161, § 1.

1920's,[10] the statute was declared unconstitutionally vague by the United States Supreme Court in 1927.[11] This ruling resulted in a thirty-year hiatus in the state's antitrust law,[12] which lasted until the present statute's enactment in 1957.[13]

When drafting the state's modern antitrust statute,[14] the Colorado legislature used Wisconsin's antitrust statute[15] as a prototype. Wisconsin had based its statute on applicable sections of the federal antitrust statutes,[16] namely the Sherman Act of 1890[17] and the Clayton Act of 1914.[18]

Although case law construing the federal antitrust statutes abounds,[19] the modern Colorado antitrust statute did not receive a substantive judicial interpretation until 1975, eighteen years after its enactment.[20] This interpretation came from a federal court in the case of *Q-T Markets, Inc. v. Fleming Companies, Inc.*[21] Although *Q-T Markets* did not address the same antitrust issues as *North Avenue*,[22] the method of analysis employed by the *Q-T Markets* court became extremely significant in deciding *North Avenue* and, therefore merits a brief discussion.

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10. *See* People v. Apostolos, 73 Colo. 71, 213 P. 331 (1923) (1913 antitrust statute applied to shoe industry); Johnson v. People, 72 Colo. 218, 210 P. 843 (1922) (statute applied to price fixing in electrical contracting business); Campbell v. People, 72 Colo. 213, 210 P. 841 (1922) (statute applied to restraint of plumbing and gas fitting business).

11. Cline v. Frink Dairy Co., 274 U.S. 445 (1927).

12. Note, *supra* note 7, at 215.

13. Colorado Antitrust Act, 1957 Colo. Sess. Laws 369 (originally codified as amended at COLO. REV. STAT. §§ 55-4-1 to -9 (1958)). The antitrust statute is currently codified at COLO. REV. STAT. §§ 6-4-101 to -108 (1973 & Supp. 1982) (Restraint of Trade and Commerce). Colorado has promulgated other statutes designed to prevent anti-competitive practices: COLO. REV. STAT. §§ 6-1-101 to -114 (1973 & Supp. 1982) (Consumer Protection Act) and COLO. REV. STAT. §§ 6-2-101 to -117 (1973 & Supp. 1982) (Unfair Practices Act). Two other provisions were repealed in 1975: COLO. REV. STAT. §§ 6-3-101 to -106 (1973) (Fair Trade Act) and COLO. REV. STAT. §§ 6-5-101 to -114 (1973) (Unfair Cigarette Sales Act).

14. The *North Avenue* court cited the affidavit of David J. Clark, the drafter of the antitrust bill, which states in pertinent part:

> I decided that the antitrust statute enacted in Wisconsin . . . provided the best model. I then drafted the bill which was subsequently enacted as Senate Bill No. 200 using the Wisconsin statute as a model. . . . In drafting this legislation it was my intent to follow the substantive provisions of the Wisconsin statute so that any court decision interpreting the Wisconsin statute could be cited by Colorado courts.

People v. North Ave. Furniture & Appliance, Inc., 645 P.2d at 1294, n.4.

15. WIS. STAT. § 133.01 (1939) (current version at WIS. STAT. § 133.03 (1980)).

16. *See* Pulp Wood Co. v. Green Bay Paper & Fiber Co., 157 Wis. 604, 147 N.W. 1058 (1914), *cert. denied*, 249 U.S. 610 (1919) (Wisconsin Supreme Court held that its antitrust statute was to mean the same thing as the federal statute).

17. 15 U.S.C. §§ 1-7 (1976 & Supp. V 1981).

18. 15 U.S.C. §§ 12-27, 44 (1976 & Supp. V 1981).

19. Note, *supra* note 7, at 225-26.

20. *Id.* at 215. *North Avenue* is the only decision by the Colorado Supreme Court construing the state's antitrust statute, and only three cases even mentioning the Colorado antitrust statute have ever reached the Colorado Court of Appeals. None of the three cases was decided on a substantive application of the antitrust statute. *See* National Cigarette Serv. Co. v. Farr, 42 Colo. App. 356, 594 P.2d 603 (1979); Beneficial Fin. Co. v. Sullivan, 534 P.2d 1226 (Colo. App. 1975) (not selected for official publication); People *ex rel.* Kinsey v. Sumner, 34 Colo. App. 61, 525 P.2d 512 (1974). *See also* Appellant's Opening Brief at 7, North Ave. Furniture & Appliance, Inc., 645 P.2d 1291 (Colo. 1982).

21. 394 F. Supp. 1102 (D. Colo. 1975).

22. *Q-T Markets* dealt with the application of the restraint of trade provision of the Colorado Antitrust Act to tying agreements and exclusive dealing contracts.

A. *The* Q-T Markets *Case*

The plaintiff in *Q-T Markets* asserted both federal and state antitrust claims against the defendant.[23] The federal claims alleged an illegal tying arrangement,[24] in violation of section 1 of the Sherman Act,[25] and an exclusive dealing contract,[26] in violation of section 3 of the Clayton Act.[27] More importantly for present purposes, the plaintiff also alleged a violation of Colorado's Antitrust Act.[28] The federal court entertained the state claim under the doctrine of pendent jurisdiction,[29] whereby the federal court construes state law in accordance with available state interpretations.[30] Because no Colorado case law construing the antitrust statute existed, the federal court interpreted the state statute as a matter of first impression.[31]

In its interpretation of section 6-4-101,[32] the federal court seized upon slight differences[33] in language between the Colorado statute and the Sherman Act. The court concluded that "[b]ecause of those differences it would be unwarranted to assume that the Colorado legislature intended to adopt the case law interpreting the Federal statutes."[34] The court therefore strictly construed the Colorado statute in accordance with the literal meaning of the language used by the legislature.[35] The court's holding has had an ironic result: while Colorado's Little Sherman Act was drafted so as to track the federal Sherman Act,[36] the effect of *Q-T Markets* was to disregard the entire body of federal case law construing the Sherman Act. The *Q-T Markets* decision made Colorado a minority of one[37] by construing its antitrust law independently of federal law. Courts and commentators have, without exception, questioned or criticized this holding, arguing instead that federal precedent should furnish a guide to interpreting Colorado's antitrust stat-

23. 394 F. Supp. at 1105.

24. *See* Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6 (1958) where an illegal tying arrangement was defined as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier."

25. 394 F. Supp. at 1107.

26. *See* 3 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 11.03 (1982), defining an exclusive dealing contract as one where "the buyer is precluded from purchasing a particular commodity from anyone but the seller; in other words, the sales are conditioned on the agreement that no competing lines will be carried."

27. 394 F. Supp. at 1109.

28. *Id.* at 1105.

29. *See* Chatanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1906). *See also* Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).

30. United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

31. 394 F. Supp. at 1106.

32. COLO. REV. STAT. § 6-4-101 (1973 & Supp. 1982).

33. The court found the significant difference between the two statutes to be that section 1 of the Sherman Act makes illegal "every contract, combination in the form of a trust *or otherwise*, or conspiracy, in restraint of trade . . ." 15 U.S.C. § 1 (1976 and Supp. V 1981) (emphasis added). The Colorado statute omits the words "or otherwise." 394 F. Supp. at 1106.

34. 394 F. Supp. at 1106.

35. *Id.*

36. 645 P.2d at 1294.

37. *But cf.* Note, *State Anti-Merger Policy: Divesting the Federal Government of Exclusive Regulation*, 12 LOY. U. CHI. L.J. 531, 564 n.189 (1981) (speculating that Louisiana may also construe its antitrust statute independently of federal precedent).

ute.[38] *Q-T Markets*, however, remained the only reported construction of the statute until 1982 when *People v. North Avenue Furniture and Appliance, Inc.*, provided an opportunity to challenge the *Q-T Markets* decision.

II. *PEOPLE V. NORTH AVENUE FURNITURE*

A. *Facts*

Adam Smith once said that "[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices."[39] While that statement may be somewhat conclusory, it nonetheless applies to the circumstances of *People v. North Avenue Furniture*.

In Grand Junction, Colorado, the locus of the instant controversy, the larger retail carpet stores subcontract their installation work to independent carpet installers. As part of the total purchase price, retailers quote carpet installation rates to their customers from a published price list.[40] In early 1980, the defendants, who were all either sellers or installers of carpeting, met to discuss the possibility of increasing the established price for carpet installation. The defendants reached an initial agreement on a fixed price increase for installation services.[41] The increase was then proposed for approval to twenty-five other independent carpet installers in the area, who later became unindicted co-conspirators.[42] This group also approved the increase, and the installers and retailers agreed to abide by the newly established prices effective March 1, 1980.

The Attorney General's office received an anonymous complaint regarding the price-fixing arrangement and initiated a grand jury investigation.[43] This resulted in the return of an indictment charging price-fixing violations under the Colorado Antitrust Act in May of 1980.[44]

The district court dismissed the indictments in November of 1980 after finding the defendant's activity was protected by the statutory labor exemption to the antitrust statute.[45] Disagreeing with the lower court's construction of the labor exemption, the Attorney General filed a notice of appeal to

38. *North Avenue*, 645 P.2d at 1293, n.3 ("We therefore reject the contrary assumption implicit in *Q-T Markets*."); Kelly v. Blue Cross, 1979-1 Trade Cases (CCH), ¶ 62,646 at 77,651 (Mich. Cir. Ct. 1979) ("The Court is not persuaded by Defendant's [citation of the *Q-T Markets* case]."); Burke & Walters, *supra* note 6, at 7 ("Whether or not the Colorado courts will follow this . . . [*Q-T Markets*] analysis remains to be seen. Some hint of rejection can be found . . . ."); Note, *supra* note 7, at 229-30 ("The *Q-T Markets* opinion abrogates the pervasive intent of state legislatures to look to federal law and landmark cases in construing their own laws.").

39. A. SMITH, THE WEALTH OF NATIONS 128 (1st Modern Library ed. 1937), quoted by Ducker, *supra* note 1, at 577.

40. 645 P.2d at 1292.

41. *Id.*

42. Appellant's Opening Brief at 5, People v. North Ave. Furniture, 645 P.2d 1291 (Colo. 1982) [hereinafter cited as Appellant's Opening Brief].

43. 645 P.2d at 1293.

44. *Id.*

45. *Id.* *See* COLO. REV. STAT. § 6-4-103(2) (1973), which states that "[t]he labor of a human being is not a commodity or article of commerce."

the Colorado Supreme Court.[46]

B. *The Issues and Decisions*

In *North Avenue* the Colorado Supreme Court confronted the state antitrust statute on first impression.[47] The principal issue of the case concerned the construction of the statutory labor exemption.[48] Before considering whether the case qualified for the exemption, however, the court had to decide whether Colorado's antitrust statute even applied to *North Avenue*.[49]

1. The "Trade or Commerce" Issue

The illegal restraint of trade provision of the Colorado Antitrust Act provides in part that "[e]very contract or combination in the nature of a trust or conspiracy in restraint of *trade or commerce* is declared illegal . . . ."[50] The preliminary issue, then, was whether carpet installation, generally considered a service, was also "trade or commerce" within the scope of the antitrust statute.[51] If carpet installation was *not* a trade under the purview of section 6-4-101, then the antitrust statute would not apply, and construction of the labor exemption issue would have been unnecessary.

2. The Decision

The court held that carpet installation was "trade or commerce" within the meaning of the Colorado Antitrust Act.[52] The court noted that the distinction between carpet installation as an exchange of services for money, as opposed to an exchange of commodities for money, was without antitrust significance.[53]

In reaching their conclusion, the Colorado court chose to follow the multitude of federal cases that broadly apply the Sherman Act.[54] The court

46. The notice of appeal to the supreme court from the district court was filed pursuant to COLO. REV. STAT. § 16-12-102 (1973 & Supp. 1982) and COLO. APP. R. 4(b).

47. 645 P.2d at 1294.

48. *Id.* at 1297.

49. *Id.* at 1296.

50. COLO. REV. STAT. § 6-4-101 (1973 & Supp. 1982) (emphasis added). This section provides in full that:

> Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is declared illegal. Every combination, conspiracy, trust, pool, agreement, or contract intended to restrain or prevent competition in the supply or price of any article or commodity constituting a subject of trade or commerce in this state, or every combination, conspiracy, trust, pool, agreement or contract which controls in any manner the price of any such article or commodity, fixes the price thereof, or limits or fixes the amount or quantity thereof to be manufactured, produced, or sold in this state, or monopolizes or attempts to monopolize any part of the trade or commerce in this state, is declared an illegal restraint of trade.

Id. The penalties for violating the Colorado antitrust statute are found in COLO. REV. STAT. § 6-4-107 (1973 & Supp. 1982).

51. 645 P.2d at 1296.

52. *Id.*

53. *Id.*

54. For other examples of labor and service industries within the scope of the Sherman Act, *see, e.g.*, National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978) (engineering services); Gordon v. New York Stock Exch., 422 U.S. 659 (1975) (stock brokerage services); Connell Constr. Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616

was persuaded by legislative history which showed that in enacting section 1 of the Sherman Act,[55] "Congress intended to strike as broadly as it could."[56] Recognizing that Colorado's section 6-4-101 was modeled on section 1 of the Sherman Act,[57] the court looked to several United States Supreme Court constructions of the Sherman Act for guidance in construing the Colorado Act.[58]

The court first looked to the Supreme Court decision in *Atlantic Cleaners & Dyers v. United States*,[59] where "trade" under the Sherman Act was interpreted as the equivalent of "occupation, employment, or business whether manual or mercantile."[60] Thus, laundering clothes, although a service, nonetheless constituted a "trade" under the Sherman Act.[61] The court also discussed *Goldfarb v. Virginia State Bar Ass'n*,[62] where the Supreme Court held that real estate title examination conducted by attorneys was "trade or commerce."[63] The Court tersely stated that land title examination is a service and that exchanging such a service for money is "commerce" in the most ordinary use of that term.[64]

On the strength of federal interpretations of "trade or commerce" under the Sherman Act, the Colorado Supreme Court held carpet installation to be within the corresponding provision of the Colorado act.[65] This holding appears to indicate that Colorado will follow the federal lead by reading wide coverage into Colorado's Little Sherman Act.

3. The Labor Exemption Issue

Having found that carpet installation services were "trade or commerce" within the scope of the antitrust act, the court turned to the pivotal issue of the case: construction of the labor exemption.

The labor exemption states that "[t]he labor of a human being is not a commodity or article of commerce."[66] The defendants argued that because their agreement to increase carpet installation charges "dealt solely with the

(1975) (construction services); United Mine Workers v. Pennington, 381 U.S. 657 (1965) (coal mining); Associated Press v. United States, 326 U.S. 1 (1945) (furnishing news).

55. 15 U.S.C. § 1 (1976 & Supp. V 1981).

56. Goldfarb v. Virginia State Bar Ass'n, 421 U.S. 773, 787 (1975).

57. 645 P.2d at 1294 n.4. *See supra* note 14.

58. *Id.* at 1295.

59. 286 U.S. 427 (1931).

60. *Id.* at 436.

61. The court's citation to *Atlantic Cleaners & Dyers* is problematic, however, because that case relates only to section 3 of the Sherman Act. Section 3 deals *exclusively* with people engaged in trade or commerce in the District of Columbia, and therefore, by definition, ought to be inapplicable to other jurisdictions (15 U.S.C. § 3 (1976 & Supp. V 1981)).

62. 421 U.S. 773 (1975).

63. *Id.* at 787.

64. *Id.* Perhaps the best test used to determine Sherman Act (and Little Sherman Act) applicability is the one articulated by Sullivan: "If there is a dollar to be made, it's trade or commerce." L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 709 (1977).

65. 645 P.2d at 1296. After finding applicability of the antitrust statute to the carpet installation business, the court swiftly moved to a construction of the labor exemption. The court, however, never stated whether the defendants' activity actually constituted a price fixing violation; instead, it tacitly assumed the requisite illegality and proceeded to construe the exemption. In the court's defense, it should be noted that neither party discussed price fixing in their briefs.

66. COLO. REV. STAT. § 6-4-103 (1973).

price of human labor," their actions were immune from antitrust prosecution under the Colorado labor exemption.[67] The Attorney General argued that Colorado should narrowly interpret its labor exemption and thereby limit its application to bona fide labor union activities relating to the terms and conditions of employment.[68]

4. The Decision

The Colorado Supreme Court rejected the defendant's broad interpretation and held that in order for the labor exemption to apply, the defendants' agreement would have to arise from an employer-employee relationship concerning wages, hours of work and other conditions of employment.[69]

In arriving at this conclusion, the court had to juggle several entangled concepts that were not susceptible of a pigeonhole analysis. It is therefore understandable why the court experienced difficulty in articulating their rationale. The holding itself and the reasoning used, however, appear to be entirely proper, with the net effect being that *North Avenue* interprets Colorado's labor exemption in harmony with both the history and the case law constructions of the federal labor exemption. The following sections explore the court's treatment of the labor exemption issue.

C. *Analysis*

1. History of the Federal Labor Exemption

A necessary dimension of the court's analysis was its discussion of the Clayton Act labor exemption.[70] The purpose of antitrust law has been to promote free competition and prevent restraints of trade.[71] The goal of federal labor law, however, has been to enhance workers' rights by encouraging voluntary economic agreements between employers and employees.[72] The aims of labor law thus clash with those of antitrust law where employer-employee agreements have the effect of inhibiting competition and restraining trade.[73]

The tension between antitrust law and labor law climaxed in 1908 when the Supreme Court decided the so-called *Danbury Hatters* case,[74] where a union-organized boycott of the plaintiff's nonunion-made hats was found

67. 645 P.2d at 1293.

68. *Id.*

69. *Id.* at 1299.

70. 15 U.S.C. § 17 (1976 & Supp. V 1981).

71. 645 P.2d at 1295. *See* 21 CONG. REC. 2457 (1890) (Comments of Senator Sherman). *See also* United States v. Hutcheson, 312 U.S. 219 (1941); Standard Oil Co. v. Tennessee, 217 U.S. 413 (1910).

72. 645 P.2d at 1295. *See* Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616 (1975). *See also* Casey & Cozzillo, *Labor-Antitrust: The Problems of* Connell *and a Remedy that Follows Naturally*, 1980 DUKE L.J. 235, 235.

73. 645 P.2d at 1295. *See* Casey & Cozzillo, *supra* note 72, at 235-36; Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 16-17 (1963).

74. Lowe v. Lawlor, 208 U.S. 274 (1908).

to violate the Sherman Act.[75] This decision prompted the labor unions to seek specific statutory immunity for legitimate union activities violative of the Sherman Act. Congress responded by passing section 6 of the Clayton Act[76]—the labor exemption. In providing this exemption, Congress sought to accommodate the important national policies of both antitrust enforcement and legitimate labor union activities.[77]

2. Federal Construction of the Labor Exemption

A long line of federal cases has perpetuated the historical purpose of the Clayton Act exemption, and these cases firmly support the *North Avenue* court's interpretation of the Colorado provision. Unlike the broad applicability of section 1 of the Sherman Act, the courts narrowly construe *all* antitrust statutory exemptions in order to effectuate the legislative intent of promoting competition.[78] The section 6 labor exemption of the Clayton Act is no exception to this general rule, and its scope has been severely limited by the judiciary.

In *Columbia River Packers Association, Inc. v. Hinton*,[79] the Supreme Court held that the labor exemption did not apply to agreements between independent businessmen, but rather, only to employer-employee relationships.[80] Similarly, in *Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers*,[81] the Supreme Court held the labor exemption was available only to legitimate unilateral union activity.[82] *Los Angeles Meat and Provision Drivers Union v. United States*[83] continued the well-defined trend by stating that the labor exemption's purpose is to ensure that legitimate union activities are not stifled by the antitrust laws.[84]

In light of this federal precedent, the Colorado Supreme Court formulated the following test for application of the labor exemption: where an agreement "arises from lawful associational activities of employees concern-

75. *Id.* at 301.

76. 15 U.S.C. § 17 (1976 & Supp. V 1981).

77. People v. North Ave. Furniture, 645 P.2d at 1295.

78. Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979).

79. 315 U.S. 143 (1943).

80. *Id.* at 145-47. The Supreme Court's conclusion is particularly applicable to *North Avenue*:

> The controversy here is altogether between fish sellers and fish buyers. The sellers are not employees of the petitioners or of any other employer nor do they seek to be. On the contrary, their desire is to continue to operate as independent businessmen, free from such controls as an employer might exercise. That some of the fishermen have a small number of employees of their own, who are also members of the Union, does not alter the situation. For the dispute here, relating solely to the sale of fish, does not place in controversy the wages or hours or other terms and conditions of employment of these employees.

Id. at 147.

81. 325 U.S 797 (1945).

82. *Id.* at 808-11.

83. 371 U.S. 94 (1962).

84. *Id.* at 103. In H.A. Artists & Associates, Inc. v. Actor's Equity Ass'n, 451 U.S. 704 (1981), the Supreme Court found that the federal labor exemption applied only to *bona fide* labor activity and not to independent contractors or entrepreneurs. *See also* Home Box Office, Inc. v. Directors Guild of Am., Inc., 531 F. Supp. 578, 588 (S.D.N.Y. 1982); Cesnik v. Chrysler Corp., 490 F. Supp. 859, 865 (M.D. Tenn. 1980).

ing the terms or conditions of their employment," the exemption is available.[85] Applying this test to the facts of *North Avenue*, the court found that the defendant carpet retailers and installers bore no employment relationship with each other. The primary purpose of their agreement was to fix the prices for carpet installation and thereby restrain competition in the Grand Junction market.[86] The court therefore ruled that the labor exemption was not available to the *North Avenue* defendants.[87] The court concluded by stating that businessmen cannot organize into a union and, on that basis, hope to escape from antitrust prosecution.[88]

3. Disposing of *Q-T Markets*

If federal law controlled the *North Avenue* case, the analysis would end here. Even the defendants agreed that under *federal* law, their pricing agreement did not result from a *union* activity, much less stem from a *bona fide* employer-employee relationship.[89] Federal law, however, did not control the instant case,[90] and the issue thus became, to what extent should the federal constructions apply to the Colorado statute?

Relying on the rationale of *Q-T Markets*,[91] defendants contended that minor differences between the labor exemptions in the Colorado antitrust statute and the Clayton Act indicated a legislative intent to depart from federal precedent.[92] This argument was not frivolous as it was founded on the logic of the only prior case which construed Colorado's modern antitrust

85. 645 P.2d at 1299.
86. *Id.*
87. *Id.*
88. *Id.* at n.9.
89. *Id.* at 1297.
90. *Id.* at 1295-96.
91. *See supra* text accompanying notes 23-38.
92. Since their interpretations are critical to the outcome of the case, the two statutes are juxtaposed below. The italicized portions show the Colorado statute places the human labor sentence in a *second* section, at the *end* of the statute. The federal provision on the other hand, has only *one* section, with the human labor sentence appearing at the *beginning*.

In defense of the alleged price fixing, the defendants invoked Colorado's labor exemption, COLO. REV. STAT. § 6-4-103 (1973):

> (1) Nothing in this article shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations instituted for the purpose of mutual help, or engaged in making collective sales or marketing for its members or shareholders of farm, orchard, or dairy products produced by its members or shareholders, and not having capital stock or conducted for profit or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under this article.
>
> (2) *The labor of a human being is not a commodity or article of commerce.*

(emphasis added).

The People offered, by way of comparison, the Clayton Act labor exemption, which served as the model for section 6-4-103:

> *The labor of a human being is not a commodity or article of commerce.* Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

15 U.S.C. § 17 (1976 & Supp. V 1981) (emphasis added).

statute.[93]

The court, however, viewed any reliance on *Q-T Markets* as tenuous and declined the invitation to deviate from the clear federal case law of *Columbia River Packers* and its progeny.[94] The court rejected the assumption implicit in *Q-T Markets* that the Colorado antitrust statute was intended to mean something distinct from federal antitrust statutes.[95] Instead, the court reached the conclusion that the federal constructions were entitled to considerable weight.[96]

4. Justification for Applying Federal Precedent to the State Statute

Having dispensed with the *Q-T Markets* cases, the *North Avenue* court then had to justify why it could apply federal precedent, by analogy, to the state statute. The court accomplished this by resorting to the doctrine of *in pari materia*.

Under this doctrine of statutory construction, the court interprets the meaning of a statute by looking to constructions of statutes with similar language and purpose.[97] In this case, the court noted that both federal and state antitrust laws were devoted to the dual purpose of protecting the public against restraints of trade while preserving the rights of workers to bargain collectively with employers over the terms and conditions of employment.[98] The court stated that the role of state antitrust laws was to address conditions beyond the reach of federal laws.[99] The court concluded that given the substantial similarity in text and purpose of federal and state antitrust laws, the federal decisions construing the Sherman and Clayton Acts, although not necessarily controlling, were entitled to careful scrutiny in determining the scope of the state antitrust statute.[100]

In justifying its adoption of federal precedent as a guide to interpreting the Colorado Act, the court appears to rely solely on the doctrine of *in pari materia*. Interestingly, the court ignored the Attorney General's argument,[101] which reached the same conclusion by means of the "borrowing doctrine." Under this doctrine, the construction of statutes borrowed from other jurisdictions is controlled by the lending jurisdiction's interpretation of

93. It is interesting to note that the defendant did not contest the application of federal precedent in interpreting COLO. REV. STAT. § 6-4-101 (1973), which differs slightly from section 1 of the Sherman Act.

94. 645 P.2d at 1299.

95. *Id.* at 1293 n.3.

96. *Id.* at 1296.

97. 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION 51.01 (4th ed. 1973). An illustrative case is State v. Duluth Bd. of Trade, 107 Minn. 506, 121 N.W. 395 (1909):

> The Minnesota anti-trust law is framed along the lines of the federal statute, although it is more diffuse. It may fairly be assumed, however, that the general purpose of all statutes of this kind is the same, and we may therefore properly look to the decisions made under federal and state statutes of a similar character for the principle by which to construe our own statute.

Id. at 107 Minn. at 510, 121 N.W. at 399.

98. 645 P.2d at 1295.

99. *Id.*

100. *Id.* at 1296.

101. Appellant's Opening Brief, *supra* note 42, at 9.

its statute at the time of the borrowing.[102] The advantage of employing this doctrine is that it has solid support in Colorado case law.[103]

The court did note that in enacting the Colorado antitrust statute in 1957, the legislature "borrowed" Wisconsin's antitrust statute as a model.[104] The court cited an affidavit from the draftsman of the Colorado statute, which stated that it was the legislator's intent that any cases interpreting Wisconsin's statute could be used as precedent to interpret Colorado's statute.[105] Significantly, at the time Colorado borrowed Wisconsin's antitrust statute, Wisconsin interpreted it in harmony with federal precedent.[106] Thus, by looking to Wisconsin case law, the *North Avenue* court could have "borrowed" that state's policy of accepting federal constructions of the Sherman Act as a guide to interpreting its own statute. The court could have supported this conclusion by citing its own line of decisions concerning the borrowing doctrine.[107]

Thus, the court could have solidly and artfully justified its application of federal constructions to the Colorado Act. The court, however, declined to take this approach in favor of the more direct comparison of the Colorado statute to the federal antitrust laws.

5. The Language Differences in the Federal and State Exemption

The final issue that the court had to address was the defendants' argument concerning the organizational differences in the federal and state exemption provisions.[108] The defendant seized upon two differences, namely, the bifurcation and the reverse order of the human labor sentence.

The court easily disposed of the bifurcation issue. The original enactment of the labor exemption came in a single section entitled "organizations exempt."[109] In the 1973 version of the statutes, that section was editorially divided into two parts by the statutory revisor, with the human labor sentence appearing separately.[110] There were no intervening amendments authorized by the legislature. The change was only cosmetic, with no apparent explanation. Because editorial changes by the statute revisor cannot alter the substantive meaning,[111] the court stated that it would attach no significance to the revisor's bifurcation.[112]

The court never actually addressed the defendants' argument about the

102. *Vandermee*, 164 Colo. 117, 121, 433 P.2d 335, 337 (1967).
103. *See, e.g.*, Vandermee v. District Court, 164 Colo. 117, 433 P.2d 335 (1967).
104. 645 P.2d at 1294.
105. *Id.* at 1294 n.4.
106. *See, e.g.*, Pulp Wood Co. v. Green Bay Paper & Fiber Co., 157 Wis. 604, 147 N.W. 1058 (1914).
107. *See* Vandermee v. District Court, 164 Colo. 117, 433 P.2d 335 (1967).
108. 645 P.2d at 1298.
109. COLO. REV. STAT. § 55-4-3 (1963).
110. COLO. REV. STAT. § 6-4-103(2) (1973).
111. COLO. REV. STAT. § 2-5-103(2) (1973 & Supp. 1982). *See also* COLO. REV. STAT. § 2-3-703 (1973 & Supp. 1982).
112. 645 P.2d at 1298. The human labor sentence once again appears as a part of a single section. An editor's note attributes the change to the *North Avenue* case. *See* COLO. REV. STAT. § 6-4-103 (Supp. 1982).

reverse order of the human labor sentence. After noting the history behind the sentence, the court only stated that the sentence, in and of itself, does not affect the rest of the exemption and "has no independent legal significance."[113] A plain meaning analysis of the federal and state exemptions would probably have been sufficient justification of the court's quick dismissal of any significance to the reverse order.

III. THE RAMIFICATIONS OF *NORTH AVENUE*

The numerous federal interpretations have molded the labor exemption into a mature and well-defined legal concept. The *North Avenue* holding, which accords with the federal case law, therefore cannot be claimed as a milestone in the development of antitrust law. Instead, *North Avenue* is best viewed in a broad sense. This generic approach suggests several likely ramifications of the case and permits a richer appreciation of the importance of *North Avenue* to Colorado antitrust law.

A. *A Death-Knell to* Q-T Markets

The court's rejection of *Q-T Markets* will probably be viewed as a death-knell to that anomalous case. The severe criticism received by *Q-T Markets*, together with the *North Avenue* decision, firmly establishes that *Q-T Markets* was wrongly decided. The only technicality remaining in the *Q-T Markets* saga is its inevitable overruling by a federal court.

The court's treatment of the *Q-T Markets* case, however, seems mildly troubling. Although the *Q-T Markets* decision was heavily criticized,[114] it was the only judicial interpretation of Colorado's antitrust statute. As such, the case merited a direct, frontal attack if it were to be disregarded. Instead, the *North Avenue* court's rejection of *Q-T Markets* was relegated to mere footnote status.[115] The unfortunate, though by no means fatal, result was to dilute an otherwise forceful ruling indicating that Colorado intends to interpret its statute by carefully considering federal precedent.

B. *The Use of Federal Precedent in State Antitrust Law*

By ruling that federal precedent furnished a guide to the interpretation of the antitrust act,[116] the court has breathed new life into Colorado antitrust enforcement. This ruling adds stability and predictability to antitrust law in Colorado because businesses, as well as other public and private litigants, can now confidently rely on the wealth of federal antitrust precedent to guide their activities and shape their strategies.

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113. 645 P.2d at 1299.

114. *See supra* note 38 and accompanying text.

115. 645 P.2d at 1293 n.3.

116. The court stops short of holding federal precedent "controlling" on the Colorado interpretation, thus preserving the court's room to maneuver in future cases. This loophole was probably intended to avoid exactly the kind of dilemma that led to the *Q-T Markets* aberration. It has been speculated that the reason behind the *Q-T Markets* ruling with respect to the Colorado statute was the federal district court's disagreement with the course federal antitrust law was taking. *See* Note, *supra* note 7, at 225.

C. *Some Final Thoughts on* North Avenue

The analysis of *North Avenue* and the implications suggested above seem to assume that there is a significant amount of antitrust activity in Colorado. It has also been noted, however, that only two cases, *Q-T Markets* and *North Avenue*, have construed Colorado's antitrust statute since its enactment over twenty-five years ago. The pragmatic question, then, becomes: does the *North Avenue* case really matter? The answer, unreservedly, is yes.

The student or practitioner of Colorado antitrust law should not be deceived by the paucity of *reported* antitrust cases. Because antitrust litigation is expensive, there is a strong incentive for litigants to settle.[117] One commentator claims that over eighty per cent of all antitrust cases reach settlement through consent decrees.[118] The popularity of settlements helps explain why so few cases reach the Colorado appellate courts and are reported.

The best evidence of the antitrust statute's present vitality in Colorado is the amount of antitrust enforcement conducted by the office of the Attorney General. The office did not have an antitrust section until 1975,[119] which may well account for the relative dormancy of antitrust law in Colorado prior to that time. Since the antitrust section has been added, however, antitrust activity in the state has increased dramatically.[120] Most of this antitrust enforcement activity has been initiated by the Attorney General. *North Avenue* constitutes judicial approval of the Attorney General's activities and should be the encouragement needed to stimulate an aggressive enforcement policy in Colorado.

Private antitrust actions may also increase as a result of *North Avenue*. The use of federal precedent adds one of the incentives needed for litigants to choose a state forum, namely, predictability in the law. A serious deterrent, however, to choosing a state forum remains due to the mysterious absence from the Colorado statute of a treble damage penalty.[121] The Colorado Legislature should view *North Avenue* as an invitation to enact such a remedy.

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117. Note, *supra* note 7, at 218.

118. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 758 n.8 (1977). *See also* Burke & Walters, *supra* note 6, at 2.

119. Burke & Walters, *supra* note 6, at 1.

120. Burke & Walters, *supra* note 6, at 1. There are several reasons for this increase in state antitrust enforcement in Colorado and across the nation. An exhaustive discussion of these reasons, however, is both beyond the scope of this comment and has been well documented in other writings. *See generally* Dibble & Jardine, *The Utah Antitrust Act of 1979: Getting into the State Antitrust Business*, 57 UTAH L. REV. 73 (1980); Rahl, *State Antitrust Symposium*, 4 J. CORP. L. 475 (1979); Sieker, *The Role of States in Antitrust Law Enforcement—Some Views and Observations*, 39 TEX. L. REV. 873 (1961); Note, *The Present Revival and Future Course of State Antitrust Enforcement*, 38 N.Y.U.L. REV. 575 (1963).

121. The absence of a treble damages penalty was explained in part by the affidavit of David J. Clark, cited by the *North Avenue* court. "I did make certain changes regarding penalties to be applied, such as elimination of the provision for treble damages in civil cases, because I thought the new statute should be 'on the books' for awhile before private actions for treble damages could be instituted. 645 P.2d at 1294, n.4. This does not explain, however, why the legislature has failed to enact a treble damages penalty since the enactment of the law eighteen years ago.

Finally, state antitrust enforcement is important to Colorado because some industries may be wholly intrastate and thus not within the federal jurisdiction. In what is perhaps the major downfall of the *North Avenue* opinion, the court made only a fleeting reference to this issue when it stated that the purpose of state antitrust law is protection of the public against restraints of trade "beyond the reach of federal law."[122] The court leaves to the reader the troubling task of deciding what constitutes an activity "beyond the reach of federal law."

Presumably, the answer is those activities that are entirely intrastate. The authorities, however, are in conflict on the viability of the interstate/intrastate distinction. Some argue that almost all actions will result in interstate commerce.[123] Other writers maintain that industries do exist which are completely intrastate, such as dry cleaning, dairy farming, and restaurants.[124] In light of the tremendous docket problems facing the federal courts today, it is not inconceivable that the federal courts will be less inclined to find the degree of interstate activity required to invoke federal jurisdiction. This increased burden on state courts would make state antitrust laws even more important.

CONCLUSION

North Avenue represents the Colorado Supreme Court's first construction of the state's modern antitrust statute. The case clearly indicates that interpretations of federal antitrust statutes will be given considerable weight when construing Colorado's antitrust statute. The concepts delineated above are compelling reasons for an aggressive state antitrust enforcement policy, and they show that any reliance on the scarcity of reported antitrust cases as an indication of the degree of antitrust activity in Colorado is a trap for the unwary. As a result, *North Avenue* is not an example of much ado about nothing, but rather, *North Avenue* should be viewed as an important case which will significantly guide antitrust enforcement in Colorado.

North Avenue has put antitrust law in Colorado back on track. However, *North Avenue* is but a single step. To continue the advances begun by *North Avenue*, the judiciary must further define the parameters of the Colorado antitrust statute, the Attorney General must maintain its aggressive enforcement philosophy, and the legislature must provide litigants with an appropriate remedy.

Mark Lillie

122. 645 P.2d at 1295.
123. Ducker, *supra* note 1, at 560 n.7.
124. Note, *supra* note 7, at 232-33.