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OVERVIEW

There were few cases considered by the Tenth Circuit Court of Appeals in the area of antitrust during the past year. The court considered only three cases, all of which applied pre-existing law. The issues considered in the three cases decided were jurisdiction under the Sherman Act, group boycotts and *per se* violations under the antitrust laws, and the applicability of the antitrust laws to labor unions and collective bargaining agreements. These issues will be discussed in a brief synopsis of the cases.

I. JURISDICTION UNDER THE SHERMAN ACT

In *Crane v. Intermountain Health Care, Inc.*,[1] the court considered the issue of subject matter jurisdiction under section 1 of the Sherman Act. The *Crane* case involved a complaint by Dr. Crane alleging that the defendant, owner and operator of Cottonwood Hospital in Murray, Utah, conspired with others to limit competition, restrain trade, and fix prices in the practice of pathology. More specifically, the complaint alleged that: 1) the hospital refused to consult with Dr. Crane or to permit members of Cottonwood's medical staff to consult with him; 2) the hospital required that all pathology specimens of Cottonwood patients be evaluated at Cottonwood's pathology laboratory; and 3) the hospital refused to permit Dr. Crane to use either the hospital or his own laboratory to evaluate specimens from patients of Cottonwood's physician staff members.[2] The district court, before allowing Dr. Crane the opportunity for discovery, dismissed the complaint for lack of Sherman Act subject matter jurisdiction.[3] The district court based its holding on the 1975 decision in *Wolf v. Jane Phillips Episcopal-Memorial Medical Center*,[4] in which the Tenth Circuit held that, in order to satisfy the jurisdictional requirement of section 1 of the Sherman Act, one must show a nexus between the defendant's alleged violative conduct and interstate commerce.

A three judge panel affirmed the district court's decision in *Crane*.[5] On the same day the panel decision was handed down, the United States Supreme Court decided *McLain v. Real Estate Board*.[6] The Tenth Circuit granted a rehearing *en banc*[7] to review the panel's decision in light of *McLain*.

Section 1 of the Sherman Act makes illegal "every contract, combination . . . , or conspiracy, in restraint of trade or commerce among the sev-

1. 637 F.2d 715, 719 (10th Cir. 1980) (on rehearing).
2. *Id.* at 719-20.
3. *Id.* at 720.
4. 513 F.2d 684 (10th Cir. 1975).
5. 637 F.2d 715 (10th Cir. 1980). For a more complete discussion of the three judge panel decision, see *Antitrust, Seventh Annual Tenth Circuit Survey*, 58 DEN. L.J. 249, 273 (1981) [hereinafter cited as *Survey*].
6. 444 U.S. 232 (1980). For a complete discussion of the facts in *McLain*, see *Survey*, *supra* note 5, at 273.
7. No. 78-1346 (10th Cir. Sept. 16, 1980).

eral states. . . ."[8] As so aptly put by Judge Seymour, writing for the court on rehearing, "[i]t is now hornbook law that to satisfy interstate commerce jurisdiction under the Sherman Act the challenged activity must occur *in* the flow of interstate commerce, or, though occurring on a purely local level, substantially affect interstate commerce."[9] The court reviewed many previous United States Supreme Court cases and concluded that "for jurisdictional purposes a plaintiff must point to the relevant channels of interstate commerce logically affected by the defendant's allegedly unlawful conduct."[10]

Dr. Crane argued that *McLain* overruled the previous Supreme Court decisions and held that the plaintiff needed only to allege that the defendant's overall business has some "substantial general effect on interstate commerce" in order to meet the jurisdictional requirement of the Sherman Act.[11] The court refused to accept Dr. Crane's argument and interpreted *McLain* as requiring a plaintiff to establish two things in order to meet the Sherman Act jurisdictional requirements.[12] First, the plaintiff must identify a relevant aspect of interstate commerce. Second, the plaintiff must establish a specific relationship between the aspect of interstate commerce and the defendant's alleged unlawful activities. Therefore, the court stated, "[i]n sum, we do not believe *McLain* signals a shift in analytical focus away from the challenged activity and towards the defendant's general or overall business."[13]

Although the court of appeals held that *McLain* did not overrule the previous Supreme Court decisions and the Tenth Circuit decision in *Wolf*, the court did hold that dismissal of Dr. Crane's complaint was premature.[14] Citing *McLain*, the court reversed, stating that dismissal of a complaint should not occur prior to giving the plaintiff ample opportunity for discovery "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[15] Applying this standard to Dr. Crane's complaint, the court held that it could not be said beyond doubt that Dr. Crane could prove no set of facts to show the required effect on interstate commerce.[16]

Judge Holloway, dissenting, agreed with the majority's conclusion that dismissal was improper, but disagreed with the majority's interpretation of *McLain*. He agreed with Dr. Crane that *McLain* established that "an antitrust plaintiff simply need not make a particularized showing of an effect on interstate commerce caused by the alleged conspiracy or other illegal acts,"[17] but instead, need show only that the plaintiff's activities had some general effect on interstate commerce in order to satisfy the threshold standard for

8. 15 U.S.C. § 1 (1976).
9. 637 F.2d at 720.
10. *Id.* at 722.
11. *Id.*
12. *Id.* at 723.
13. *Id.* at 724.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 727 (Holloway, J., dissenting in part).

jurisdiction under section 1 of the Sherman Act.[18]

Other circuits that have interpreted *McLain* have adopted the view of the *Crane* dissent. For example, the Seventh[19] and Ninth[20] Circuits have held that a plaintiff need only establish a nexus between his activities and interstate commerce, and need not establish a more specific nexus between the defendant's alleged unlawful activities and interstate commerce. On the other hand, the First[21] and Fifth[22] Circuits, when faced with the interpretation of *McLain*, have not found it necessary to resolve the issue. Thus, the issue of jurisdiction under the Sherman Act is still unresolved. What is needed is a specific mandate from the Supreme Court as to the precise requirements of subject matter jurisdiction under the Sherman Act.

II. GROUP BOYCOTTS AND PER SE VIOLATIONS UNDER THE ANTITRUST LAWS

In an unpublished decision, the Tenth Circuit followed the trend of avoiding the use and recognition of *per se* rules under the antitrust laws. *Consolidated Farmers Mutual Insurance Co. v. Anchor Savings Association*[23] involved a suit instituted by the plaintiff insurance companies against the defendant home mortgage lenders and mortgage purchasers. The complaint charged that the defendants willfully conspired to boycott the plaintiffs' insurance businesses. In 1974, defendant Federal National Mortgage Association (FNMA) promulgated certain regulations providing that it would purchase home mortgages only if the property subject to the mortgage had insurance coverage written by an insurance company having a "Best's VI" or a "Class VI" rating. In the same year, the defendant home mortgage lenders adopted a policy of granting loans solely on properties covered by insurance policies written by insurance companies with a "Class VI" rating.[24]

The rating system was established by the A.M. Best Company in its *Best's Insurance Report*. The A.M. Best Company is the only major specialized insurance reporting and rating service in the United States. The "Class VI" rating was assigned to insurance companies having a net worth of at least $1,500,000.[25]

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18. *Id.*

19. *See* Williams v. St. Joseph Hosp., 629 F.2d 448 (7th Cir. 1980).

20. *See* Western Waste Serv. Sys. v. Universal Waste Control, 616 F.2d 1094, 1097 (9th Cir.), *cert. denied*, 101 S. Ct. 205 (1980), in which the majority stated: "Under *McLain* it is unnecessary to establish that the alleged antitrust violations substantially affected interstate commerce. . . ." The dissent, agreeing with the majority's interpretation of *McLain*, stated:

> The *McLain* Court did away with the notion that a plaintiff must prove a substantial nexus between a *defendant's unlawful conduct* and interstate commerce in order to establish subject matter jurisdiction under 15 U.S.C. § 1; instead, to establish the jurisdictional element of a Sherman Act violation, a plaintiff need only demonstrate a *substantial nexus* between *plaintiff's business activities* and interstate commerce.

Id. at 1101 (emphasis in original). *See also* Bain v. Henderson, 621 F.2d 959 (9th Cir. 1980); Program Eng'r., Inc. v. Triangle Publications, Inc., 634 F.2d 1188 (9th Cir. 1980).

21. *See* Corey v. Look, 641 F.2d 32 (1st Cir. 1980).

22. *See* Alabama Homeowners, Inc. v. Findahome Corp., 640 F.2d 670 (5th Cir. 1981); United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980).

23. No. 79-2260 (10th Cir. July 24, 1980) (not for routine publication).

24. *Id.*, slip op. at 1-2.

25. *Id.*, slip op. at 2.

The plaintiffs alleged that the policies established by the defendants constituted a group boycott which is *per se* illegal under the Sherman Act. In the alternative, they argued that if the boycott was not *per se* illegal, it constituted a violation of the Sherman Act under the "rule of reason." The district court granted the defendants' motion for summary judgment holding that the evidence showed no conspiracy among the defendants and, even assuming a conspiracy existed, there was no restraint of trade.[26]

The Tenth Circuit affirmed the district court's decision based upon three findings. First, the Tenth Circuit stated that the "[a]ppellants failed to respond to appellees' affidavits 'with *specific facts* showing the existence of a genuine issue for trial.' "[27] Second, the court, citing *Continental T.V., Inc. v. GTE Sylvania Inc.* and its progeny,[28] stated that the establishment of a *per se* rule of illegality is appropriate only where it relates to "conduct that is manifestly anticompetitive."[29] Following this standard, the court held that the plaintiffs did not show that the "Class VI" rating was manifestly anticompetitive. Finally, the court held that it was reasonable for FNMA to establish such a policy because "it would be impractical for FNMA to attempt to examine the position of the carrier in each mortgage it considered purchasing. . . ."[30] Since it was reasonable for FNMA to establish such a policy, the court implicitly concluded that it was also reasonable for the home mortgage lenders to establish such a policy because FNMA was a major purchaser of mortgages in the United States, with purchases in 1978 of approximately 311,000 home mortgages with unpaid balances of over $12 billion.[12]

III. APPLICABILITY OF ANTITRUST LAWS TO LABOR UNIONS AND COLLECTIVE BARGAINING

In *Frito-Lay, Inc. v. Retail Clerks Local 7*,[32] the Tenth Circuit followed the established precedent that collective bargaining agreements between unions and management are not automatically exempt from the antitrust laws. The decision primarily involved the court's interpretation of sections 8(b) and 8(e) of the National Labor Relations Act (N.L.R.A.)[33] and only briefly discussed the antitrust aspect of the case.

The case involved suits by Frito-Lay, Inc. and L'Eggs Products, Inc. against the Retail Clerks Union Local No. 7 alleging that a collective bargaining agreement between Local No. 7 and the Denver Retail Grocers violated sections 8(b) and 8(e) of the N.L.R.A. and section 1 of the Sherman Act.[34] A provision in the collective bargaining agreement prohibited em-

26. *Id.*, slip op. at 1.
27. *Id.*, slip op. at 2 (quoting Stevens v. Barnard, 512 F.2d 876, 878 (10th Cir. 1975) (emphasis in original)).
28. 433 U.S. 36, 50 (1977). *See generally* Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 7-10 (1979); Smith v. Pro Football, Inc., 593 F.2d 1173, 1181 (D.C. Cir. 1978); Gough v. Rossmoor Corp., 585 F.2d 381, 387 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979).
29. No. 79-2260, slip op. at 2 (quoting Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. at 50).
30. No. 79-2260, slip op. at 3.
31. *Id.*
32. 629 F.2d 653 (10th Cir. 1980).
33. 29 U.S.C. § 158(b), (e) (1976).
34. 629 F.2d at 656.

ployees of suppliers, including salesmen employed by Frito-Lay, Inc. and L'Eggs Products, Inc., from entering retail grocery stores to stock their merchandise. The provision specifically exempted employees of bakery and dairy companies, most of whom were represented by the Teamsters Union, from its operation. This exemption from the provision was negotiated pursuant to a separate agreement between Local No. 7 and the Teamsters Union.[35] In separate lower court proceedings, the district court granted summary judgment for Local No. 7 against both Frito-Lay and L'Eggs.[36]

Section 8(b)(4)(B) of the N.L.R.A. prohibits unions from forcing one employer to "cease using, selling, handling, transporting or otherwise dealing in the products of"[37] another. Section 8(e) proscribes collective bargaining agreements whereby the employer ceases "handling, using, selling, transporting or otherwise dealing in any of the products of any other employer. . . ."[38] Section 8(b)(4)(A) prohibits unions from engaging in activities designed to force employers to enter into agreements prohibited under section 8(e).[39]

The district court held in both cases that the agreement between Local No. 7 and the Teamsters Union and the collective bargaining agreement between Local No. 7 and the Denver Retail Grocers were both exempt from the antitrust laws. The Tenth Circuit pointed out that although "lawful primary activity by unions acting in their own self interests generally may not provide the basis of antitrust liability," the district court holding was based on a premature finding that the provision constituted a valid primary work preservation agreement.[40] The Tenth Circuit therefore reversed the grants of summary judgment and remanded the cases for further findings in accordance with the Tenth Circuit's interpretation of sections 8(b) and 8(e). The court instructed the district court that, should it find the contract provisions violative of sections 8(b) and 8(e), it should explore the possible antitrust liability of Local No. 7.[41]

This holding squarely follows the United States Supreme Court decision in *United Mine Workers of America v. Pennington*,[42] and similar cases,[43] which established that collective bargaining agreements which are not in the interest of regulating management's labor relations with unions and which impose anticompetitive restrictions upon others are subject to scrutiny under the antitrust laws.

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35. *Id.*

36. *Id.*

37. 29 U.S.C. § 158(b)(4)(B) (1976).

38. *Id.* § 158(e).

39. *Id.* § 158(b)(4)(A).

40. 629 F.2d at 663.

41. *Id.* at 663, 665.

42. 381 U.S. 657 (1965).

43. *See also* Local 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676 (1965); Kold Kist, Inc. v. Meat Cutters Local 421, 99 Cal. App. 2d 191, 221 P.2d 724 (1950).

IV. CONCLUSION

In the few antitrust cases decided by the Tenth Circuit Court of Appeals during the last year, the court simply applied pre-existing precedent to new fact situations. The issue of jurisdiction under the Sherman Act is one of the few issues in the forefront of antitrust law at this time. The Tenth Circuit was presented with the dilemma of whether to interpret an unclear United States Supreme Court decision in accord with pre-existing precedent or to follow the lead of the Seventh and Ninth Circuits. The Tenth Circuit opted to follow pre-existing precedent and await a clear resolution by the Supreme Court of what is required to meet the threshold jurisdictional requirement under the Sherman Act. The Tenth Circuit may be criticized for not following the innovative lead of its sister circuits, but this Pandora's box is best, at this time, left unopened.

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