Denver Law Review

Volume 58
Issue 2 *Tenth Circuit Surveys*

Article 6

January 1981

Antitrust

Mark H. Boscoe

Antitrust

ANTITRUST

OVERVIEW

During the past year, the Tenth Circuit Court of Appeals has considered several antitrust issues involving matters at the forefront of antitrust law. Questions such as state action antitrust immunity, the insurance industry's exemption from the antitrust laws, contribution among antitrust violators, and the Sherman Act's jurisdictional reach were all considered by the appellate court during the period of this survey. These issues will be discussed in the context of the decisions that purported to resolve them. In addition, two decisions of lesser importance will be briefly digested.

I. THE SHERMAN ACT VERSUS FEDERALISM: A CLASH BETWEEN GIANTS

A. *Introduction*

The Sherman Act has been called the "Magna Carta of free enterprise,"[1] yet the scope of this central charter of our national economic policy was not defined by Congress when it adopted the Act. The contours of the antitrust laws in general, and the Sherman Act in particular, have been delineated, instead, by the judiciary. On occasion, the antitrust statutes have brushed up against the tenet of federalism. Whether the action of states and their subdivisions come within the purview of the antitrust laws, when governmental acts have an anticompetitive impact, is a question the Supreme Court rarely addressed prior to the 1970's. Although recent decisions of the Court have dealt unsatisfactorily with shaping the contours of state immunity from the antitrust laws, the Court has clearly drawn an immunity template by which to judge state activity. It is the duty of the federal courts to follow Supreme Court pronouncements. In *Community Communications Co. v. City of Boulder*,[2] the Tenth Circuit court was faced with the competing concerns of our national economic policy, on the one hand, and the pressing needs of a municipality to freely carry out its governmental functions, on the other. The Tenth Circuit court rendered a decision in conflict with the Supreme Court's most recent dictates on state immunity from the antitrust laws. The court of appeals may have heard the siren call of the tenth amendment.[3] The Tenth Circuit judges also had to confront critical problems which the Supreme Court has left in the wake of its attempt to define state immunity.

This section of the antitrust survey will attempt to analyze the Tenth Circuit's decision in light of the Supreme Court's recent state antitrust im-

1. United States v. Topco Assocs. Inc., 405 U.S. 596, 610 (1972). The Sherman Act, one of the major pieces of antitrust legislation, is found at 15 U.S.C. § 1 (1976).

2. 630 F.2d 704 (10th Cir. 1980).

3. The tenth amendment proclaims that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people." U.S. CONST. amend. X.

munity decisions. An effort will also be made to briefly explain the problems inherent in the present state immunity doctrine and the pressing need for its change, a need which may have been the driving force behind the decision in *Community Communications Co.*

B. *The Birth of a Doctrine: "State Action" Immunity*

The first antitrust law was passed by Congress in 1890 in response to a growing awareness of the harmful economic consequences apparent in the concentration of economic power in the hands of the few and the mighty.[4] The legislative history of the Act is devoid of any congressional concern with anticompetitive acts of government.[5] A federal court was first faced with the task of determining the scope of the Sherman Act in *Lowenstein v. Evans*.[6] The court held that the state could not be attacked for its monopolistic activities since the state was neither a person nor a corporation amenable to suit.[7] The Supreme Court's decision in *Olsen v. Smith*[8] gave lower courts the first guidelines on state immunity from the federal antitrust law. The *Olsen* Court refused to allow harbor pilots, unlicensed by the state, to attack the state's licensing statute as a restraint on trade. The Court found that Congress had evinced an express desire to allow state regulation of this activity, and that the state's immunity from the antitrust laws would adhere, unless Congress expressed a clear statement to the contrary.[9] In the same year that *Olsen* was decided, it became equally clear that state antitrust immunity is not a transferable gift which a state may bestow on private parties. In *Northern Securities Co. v. United States*,[10] the Court refused to immunize the activities of two railroads, merging in violation of section 1 of the Sherman Act, simply because the railroad's actions were legal under state law. A state cannot impart immunity to private parties by declaring their anticompetitive actions legal.

After the *Northern Securities* decision, no major advance in the state action immunity doctrine occurred for almost forty years.[11] The United States

4. The Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (current version codified at 49 U.S.C. § 1 (1976)), created a commission to prevent rate discrimination by railroads. The next year saw anti-monopoly planks in the platforms of both major political parties. A. NEALE, THE ANTITRUST LAWS OF THE U.S.A. 12 (2d ed. 1970). The Fifty-first Congress, in authorizing the Sherman Act, declared itself to be protecting the public interest by attacking "these great trusts, these great corporations, these large moneyed institutions." 21 CONG. REC. 2562 (1898).

5. Parker v. Brown, 317 U.S. 341, 351 (1943).

6. 69 F. 908 (D.S.C. 1895).

7. *Id.* at 911. In Chattanooga Foundry & Pipeworks v. City of Atlanta, 203 U.S. 390 (1906), Justice Holmes declared that a city may sue under the Sherman Act. He interpreted the term "person" in section 8, the general definitions paragraph of the Act, to include municipalities; thus, under section 7 of the Sherman Act (replaced by section 4 of the Clayton Act, 15 U.S.C. § 15 (1976)), the city was deemed to be a person injured in its "business or property" and capable of collecting treble damages.

8. 195 U.S. 332 (1904).

9. *Id.* at 344-45.

10. 193 U.S. 197 (1904).

11. *See* note 7 *supra*. In Georgia v. Evans, 316 U.S. 159 (1942), the Court extended Chattanooga Foundry & Pipeworks v. City of Atlanta, 203 U.S. 390 (1906), to its logical end. The Court held that a state, like a city, was a "person" under section 7 of the Sherman Act and could, therefore, bring an antitrust action against private parties.

Supreme Court did not again address the immunity of states as defendants in an antitrust action until the seminal decision of *Parker v. Brown*.[12] According to the California statute challenged by the plaintiff in *Parker*, a state advisory commission was authorized to supervise a program restricting competition among farmers in order to maintain stable prices along the distributive chain. The plaintiff, a packer and producer of raisins, sought an injunction[13] against the state officials involved in the program, claiming that the state agricultural act was in violation of the Sherman Act. Chief Justice Stone, scrutinizing the legislative history and the language of the Sherman Act, found nothing to suggest

> that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.[14]

The lack of reference to state anticompetitive behavior in the legislative history[15] convinced the Court of the impropriety of expanding the scope of the antitrust laws to encompass state action. The Court found the alleged anticompetitive acts to be no more than the legitimate enactment and enforcement of state legislation. Furthermore, an examination of the federal statute concerning agricultural proration[16] reinforced the Court's view of the antitrust immunity issue. Because the federal act also restricted competition in the marketing of agricultural products, there was no conflict with the state's proration program.[17]

After the *Parker* decision another long hiatus set in before the Court had occasion to consider again the scope of state immunity from the antitrust

12. 317 U.S. 341 (1943). The immunity doctrine born of this decision occasionally will be referred to in this comment as "*Parker* immunity."

13. The injunction was sought pursuant to 15 U.S.C. § 26 (1976).

14. 317 U.S. at 350-51.

15. In Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 420-21 (1978), Chief Justice Burger noted that Congress' silence on the anticompetitive actions of states is not necessarily dispositive of the state immunity issue. In the years immediately surrounding the Sherman Act's passage, the Court had strictly construed the jurisdictional requirement of interstate commerce. Manufacturing, as an isolated activity, was deemed not to constitute interstate commerce and Congress was precluded from regulating it. Kidd v. Pearson, 128 U.S. 1 (1888). States were said to have broad powers to regulate business activities within their borders. United States v. E.C. Knight Co., 156 U.S. 1 (1895). Because of the Court's narrow posture on the jurisdictional reach of the interstate commerce clause, it may have appeared improbable to Congress that the Court would permit suits against the states and their subdivisions for violations of the Sherman Act. Several commentators have also made this criticism. *See, e.g.*, Slater, *Antitrust and Government Action: A Formula for Narrowing* Parker v. Brown, 69 NW. U.L. REV. 71, 83 (1974).

16. Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 (1976).

17. 317 U.S. at 354. The Court determined that Congress, in enacting the federal agricultural marketing act, contemplated state programs similar to California's restrictions. Both acts were consistent in that they sought to achieve a parity price, the federal statute expressly and the state program by its effect. Evidence of this consistency of purpose was displayed by a loan agreement between California and the federal Commodity Credit Corporation, which loan was approved by the Department of Agriculture. *Id.* at 356.

laws.[18] *Goldfarb v. Virginia State Bar*[19] provided that opportunity. The Court struck down the state and local bar associations' minimum fee schedules as price fixing violative of section 1 of the Sherman Act. The state bar's defense, that its activities were immune from suit as state action, was not persuasive. The *Goldfarb* Court read *Parker* as requiring a showing that the state, acting as sovereign, had compelled the challenged activities.[20] The defendants, however, could point to no Virginia statute, state court decision, or state supreme court rule that required the minimum fee schedule. The status of the Virginia bar as an appendage of the state[21] did not, of its own force, cloak the bar with immunity from the Sherman Act.

The Court's next reflection on state action antitrust immunity focused not on a state-related entity, as in *Goldfarb*, but concentrated instead on private parties involved in a state program. In *Cantor v. Detroit Edison Co.*,[22] Justice Stevens wrote the majority decision, joined, however, by only four other members of the Court in parts I and III.[23] The private utility, Detroit Edison, which allegedly had unlawfully restrained competition in its sale of electric light bulbs,[24] was held not to be immune from the federal antitrust laws, even though the state regulatory commission had approved of the challenged actions of the utility, and even though the defendant could not discontinue those actions without the state commission's consent. The Court found the following facts to be determinative: the state had expressed no opinion as to the propriety of a utility-sponsored light-bulb program; the responsibility for initiating the light-bulb program belonged to the utility; the market for light bulbs was not a regulated area of the economy; and the light-bulb program was not necessary to the state's regulation of its electric utilities.[25] While the *Cantor* decision does little to clarify the Court's state

18. The Court's decision in Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), concerned an issue related to, but distinct from, state antitrust immunity. The Court weighed the validity of a state's economic regulations under the doctrine of preemption. In *Schwegmann*, the Court found Louisiana's Fair Trade Law, LA. REV. STAT. ANN. §§ 391-396 (West 1965) (repealed by 1977 La. Acts No. 709 § 1), to be inconsistent with the Miller-Tydings Amendment to section 1 of the Sherman Act, 15 U.S.C. § 1 (1970) (amended by Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, § 2, 89 Stat. 801) (repealing Miller-Tydings Amendment). Other decisions peripherally implicating the state action immunity doctrine, before Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), were: Eastern R.R. Presidents' Conference v. Noerr Motor Freight Inc., 365 U.S. 127 (1961); and Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

19. 421 U.S. 773 (1975).

20. *Id.* at 790.

21. The Virginia Bar Association was granted the authority to issue decisions in matters of legal ethics. *Id.* at 791.

22. 428 U.S. 579 (1976).

23. Chief Justice Burger concurred separately because he disagreed with what he interpreted as Justice Stevens' narrow view of *Parker* immunity. He emphasized that state action immunity may extend beyond state officials because the " 'threshold inquiry . . . is whether the *activity* is required by the state acting as sovereign.' " 428 U.S. at 604 (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 790 (1975)) (emphasis added). Justice Blackmun concurred only in the judgment. 428 U.S. at 605-15.

24. The plaintiff, a retail druggist who sold light bulbs, alleged that Detroit Edison's practice of providing free light bulbs to its customers was a tying arrangement. Plaintiff asserted that the utility took advantage of its monopoly in the distribution of electricity to unreasonably restrain competition in the retail light bulb market. *See* section 3 of the Clayton Act, 15 U.S.C. § 14 (1976).

25. 428 U.S. at 600.

action test, it may point to the emphasis on state compulsion in the antitrust immunity doctrine. Detroit Edison, regardless of its status as a public utility, failed to receive immunity because the state had not compelled its challenged actions.

The importance of state compulsion was reemphasized in *Bates v. State Bar of Arizona*.[26] Primarily a decision grounded on first amendment concerns, *Bates* also included an antitrust challenge to the Arizona Supreme Court's disciplinary rule restricting advertising by attorneys. Justice Blackmun, in an opinion distinguishing *Goldfarb* and *Cantor* from *Bates*, held that the Arizona Bar was immune from the antitrust laws. The most cogent factors in the *Bates* analysis were the state supreme court's promulgation and enforcement of the advertising restriction, the important state interest in regulating attorneys, and the Court's acknowledgment that the state, through its supreme court, was the real defendant.

On the eve of one of the most far-reaching decisions in state action jurisprudence, the two most relevant criteria for obtaining *Parker* immunity were that the challenged restraint was "compelled by direction of the State acting as a sovereign,"[27] and that the party seeking immunity was the state or an agency[28] of the state. Only the latter of these considerations was present in *City of Lafayette v. Louisiana Power & Light Co.*[29] The *Lafayette* Court considered the quantum of state involvement in the activities of political subdivisions necessary to qualify them for immunity from the antitrust laws.

The immunity issue arose out of an antitrust counterclaim by a private utility, Louisiana Power and Light Co., against two cities that owned and operated competing electric utilities.[30] The majority decision is reminiscent of *Cantor*, in that only five members of the Court concurred in a segment of this opinion.[31] The majority held that *Parker* immunity is not automatically granted to a city simply because of its status as a subdivision of the state.[32] The holding was more complicated however, because, while Chief Justice Burger acknowledged that municipal status, by itself, was not sufficient to

26. 433 U.S. 350 (1977).

27. Goldfarb v. Virginia State Bar, 421 U.S. at 791.

28. "Agency" in this context is used in a generic sense, to indicate that the entity was created by the state and had no independent significance outside of that relationship.

29. 435 U.S. 389 (1978).

30. The cities, Lafayette and Plaquemine, Louisiana, originally brought suit against Louisiana Power & Light Co. for, *inter alia*, refusing to wheel power and for boycotting the cities, in order to retain sole control over electric bulk power in the area, in violation of sections 1 and 2 of the Sherman Act. "Wheeling of power" means that a utility allows its transmission lines to be used by another. *See* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). The private utility counterclaimed, alleging that the two cities had violated section 1 of the Sherman Act and section 3 of the Clayton Act by, *inter alia*, using long term supply agreements to exclude competition and requiring customers of Louisiana Power & Light to purchase electricity from the cities if they desired continued water and gas service. 435 U.S. at 392 nn.4-6.

31. Chief Justice Burger again concurred separately, this time only in Part I of Justice Brennan's opinion and in the judgment. 435 U.S. at 418-26.

32. Justice Brennan was concerned that "[i]f municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established." 435 U.S. at 408. The Court remanded this case to the district court to determine, according to the Court's state action immunity test, if the city-run public utilities were immune from the antitrust counterclaim.

confer antitrust immunity,[33] the thrust of his concurrence focused on the commercial nature of the cities' actions.[34] The *Lafayette* plurality set out a test for determining *Parker* immunity: The test requires a showing that the challenged activity was "engaged in as an act of government by the State as sovereign, or, by its subdivisions pursuant to state policy to displace competition with regulation or monopoly public service."[35] This test, by using the phrase "pursuant to state policy," appears to incorporate the state "compulsion" test of *Goldfarb*, as the Chief Justice noted.[36] In his concurrence, Chief Justice Burger suggested that he would require more than state compulsion of the challenged restraint; immunity should not adhere unless its absence would foil the state's regulatory scheme.[37] No clear test of state action antitrust immunity emerged from the *Lafayette* decision because of the differing views expressed in the plurality opinion and in the Burger concurrence. No similar ambiguity, however, is found in the Court's most recent antitrust immunity decision.

In the Court's unanimous opinion in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,[38] California's wine pricing system was found to enjoy no immunity from the Sherman Act.[39] Justice Powell explained the Court's understanding of *Parker* immunity. The test for state action antitrust immunity came from the opinion in *Bates*, reconfirmed by the plurality in *Lafayette*: "First, the challenged restraint must be 'one clearly articulated

33. "There is nothing in Parker v. Brown, or its progeny, which suggests that a proprietary enterprise with the inherent capacity for economically disruptive anticompetitive effects should be exempt from the Sherman Act merely because it is organized under state law as a municipality." 435 U.S. at 418 (Burger, C.J., concurring) (citation omitted).

34. "There is nothing in this record to support any assumption other than that this is an ordinary dispute among competitors in the same market." *Id.* at 419.

35. *Id.* at 413.

36. *Id.* at 425 (Burger, C.J., concurring).

37. *Id.* at 426. Chief Justice Burger's reliance on the municipalities running their own utilities, as opposed to merely regulating private utilities, has led one commentator to interpret the Chief Justice's concurrence as favoring a blanket immunity for state subdivisions whose anticompetitive activities could be categorized as "governmental". *See The Supreme Court, 1977 Term*, 92 HARV. L. REV. 1, 281 (1978).

38. 445 U.S. 97 (1980). Justice Brennan did not participate in the decision of this case. However, since Justice Brennan wrote the plurality opinion in *Lafayette*, it is hardly likely that he would have dissented in *Midcal*.

39. Midcal Aluminum, Inc., a wholesale distributor of wine in California, sought an injunction in the state court of appeals to prevent enforcement of California's wine price-fixing program. Midcal Aluminum, Inc. v. Rice, 90 Cal. App. 3d. 979, 153 Cal. Rptr. 757 (1979). Under CAL. BUS. & PROF. CODE § 24866 (West 1964), vineyards and wine wholesalers were required to set prices through a fair trade contract or post a price list governing the price retailers and consumers had to pay for wine. Anyone in the distributive chain selling below the set price was subject to state sanction. *Id.* § 24880. Midcal sought the injunction after it was charged with violating the state program by the Department of Alcoholic Beverage Control.

The state court of appeals found the wine pricing program to be violative of section 1 of the Sherman Act. The appellate court held that the state department which enforced the wine scheme lacked immunity. Additionally, the state's defense that section 2 of the twenty-first amendment protected the state program was dismissed. *Cf.* Rice v. Alcoholic Beverage Control Appeals Bd., 21 Cal. 3d 431, 579 P.2d 476, 146 Cal. Rptr. 585 (1978) (distilled liquor fair trade law did not confer antitrust immunity). The California Supreme Court declined to hear *Midcal* and the state agency decided against seeking a writ of certiorari from the United States Supreme Court. The California Retail Liquor Dealers Association, a trade association of independent retail liquor dealers, sought a writ of certiorari from the Supreme Court as an intervenor.

and affirmatively expressed as state policy;' second, the policy must be 'actively supervised' by the state itself."[40] While the California wine pricing scheme met the state policy criterion, it failed at the second hurdle. The Court saw no evidence of active state supervision. The statutory scheme did not include state review of price schedules or fair trade contracts, nor was it mandated that such schedules and contract terms be set by California. The state merely enforced private agreements.

C. *The Facts in* Community Communications Co. v. City of Boulder[41]

In *Community Communications*, the Tenth Circuit court was faced with an appeal by the defendants from the district court's order[42] of a preliminary injunction against the city. Community Communications Company (CCC) holds a non-exclusive franchise from the City of Boulder to operate a cable television company within Boulder's city limits.[43] There are, at the present time, no other cable franchisees. The permit or franchise issued by the city is actually no more than a contract, enacted in the form of an ordinance. The city council, alleging a reconsideration of its cable television goals, passed an ordinance on December 19, 1979,[44] imposing a ninety-day moratorium on CCC's cable expansion in Boulder. Concurrently, the city revoked and reenacted CCC's franchise to include the moratorium.[45] The city, preparing to seek other applicants for its cable television market, drafted a model ordinance and sought comment from the cable industry. The ordinance was to be negotiated and enacted in lieu of a contract.[46] Subsequent to Boulder's actions, CCC brought suit against the city and against those parties involved in a recently organized cable television corporation,[47] alleging that the enactment of the two new ordinances violated, *inter alia*, section 1 of the Sher-

40. 435 U.S. at 410 (citing 430 U.S. at 362).

41. 630 F.2d 704 (10th Cir. 1980).

42. Community Communications Co. v. City of Boulder, 485 F. Supp. 1035 (D. Colo. 1980).

43. CCC, together with its predecessor, has operated in Boulder since 1964. The city's twenty-year contract with the cable television firm is in the form of an ordinance. Under this ordinance, CCC can string cable over the entire city either for a cable television system or for a community antenna system (CATV). CCC's system is involved in retransmission, not program origination. Since February 1980, CCC has utilized its newly developed satellite capability. Its program content has expanded greatly from its former schedule, which comprised only Denver and Cheyenne television stations. Cable is strung via utility poles, most of which are jointly owned by the Colorado Public Service Company and Mountain Bell Telephone Company. CCC has obtained a license from the utilities to use their poles. *Id.* at 1036.

44. Boulder, Colo. Ordinance 4473 (Dec. 19, 1979).

45. Boulder, Colo. Ordinance 4472 (Dec. 19, 1979).

46. Some of the more interesting features of the model ordinance include:

> the city's right to purchase the cable company, at a price excluding good-will and limited to depreciated investment; the city's right of prior approval of every company contract; rate regulation; the city's right to change rates at any time; a 5% franchise fee (two and one-half times the present fee); a requirement for five leased access channels; a complaint procedure monitored by the city manager, with a liquidated damage provision; a requirement to continually upgrade company facilities to state-of-the-art conditions; and a requirement for renegotiation, at specified intervals, of rate structures, free or discounted service, services provided, programming offered, and human rights.

Community Communications Co. v. City of Boulder, 630 F.2d at 710 (10th Cir. 1980) (Markey, J., dissenting).

47. The other defendants were Boulder Communications Co. (BCC), a partnership, and the individual partners. The plaintiff alleged that BCC conspired with Boulder officials to uni-

man Act.[48]

At the preliminary hearing on the requested injunction, the city defended its conduct on the basis of *Parker* immunity. Boulder asserted that its status as a home rule city, as provided by Colorado's Constitution,[49] made its action in regulating cable television tantamount to action of the state.[50] The district court held that the city lacked immunity from the Sherman Act, and found that CCC could suffer "irrevocable injury" without the requested injunction. The lower court found the city's method of regulating CCC to be dispositive. In light of the *Lafayette* and *Midcal* decisions, the court decided that the city's use of "an offer and acceptance mechanism" was not "characteristic of utility regulation," and therefore, was not a form of government regulation deserving of antitrust immunity.[51] The district court was unimpressed with Boulder's home rule argument. The court found that the regulation of cable television touched upon matters beyond local concern, justifying federal intervention through the application of the Sherman Act. No discovered case law characterized cable television as a matter of local concern.[52]

On appeal to the Tenth Circuit, Chief Judge Seth, speaking for the appellate court,[53] reversed the district court, finding that the city was im-

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laterally alter CCC's franchise based on BCC's desire to become the exclusive city-wide cable television franchisee.

48. Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), reads, in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . . ."

49. COLO. CONST. art. XX, § 6 gives cities in Colorado with a population of at least two thousand people the power to adopt a charter authorizing the city to enact legislation in matters of local concern. Such legislation supersedes any inconsistent state law. Conrad v. City of Thornton, 191 Colo. 444, 553 P.2d 822 (1976). Colorado has a very broad home rule provision:

> 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 . . . .

COLO. CONST. art. XX, § 6.

50. Presumably, Boulder's authority to contract with companies and regulate cable television within its bounds is based on the Colorado Constitution, which provides authority over "works or ways local in use and extent . . . ." *Id.* at § 1. This provision is made applicable to home rule cities, other than Denver, through art. XX, § 6 of the Colorado Constitution. A cable television system must run cable over public ways to operate.

51. 485 F. Supp. at 1039.

52. On July 1, 1980, after both the district court's preliminary injunction against Boulder and the Tenth Circuit's reversal of that order, the Boulder City Council passed Ordinance 4515. This ordinance became effective August 21, 1980. It permanently limited CCC's right to expand cable television service outside of the one-third of the city it had reached prior to July 1, 1980. On August 5, 1980, in the district court, Judge Matsch again issued a preliminary injunction prohibiting enforcement of the ordinance limiting CCC's growth. *See* Community Communications Co. v. City of Boulder, No. 80-M-62 (D. Colo. filed Sept. 5, 1980) (memorandum opinion).

53. According to CCC, the City of Boulder continually stressed the urgency of a decision from the court of appeals. An initial order, reversing the district court decision, came down one day after the appellate argument. Supplemental Brief of CCC in Support of Petition for Rehearing *en banc* at 2, Community Communications Co. v. City of Boulder, 630 F.2d 704 (10th Cir. 1980), *rehearing denied* (Oct. 1, 1980). It is interesting to note that the appellate court characterized the proceedings below as involving a request for a temporary restraining order. Community Communications Co. v. City of Boulder, 630 F.2d at 705 (10th Cir. 1980). The district court, however, clearly considered CCC to have moved for a preliminary injunction. 485 F.

mune from the reach of the Sherman Act. This conclusion was based upon the nature of Colorado's constitutional home rule provisions and a recent Colorado Supreme Court decision, *Manor Vail Condominium Association v. Town of Vail*.[54] The court of appeals held that the *Manor Vail* decision indicated Colorado's acknowledgment of the local nature of cable television regulation.[55] The appellate court reasoned, therefore, that since Boulder's home rule status entitled the city to legislative preeminence in matters of local concern, its promulgation of the challenged ordinances was equivalent to state action. This deduction led Chief Judge Seth to inquire into the city's actions surrounding the enactment of the cable television ordinances to determine whether they met the Supreme Court's pronouncements in *Lafayette* and *Midcal*. In the court's view, Boulder satisfied the two criteria of the state action antitrust immunity test enunciated in *Midcal*: Boulder had "clearly articulated and affirmatively expressed" a policy on cable television through its city council transcripts and through the moratorium ordinance. The policy to halt CCC's growth was "actively supervised by the state," that is, by the home rule city, through enactment and enforcement of the moratorium ordinance. Apparently as dictum, the court of appeals found the "governmental" nature of Boulder's involvement in the cable television business supportive of the city's immunity stance.[56]

Subsequent to the filing of the majority opinion in *Community Communications*, Judge Markey[57] authored a vehement and lengthy dissent. This dissent was grounded upon a first amendment analysis of the city's action which prevented new listeners and the cable television company from connecting.[58] Judge Markey did treat at length the antitrust claim and the

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Supp. at 1036. A preliminary injunction is issued after a hearing where notice has been previously given to the opposing party. In contrast, a temporary restraining order may be issued ex parte, without an adversary hearing. *See* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2947 at 426 (1973).

54. 602 P.2d 1168 (Colo. 1980). In this suit, the plaintiff claimed that Vail's rate structure for its cable television franchise violated the equal protection clause of the fourteenth amendment. The Colorado Supreme Court upheld the rate structure, for it was not "wholly arbitrary" or "invidious discrimination" against the plaintiff, a cable television customer. 604 P.2d at 1172. No challenge appears to have been made to Vail's authority to regulate the cable television franchise, nor was the city's right to grant the franchise contested.

55. Community Communications Co. v. City of Boulder, 630 F.2d at 706-07 (10th Cir. 1980).

56. See Chief Justice Burger's concurrence in *Lafayette*, 435 U.S. at 426, and note 37 *supra* and accompanying text.

57. Chief Judge Markey, of the United States Court of Customs and Patent Appeals, sat by designation. Judge Markey filed a separate dissent more than a month after the majority opinion was handed down.

58. The plaintiff also had asserted a claim based on the first amendment, because of Boulder's restrictions on CCC's ability to reach more listeners. The district court brushed this claim aside, noting that the first amendment issue was not ripe; however, the court cautioned the city that its regulations must be carefully articulated to avoid conflict with the first amendment. 485 F. Supp. at 1040.

The nature of the antitrust section of the Tenth Circuit Survey does not permit an extensive treatment of the serious first amendment concerns raised by Judge Markey. The dissent would have upheld the district court's preliminary injunction because the moratorium on CCC's future growth appeared to be a "prior restraint" on speech. In the context of this decision, a "prior restraint" refers to government repression of intended communication. *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975). Judge Markey considered CCC's activities in carrying programming signals, as opposed to originating programming, to be en-

immunity defense. Nevertheless, he considered this analysis subordinate to, albeit supportive of, his first amendment views requiring the preliminary injunction to be upheld.[59]

The dissenting opinion focused on the dictates of the majority decision in *Lafayette*. Judge Markey rejected Chief Judge Seth's conclusion that home rule status cloaked Boulder with the mantle of state action, leading to immunity. Whereas the Supreme Court found no automatic immunity for the plaintiff-cities in *Lafayette*,[60] the dissent reasoned that the Tenth Circuit majority's position undermined the Supreme Court's view of state action antitrust immunity. Judge Markey could find no Colorado policy on cable television regulation, nor could he find a state policy of replacing competition in the cable television business with anticompetitive regulation.[61] The dissent, in agreement with the lower court, concluded that cable television did not appear to be solely a matter of local concern in light of the Supreme Court's pronouncement in *United States v. Southwestern Cable Co.*,[62] which stated that cable operators were engaged in interstate commerce. Basically, Judge Markey did not accept the notion that the dictates of federalism, which spawned the *Parker* immunity doctrine, placed home rule cities in the position of sovereign states so as to justify municipal antitrust immunity. This conclusion seemed especially evident where the state offered no guidance or supervision to the city in dealing with the challenged activity.

A final point of difference between the dissent's view and the majority opinion concerned the distinction Chief Justice Burger had mentioned in his concurrence in *Lafayette*, the distinction between governmental and proprietary activity. Chief Judge Seth found that Boulder's *regulation* of cable television, as opposed to the city's actual operation of that industry, supported his immunity view. Judge Markey emphasized that Boulder's regulation of CCC, through an ordinance which was no more than a contract between the city and CCC, was hardly typical of "governmental" activity.[63] Judge Mar-

compassed nonetheless within the protection of the first amendment. Community Communications Co. v. City of Boulder, 630 F.2d at 713 (10th Cir. 1980) (Markey, J., dissenting). The dissent cited the oft-quoted language of Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969), that "[i]t is the right of viewers and listeners . . . which is paramount . . . . [T]he First Amendment [protects the] marketplace of ideas . . . rather than [give] countenance [to] monopolization of that market." *Id.* at 390. The dissent did not find Boulder's police power concern for the public ways or its attempt to find a single cable operator for the city to be tantamount to a compelling governmental interest justifying the first amendment infringement which Judge Markey perceived.

59. The appellate court has the power to affirm a judgment on grounds not necessarily relied on by the court below. *See* 9 MOORE'S FEDERAL PRACTICE ¶ 110.25 [1] (2d ed. 1979).

60. Lafayette and Plaquemine, Louisiana, are not home rule cities, although Louisiana's Constitution does allow a city to adopt a home rule charter. 435 U.S. at 434 n.15 (Stewart, J., dissenting).

61. *In re* Mountain States Tel. & Tel. Co., 73 PUB. U. REP. 3D 161, 175 (1968) (Public Utilities Commission of Colorado refused to regulate cable television until the state legislature takes action to bring cable operators within the jurisdiction of the commission). Colorado currently has no statutes or administrative regulations pertaining to cable television.

62. 392 U.S. 157, 168-69 (1968). The Court found CATV systems to be in interstate commerce and therefore within the regulatory control of the FCC through the Communications Act of 1934, 47 U.S.C. § 153(a) (1976).

63. Judge Markey echoed the district court's position on the city's manner of regulating CCC. See 485 F. Supp. at 1039.

key considered that Chief Justice Burger's *Lafayette* concurrence was overemphasized by the Tenth Circuit court, in disregard of the thrust of both the majority and plurality sections of the Supreme Court's opinion in *Lafayette*.

D. *The Tenth Circuit: Lost in a Supreme Court Labyrinth*

The Tenth Circuit Court of Appeals, in *Community Communications*, reached its conclusion by finding Boulder's home rule status and its lack of direct participation in the operation of the cable television business to be highly significant. Combining these facts with a strained interpretation of the *Manor Vail* decision, the appellate court was able to conclude that Boulder met the two-part test for state action antitrust immunity as set out in the Supreme Court's latest *Parker* immunity decision, *Midcal*. The following analysis will consider the court's reasoning and conclusions.

Community Communications differs from *Lafayette* in two respects: Boulder is regulating rather than operating an industry, and unlike the cities in *Lafayette*, Boulder has home rule status, giving it preeminence in matters of exclusive local concern vis-à-vis the state. Focusing on the doctrine of home rule and Chief Justice Burger's concurrence in *Lafayette*, these factors might appear to justify a result that differs from *Lafayette*. On a closer analysis of these tenets of the Tenth Circuit's decision, however, it is clear that their value in justifying Boulder's antitrust immunity has been greatly overstated.

The appellate court's conclusion, that Boulder's actions in regulating cable television are tantamount to those of the state, is premised on the notion that cable television is solely a matter of local concern. It is only when a home rule city in Colorado legislates on an exclusively local matter that the city has preeminence over contradictory state laws.[64] The court's categorization of the cable television business as an exclusively local matter fails to take note of contradictory case law.[65] Even if it is assumed that such cases are not apposite, the Tenth Circuit's reliance on the Colorado Supreme Court's decision in *Manor Vail* as evidence of the exclusively local nature of cable television regulation is misplaced. In *Manor Vail*, the plaintiff had argued that the city's rate structure for cable television customers denied it equal protection of the laws. Vail's ability to franchise a cable television firm and to set rates was not challenged by the plaintiff and was not mentioned in the opinion. Assuming that the Colorado Supreme Court, in a proper case, would rule that Vail had the power to franchise and set cable television rates, this would not be dispositive of the exclusively local nature of cable television. Colorado has no policy, case law, or statute concerning cable television regulation. Under Colorado law, a home rule city may legislate on matters of *state*

64. *See* note 49 *supra*.

65. *See, e.g.*, United States v. Southwestern Cable Co., 392 U.S. 157, 180-81 (1968) (CATV deemed an enterprise within interstate commerce and therefore subject to regulatory authority of the FCC). *Cf.* TV Pix, Inc. v. Taylor, 304 F. Supp. 459 (D. Nev. 1968), *aff'd per curiam*, 396 U.S. 556 (1970) (the district court ruled that a CATV system was in interstate commerce; however, under the preemption doctrine, the state statute regulating CATV as a public utility did not conflict with the commerce clause) In *TV Pix*, the lower court commented that CATV's character was more local than national.

and local concern in the *absence* of state law or regulation.[66] Therefore, granting that *Manor Vail* stands for the proposition that Colorado home rule cities may franchise and set rates for cable companies, the decision conclusively proves only the obvious: Colorado has not entered the area of cable television regulation. There is no support for the view that the Colorado court would find inconsistent municipal law to take precedence over an expressed state policy in this area.

Reliance on the *Manor Vail* decision led the Tenth Circuit court to a second misconception. This decision dealt with a *constitutional* challenge to Vail's regulatory behavior; antitrust issues were not involved. In *Community Communications*, Boulder's ability to franchise and set rates for CCC was not in dispute. The issue was whether the city's allegedly anticompetitive conduct was beyond the reach of the Sherman Act. The *Manor Vail* decision gave no guidance on the ability of home rule cities to act in an anticompetitive fashion in regulating cable television.

Home rule status fails to be of conclusive significance for another reason. The *Lafayette* and *Midcal* decisions are inconsistent with a *Parker* immunity view that would allow mere home rule activity to equal state action. In *Lafayette*, the only Supreme Court decision to focus on the antitrust immunity of municipalities, both the majority and the dissent were aware of the doctrine of home rule.[67] However, the Court did not, even in a passing footnote, make any reference to a possible distinction in treatment between home rule cities and those cities with more limited authority. While this negative conclusion is certainly not dispositive, it bears consideration when the *Midcal* Court's latest interpretation of the *Parker* immunity test is examined. The dissent in *Lafayette* had justifiably complained that the plurality's test for antitrust immunity was unclear: that sovereign acts of the states and their subdivisions are immune when they are "*pursuant to* state policy to displace competition."[68] Justice Stewart, dissenting in *Lafayette*, was not certain whether state *authority* suffices or whether state *compulsion* is necessary.[69] If state authority is sufficient, a stronger case for the significance of home rule might be available. But the Supreme Court's most recent antitrust immunity decision, *Midcal*, does not allow a general grant of state authority to provide federal antitrust immunity. Not only must the "challenged restraint . . . be . . . 'clearly articulated and affirmatively expressed as state policy' . . . [but] the policy must be 'actively supervised' by the State *itself*."[70] Within this succinct test, home rule cities can find no comfort. The *Midcal* criteria were created as a template to be placed over the activity of a state as a means of determining antitrust immunity. *Midcal* points to the focus of all the Court's antitrust immunity decisions: the state *itself* must be actively

66. *See* Greeley Police Union v. City Council, 191 Colo. 419, 553 P.2d 790 (1976); Woolverton v. Denver, 146 Colo. 247, 316 P.2d 982 (1961).

67. 435 U.S. at 408 (plurality opinion) (noting that most counties, municipalities and townships have broad authority for general governance). *Id.* at 434-35 n.15 (dissenting opinion) (pointing out that petitioner-cities did not have home rule charters, but that Louisiana has a statutory home rule provision).

68. *Id.* at 435.

69. *Id.*

70. 445 U.S. at 105 (citations omitted)(emphasis added).

involved in the challenged restraint, giving its imprimatur to the allegedly anticompetitive actions. Colorado has made no provision for cable television regulation either in its constitutional provision for home rule or in its statutes and regulations; nor did the Colorado Supreme Court mandate the anticompetitive regulation of cable television in *Manor Vail*, all of which points to a conclusion at odds with the Tenth Circuit.

The Supreme Court's *Midcal* opinion clarifies another point of contention. Chief Justice Burger appears to have abandoned his distinction between governmental activity and proprietary activity. This *8-0* decision contains not a word about such a dichotomy. This is particularly telling because the challenged activities of the State of California in *Midcal* could hardly have been more "governmental". The *Midcal* case involved a state program of authorizing and enforcing wine price schedules and fair trade contracts generated through private agreements.[71] The Tenth Circuit's use of the governmental/proprietary distinction to support its immunity decision in *Community Communications* appears inconsistent with the Supreme Court's present focus.

The Tenth Circuit court seems to have been led astray by focusing on Boulder's ability to regulate cable television in general. The real issue, however, concerned the city's ability to act anticompetitively with impunity. If the issue had been framed in this fashion, Boulder's home rule status and the city's manner of regulating CCC would have taken their proper place as secondary considerations. Under the Supreme Court's two most recent *Parker* immunity decisions, the threshold inquiry should have been whether the challenged anticompetitive policy came from the state. Colorado's silence on the ability of its cities to regulate cable television in an anticompetitive fashion should have been dispositive in this case. The Tenth Circuit's reluctance to follow the Supreme Court's present *Parker* immunity test is understandable, however, when the potential impact of this test upon municipalities, other political subdivisions, and states is considered.[72] The following section will briefly discuss the competing concerns that must be balanced in articulating a test of state action immunity from the antitrust laws.

E. *Federal Expansion Overruns State Sovereignty*

Chief Justice Burger, in his concurrence in *Lafayette*, commented on the ever-expanding concept of interstate commerce with its concomitant effect of extending the reach of the antitrust laws.[73] The point is well taken, in light of the Supreme Court's most recent pronouncement on subject matter juris-

71. *Id.*

72. *See generally* Handler, *Antitrust-1978*, 78 COLUM. L. REV. 1363 (1978); Kennedy, *Of Lawyers, Lightbulbs and Raisins: An Analysis of the State Action Doctrine Under the Antitrust Laws*, 74 NW. U.L. REV. 31 (1979); Posner, *The Proper Relationship Between State Regulations and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693 (1974); *Comment*, National League of Cities *and the* Parker *Doctrine: The Status of State Sovereignty Under the Commerce Clause*, 8 FORDHAM URB. L. J. 301 (1980); Note, *The State Action Antitrust Defense for Local Government: A State Authorization Approach*, 12 URB. LAW. 315 (1980).

73. 435 U.S. at 420-22 (Burger, C.J., concurring).

diction under the Sherman Act. This decision, *McLain v. Real Estate Board of New Orleans, Inc.*, extends the purview of the Sherman Act to any defendant whose effect on interstate commerce is as peripheral as an interstate brokerage receiving out-of-state financing.[74]

The federal expansionist trend has not been limited to the antitrust laws. Cities no longer can assert the good faith immunity defense in suits charging them with violating an individual's civil rights under the fourteenth amendment.[75] Another area of encroachment on the states has occurred through a broad reading of section 1983 of the Civil Rights Act of 1871.[76] The Court has expanded the reach of section 1983 to include private actions against the states for violations of federal statutory law as well as for constitutional infringements.[77]

In the context of congressional expansion into areas once thought to be beyond the reach of the national government, the *Midcal* and *Lafayette* decisions are not remarkable. The present test of state immunity from the antitrust laws, however, fails to strike the proper balance between a national economic policy and the sovereign functions of states and their political subdivisions.

There is little doubt that if every municipality and other political subdivision in this country acted in an anticompetitive manner, motivated by their own sense of self-interest, economic dislocation and subversion of the federal antitrust laws would occur. Justice Brennan's plurality opinion in *Lafayette* expressed a fear of such a distortion of the efficiency of free markets if the immunity doctrine automatically included state subdivisions.[78] Regardless of how one views the scope of the federal antitrust laws, it is the present *test* of state action immunity that fails to consider our federalist system.

The plurality in *Lafayette* did not consider *National League of Cities v. Usery*[79] to be relevant to the issue of municipal antitrust immunity.[80] In *Usery*, a 5-4 majority held that Congress' use of the commerce clause is limited when federal law attempts to "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions. . . ."[81] The Court's *Parker* immunity test may conflict with *Usery* when a municipality is sued for anticompetitive behavior in an area that can be considered a "traditional government function." The *Usery* decision demonstrates the inherent problem in the Supreme Court's current thinking on municipal antitrust immunity: compliance with the *Midcal* test may significantly interfere in state and local governmental functioning.

74. 444 U.S. 232, 244 (1980). *See* notes 165-67 *infra* and accompanying text.
75. Owen v. City of Independence, 445 U.S. 622 (1980).
76. 42 U.S.C. § 1983 (1976).
77. Maine v. Thiboutot, 100 S. Ct. 2502 (1980).
78. 435 U.S. at 407-08.
79. 426 U.S. 833 (1976). *Usery* invalidated a federal wage law that provided for a minimum wage for state and local government employees. The Court stated that the added expense of compliance would interfere with the integral operations of the states.
80. 435 U.S. at 412 n.42.
81. 426 U.S. at 852.

As the dissent in *Lafayette* pointed out, the Court's antitrust immunity test does not consider the manner in which states have delegated powers to municipalities.[82] States rarely express an anticompetitive policy or supervise such a policy when they delegate authority to their political subdivisions.[83] Thus, most municipal activities initiated before the *Lafayette* decision will not be immunized under the Court's present test. One effect of the Court's *Midcal* and *Lafayette* tests will be increased state intervention in municipal activities to ensure compliance with the antitrust immunity test.[84] Alternatively, states may refuse initially to share power with the cities, preferring to avoid the intimate involvement in municipal affairs necessary to provide antitrust immunity.[85] The ability of cities to enact programs that are tailored to the special needs of their citizenry, or to react to modern problems with innovative solutions may be hampered by a fear of the federal antitrust laws.[86]

The terror that the treble damages provision[87] produces in the hearts of antitrust defendants will be equally felt by government defendants involved in private antitrust suits. It is conceivable that an antitrust damage award might bankrupt a city.[88] Extremely large damage awards against cities may directly affect the citizenry by reducing local government programs and services.[89] States themselves may suffer financially from antitrust damage awards if they are forced to bail out bankrupt cities, satisfying the cities' judgments.[90]

All of these potential adverse consequences from the Court's present view of *Parker* immunity are illustrative of the problems inherent in balancing the concept of federalism—with its allowance for state sovereignty in our governmental system—against a national economic policy which extolls free market enterprise. Alternatives to the current immunity test as articulated in *Midcal* may lie in an equitable defense[91] to treble damages when a munic-

82. 435 U.S. at 434-38 (Stewart, J., dissenting).

83. *See generally* Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 280-83 (1968).

84. A recent state statute authorizing New York to participate with New Jersey in the organization of industrial development projects reflects the impact of the *Lafayette* decision. The statute specifically authorizes local governmental anticompetitive behavior. N.Y. UNCONSOL. LAWS § 7171(g) (65) (McKinney 1979).

85. *See, e.g.*, Northern Sec. Co. v. United States, 193 U.S. 197 (1904). In *Lafayette*, Justice Stewart commented on the dearth of state legislative history, making it extremely difficult to support an argument of legislative intent to provide municipal immunity. 435 U.S. at 436-37 (Stewart, J., dissenting).

86. On the municipal problems inherent in the Court's present *Parker* immunity doctrine, see Comment, National League of Cities *and the* Parker *Doctrine: The Status of State Sovereignty Under the Commerce Clause*, 8 FORDHAM URB. L.J. 301, 336-42 (1980).

87. 15 U.S.C. § 15 (1976).

88. 435 U.S. at 442 n.1 (Blackmun, J., dissenting). Justice Blackmun pointed out that Louisiana Power & Light Co. sought $540 million in treble damages, amounting to $28,000 per family, equally divided among the residents of Plaquemine and Lafayette, Louisiana.

89. *See Federal Antitrust Immunity: Exposure of Municipalities to Treble Antitrust Damages Sets Limit For New Federalism:* City of Lafayette v. Louisiana Power and Light Co., 11 CONN. L. REV. 126, 140 (1978) [hereinafter cited as *Federal Antitrust Immunity*].

90. "A recent study revealed that the statutes of 15 states provided for a State receiver or state agency to act as a receiver when a local government unit defaults on its financial obligations." ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, CITY FINANCIAL EMERGENCIES: THE INTERGOVERNMENTAL DIMENSION 77 (1973).

91. *See Federal Antitrust Immunity*, *supra* note 89, at 142.

ipality is found to have violated the antitrust laws, or in injunctive relief in lieu of damages.[92] Possibly, as Professor Handler has suggested,[93] municipal anticompetitive conduct should be left to the states to handle through state antitrust laws.

However rough the present attempt by the Supreme Court is in striking the balance and articulating a satisfying *Parker* immunity test, it is clear that the test we now have is not ambiguous. The Court and Congress should each be urged to consider the ramifications of the present immunity test. Until such time as a new balance is struck, however, federal courts will have the obligation to adhere to the dictates of *Midcal* and *Lafayette* when confronted with municipalities seeking immunity from the antitrust laws.

II. THE BAR TO THE INSURANCE INDUSTRY'S ANTITRUST EXEMPTION: THE "BOYCOTT EXCEPTION" TO THE MCCARRAN ACT

In *Card v. National Life Insurance Co.*,[94] the Tenth Circuit Court of Appeals waded into an area that lately has received an unusual amount of attention from the Supreme Court: the statutory exemption from the antitrust laws afforded to the insurance industry.[95] The McCarran-Ferguson Act[96] (McCarran Act) excludes from antitrust liability every person or entity in the "business of insurance,"[97] to the extent that their activity is "regulated by state law,"[98] unless such activity is an act of "boycott, coercion or intimidation."[99]

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92. 15 U.S.C. § 26 (1976) provides for injunctive relief. Under Section 26, any party in a private antitrust suit may seek an injunction when injury is alleged under the Sherman or Clayton Acts.

93. Handler, *Antitrust-1978*, 78 COLUM. L. REV. 1363, 1388 n.160 (1978). Professor Handler and the Colorado Attorney General's Office took the same position before the National Commission for the Revision of Antitrust Laws and Procedures. Both expressed the belief that the states should control anticompetitive state action through state antitrust laws. *Id.*

94. 603 F.2d 828 (10th Cir. 1979).

95. *See* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979); St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978).

96. 15 U.S.C. §§ 1011-1015 (1976). The Act provides, in relevant part:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Id. § 1011. The statute continues:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That . . . the Clayton Act, and . . . Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

Id. § 1012. The McCarran Act further provides:

> (b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Id. § 1013.

97. *Id.* § 1011.

98. *Id.* § 1012(b).

99. *Id.* § 1013(b).

Congress passed the McCarran Act in 1945 in response to a precedent-setting decision by the Supreme Court in *United States v. South-Eastern Underwriters Association*,[100] which held, for the first time, that the business of insurance was an activity in interstate commerce.[101] Congress and the dissenting justices in *South-Eastern Underwriters* feared that this extension of federal power under the commerce clause would invalidate state regulation of the insurance industry because of the preemption doctrine.[102] The McCarran Act's main thrust was to allow state regulation and taxation of the insurance industry.[103] The insurance industry exemption from the federal antitrust laws was added as a proviso.[104]

The Tenth Circuit's decision in *Card* did not concern the McCarran Act as a whole; the opinion only discussed the scope of the term "boycott," as used in the Act. Before discussing the phrase "boycott, coercion or intimidation" as contained in the McCarran Act, it should be understood that a defendant in an antitrust suit who asserts the McCarran Act's exemption need only prove that it is indeed in the "business of insurance," and that the activity that has been challenged as a restraint of trade is "regulated by state law." The meaning of both these phrases has been scrutinized by federal courts to determine the scope of such broad language.[105] If a plaintiff is to successfully negate a defendant's McCarran Act antitrust exemption, he must show that the defendant, who has met the McCarran Act's requirements, has boycotted, coerced or intimidated the plaintiff. Such a showing

100. 322 U.S. 533 (1944).

101. The *South-Eastern Underwriters* decision reversed a seventy-five year old precedent established in Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868), which had declared insurance not to be "a transaction of commerce." *Id.* at 183.

102. Federal preemption, through the supremacy clause, is imposed sparingly today. State law will be deemed invalid where it conflicts with federal law, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); or when Congress has clearly decided to so occupy an area by regulation that even consistent state law will be declared invalid, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963). At the time of the passage of the McCarran Act, the preemption doctrine was thought to have a broader scope than it does today; thus, federal regulation of insurance could have invalidated even consistent state law. *See* Sullivan & Wiley, *Recent Antitrust Developments: Defining The Scope of Exemptions, Expanding Coverage and Refining the Rule of Reason*, 27 U.C.L.A. L. REV. 265, 270-71 (1979) [hereinafter cited as *Recent Antitrust Developments*].

103. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429 (1946).

104. 15 U.S.C. § 1012(b) (1976).

105. In SEC v. National Sec., Inc., 393 U.S. 453 (1969), the Court outlined those activities which fall within the "business of insurance": "[T]he fixing of rates . . . , the selling and advertising of policies . . . , the licensing of companies and their agents . . . , [t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation and enforcement—these [are] the core of the 'business of insurance.'" *Id.* at 459-60. Recently, in Group & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979), the Court held that petitioner's agreements with pharmacies, to make it attractive for policyholders to patronize pharmacies that limited their profit margins on drug sales, did not qualify as "the business of insurance." For other cases defining this phrase, see Nedrow, *The McCarran Controversy: Insurance and the Antitrust Law*, 12 CONN. L. REV. 205, 210-45 (1980).

The requirement that insurance be "regulated by state law" to avoid antitrust liability, 15 U.S.C. § 1012(b) (1976), is met by a general authorization or prohibition of "certain standards of conduct." California League of Ind. Ins. Producers v. Aetna Cas. & Sur. Co., 175 F. Supp. 857, 860 (N.D. Cal. 1959). A general scheme of regulation which failed to specifically include the defendant's challenged restraint was, nonetheless, said to meet the "regulated by state law" test in Ohio AFL-CIO v. Insurance Rating Bd., 451 F.2d 1178 (6th Cir. 1971).

has been called the "boycott exception"[106] to the McCarran Act.

Before the Supreme Court's decision in *St. Paul Fire & Marine Insurance Co. v. Barry*,[107] the federal courts had been polarized over their interpretation of the boycott language in the McCarran Act. The first federal court to define the boycott language took a narrow view, considering that only the "blacklisting" of insurance companies or agents by a group of insurers was sufficient to meet the boycott exception.[108] Both the Fifth and Ninth Circuits adopted such a view.[109] Other circuits, however, have found that the boycott exception extends to any boycotting conduct that would violate the Sherman Act.[110] The usual definition of a boycott, within the prohibitions of the Sherman Act, is any concerted action to exclude a competitor from the market.[111]

In *Barry*, the Court settled this conflict at its extremes, but left the middle latitudes open to lower court interpretation. The Supreme Court was faced with the issue of whether the McCarran boycott exception applied to disputes between *policyholders* and insurers. Justice Powell, writing for the Court, resoundingly answered in the affirmative.[112] The respondents, plaintiffs below, were physicians who brought a class action suit against the four insurers who carried medical malpractice insurance in the state where the physicians practiced. Allegedly, these insurers had conspired so that three of the companies refused to deal with the physicians; thus, the doctors were forced to seek coverage from the fourth insurer, and that company had changed the rules of coverage to favor insurers.[113] The Court made clear that it was deciding only whether the insurers were acting to "boycott" the physicians within the "boycott exception" to the McCarran Act. There was no issue as to whether the insurers' acts were related to the business of insur-

106. The phrase "boycott, coercion and intimidation" will be referred to merely as the "boycott exception", since courts appear to treat these terms synonymously. *See, e.g.*, United States v. South-Eastern Underwriters Ass'n., 322 U.S. 533, 535-36 (1944). *See also Recent Antitrust Developments*, *supra* note 102, at 278 n.59.

107. 438 U.S. 531 (1978).

108. Transnational Ins. Co. v. Rosenlund, 261 F. Supp. 12 (D. Or. 1966). This court came to its definition of "boycott" based upon the legislative history. *See* 91 CONG. REC. 1087 (1945) (remarks of Rep. Allen).

109. *See, e.g.*, Meicler v. Aetna Cas. & Sur. Co., 506 F.2d 732 (5th Cir. 1975); Addrisi v. Equitable Life Assurance Soc'y, 503 F.2d 725 (9th Cir. 1974).

110. *See, e.g.*, Proctor v. State Farm Mut. Auto. Ins. Co., 561 F.2d 262 (D.C. Cir. 1977), *vacated for reconsideration in light of* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979), at 440 U.S. 942 (1979); Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co., 326 F.2d 841 (2d Cir. 1963) (dictum), *cert. denied*, 376 U.S. 952 (1964).

111. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST, § 83 at 229 (1977). A group boycott to exclude a competitor from the market is a per se violation of the Sherman Act. Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). Some activities are considered to be so economically egregious as to be per se unreasonable, and therefore, violative of section 1 of the Sherman Act. United States v. Trenton Potteries Co., 273 U.S. 392, 401 (1927) (price fixing). Not all concerted refusals to accede to the demands of a trader in the market are per se violations of section 1. *E.g.*, Deesen v. Professional Golfers' Ass'n., 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966) (PGA's rules for participation in golf tournaments, while excluding Deesen, were a reasonable restraint to aid in the management of the professional sport).

112. 438 U.S. at 552-55. Justice Stewart filed a dissent in which Justice Rehnquist joined. *Id.* at 555.

113. *Id.* at 535.

ance, or whether the state regulated that business.[114] Justice Powell defined a boycott in generic terms as "a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target."[115] The Court stated that "the term 'boycott' is not limited to concerted activity against insurance companies or agents or, more generally, against competitors of members of the boycotting group."[116] The Court, however, did stop short of the more expansive reading of the term adopted by some lower courts. The majority held that a "boycott" within the McCarran Act is not synonymous with all activity that constitutes a per se violation of the Sherman Act.[117] Almost as an afterthought, Justice Powell reminded the parties that the threshold inquiry in a charge of boycott is that there is concerted activity; an individual actor alone cannot "boycott." The boycott exception now encompasses concerted action against policyholders. The Court has left unanswered the question of to what extent conduct beyond concerted action against insurers, agents, or policyholders will come within the definition of "boycott."

The Tenth Circuit's recent decision in *Card v. National Life Insurance Co.* is consistent with the Supreme Court's general premise that a boycott is *concerted* activity to withhold "patronage or services from the target."[118] The plaintiffs in *Card*, a general insurance agent and the corporation he headed, charged a life insurance company (National Life), a broker-dealer,[119] and employees of the life insurance firm[120] with a section 1 Sherman Act violation. Card contended that these defendants and National Life's general agents association had conspired together to terminate Card's general agency contract with National Life.[121] The defendants asserted that Card was terminated because he had violated his contract by seeking another general agency agreement with a competing insurer. In the district court, the defendants affirmatively pleaded that the McCarran Act exempted them from Sherman Act liability. The lower court agreed and granted summary judgment for the defendants.[122] The trial court based its conclusion primarily on the plaintiff's failure to show concerted activity aimed at harming

114. *Id.* at 540 n.9.

115. *Id.* at 541.

116. *Id.* at 552.

117. *Id.* at 545 n.18. Business activities that are traditionally considered per se unreasonable and therefore violative of the antitrust laws are: price fixing, horizontal division of markets, resale price maintenance, and group boycotts. 2 E. KINTNER, FEDERAL ANTITRUST LAW § 9.20, at 57-58 (1980).

118. 438 U.S. at 541.

119. Equity Services, Inc., the broker-dealer, was not a party to the appeal. The district court held that Equity Services was not in the business of insurance and could not seek exemption from suit under the McCarran Act. Card v. National Life Ins. Co., No. 74-446 (D. Colo. Dec. 9, 1977) (mem.).

120. Lawrence Leyland, executive vice-president of National Life Insurance Co. and William Ryan, a general agent for National Life Insurance Co., were both dismissed from the suit by the district court's order of August 6, 1974. Brief for Appellee at 2, Card v. National Life Ins. Co., 603 F.2d 828 (10th Cir. 1979).

121. 603 F.2d at 829.

122. The district court and the plaintiffs agreed that, for purposes of the McCarran Act, the defendants were in the "business of insurance" and defendants' activities were regulated by the State of Colorado. *Id.* at 832.

Card;[123] secondarily, the district court found that National Life's termination of Card lacked the qualities of a "boycott": it was not a systematic exclusion from the marketplace.[124]

The court of appeals affirmed the lower court.[125] The Tenth Circuit court placed the main emphasis on the boycott issue rather than on the issue of concerted action. Judge Doyle, speaking for the court, held that under either a narrow view[126] or an expansive view[127] of the meaning of "boycott" in the McCarran Act, the defendants' conduct did not disqualify them from the Act's antitrust exemption.[128] The appellate court confirmed the lower court's view of concerted activity, finding that all of the defendants were a part of National Life Insurance Co.

The court of appeals did not choose to define the scope of the McCarran Act boycott exception. The appellate court viewed this complaint as a breach of contract action. National Life alleged that Card was dismissed for entering into a general agency agreement with another life insurance company in violation of National Life's rules. Judge Doyle did not perceive how Card's termination of employment could amount to a boycott.

The *Card* decision is consistent with other federal court decisions on similar facts.[129] Aside from the issue of the propriety of insurance companies having an exemption from the antitrust laws,[130] the Tenth Circuit's opinion in *Card* upholds the integrity of the meaning of "boycott" in the antitrust lexicon.[131]

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123. The boycott claim focused on National Life, an agent/employee of that firm, and an association of National Life's agents, which was not a named defendant in the suit. The district judge found that among these defendants, there were no two separate parties capable of acting in a concerted fashion. See the discussion of intra-enterprise conspiracy at notes 182-84 *infra* and accompanying text.

124. Brief for Appellee at 19, Card v. National Life Ins. Co., 603 F.2d 828 (10th Cir. 1979).

125. Judge McKay concurred, but only so far as the majority opinion affirmed the district court's conclusion that the defendants had exhibited no concerted action. 603 F.2d at 834.

126. See notes 108-109 *supra* and accompanying text.

127. See note 110 *supra* and accompanying text.

128. 603 F.2d at 832-33.

129. Black v. Nationwide Mut. Ins. Co., 429 F. Supp. 458 (W.D. Pa. 1977), *aff'd*, 571 F.2d 571 (3d Cir. 1978); Blackley v. Farmers Ins. Group, Inc. [1976-2] Trade Cas. 69,787 (D. Utah 1976).

130. See NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, 244-45 (1979) (calling for the repeal of the McCarran Act; anticompetitive activities of insurance companies that are protected by the Act are not considered by the Commission to be essential to the survival of insurance companies).

131. It is interesting to note that, assuming the presence of concerted activity in *Card*, the facts alleged at the preliminary hearing bear considerable similarity to cases where judges have found such behavior to be reasonable. *See, e.g.*, Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). In *Hawaiian Oke*, two distillers, which had used the same distributor and were both dissatisfied with his performance, agreed to terminate his contract and replace him with another distributor. The Ninth Circuit could not find this action unreasonable per se because the distillers had not coerced the terminated distributor's market conduct; the exclusion of competition was merely incidental to the distillers' agreement to transfer their business. Similarly, in Molinas v. NBA, 190 F. Supp. 241 (S.D.N.Y. 1961), the concerted activity of the NBA in excluding Molinas for gambling was not a per se violation, and indeed, was considered reasonable.

A Tenth Circuit decision reminiscent of the facts in *Card*, although in another context, is Farnell v. Albuquerque Publishing Co., 589 F.2d 497 (10th Cir. 1978). In *Farnell*, the plaintiff

III. CONTRIBUTION AMONG ANTITRUST DEFENDANTS

The thorny area of contribution among antitrust violators, with its multidimensional considerations and policy arguments,[132] was broached by the Tenth Circuit court in *Olson Farms, Inc. v. Safeway Stores, Inc.*[133] The issue of contribution among antitrust defendants has been hotly contested of late, both by scholars[134] and by the federal courts.[135] The genesis of this conflict can be traced to the fact that antitrust defendants are subject to joint and several liability for the treble damages possible under section 4 of the Clayton Act.[136] Since Congress has made no provision in regard to contribution in the antitrust laws,[137] defendants in an antitrust litigation have had to

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was fired from his newspaper management position because of insubordination. Farnell had refused to cease selling newspapers independently, in violation of company policy. The court of appeals held that he lacked standing to bring a Sherman Act or a Clayton Act complaint, for under section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), Farnell could not show injury "by reason of" anything in the antitrust laws. For a discussion of the standing requirements for suits under the antitrust laws, see notes 169-70 *infra* and accompanying text.

132. An analysis of the competing policy considerations concomitant to a right of contribution in suits under the antitrust laws is beyond the scope of this survey. Several of these policy concerns will be discussed, however, in the context of the Tenth Circuit's contribution decision. For a significant and thoughtful analysis of the contribution issue in antitrust law, in general, and a critical assessment of the Tenth Circuit's views, in particular, *see* Note, *Contribution and Antitrust Policy*, 78 MICH. L. REV. 890 (1980).

133. [1979-2] Trade Cas. 79,699 (10th Cir. 1979), *rehearing en banc granted*, No. 77-2068 (10th Cir. Dec. 27, 1979) (*Olson Farms I*). A companion case, decided on the same day, achieved the same result. Olson Farms, Inc. v. Countryside Farms, Inc., No. 78-1773 (10th Cir., Nov. 8, 1979) (*Olson Farms II*). *Olson Farms I* stemmed from an antitrust conspiracy suit, alleging that Olson Farms and Oakdell Egg Farms, Inc. had conspired to price-fix and to monopolize the purchase of eggs from fourteen producers. Olson Farms was found liable for damages, but only an injunction issued against Oakdell Farms. 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).

Olson Farms II, based on the same complaint as *Olson Farms I*, covered damages subsequently incurred as a result of continued antitrust violations. The defendants in *Olson Farms II* have entered a settlement, accompanied by an order of dismissal with prejudice. Olson Farms II, No. 78-1773, slip op. at 4 (10th Cir. Nov. 8, 1979). The appeal in *Olson Farms II* 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., all for contribution or indemnity. The court of appeals found the arguments it had set forth in *Olson Farms I* compelling in the companion decision. Judge Holloway, as he did in *Olson Farms I*, concurred only in the denial of indemnity, finding the Eighth Circuit's decision in Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979), persuasive on the issue of contribution.

134. *See generally* Schwartz, Simpson & Arnold, *Contribution in Private Actions Under the Federal Antitrust Laws*, 33 SW. L. J. 779 (1979); Note, *Contribution Among Antitrust Violators*, 29 CATH. U. L. REV. 669 (1980); Note, *Contribution in Private Antitrust Actions*, 93 HARV. L. REV. 1540 (1980); Note, *Contribution Among Antitrust Defendants*, 33 VAND. L. REV. 979 (1980).

135. *Compare* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979) (joint antitrust tortfeasors have a right of contribution) *and* Heizer Corp. v. Ross, 601 F.2d 330, 333 (7th Cir. 1979) (approving of *Professional Beauty Supply* in dictum) *with* Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979), *cert. granted sub nom.*, Texas Indus., Inc. v. Radcliff Materials, Inc., 101 S. Ct. 351 (1980) (contribution unavailable to antitrust violators) *and* Goldlawr, Inc. v. Shubert, 276 F.2d 614, 616 (3d Cir. 1960) (contribution declared unavailable to antitrust violators in dictum).

136. *See* City of Atlanta v. Chattanooga Foundry & Pipeworks, 127 F. 23 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906). A violation of the antitrust laws is considered a tort. *See* Vines v. General Outdoor Advertising Co., 171 F.2d 487, 491-92 (2d Cir. 1948) (L. Hand, J.).

137. Unlike the antitrust laws, the federal securities laws provide for contribution in certain instances. *See* The Securities Act of 1933, § 11(f), 15 U.S.C. § 77k(f) (1976) (false registration

argue the equity of their position.

Only one federal appellate court has decreed that there exists an equitable right to contribution among antitrust violators. In *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*,[138] the Eighth Circuit held that antitrust defendants are entitled to *pro rata* contribution, when, on a case-by-case determination, the trier of fact finds contribution appropriate.[139] The litigation in *Professional Beauty Supply* arose from a section 2 Sherman Act complaint charging National Beauty Supply (National) with attempting or conspiring to monopolize the beauty supplies market. La Maur, Inc., a manufacturer of beauty supplies, was brought into the suit by National on a third-party complaint for contribution. National allegedly prompted La Maur to terminate Professional Beauty Supply's franchise with La Maur and to grant National an exclusive dealership. The district court had dismissed the third-party complaint for contribution based on rule 12(b)(6) of the Federal Rules of Civil Procedure. The appellate court reviewed only this 12(b)(6) dismissal.

The Eighth Circuit court in *Professional Beauty Supply* stressed the fairness that is implicit in a right to contribution[140] and rejected the five arguments La Maur adduced against such a right.[141] These arguments, considered germane by most courts,[142] are: 1) Congress provided for contribution in the securities laws;[143] therefore, congressional silence on the right of contribution in the antitrust laws demonstrates a legislative intent to exclude this right; 2) contribution will cause plaintiffs to lose control of their lawsuits through the defense tactic of impleading numerous third-party defendants; 3) contribution may deter settlement; 4) antitrust litigation is inherently complex and contribution can only further such complexity; and 5) contribution would vitiate the deterrent effect of placing the burden of treble damages on one antitrust violator. The Eighth Circuit court answered these arguments by focusing upon two points. The appellate court asserted that federal courts could handle the added complexity of contribution through the prudent use of severance. Furthermore, the *Professional Beauty Supply* court found that there was no proof that the concentration of the treble damage award on one of several possible violators was any more of a deterrent than spreading damages among all of them.[144]

The Tenth Circuit Court of Appeals has chosen a route different from

statement); The Securities Exchange Act of 1934 § 9(e), 15 U.S.C. § 78i(e) (1976) (willful manipulation of security prices); and The Securities Exchange Act of 1934, § 18(b), 15 U.S.C. § 78r(b) (1976) (filing a misleading statement with SEC). See Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1184 (8th Cir. 1979), for cases citing a federal common law right of contribution in specific instances. In addition, for a list of most of the states that have either enacted a right to contribution or promulgated such a right through state court decisions, see Schwartz, Simpson & Arnold, *Contribution in Private Actions Under the Federal Antitrust Laws*, 33 Sw. L. J. 779, 786 nn.49-51 (1979).

138. 594 F.2d 1179 (8th Cir. 1979).
139. *Id.* at 1182, 1186.
140. *Id.* at 1185.
141. *Id.* at 1183.
142. *See* note 134 *supra*.
143. *See* note 137 *supra*.
144. 594 F.2d at 1188.

that of the Eighth Circuit. In *Olson Farms I*, the court of appeals affirmed the district court's rule 12(b)(6) dismissal of Olson Farms' request for a declaratory judgment which sought contribution or indemnity[145] from Safeway Stores and others.[146] Olson Farms had been adjudged liable in a price-fixing conspiracy under section 1 of the Sherman Act and for conspiracy to monopolize under section 2[147] of that Act. Oakdell Farms, a co-conspirator, only suffered the issuance of an injunction. Olson Farms, in collusion with many other egg buyers, had induced egg producers to sell eggs to the conspirators at a depressed price. Olson Farms paid a judgment of almost $2.5 million.[148] This figure was obtained by trebling all the damages suffered by the egg producer-plaintiffs, including damages incurred from sales to conspiring buyers *not* party to the suit.[149]

In the Tenth Circuit's decision, the court of appeals considered the three arguments relied on by Olson Farms in seeking a right of contribution: 1) federal decisions have created a common law right to contribution in particular instances;[150] 2) there is a federal common law right to contribution in rule 10b-5 suits;[151] and 3) the Eighth Circuit's decision in *Professional Beauty Supply* mandates a right to contribution.

The appellate court, addressing the contribution issue, found that Olson

145. As an alternative to contribution from its co-conspirators, Olson Farms sought indemnification. The indemnification claim was framed as a demand for the damages Olson Farms had paid that were attributable to its co-conspirators. The Tenth Circuit previously had commented that such a demand was inconsistent with the nature of indemnification—a desire to be compensated for *all* damages. Thomas v. Malco Refiners, Inc., 214 F.2d 884, 885 (10th Cir. 1954). Nonetheless, the Tenth Circuit court addressed the issue of indemnification. A party adjudged liable for damages may seek indemnification if its liability is the result of a legal relationship to the actual wrongdoer. Tortious conduct that is imputed, vicarious, or constructive may give rise to indemnification. *See* United Airlines v. Wiener, 335 F.2d 379, 398-99 (9th Cir. 1964). Olson Farms, as an intentional tortfeasor, with no legal relationship to its co-conspirators, was denied indemnification. [1979-2] Trade Cas. at 79,704.

146. Judge Holloway, in concurrence, did not accept the majority's position on contribution, finding *Professional Beauty Supply* compelling. The damages that Olson Farms had paid amounted to $2,405,580 with accrued interest. When Judge Holloway compared this amount to the damages actually attributable to Olson Farms, $99,656 (trebled, this amounted to $298,968), the inequity in denying contribution became apparent. The other egg buyers involved in the conspiracy were unjustly enriched by the denial of contribution.

147. Section 2 of the Sherman Act, 15 U.S.C. § 2 (1976) makes it unlawful for "[any] person . . . [to] 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 . . . ." *Id.*

148. The judgment was for $1,950,827.23. Olson Farms subsequently paid the judgment, which, with interest, totaled more than $2,400,000.

149. The untrebled amount was calculated by including the damages incurred by the egg producers from sales to Olson Farms, Safeway Stores, Inc., Egg Products Co., Snow White Egg Co., Countryside Farms, Inc., and Gusto Marketing Systems, Inc. The jury whose verdict was upheld in *Cackling Acres* did not specifically find that these other buyers were liable; however, the court of appeals in *Olson Farms I* found such an inference reasonable. [1979-2] Trade Cas. at 79,700 n.4.

150. The court mentioned Olson Farms' reference to Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) (unintentional tortfeasor has right of contribution). [1979-2] Trade Cas. at 79,701.

151. In DeHaas v. Empire Petroleum Co., 286 F. Supp. 809 (D. Colo. 1968), *modified on other grounds*, 435 F.2d 1223 (10th Cir. 1970), a federal district court held that a violator of rule 10b-5, 17 C.F.R. § 240.10b-5 (1978), could seek contribution. There is provision for this right in other sections of the securities laws. See note 137 *supra*.

Farms' status as an "intentional" tortfeasor weighed heavily against it.[152] The decision in *Sabre Shipping Corp. v. American President Lines*,[153] which had vigorously denied a right of contribution to an intentional tortfeasor, was a persuasive precedent to the court of appeals. The Tenth Circuit court, in analyzing the majority and dissenting opinions of the *Professional Beauty Supply* decision, was impressed by the substantial competing concerns present in the conflict over contribution. The court further noted that most states that provide a right to contribution among joint tortfeasors do so by statute.

The Fifth Circuit's recent decision in *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*[154] paralleled the Tenth Circuit's reflections on the contribution dilemma. This Fifth Circuit holding provided the appellate court with the final impetus to decide to await congressional action, rather than to create by judicial fiat a right of contribution among antitrust violators.[155]

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152. Olson Farms, while claiming that it was a passive antitrust violator, was adjudged guilty of attempting to and conspiring to monopolize; both charges require a showing of specific intent. *See, e.g.*, Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626 (1953) (attempt to monopolize); American Tobacco Co. v. United States, 147 F.2d 93 (6th Cir. 1944), *aff'd*, 328 U.S. 781, 808-09 (1946) (conspiracy to monopolize).

Olson Farms claimed that it was a passive violator because some courts have been willing to allow contribution between unintentional tortfeasors. *E.g.*, Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975). The early common law rule on contribution came from Merryweather v. Nixan, 101 Eng. Rep. 1337 (K.B. 1799), which denied the right of contribution to an intentional tortfeasor. By the twentieth century, the American courts had, for the most part, glossed over *Merryweather*'s actual holding and denied contribution in both intentional and negligent torts. Union Stock Yards Co. v. Chicago B. & Q.R.R., 196 U.S. 217 (1905). *See* Schwartz, Simpson & Arnold, *Contribution in Private Actions Under the Federal Antitrust Laws*, 33 SW. L. J. 779, 781-84 (1979).

153. 298 F. Supp. 1339, 1346 (S.D.N.Y. 1969). Using the term "unintentional" to describe the actions of an antitrust violator is bound to cause confusion. In tort liability, one who acts with intent desires "to bring about a result which will invade the interests of another in a way that the law will not sanction." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 8 at 31 (4th ed. 1971). Obversely, an unintentional or negligent act is done by one who knows the danger to be a foreseeable risk and not a substantial certainty. *Id.* at 32. It is difficult to conceive of an unintentional antitrust violation, especially when section 1 of the Sherman Act is involved; one who conspires, contracts, or combines to restrain trade can hardly be said, as a matter of law, not to know of the harmful effect involved. *See* Schwartz, Simpson & Arnold, *Contribution in Private Actions Under the Federal Antitrust Laws*, 33 SW. L. J. 779, 792-93 (1979). *Cf.* Comment, *Contribution in Private Antitrust Suits*, 63 CORNELL L. REV. 682 (1978) (the author suggests a right of contribution for unintentional violators of the antitrust laws, but never explains how one can be an unintentional antitrust violator). Possibly, the line of demarcation between unintentional and intentional antitrust violators is drawn at the point where a defendant's conduct is no longer judged by a per se standard and must instead be unreasonable to constitute a violation of the antitrust laws.

154. 604 F.2d 897 (5th Cir. 1979), *cert. granted sub nom.*, Texas Indus., Inc. v. Radcliff Materials, Inc., 101 S. Ct. 351(1980).

155. The Tenth Circuit Court of Appeals granted a petition for a rehearing *en banc* in Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. 79,699 (10th Cir. 1979), in No. 77-2068 (10th Cir. Dec. 27, 1979). The rehearing was held on September 16, 1980.

It appears that the United States Supreme Court will soon decide the issue of contribution among antitrust violators. The Fifth Circuit affirmed, without published opinion, a denial of contribution rights in *In re* Corrugated Container Antitrust Litigation, 606 F.2d 319 (5th Cir.), *aff'g* 84 F.R.D. 40 (S.D. Tex. 1979). A petition for certiorari had been granted *sub nom.* Westvaco Corp. v. Adams Extract Co., 100 S. Ct. 3008 (1980). Subsequently, certiorari was *dismissed*, Westvaco Corp. v. Adams Extract Co., 101 S. Ct. 311(1980). The Court has recently granted, however, the petition for certiorari filed in the *Abraham Construction* case, 604 F.2d 897

IV. INTERSTATE COMMERCE AND THE SHERMAN ACT

The decision in *Crane v. Intermountain Health Care, Inc.*[156] turned upon the jurisdictional requirement of interstate commerce under the Sherman Act.[157] The Tenth Circuit court affirmed[158] the district court's 12(b)(1) dismissal, reasoning that the plaintiff's antitrust complaint failed to disclose that the defendants' restraint had a "substantial effect on interstate commerce."[159]

The plaintiff Crane, a pathologist, complained that the defendants had conspired to prevent him from performing pathological services at Cottonwood Hospital, a facility owned and operated by Intermountain Health Care. In Crane's allegation of boycott, he charged that the defendants had restrained the practice of pathology at the hospital, as well as inhibited his own practice.

The court of appeals based its decision upon a prior Tenth Circuit case involving a similar situation. In *Wolf v. Jane Phillips Episcopal Memorial Medical Center*,[160] the complaint asserted that the plaintiff, an osteopath, and all other local osteopaths had been denied the opportunity to join the medical staff of the local hospitals, and were therefore unable to admit patients to those hospitals. The Tenth Circuit court held that the complaint showed only an insubstantial effect on interstate commerce. The court in *Wolf* considered that the goods and services which the hospitals had purchased in interstate commerce were irrelevant to the plaintiff's showing of Sherman Act jurisdiction. The defendants' alleged actions did not restrain their purchases in interstate commerce, nor was it demonstrated that the plain-

(5th Cir. 1979), *cert. granted sub nom.*, Texas Indus., Inc. v. Radcliff Materials, Inc., 101 S. Ct. 351(1980).

Another contribution case, Northwest Airlines, Inc. v. Transport Workers Union, 606 F.2d 1350 (D.C. Cir. 1979), *cert. granted* 100 S. Ct. 3008(1980), will be decided this term. *Northwest Airlines* raises the issue of contribution in an employment discrimination suit brought under section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1976).

156. [1980-1] Trade Cas. 77,593 (10th Cir. 1980), *rehearing en banc granted*, No. 78-1346 (10th Cir. Sept. 16, 1980).

157. The modern notions of Congress' authority under the commerce clause stem from Wickard v. Filburn, 317 U.S. 111 (1942). From the time of this watershed decision, federal power has been expanded by a broadening of the interpretation of interstate commerce to include activities which have a substantial effect on interstate commerce. The interstate commerce requirement differs between actions brought under the Sherman Act and those brought under the Clayton Act. The Sherman Act speaks to "restraint[s] of trade or commerce among the several states"; thus a substantial effect on commerce meets the Sherman Act's jurisdictional requirement. *See* Hospital Building Co. v. Trustees of Rex Hospital, 435 U.S. 738, 743 (1976). A stricter jurisdictional standard pertains to the Clayton Act, 15 U.S.C. §§ 12-27 (1976), since it encompasses "person[s] or activities [that are] *within the flow* of interstate commerce." Gulf Oil Co. v. Copp Paving Co., 419 U.S. 186, 195 (1974) (emphasis added). Unlike the Sherman Act, the Clayton Act dictates that the Act is violated only when one is engaged in interstate commerce generally, and has restrained trade during the course of interstate commerce. *See* J. VON KALINOWSKI, 16A ANTITRUST LAWS AND TRADE REGULATION, §§ 12.03-12.03[2] (1979).

158. Judge McKay concurred only in the result. Crane v. Intermountain Health Care, Inc., [1980-1] Trade Cas. 77,593, 77,596 (10th Cir. 1980) (McKay, J., concurring).

159. *Id.* When there is an effect on interstate commerce that is substantial and adverse, subject matter jurisdiction under the Sherman Act will attach. Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 234 (1948).

160. 513 F.2d 684 (10th Cir. 1975).

tiff's purchases from interstate commerce had been substantially reduced. The court's conclusion was that the practice of medicine was wholly an intrastate activity.[161]

The Tenth Circuit panel in *Crane* felt that *Wolf* compelled the court to follow precedent until such time as an *en banc* court reconsidered their stance regarding medical services and the Sherman Act's jurisdictional requirement. The court of appeals has decided to reconsider its position in *Crane*,[162] a decision possibly prompted by the Supreme Court's recent opinion in *McLain v. Real Estate Board of New Orleans, Inc.*[163] The *Crane* panel had cited the Fifth Circuit's *McLain* decision, a decision that the Supreme Court subsequently reversed.[164]

In *McLain*, the plaintiffs asserted that various real estate brokers, firms, and trade associations had conspired to fix real estate commissions on the sale of residential property, in violation of section 1 of the Sherman Act. Both the district court and the Fifth Circuit Court of Appeals found the defendants' activities to be local in nature and without a substantial effect on interstate commerce. In reversing the Fifth Circuit, the Supreme Court held that the plaintiffs could show Sherman Act jurisdiction by "demonstrat[ing] a substantial effect on interstate commerce generated by respondents' brokerage activity."[165] The Court concluded that it was unnecessary to show "that the unlawful conduct *itself* had an effect on interstate commerce."[166] The amount of out-of-state funds that flowed into New Orleans to finance residential properties met the interstate commerce test which the Court had enunciated.

The ripples from the *McLain* decision may permit the Sherman Act to extend to almost all business activities. Realistically, the Court's only current limitation on jurisdiction under the Sherman Act is that a defendant whose activities have an insubstantial effect on interstate commerce is beyond the purview of the Act.[167] Considering the Supreme Court's view of the interstate commerce requirement of the Sherman Act, the Tenth Circuit's *en banc* review of *Crane* may possibly lead to a reversal of the panel's decision.

V. CASE DIGESTS

A. *Comet Mechanical Contractors, Inc. v. E. A. Cowen Construction, Inc.*[168]

Section 4 of the Clayton Act[169] is a familiar citation to any party in an

161. The Tenth Circuit court came to the same conclusion in Spears Free Clinic & Hosp. v. Cleere, 197 F.2d 125, 126 (10th Cir. 1952).

162. A rehearing *en banc* was held on September 16, 1980.

163. 444 U.S. 232 (1980).

164. McLain v. Real Estate Bd. of New Orleans, Inc., 583 F.2d 1315 (5th Cir. 1978), *vacated*, 444 U.S. 232 (1980).

165. 444 U.S. at 242.

166. *Id.* (emphasis added).

167. *Id.* at 246.

168. 609 F.2d 404 (10th Cir. 1980).

169. Section 4 of the Clayton Act states:

> 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

antitrust suit, for it contains the ominous treble damages provision of the antitrust laws.[170] Section 4 also contains the standing requirement for all violations of the Sherman and Clayton Acts.[171] The prerequisite of antitrust standing is that the plaintiff must have been injured in his "business or property *by reason of* anything forbidden in the antitrust laws."[172] While this condition precedent appears simple to apply, federal courts have created a body of antitrust standing law[173] that is the antithesis of this succinct standing statute.[174]

The Tenth Circuit has been consistent in its decisions concerning antitrust standing, always equating the "by reason of" language in section 4 with a proximate cause showing of an antitrust injury.[175] The Tenth Circuit's analytical treatment of antitrust standing, however, has not dissipated the confusion present in this area of the law.

In *Comet Mechanical Contractors, Inc. v. E.A. Cowen Construction, Inc.*,[176] the Tenth Circuit court affirmed the district court's grant of summary judgment to the defendants. The plaintiff, a construction subcontractor, alleged that the defendants had conspired to inflate bids for the construction of public buildings in order to force subcontractors and suppliers to pay a "kickback" to the Governor of Oklahoma. The plaintiff alleged that E.A. Cowen Con-

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States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1976).

170. Section 1 of the Clayton Act, 15 U.S.C. § 12 (1976) defines the "antitrust laws" to include the Sherman Act, 15 U.S.C. §§ 1-7 (1976), and the Clayton Act, 15 U.S.C. §§ 12-27 (1976).

171. 15 U.S.C. § 15 (1976). For the text, see note 169 *supra*.

172. *Id.* (emphasis added).

173. Two main problems in antitrust standing have concerned 1) the type of plaintiff who may bring suit, and 2) the interjection into standing analysis of a proximate cause test based on the section 4 Clayton Act language requiring the injury to occur *"by reason of* anything forbidden in the antitrust laws." 15 U.S.C. § 4 (1976) (emphasis added).

As to the first problem, courts have taken two views. Courts have looked to the "target" of the alleged violation to determine whether the plaintiff is within the "area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952). Alternatively, courts have examined the nature of the plaintiff's business or relationship to the defendant. *E.g.*, Pitchford v. PEPI, Inc., 531 F.2d 92 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976) (corporate officer, as an employee of company injured by antitrust violation, lacked standing); Nationwide Auto Appraisers Serv., Inc. v. Association of Cas. & Sur. Cos., 382 F.2d 925 (10th Cir. 1967) (franchisor had no standing to sue for injury to franchise).

The interjection of proximate cause into antitrust standing has led some courts to decide the merits of an antitrust complaint under a standing analysis based exclusively on pretrial information. *E.g.*, Southern Concrete Co. v. United States Steel Corp., 535 F.2d 313 (5th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); Bowen v. New York News, Inc., 522 F.2d 1242 (2d Cir. 1975), *cert. denied*, 425 U.S. 936 (1976). The confusion created by this approach has prompted leading authorities in the area to express concern over the analytical techniques employed. Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 835-40 (1977).

174. *See generally* Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809 (1977); Tyler, *Private Antitrust Litigation: The Problem of Standing*, 49 U. OF COLO. L. REV. 269 (1978); Comment, *Standing to Sue Under Section 4 of the Clayton Act: Direct Injury, Target Area, or Twilight Zone*, 47 MISS. L.J. 502 (1976).

175. *See* Jones v. Ford Motor Co., 599 F.2d 394 (10th Cir. 1979); Farnell v. Albuquerque Publishing Co., 589 F.2d 497 (10th Cir. 1978); Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973); Nationwide Auto Appraisers Serv., Inc. v. Association of Cas. & Sur. Cos., 382 F.2d 925 (10th Cir. 1967).

176. 609 F.2d 404 (10th Cir. 1980).

struction, the successful bidder, had granted Comet Mechanical Contractors, the plaintiff, a subcontract by oral promise, then reneged when Comet refused to contribute to the kickback. The district court stated that the plaintiff lacked standing to sue; the court of appeals agreed.[177]

The Tenth Circuit court conceded that Comet had been injured in its "business or property" as that term is defined in section 4 of the Clayton Act. The plaintiff lacked standing, however, because it could not meet the "by reason of" requirement of section 4, a test that the court had articulated in *Reibert v. Atlantic Richfield Co.*[178] The *Reibert* court created two conjunctive requirements that plaintiffs must satisfy in order to comply with the "by reason of" language of section 4: "1) there [must be] a causal connection between an antitrust violation and an injury sufficient to establish the violation as a substantial factor in the occurrence of the damage; and 2) . . . the illegal act [must be] linked to a plaintiff engaged in activities intended to be protected by the antitrust laws."[179] The court of appeals determined that Comet had failed to meet the second prong of the *Reibert* test. Comet failed this test for two reasons. The plaintiff was not a bidder in the relevant market, which the appellate court defined as the market in general construction contracts. The court further held that even in the subcontract market, the alleged bribe was unrelated to an antitrust violation. No allegation of a conspiracy to restrain competition in securing subcontracts had been made.

The aspect of Comet's complaint which, of its own force, should have been fatal to the plaintiff's cause was the lack of a nexus between the alleged request for money to further a bribe and any substantive violation of the antitrust laws. It appears that the complaint failed to state an antitrust violation. The court's focus on standing only obscures and confuses the merits of the case. The Tenth Circuit is not alone in this approach to standing.[180] Nonetheless, there is a need for all circuits to reevaluate their antitrust standing doctrines—to separate substantive law from standing requirements—so that neither fatally intertwines with the other.

B. *Skyview Distributing, Inc. v. Miller Brewing Co.*[181]

The Tenth Circuit Court of Appeals treated the issue of concerted action under section 1 of the Sherman Act in *Skyview Distributing, Inc. v. Miller Brewing Co.* The appellate court reversed the district court's 12(b)(6) dismissal, finding that the complaint adequately alleged a combination or conspiracy in restraint of trade within section 1 of the Sherman Act. Skyview had been a distributor of Miller's beer, while also carrying other brands. The plaintiff alleged that Miller, under a plan to eliminate beer distributors carrying beer other than Miller's, induced Skyview into another market, created a new distributorship, Star Distributing Company, and eventually supplanted the plaintiff with Star. Skyview asserted that this plan restrained trade, by allowing Miller to fix prices, and extended Miller's market control,

177. *Id.* at 406-07.
178. 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973).
179. 609 F.2d at 406 (quoting 471 F.2d at 731).
180. *See* notes 173-74 *supra*.
181. 620 F.2d 750 (10th Cir. 1980).

by depriving its competitors of local distributors for their beers. The Tenth Circuit noted that the district court dismissed the complaint because the lower court had determined that the plaintiff's injuries occurred before Star Distributing was created. If this were true, Miller Brewing's actions were unilateral, and unilateral anticompetitive behavior does not violate section 1 of the Sherman Act.[182] The court of appeals, however, determined that Star's creation three days before Miller Brewing terminated Skyview's distributorship provided "ample time for a conspiracy in restraint of trade to come into being."[183] The appeals court felt that it was not necessary to explore the nature of the relationship between Miller Brewing and Star Distributing to determine whether they were separate entities who could conspire in violation of section 1; apparently, this was assumed.[184]

The court of appeals read Skyview's complaint as alleging more than the mere substitution of a distributor. Generally, a producer may with impunity replace its distributor with another according to its business needs.[185] Star's takeover was alleged to be in furtherance of an anticompetitive plan, however, and thus was sufficient to withstand a 12(b)(6) motion.[186]

Mark H. Boscoe

182. Under section 1 of the Sherman Act, the unilateral actions of a business, even if harmful to competitors, are not unlawful. "[C]ontract[s], combination[s] or conspirac[ies] in restraint of trade . . ." are prohibited by section 1; none of these activities can be accomplished by one entity. Albrecht v. Herald Co., 390 U.S. 145, 149 (1968). The unilateral substitution of one distributor for another does not violate section 1. *See* Scanlan v. Anheuser-Busch, 388 F.2d 918 (9th Cir.), *cert. denied*, 391 U.S. 916 (1968).

183. 620 F.2d at 752.

184. The Tenth Circuit did not elaborate on the nature of the association between Miller and Star, other than to state that the plaintiff alleged that "Miller Brewing Company caused the Star Distributing Company to be formed for the express purpose of eventually taking over Skyview's distributorship . . . ." 620 F.2d at 752.

Two or more associated corporations will not automatically be considered so closely linked that they could not, as a matter of law, conspire as separate entities. The Supreme Court has declared that "common ownership and control does not liberate [corporations] from the impact of the antitrust laws . . . ." Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951) (parent and wholly-owned subsidiary found to have conspired). Apparently, the Second Circuit has carved out an exception to the Court's views in *Kiefer-Stewart* when affiliated companies do not compete with each other. Beckman v. Walter Kidde & Co., 316 F. Supp. 1321, 1326 (E.D.N.Y. 1970), *aff'd per curiam*, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S. 922 (1972). *But see* Cromar Co. v. Nuclear Materials Equip. Corp., 543 F.2d 501, 511-12 (3d Cir. 1976) (mere presence of two legally distinct corporations is sufficient for a conspiracy). The bounds of an "intra-enterprise" conspiracy that will satisfy the concerted action requirement of section 1 of the Sherman Act has never been distinctly demarcated. *See generally* 16 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION, § 6.01[2] (1979 & Supp. 1980); Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 MICH. L. REV. 717 (1977).

Based on the dearth of evidence available on the Miller Brewing-Star Distributing relationship, a decision that, as a matter of law, Miller and Star could not have conspired would have been precipitous. Miller and Star are not competitors; if the lower court, on remand, were to accept the Second Circuit's view of conspiracy, summary judgment for the defendants might be appropriate. *See* 16 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION, § 6.01[2]e (1979).

185. Craig v. Sun Oil Co., 515 F.2d 221, 223 (10th Cir. 1975), *cert. denied*, 429 U.S. 829 (1976); Feddersen Motors, Inc. v. Ward, 180 F.2d 519, 522 (10th Cir. 1950). *See generally* Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

186. *See* Natrona Serv., Inc. v. Continental Oil Co., 435 F. Supp. 99, 110 (D. Wyo. 1977), *aff'd*, 598 F.2d 1294 (10th Cir. 1979).