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Antitrust

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ANTITRUST

OVERVIEW

During the period of this survey, the United States Court of Appeals for the Tenth Circuit reviewed four antitrust cases, each private actions under the Sherman Act.[1] None of the decisions present major developments or changes in antitrust law. Two cases, *Income Realty & Mortgage, Inc. v. Denver Board of Realtors*[2] and *Webb v. Utah Tour Brokers Association*,[3] have been selected for discussion to illustrate difficulties establishing subject-matter jurisdiction over intrastate conduct and damages for lost profits. A third case, *Lamp Liquors, Inc. v. Adolph Coors Co.*,[4] is of some interest as the latest in a recent series of attacks on Coors' territorial marketing restrictions.[5] In this appeal, the Tenth Circuit considered but rejected Coors' defenses that the twenty-first amendment and Wyoming liquor laws preempted application of the antitrust laws, and that the doctrine of *in pari delicto* barred Lamp Liquors from pursuing its claim.[6]

The discussion following omits extended review of the Tenth Circuit's fourth antitrust case during this period, *T'ai Corp. v. Kalso Systemet, Inc.*[7] In *T'ai*, the plaintiff's Sherman Act claims[8] were predicated on elements of an alleged oral contract granting plaintiff an exclusive franchise to sell "Earth Shoes"[9] in Colorado. Judge McWilliams, for the Tenth Circuit, agreed with the trial court that the evidence was insufficient to establish exist-

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[1] 15 U.S.C. §§ 1-7 (1976).

[2] 578 F.2d 1326 (10th Cir. 1978).

[3] 568 F.2d 670 (10th Cir. 1977).

[4] 563 F.2d 425 (10th Cir. 1977).

[5] Predating *Lamp* in the series are Adolph Coors Co. v. A & S Wholesalers, Inc., 561 F.2d 807 (10th Cir. 1977) and Adolph Coors Co. v. F.T.C., 497 F.2d 1178 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

[6] *See* Lamp Liquors, Inc. v. Adolph Coors Co., 563 F.2d 425, 430-31 (10th Cir. 1977).

[7] 568 F.2d 145 (10th Cir. 1977).

[8] T'ai Corp., a shoe retailer in Boulder, Colorado, asserted that Kalso, a vertically integrated shoe manufacturer, had violated section 1 of the Sherman Act in two respects: first, by imposition of a restriction on T'ai's solicitation of mailorder sales outside Colorado; and second, by refusal to supply T'ai with sufficient stock for a new retail outlet in Denver. *Id.* at 148.

[9] "Earth Shoes" are a patented shoe design characterized by a "negative heel," that is, a heel approximately one and one-half inches lower than the ball of the foot. *Id.* at 146.

ence of the contract.[10] As a result, T'ai's antitrust claims had no foundation.[11]

I. ANTITRUST JURISDICTION: *Income Realty & Mortgage, Inc. v. Denver Board of Realtors*[12]

Establishing a link between an alleged trade restraint and interstate commerce is a jurisdictional prerequisite for invoking protection of the Sherman Act.[13] In most Sherman Act cases, the interstate commerce connection has not been at issue.[14] Where the issue has arisen, two modes of analysis have been identified for determining whether a course of conduct falls within the jurisdictional reach of the Act.[15] The first, the "in commerce" test, encompasses activities *in* the stream or flow of interstate commerce—for example, shipment of goods across state lines.[16] The second, the "affecting commerce" test, encompasses conduct having a *substantial effect on* interstate commerce.[17] Through

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[10] *Id.* at 147.

[11] *Id.* at 148.

[12] 578 F.2d 1326 (10th Cir. 1978).

[13] Section one of the Sherman Act, 15 U.S.C. § 1 (1976), prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . ." Section 2, 15 U.S.C. § 2 (1976), prohibits conspiracies and attempts to monopolize "any part of the trade or commerce among the several States . . . ." *See* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 229-34 (1947) (tracing the historical evolution of the interstate commerce requirement of the Sherman Act). One source of confusion is that the interstate commerce requirement has both jurisdictional and substantive aspects. A motion to dismiss for failure to establish a sufficient connection with interstate commerce may be based on either FED. R. CIV. P. 12(b)(1) (lack of subject-matter jurisdiction) or FED. R. CIV. P. 12(b)(6) (failure to state a claim on which relief can be granted). The U.S. Supreme Court has recently stated that the analysis in either case is identical. Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 742 n.1 (1976).

[14] Note, *Portrait of the Sherman Act as a Commerce Clause Statute*, 49 N.Y.U. L. REV. 323, 327 (1974).

[15] *See id.* at 327-28; Eiger, *The Commerce Element in Federal Antitrust Litigation*, 25 FED. B.J. 282, 286-87 (1965); L. SULLIVAN, ANTITRUST 709-10 (1977). *See also* Burke v. Ford, 389 U.S. 320, 321 (1967).

[16] Note, *supra* note 14, at 328. *See* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 194-95 (1974). The "in commerce" test is the only test used for jurisdictional analysis of alleged violations of the Clayton and Robinson-Patman Acts, because these statutes contain express "in commerce" language. *Id. See* 15 U.S.C. §§ 13a, 14, 18 (1976). The jurisdictional reach of the Clayton and Robinson-Patman Acts is thus more limited than that of section one of the Sherman Act. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. at 195.

[17] Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 743 (1976); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195 (1974); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 234 (1948). A classic explanation of the

application of the "affecting commerce" test, local business activities may become subject to Sherman Act regulation.[18]

In *Income Realty & Mortgage, Inc. v. Denver Board of Realtors*,[19] the Tenth Circuit was presented with an opportunity to evaluate the interstate impact of the real estate brokerage business in Colorado. Income Realty, a Denver broker, commenced an action against a local real estate trade association and other Denver-area brokers for violations of sections 1 and 2 of the Sherman Act.[20] Income Realty's complaint, however, was seriously deficient. The allegations in the complaint regarding the defendants' connection with interstate commerce were confined to a statement that the parties were "engaged in interstate brokerage of real estate."[21] After reciting a number of Supreme Court cases illustrating the "affecting commerce" test,[22] Judge Pickett, for the majority, noted that Income Realty had alleged no facts

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"affecting commerce" test appears in United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460 (1949) (Jackson, J.):

> Restraints, to be effective, do not have to be applied all along the line of movement of interstate commerce. The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. *If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.*

Id. at 464 (emphasis added).

[18] The U.S. Supreme Court applied section 1 to local hospital services in Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738 (1976), and to a county bar association's activities in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). The Court has emphasized that the "affecting commerce" test is qualitative, not quantitative. *See* United States v. Yellow Cab Co., 332 U.S. 218, 225 (1946). There is no requirement that the quantity of interstate commerce be reduced; in fact, anticompetitive activity may operate to stimulate interstate trade. *See, e.g.*, Burke v. Ford, 389 U.S. 320, 322 n.2 (1967). As long as a local trade restraint has some appreciable impact on interstate commerce, the restraint is within the ambit of the Sherman Act. *See* United States v. Yellow Cab Co., 332 U.S. 218, 225 (1946); L. SULLIVAN, *supra* note 15, at 710-11.

[19] 578 F.2d 1326 (10th Cir. 1978).

[20] The substance of Income Realty's complaint was that the Denver Board of Realtors had engaged in a conspiracy to destroy Income Realty's business by a series of unfair trade practices. Among other things, Income Realty alleged that defendants had published defamatory statements concerning it, threatened to discontinue dealings with it, and solicited filing of grievances concerning it with the Colorado Real Estate Commission. *Id.* at 1327.

[21] *Id.* at 1328.

[22] *E.g.*, Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738 (1976); United States v. Yellow Cab Co., 332 U.S. 218 (1947), *cited in* Income Realty & Mortgage, Inc. v. Denver Bd. of Realtors, 578 F.2d 1326, 1328 (10th Cir. 1978).

indicating the brokers' conduct affected interstate commerce.[23] Relying on *Bryan v. Stillwater Board of Realtors*,[24] a recent Tenth Circuit case similarly concerned with the interstate effects of local real estate transactions, Judge Pickett affirmed the trial court's dismissal of Income Realty's complaint without leave to amend.[25]

Judge Logan filed a separate opinion, concurring in part and dissenting in part. Criticizing the majority's reliance on *Bryan v. Stillwater Board of Realtors*,[26] he quoted with approval language from an Eighth Circuit decision[27] indicating that real estate brokerage services may have a sufficient connection with interstate commerce, depending upon the evidence presented. Judge Logan was of the opinion that "realtors and real estate board activities in large metropolitan areas such as Denver, do sufficiently affect interstate commerce that they cannot be classified as immune from all antitrust claims."[28]

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[23] 578 F.2d at 1328.

[24] 578 F.2d at 1319 (10th Cir. 1977). *Bryan* was a private antitrust suit brought by a real estate broker against his local real estate board after expulsion from board membership. Unlike Income Realty, Bryan had made some attempt to establish subject-matter jurisdiction. Specifically, Bryan alleged:

> First, a substantial number of persons using the services of Board members in conjunction with real estate transactions are persons moving into the City of Stillwater from outside the State of Oklahoma, and persons moving from the City of Stillwater to places outside the State of Oklahoma. Secondly . . Board members have caused substantial amounts of . . . financing, insurance, commodities and services to move into the City of Stillwater from outside the State of Oklahoma from business operating in interstate commerce . . . . Lastly, Board members have access to national referral and marketing systems, whereby cooperating broker members split commission fees in return for early information about a prospective seller or buyer.

Id. at 1322-23. Judge Barrett, for the Tenth Circuit, affirmed the trial court's dismissal of Bryan's complaint on both substantive and jurisdictional grounds. With respect to the jurisdictional deficiency, Judge Barrett stated: "[t]he conduct complained of is entirely of a local character . ... nothing contained in Bryan's complaint does other than indicate that the acts complained of *affect a business* engaged in interstate commerce . . . the complained of conduct does not *affect* the *interstate commerce* of such a business." *Id.* at 1326 (emphasis added). *Cf.* Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 741 (1976) (plaintiff's complaint alleged that plaintiff's interstate commerce involvements had been adversely affected).

[25] Income Realty & Mortgage, Inc. v. Denver Bd. of Realtors, 578 F.2d 1326, 1329 (10th Cir. 1977).

[26] 578 F.2d at 1319 (10th Cir. 1977).

[27] Diversified Brokerage Services, Inc. v. Greater Des Moines Bd. of Realtors, 521 F.2d 1343, 1347 (8th Cir. 1975).

[28] Income Realty & Mortgage, Inc. v. Denver Bd. of Realtors, 578 F.2d 1326, 1330 (10th Cir. 1978).

Judge Logan also focused on a distinction that has been drawn between the burden of proof of interstate-commerce effect in cases where a *per se* violation of the Sherman Act is alleged and in cases requiring a rule-of-reason analysis.[29] Resolution of the jurisdictional issue of whether local activity substantially affects interstate commerce may involve detailed consideration of the nature of the local business and its interrelationship with interstate markets.[30] This type of inquiry is quite appropriate where the substantive aspects of plaintiff's claim must be evaluated under the rule of reason. Where a plaintiff has alleged a *per se* violation of the Sherman Act,[31] however, it has been suggested that the standard for pleading and proof of the interstate commerce nexus should be less rigorous.[32] Judge Logan adopted this viewpoint, expressing his opinion that Income Realty's complaint would have been adequate jurisdictionally if the complaint had presented a substantive claim of *per se* unlawful conduct.[33] Since the anticompetitive impact of defendants' conduct would have to be measured by the rule of reason, however, Income Realty was remiss in failing to make a *prima facie* showing of subject-matter jurisdiction.[34] Judge Logan would have granted Income Realty the opportunity to amend its complaint.[35]

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[29] The difference between use of *per se* rules and the "rule of reason" in Sherman Act analysis was succinctly restated by the U.S. Supreme Court this year in National Society of Professional Engineers v. United States, 98 S. Ct. 1355, 1363 (1978):

> There are . . . two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are "illegal per se;" in the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.

See also Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49-50 (1977).

[30] L. SULLIVAN, *supra* note 15, at 712; P. AREEDA, ANTITRUST ANALYSIS 122 (1977).

[31] Examples of *per se* violations include price-fixing, group boycotts, and horizontal territorial allocations.

[32] L. SULLIVAN, *supra* note 15, at 712; P. AREEDA, *supra* note 29. *See also* United States v. Finis P. Ernest, Inc., 509 F.2d 1256 (7th Cir. 1975). One of the rationales for use of *per se* rules in Sherman Act analysis is to obviate the need for extensive consideration of economic effects.

[33] Income Realty & Mortgage, Inc. v. Denver Bd. of Realtors, 578 F.2d 1326, 1331 (10th Cir. 1978).

[34] *Id.*

[35] *Id.* For an example of a complaint successful in establishing Sherman Act jurisdiction over the activities of local real estate brokers, see Gateway Assoc., Inc. v. Essex-Costello, Inc., TRADE REG. REP. (CCH) ¶ 75,231 (N.D. Ill. Aug. 28, 1974).

II. DAMAGES FOR LOST PROFITS: *Webb v. Utah Tour Brokers Association*[36]

An important component of antitrust enforcement policy is preservation of the efficacy of private civil actions as a deterrent to business conduct in violation of the antitrust laws.[37] One way this goal has been served is by relaxation of the burden of proof of the *amount* of damages for injury to plaintiff's business interests.[38] The trier of fact is permitted to approximate the extent of the injury by making "a just and reasonable estimate of the damage based on relevant data," and to "act upon probable and inferential, as well as direct and positive proof."[39]

In keeping with this relaxed standard of proof, the Supreme Court has not attempted to impose any single formula for arriving at a reasonable estimate of damages for lost profits.[40] To date, three methods for proving lost profits in private antitrust cases have been sanctioned by federal courts. First, the "before and after" theory compares plaintiff's earnings record before and after defendant's violation.[41] Second, the "yardstick" theory ex-

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[36] 568 F.2d 670 (10th Cir. 1977).

[37] Zenith Radio v. Hazeltine Research, Inc., 401 U.S. 321, 339 (1971). *See also* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968); Semke v. Enid Automobile Dealers Ass'n, 456 F.2d 1361, 1369 n.9 (10th Cir. 1972).

[38] L. SULLIVAN, *supra* note 15, at 785. It is important to distinguish plaintiff's burden with respect to the *amount* of damages from plaintiff's burden with respect to the *fact* of damage. Proof of the fact of damage is required in order to establish standing to sue under section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), which grants the right to bring a private treble damage action to "[a]ny person . . . injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." *See generally* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 262-63 (1975); L. SULLIVAN, *supra* note 15, at 785. The two standards of proof were differentiated in Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931):

> [T]here is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.

282 U.S. at 562.

[39] Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946), (citing Story Parchment Co. v. Paterson Parchment Paper Co. 282 U.S. 555, 561-64 (1931)). *See also* Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 376-379 (1926).

[40] Locklin v. Day-Glo Color Corp., 429 F.2d 873, 879-80 (7th Cir. 1970). *See* Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 266 (1946).

[41] Lehrman v. Gulf Oil Corp., 500 F.2d 659, 667 (5th Cir. 1974). *See, e.g.*, Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 266 (1946). *See generally* Hoyt, Dahl & Gibson,

amines the profit record of businesses that are closely comparable to plaintiff's operation.[42] Last, the newer "market share" theory contrasts plaintiff's and defendant's market shares, and translates plaintiff's lost market share into a dollar volume of lost sales, which is, in turn, multiplied by plaintiff's historical profit record.[43] Whatever method is used, the essential task of a private antitrust plaintiff is to advance a rational theory for measurement of his injury and to introduce a sufficient amount of data to support a reasonable estimate of the loss.[44]

In *Webb v. Utah Tour Brokers Association,*[45] plaintiffs' failure to introduce a sufficient amount of evidence to support their lost profits claim reduced their damage award by approximately $65,000 on appeal to the Tenth Circuit.[46] Defendants in *Webb* were a group of bus tour brokers licensed by the ICC who had formed a trade association, the Utah Tour Brokers Association. Plaintiffs were unlicensed, independent operators who had conducted several tours as agents for some of the defendants. Contending that defendants had conspired to prevent plaintiffs' entry into the tour brokerage business and to eliminate plaintiffs as competitors, the plaintiffs instituted an action under sections 1 and 2 of the Sherman Act.[47] There was ample evidence offered at trial to support a finding that defendants had engaged in a concerted effort to boycott the plaintiffs,[48] and the district court (Rit-

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Comprehensive Models for Assessing Lost Profits to Antitrust Plaintiffs, 60 MINN. L. REV. 1233 (1976); Note, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business*, 80 HARV. L. REV. 1566 (1967). The obvious difficulty with this approach is that is precludes recovery by new businessmen. *See* text and accompanying note 58, *infra*.

[43] Under the "yardstick" theory, the business used as a standard of comparison must be as nearly identical to the plaintiff's as possible. Lehrman v. Gulf Oil Corp., 500 F.2d 659, 667 (5th Cir. 1974). The Tenth Circuit has employed the "yardstick" theory in determining lost profits. *See, e.g.*, Loew's, Inc. v. Cinema Amusements, Inc., 210 F.2d 86, 92 (10th Cir. 1954).

[44] Hoyt, Dahl & Gibson, *supra* note 41, at 1239-43. *See, e.g.*, Rangen, Inc. v. Sterling Nelson & Sons, Inc., 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966).

[45] L. SULLIVAN, *supra* note 15, at 786.

[46] 568 F.2d 670 (10th Cir. 1977).

[47] *See* text accompanying notes 49 and 50, *infra*.

[48] In particular, the plaintiffs alleged that the defendants had refused to deal with them as agents unless they maintained a joint bank account with defendants, had refused to allow plaintiffs' names to appear in advertising for tours conducted by the plaintiffs, and had filed protests with the ICC to prevent plaintiffs from becoming licensed. 568 F.2d at 672.

[48] On appeal, Judge Doyle, for the Tenth Circuit, agreed with the trial court that

ter, C.J.) entered judgment in plaintiffs' favor. The trial court's damage award included $10,165 actual damages[49] and $21,726 for lost future profits. The total was trebled in accordance with section four of the Clayton Act.[50]

On appeal, Judge Doyle, for the Tenth Circuit, vacated that portion of the judgment representing plaintiffs' lost profits award, on grounds that plaintiffs had not presented sufficient evidence on which to base a lost profits claim.[51] The evidence offered consisted solely of plaintiffs' testimony that they had planned to conduct eight additional tours the year of the boycott, but that they had abandoned their plans after losing money on scheduled tours they were forced to refer to Greyhound as a result of defendants' boycott.[52] Plaintiffs calculated that their profits on the eight tours cancelled would be approximately 25% of the tour price. Judge Doyle, however, focused on plaintiffs' admission that they had little previous experience as tour operators. Acknowledging the principle that reasonable estimates are permitted in calculation of antitrust damage awards, Judge Doyle nevertheless insisted that some "credible and substantial" foundation for a lost-profits award be laid.[53] He found critical plaintiffs' failure "to show that from prior experience they would have made a profit

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defendants' conduct constituted a group boycott. Defendants' activities were therefore *per se* unlawful, under United States v. General Motors, Corp. 384 U.S. 127 (1966), Silver v. New York Stock Exchange, 373 U.S. 341 (1963) and Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). *See* Webb v. Utah Tour Brokers Ass'n, 568 F.2d at 674-76. There was documentary evidence that defendants had organized their trade association with express intent to exclude plaintiffs from the tour brokerage business, to discourage other brokers from using plaintiffs as their agents, and to encourage protest of the plaintiffs' license application before the ICC. 568 F.2d at 672-73. Judge Doyle held that defendants' activities in connection with the plaintiffs' ICC license application were protected by the *Noerr-Pennington* doctrine. *See* Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965); Fischel, *Antitrust Liability for Attempts to Influence Govt. Action: The Basis and Limits of the* Noerr-Pennington *Doctrine*, 45 U. CHI. L. REV. 80 (1977). However, there was enough evidence independent of the defendants' ICC involvements to support the finding that defendants had made concerted efforts to prevent plaintiffs' entry into the tour brokerage business. 568 F.2d at 674.

[49] As a result of defendants' refusal to allow plaintiffs to act as their agents, plaintiffs were forced to refer previously scheduled tours to Greyhound. These alternative arrangements were more costly. 568 F.2d at 676-77.

[50] 15 U.S.C. § 15 (1976).

[51] 568 F.2d at 678.

[52] *Id.* at 677.

[53] *Id.* at 678.

. . . had the defendants allowed them to [act as defendants'] agents."[54] Judge Doyle stressed the importance of expert testimony in presentation and analysis of economic information,[55] with the implication that plaintiffs' failure to secure the assistance of an economist at trial was a strategic error.

In view of Judge Doyle's emphasis on plaintiff's lack of an established prior earnings record, *Webb v. Utah Tour Brokers Association* could be read to support the proposition that the only theory recognized in the Tenth Circuit for measurement of damages for lost profits is the "before and after" theory.[56] Judge Doyle stated, "future profits cannot rest on possibilities. It must be more tangible and prior experience is about the only foundation on which this kind of evidence can rest."[57] The difficulty with this emphasis is that it restricts lost-profits recovery to the class of plaintiffs in business for a sufficient length of time to develop the necessary quantum of prior experience, and precludes recovery by new business entrants.[58] There is additional language in Judge Doyle's opinion, however, indicating that the *Webb* case should not be given such a limited reading and that the Tenth Circuit is receptive to alternative theories for ascertaining lost future profits. Judge Doyle was careful to emphasize that "courts are

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[54] *Id.* at 677.

[55] *Id.* at 678.

[56] *See* text and accompanying note 41, *supra.*

[57] 568 F.2d at 677.

[58] On the other hand, proof of damages for lost future profits in cases involving new businesses is always speculative to some degree. Under any theory of measurement, the problem is to identify the point at which policies favoring antitrust recovery are superseded by evidentiary standards demanding a credible basis for the award.

> The treble damage suit would be inadequate to the policy requirements of antitrust law if it did not give some relief to the new entrant whose attempt to enter an industry is repelled by the defendant's illegal practices. But a serious problem arises in defining an attempted entry substantial enough to justify the conclusion that profits would have been made. Mere intention and capability to go into a given line of business are not enough—the problems of proof of intent and speculativeness of the measure of damages are unsurmountable there. Thus, while potential entrants are a vital concern of antitrust policy, judicial practicalities deny the vindication of their interests in treble damage suits. To succeed, a plaintiff that never emerged as a viable business must prove an attempt to enter and the existence of a reasonable chance of success if no illegal conduct had interfered; relevant factors are his experience in the line of business, the undertaking of affirmative action to engage in it, the ability to finance it, and the purchase of necessary facilities.

Note, note 41 *supra*, at 1576.

not strict about the *kind* of foundations or theories which are employed so long as it is credible and substantial . . . ."[59] Moreover, in reaching his conclusion that plaintiffs offered insufficient evidence to justify their claim for lost profits, Judge Doyle relied on cases where "yardstick" and "market share" approaches were employed to arrive at lost profits estimates.[60]

III. PRESUMPTIVE EFFECT OF STATE LIQUOR REGULATION; *In Pari Delicto* DOCTRINE: *Lamp Liquors v. Adolph Coors Co.*[61]

Lamp Liquors v. Adolph Coors Co. is the third antitrust case involving the Adolph Coors Co. to reach the Tenth Circuit in the last four years.[62] In all three actions, the root of the controversy has been the legality of certain restrictions imposed by the brewery on marketing and distribution of its beer. For years, Coors has limited geographical distribution of its product to eleven western states, and has required distributors and retailers to observe certain standards in handling and storage, in the interests of quality control and product "integrity."[63]

In 1966, the U. S. Supreme Court, in *United States v. Arnold Schwinn & Co.*,[64] ruled that all vertical territorial and customer restraints imposed by manufacturers after title, dominion and risk of loss had passed to distributors were illegal *per se* under the Sherman Act. In light of the *Schwinn* rule, Coors' restrictive marketing scheme appeared to be headed for extinction.[65] In 1977, however, in its landmark decision, *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[66] the Supreme Court overruled *Schwinn*, announc-

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[59] Webb v. Utah Tour Brokers Ass'n, 568 F.2d at 678.

[60] *E.g.*, Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946) (yardstick); Rangen, Inc. v. Sterling Nelson & Sons, Inc., 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966) (market share).

[61] 563 F.2d 425 (10th Cir. 1977), *rev'g and remanding* 410 F. Supp. 536 (D. Wyo. 1976).

[62] The others are Adolph Coors Co. v. A & S Wholesalers, Inc., 561 F.2d 807 (10th Cir. 1977), and Adolph Coors Co. v. FTC, 497 F.2d 1178 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

[63] Adolph Coors Co. v. A & S Wholesalers, Inc., 561 F.2d 807, 810-11 (10th Cir. 1977).

[64] 388 U.S. 365, 379 (1967), *overruled in* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). For an excellent historical review of the law on vertical restraints up to the U.S. Supreme Court's decision in *GTE Sylvania*, see ABA SECTION ON ANTITRUST LAW, VERTICAL RESTRICTIONS LIMITING INTERBRAND COMPETITION (1977).

[65] *See* Adolph Coors Co. v. FTC, 497 F.2d 1178, 1186-87 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (territorial assignments illegal *per se* under *Schwinn* rule). In the *FTC* case, the Tenth Circuit noted that Coors had a legitimate interest in quality control, and urged the Supreme Court to reconsider the *Schwinn* rule. 497 F.2d at 1187.

[66] 433 U.S. 36 (1977). In *GTE Sylvania*, the Court expressly acknowledged the Tenth

ing that *all* vertical restraints would henceforth be judged under the rule of reason.[67] Coors' marketing policies have fared markedly better in litigation since *GTE Sylvania*.[68]

Plaintiff in *Lamp Liquors v. Adolph Coors Co.*[69] was a retailer licensed under Wyoming liquor laws, who had commenced selling large quantities of Coors beer to wholesalers in Pennsylvania and Washington, D.C., outside the limits of Coors' established geographical marketing area.[70] When Coors' Wyoming distributor, Cheyenne Beverage, Inc., learned of this piratical scheme, it reported Lamp to the Wyoming Liquor Commission and ceased supplying Lamp with Coors beer. Lamp promptly sued Coors and Cheyenne Beverage under sections one, two, and three of the Sherman Act,[71] complaining that defendants' refusal to deal was the product of an unlawful conspiracy. Lamps' complaint focused on Coors' vertical customer and territorial restrictions.[72] Coors filed a motion to dismiss.

The district court decision on Coors' motion was rendered before *GTE Sylvania*. The trial judge noted that, if the conspiracy were proven, application of the *Schwinn* rule would require a judgment that Coors' vertical restraints were unlawful *per se*.[73] The judge seemed to recognize, however, that the equities were in Coors' favor. He noted that the Tenth Circuit had criticized the rigidity of the *Schwinn* rule, and that Coors had persuasive justifications for its marketing policies to assure quality of its perishable product.[74] The judge was therefore receptive to Coors' arguments on motion: first, that enforcement of the Sherman Act

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Circuit's suggestion that greater flexibility was needed in the law of vertical restraints. *Id.* at 48 n.14.

[67] *See* note 29, *supra*. Under a rule-of-reason analysis, courts may consider factors such as Coors' desires to assure speedy, refrigerated delivery of its product in assessing the lawfulness of a vertical territorial restraint.

[68] *See* Adolph Coors Co. v. A & S Wholesalers, Inc., 561 F.2d 807, 813-14 (10th Cir. 1977) (remanding issue of Coors' territorial restraints for evidentiary hearing in light of *GTE Sylvania*). *See also* Denver Post, June 9, 1978, at 29, Sec. C, col. 3. (On remand from the Tenth Circuit's decision in *Lamp Liquors*, the jury returned a unanimous verdict in Coors' favor. The jury had been instructed that they could find Coors' restrictions on east coast distribution reasonable and permissible under the antitrust laws.)

[69] 563 F.2d 425 (10th Cir. 1977), *rev'g and remanding* 410 F. Supp. 536 (D. Wyo. 1976).

[70] 410 F. Supp. at 538.

[71] 15 U.S.C. §§ 1-3 (1976).

[72] *See* Lamp Liquors, Inc. v. Adolph Coors Co., 410 F. Supp. at 538.

[73] 410 F. Supp. at 539.

[74] *See id.*

would conflict with Wyoming state liquor laws enacted under the twenty-first amendment;[75] and, second, that plaintiff lacked standing under section 4 of the Clayton Act[76] since his business activities violated Wyoming law.[77] Accordingly, the district court granted Coors' motion to dismiss.[78] Lamp appealed to the Tenth Circuit.

In the interim, the U.S. Supreme Court decided *Continental T.V., Inc. v. GTE Sylvania, Inc.*[79] As a result, the merits of Lamp's case—the legality of Coors' vertical territorial restrictions—could be evaluated at trial under the rule of reason, with appropriate weight given to Coors' business justifications.[80] The Tenth Circuit was therefore not constrained to adopt the trial court's rulings on preemption and standing in order to circumvent the *Schwinn* rule. Instead, the Tenth Circuit was free to examine the analytical correctness of the trial court's view without regard to the underlying equities of Coors' position on the merits.

Judge Doyle, for the majority, first examined the twenty-first amendment, finding that its main purpose was to empower dry states to prohibit *importation* of liquor for use within their borders.[81] Relying on *United States v. Frankfort Distilleries,*[82] Judge Doyle focused on the distinction between importation and exportation drawn in the *Frankfort* case.[83] Contrary to the view of the

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[75] U.S. CONST. amend. XXI, § 2. This section provides: The transportation of importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

[76] 15 U.S.C. § 15 (1976). *See* note 38, *supra.*

[77] *See* WYO. STAT. §§ 12-1-101, 12-1-102, 12-1-121 (1977). Since Lamp held a retail license only, it was prohibited from making sales to wholesalers. Lamp Liquors, Inc. v. Adolph Coors Co., 410 F. Supp. at 540.

[78] 410 F. Supp. at 541.

[79] 433 U.S. 36 (1977).

[80] *See* Lamp Liquors, Inc. v. Adolph Coors Co., 563 F. 2d 425, 431-32 (10th Cir. 1977).

[81] *Id.* at 429.

[82] 324 U.S. 293 (1945). *Frankfort* is one of only two U.S. Supreme Court cases to have considered the interrelationship between the states' regulatory authority under the twenty-first amendment and the antitrust laws. *Frankfort* held that the twenty-first amendment did not give "the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries." *Id.* at 299. *See also* Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 45-46 (1966) (twenty-first amendment does not prevent enforcement of antitrust laws against conspiracy to fix liquor prices).

[83] Chief Judge Markey, dissenting in *Lamp Liquors,* disagreed with Judge Doyle on this point. He would have affirmed the trial court's dismissal on the basis of twenty-first

trial court, he found that the states' regulatory authority over liquor importation under the twenty-first amendment did not preempt federal authority to regulate out-of-state commerce in liquor under the Sherman Act. Judge Doyle also examined the Wyoming licensing statutes enacted pursuant to the twenty-first amendment, concluding that the state had not undertaken to regulate liquor traffic in a way that would conflict with application of the antitrust laws.[84]

Judge Doyle went on to comment that, even if a conflict had been found, Coors did not have standing to assert the state's immunity as a defense. He noted that there were no signs that "Wyoming has expressed an intention to allow Coors . . . to assume its official function."[85] Judge Doyle's opinion did not depart into an extended consideration of the "state action" exemption to the antitrust laws,[86] but his view is fully consistent with two recent Supreme Court decisions concerning the proper scope of this exemption, *Cantor v. Detroit Edison Co.*[87] and *Goldfarb v. Virginia State Bar.*[88] Together, *Cantor* and *Goldfarb* require that, in order for a private party to assert state sovereign immunity as a defense to anticompetitive conduct, that conduct must have been required or directed by the state acting in its sovereign capacity. If a state directive is found, antitrust immunity will be implied only to the minimum extent necessary for operation of the state's regulatory scheme.[89]

In the second part of his opinion, Judge Doyle considered the trial court's ruling that Lamp did not have standing to maintain its claim. The trial court had reasoned that, since Lamp's resale business was in violation of Wyoming liquor licensing statutes, Lamp did not have a business interest protectible by the antitrust

amendment supremacy, in light of the fact that Lamp's customers, rather than Lamp itself, were exporting. 563 F.2d at 432-33.

[84] *Id.* at 430.

[85] *Id.*

[86] The "state action" exemption, granting antitrust immunity for anticompetitive restraints sanctioned by a state acting in its sovereign capacity, stems from the U. S. Supreme Court decision in Parker v. Brown, 317 U.S. 341 (1943). For a review of the historical development of the state action doctrine, see City of Lafayette, La. v. Louisiana Power & Light Co., 98 S. Ct. 1123 (1978).

[87] 428 U.S. 579 (1976).

[88] 421 U.S. 773 (1975).

[89] Cantor v. Detroit Edison Co., 428 U.S. at 596-97; Goldfarb v. Virginia State Bar, 421 U.S. at 790-91.

laws.[90] Judge Doyle characterized the trial court's rule as an application of the doctrine of *in pari delicto.*[91]

The doctrine of *in pari delicto,* which translates, "of equal fault," is a common law defense applicable where a plaintiff seeking legal or equitable relief is also involved in the wrongdoing that forms the basis of his claim.[92] In *Perma Life Mufflers, Inc. v. International Parts Corp.,*[93] recognizing that private antitrust suits serve the important public purpose of deterring potential antitrust violations, the U.S. Supreme Court held that the doctrine of *in pari delicto* would not be recognized as a defense to antitrust cases.[94] Relying on *Perma Life,* as well as two subsequent Tenth Circuit decisions,[95] Judge Doyle noted that the doctrine had been rejected as an antitrust defense in the Tenth Circuit. He also observed that Lamp's alleged violation of the Wyoming state liquor laws was not at all related to Coors' territorial restrictions that constituted the basis of Lamp's suit, and reiterated the common law requirement for application of the defense that plaintiff must have participated in the wrong of which defendant complained.[96] Judge Doyle reversed and remanded the case with instructions that the trial court consider the effect of *GTE Sylvania* at trial on the merits.[97]

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[90] Lamp Liquors v. Adolph Coors Co., 410 F. Supp. at 541.

[91] 563 F.2d at 431.

[92] Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138-39 (1968).

[93] *Id.*

[94] *Id.* For two recent comments on the proper role of the *in pari delicto* doctrine in antitrust litigation, see Hover, *The Viability of the* In Pari Delicto *Defense in Private Antitrust Actions,* 31 RUTGERS L. REV. 126 (1977), and Katz, *A Reexamination of* In Pari Delicto *under the Antitrust Laws,* 19 B.C. L. REV. 207 (1977).

[95] Adolph Coors Co. v. A & S Wholesalers, 561 F.2d 807 (10th Cir. 1977); Semke v. Enid Automobile Dealers Assoc., 456 F.2d 1361 (10th Cir. 1972).

[96] Lamp Liquors v. Adolph Coors Co., 563 F.2d at 431.

[97] *Id.* at 432. Coors' marketing policies were vindicated on remand. *See* note 68, *supra.*