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Antitrust

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The Tenth Circuit decided several interesting antitrust cases this term involving questions of territorial restrictions, tying arrangements,[1] proof of market power and relevant market, proof of resultant damages, and the Automobile Dealer Franchise Act.[2]

In *World of Sleep, Inc. v. Stearns & Foster Co.*,[3] the Tenth Circuit applied the rule "that an essential element for [private] recovery under the antitrust laws is that the claimant be injured or damaged, and a violation of the Act without resultant injury is not enough."[4] Stearns began selling bed products to Denver-based World of Sleep in 1965 under an informal business relationship, with neither party committed to a formal agreement. Stearns had a policy, with some exceptions, of selling to only one dealer in a given locality. In 1968 World of Sleep expanded and opened a sister store in Atlanta, Georgia. Stearns refused to sell merchandise to the Atlanta World of Sleep store, citing its loyalty to a local department store. The World of Sleep store in Denver began transshipping Stearns' products to its Atlanta store, and, upon learning of this, Stearns terminated all sales to World of Sleep. World of Sleep instituted a civil antitrust action alleging that Stearns violated the Sherman Act[5] by imposing territorial restrictions on the resale of Stearns' products. World of Sleep requested a directed verdict on the issue of liability and asked that the jury determine only the amount of damages. The trial court refused this motion; the jury returned a verdict for Stearns finding no antitrust violation.

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* In Continental T.V. v. GTE Sylvania, 97 S. Ct. 2549, 2562 (1977), the United States Supreme Court overruled the per se rule of United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). The impact of this decision should be considered on the analyses of *World of Sleep v. Stearns & Foster Co.* and *Randy's Studebaker Sales v. Nissan Motor Corp. infra*—Ed.

[1] Redd v. Shell Oil Co., 524 F.2d 1054 (10th Cir. 1975), *cert. denied*, 425 U.S. 912 (1976). The case involved a novel, but unsuccessful, attempt to classify the Shell trademark and Shell gasoline as separate products in an illegal tying arrangement. For a more extended analysis of this decision, see the Patents, Trademarks, and Copyrights Overview *infra*.

[2] 15 U.S.C. §§ 1221-1225 (1970) [hereinafter cited in text and footnotes as the Franchise Act].

[3] 525 F.2d 40 (10th Cir. 1975).

[4] *Id.* at 43.

[5] 15 U.S.C. §§ 1-7 (1970) [hereinafter cited as the Sherman Act].

World of Sleep argued on appeal that *United States v. Arnold, Schwinn & Co.*[6] should have been controlling on the issue of whether there had been a per se violation of the Sherman Act. Discussing the holding in *Schwinn,* the Tenth Circuit stated:

> In *Schwinn,* it was held that where a manufacturer, such as Stearns in the instant case, sells his product to a distributor, such as World of Sleep, and in connection with such sale, "firmly and resolutely" subjects the distributor to territorial restrictions upon resale, whether by "explicit agreement or silent combination or understanding with his vendee," a *per se* violation of the Sherman Act results.[7]

The Tenth Circuit held that Stearns' discontinuance of sales because of World of Sleep's transshipping did *not* necessarily establish that Stearns had previously imposed territorial restrictions on the resale of its products; therefore, the issue of liability had properly gone to the jury.[8]

The theory of damages proposed by World of Sleep was firmly rejected by the Tenth Circuit. World of Sleep argued that when Stearns terminated sales it became necessary to increase the advertising of its other lines of bedding. The court found that no direct relationship could be established between Stearns' alleged territorial restrictions and the increased advertising expenses, especially since World of Sleep's sales and net worth had also increased yearly. The court noted that the proximate damage problem alone could have justified the trial court's decision to deny the motion for a directed verdict.[9]

In *E.J. Delaney Corp. v. Bonne Bell, Inc.,*[10] E.J. Delaney

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[6] 388 U.S. 365 (1967). In *Schwinn,* a bicycle manufacturer assigned territories to each of its 22 distributors and instructed the distributors to sell only to franchised accounts in their own territories.

[7] 525 F.2d at 44 (quoting United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967)).

[8] The trial court had instructed the jury on what constituted a per se violation of the Sherman Act in accordance with the *Schwinn* holding. 525 F.2d at 44. Given the admitted policy of Stearns to sell to only one dealer in a locality, the warnings given to World of Sleep concerning transshipping, and the ultimate discontinuance of all sales to World of Sleep, query what would constitute a per se violation sufficient to warrant a directed verdict.

[9] 525 F.2d at 43. Timberlake, *The Legal Injury Requirements and Proof of Damages in Treble Damage Actions Under the Antitrust Laws,* 30 GEO. WASH. L. REV. 231 (1961). The court's damages analysis is more convincing than its attempt to distinguish *Schwinn* from the present case.

[10] 525 F.2d 296 (10th Cir. 1975), *cert. denied,* 425 U.S. 907 (1976).

Corporation, an advertising-promotional firm, alleged that Bonne Bell, a manufacturer of cosmetics exclusively endorsed by the United States Ski Team,[11] had violated sections 1 and 2 of the Sherman Act[12] by conspiring to prevent the distribution of "skier's paks" containing cosmetics.[13] At trial, the jury awarded damages to Bonne Bell.[14] The Tenth Circuit found on appeal that the evidence was sufficient to support a finding that section 1 had been violated, but held that a prima facie showing of a section 2 violation had not been made. Because the jury had returned a general verdict, the case was reversed and remanded for a new trial.[15]

The Tenth Circuit reviewed the facts supporting the allegation of a section 1 violation: Bonne Bell had initiated a "total involvement" program in the ski cosmetic market; by 1970, Bonne Bell believed it had a "hold" on that market; Bonne Bell was opposed to all competition within that market; and although the USSA was initially enthusiastic about Delaney's proposal, after Bonne Bell's objections were raised the USSA refused the proposal.[16] The court held that, although Bonne Bell's exclusive

[11] Bonne Bell entered into a contract with the United States Ski Association [USSA] in which the United States Ski Team [Ski Team] exclusively endorsed Bonne Bell's cosmetic products, with Bonne Bell designated the official cosmetic of the Ski Team.

[12] 15 U.S.C. § 1 (1970) provides in part: "Every contract, combination in the form of trust or otherwise, or *conspiracy*, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." *Id.* (emphasis added).

15 U.S.C. § 2 (1970) provides in part: "Every person who shall monopolize, or *attempt to monopolize*, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ." *Id.* (emphasis added).

[13] E.J. Delaney Corporation [Delaney] was organized to bring advertising from national advertisers to the market in ski resort areas. Delaney began distributing its advertisers' products in a "skier's pak" which included cosmetics and toiletries; a set fee was paid to Delaney by each supplier for every "pak" sold. In 1970, the USSA was contacted by Delaney, and initial approval, subject to final approval by the USSA auditors, was given to a plan which provided that each "pak" sell for one dollar and that 40% of the total receipts be given to the Ski Team.

[14] The trial court trebled the damages and awarded attorneys' fees as authorized under 15 U.S.C. § 15 (1970).

[15] 525 F.2d at 301. *See* Paramount Film Distrib. Corp. v. Village Theater, Inc., 228 F.2d 721 (10th Cir. 1955).

[16] 525 F.2d at 301. Bonne Bell's objections were premised on the concept that the distribution of the "paks" and the advertisement of the Ski Team's receipt of net proceeds would be suggestive of USSA's endorsement and not in accord with the exclusive endorsement contract.

endorsement contract with USSA was not illegal per se,[17] the jury could reasonably have concluded from the evidence that Bonne Bell utilized the endorsement contract in an illegal conspiracy in restraint of trade violative of section 1.

The trial court had proceeded on the theory that the jury could find a section 2 violation based upon a finding of "a dangerous probability of monopolization . . . even absent specific proof of Bonne Bell's market power."[18] The Tenth Circuit disagreed, stating:

> [I]n the absence of any showing by the plaintiff as to where the area of competition existed, or what clout the defendant corporation had therein, it was error for the trial judge to submit the §2 issue to the jury. No facts were before it upon which to base a verdict, and no facts from which inferences could properly be drawn.[19]

The Tenth Circuit began its analysis of the section 2 claim by reviewing the cases setting forth the established liberal rule for accepting minimal proof of damage in an antitrust case, quoting the United States Supreme Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*:[20] "[The] burden of proving the fact of damage . . . is satisfied by proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage."[21]

Despite this language in *Zenith* and an admission by the court that Delaney had "incurred some sales and distribution losses,"[22] the Tenth Circuit was able to distinguish the present issue from that discussed in *Zenith*:

> The critical problem here does not involve a question of proof of damage made at trial or how the damages may be proved. Rather, it is a basic matter of proof of a cause of action, or, more particularly, proof of a prima facie case to go to the jury.[23]

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[17] *Id.*

[18] *Id.* at 300. Attempting to monopolize is a violation of section 2. The "attempt" clause has produced interpretation problems for the lower federal courts not found in section 2's monopolization and conspiracy prohibitions. For an excellent discussion of the exact problem presented in this case, see Note, *Attempt to Monopolize Under the Sherman Act: Defendant's Market Power as a Requisite to a Prima Facie Case*, 73 COLUM. L. REV. 1451 (1973) [hereinafter cited as 73 COLUM. L. REV. 1451].

[19] 525 F.2d at 306.

[20] 395 U.S. 100 (1969) (emphasis in original).

[21] *Id.* at 114 n.9.

[22] 525 F.2d at 307.

[23] *Id.* at 306.

In so formulating the issue, the Tenth Circuit required two elements of proof to establish a prima facie case for attempted monopolization violative of section 2: (1) proof of specific intent to monopolize; and (2) proof of market power or market position (with a definition of the relevant market).[24] The Supreme Court has long required proof of specific intent to monopolize,[25] but has not yet expressly recognized the necessity of proving a defendant's market power.[26] The Tenth Circuit joined a growing number of lower federal courts which now require proof of market power in a section 2 claim for attempted monopolization.[27]

The Tenth Circuit commented on the lack of evidence concerning Bonne Bell's market power:

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[24] *Id.* at 305-06.

[25] *E.g.*, Swift & Co. v. United States, 196 U.S. 375 (1905).

[26] For a discussion of the need for clarification by the Supreme Court, see 73 COLUM. L. REV. 1451. The author suggests:

> Given the premise that attempt to monopolize should include a broad category of single-firm coercive activity, the focus should be on *economic* rather than market power. Any and all forms of economic power are relevant here, for the concept of attempt does not necessarily require a degree of market power in the field where monopolization is sought. . . . Relevant considerations might include: a deep pocket, either defendant's or a parent corporation's; control over demand, distribution or supply; a dominant position in a separate market; reciprocal arrangements with a sibling in a conglomerate family; or patents, copyrights or exclusive contract rights. All are capable of giving a defendant firm sufficient leverage to implement a predatory scheme, and all are analytically independent of market power in the area of competition in which injury is inflicted.

Id. at 1474 (footnotes omitted).

The Tenth Circuit noted that Delaney had established that:

> Bonne Bell had the *economic power* to become the official cosmetic of the U.S. Ski Team; that it had the *economic power* to pay the USSA over $180,000.00 in minimum retainers . . . [and] that it believed that it had the *economic power* to develop a "hold" on the skiers' cosmetic market in the United States . . . .

525 F.2d at 306-07 (emphasis added). However these facts were found insufficient to establish defendant's requisite *market* power.

[27] The court cited cases from the First, Fourth, Fifth, Seventh, and Eighth Circuits as supporting the view that proof of market power is necessary to establish a prima facie claim for attempt to monopolize. 525 F.2d at 305. The Third Circuit, in Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338 (3d Cir. 1975), has also adopted this requirement. The Ninth Circuit appears to be split in its view as to whether market power is important in attempt cases. *Compare* Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) (relevant market held irrelevant) *with* Cornwell Quality Tools Co. v. C.T.S. Co., 446 F.2d 825 (9th Cir. 1971) ("sufficient market power to come dangerously close" to monopolization was an element of proof in an attempt claim).

> The record, as to this element, shows only that there were at the time some five million skiers in the country who were affluent and youthful; that the market was sought after, and that there were unique marketing problems. This was all that was shown as to the market as such. There was no evidence offered as to the corporate defendant's sales volume in the "skier's cosmetic market" nor the sales volume therein of anyone else. *There was no evidence as to the total sales in the market.* There was no evidence as to the corporate defendant's power as to pricing or as to any other party's power.[28]

This lack of evidence was a fatal defect in the establishment of a prima facie case against Bonne Bell for attempted monopolization.[29]

Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.[30] involved allegations by an automobile dealer in Salt Lake City [Randy's] against the distribution of Datsun vehicles [Nissan] for violation of sections 1 and 2 of the Sherman Act[31] and for violations of the Automobile Dealer Franchise Act.[32] Randy's alleged that Nissan refused to renew the franchise because Randy's would not follow Nissan's resale price maintenance policies. Randy's also argued that Nissan deliberately attempted to drive Randy's out of business by supplying an insufficient number of Datsun vehicles. The jury returned a verdict in favor of Randy's under the Franchise Act, but found in favor of Nissan on the Sherman Act claims.

In upholding the jury verdict, the Tenth Circuit noted that "[t]he Franchise Act gives to an automobile dealer a federal cause of action against an automobile manufacturer who fails to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, cancelling, or not renewing the franchise."[33] The Franchise Act defines "good faith" as the duty of the dealer and manufacturer "to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion

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[28] 525 F.2d at 306 (emphasis in original).

[29] The trial judge's instruction on relevant market was held to be a correct statement of the law. However, since there was no evidence on relevant market, the issue should not have been submitted to the jury. *Id.* at 308.

[30] 533 F.2d 510 (10th Cir. 1976).

[31] 15 U.S.C. §§ 1, 2 (1970).

[32] The act is also popularly known as the Automobile Dealers' Day in Court Act.

[33] 533 F.2d at 514 (citing 15 U.S.C. § 1222 (1970)).

or intimidation from the other party."[34] The Franchise Act also provides "[t]hat recommendation, endorsement, exposition, persuasion, urging or argument shall not be" considered lack of good faith.[35] Noting that the line between normal recommendation and coercion may indeed be thin, the Tenth Circuit examined the cases interpreting good faith under the Franchise Act and found that Nissan's actions constituted bad faith. The court cited a Second Circuit case[36] and held that coercion and subsequent termination for failure to adhere to a manufacturer's suggested resale price constituted bad faith. The court cited *Junikki Imports, Inc. v. Toyota Motors*[37] for the proposition that bad faith also exists when a manufacturer supplies an insufficient number of cars in an attempt to drive a dealer out of business. With the aid of these holdings the Tenth Circuit found "Nissan used the nonrenewal weapon to coerce the dealer into a program of retail price fixing."[38] Sufficient evidence was present to show that Nissan curtailed the supply of automobiles in order to bring about price maintenance and suppression of competition. Additionally, Nissan tried to force Randy's to make major capital improvements, which could be deemed an effort to force Randy's to raise its prices to meet expenses.[39] The court held that projection of lost profits over a ten-year period for loss of the franchise was not too speculative for jury determination.[40]

Nissan objected to the use of questionnaires submitted into evidence by Randy's to show how the customers felt about the quality of Randy's service. The court noted the recent tendency to admit surveys of this kind if properly conducted[41] and held that the surveys "were properly admitted to reflect the then existing state of mind of the customers as to the quality of Randy's service generally."[42]

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[34] 533 F.2d at 514 (quoting 15 U.S.C. § 1221(e) (1970)).

[35] 15 U.S.C. § 1221(e) (1970).

[36] Autowest, Inc. v. Peugeot, 434 F.2d 556 (2d Cir. 1970).

[37] 335 F. Supp. 593 (N.D. Ill. 1971).

[38] 533 F.2d at 516.

[39] *Id.*

[40] *Id.* at 518-19. *See* Note, *The Elusive Measure of Damages for Wrongful Termination of Automobile Dealership Franchises*, 74 YALE L.J. 354 (1964).

[41] 533 F.2d at 520.

[42] *Id.*

In *Cackling Acres, Inc. v. Olson Farms, Inc.*,[43] the Tenth Circuit upheld a jury verdict against Olson Farms, an egg distributor. The plaintiffs, fourteen egg producers some of whom were also distributors, charged Olson Farms with conspiring with other distributors to fix and depress the prices paid to producers. Plaintiffs also alleged that Olson Farms conspired with others to fix the wholesale price for eggs. The jury was presented with a special verdict form which set forth the three causes of action under the Sherman Act: (1)a restraint of trade violation of section 1; (2) a conspiracy to monopolize in violation of section 2; and (3) an attempt to monopolize in violation of section 2.[44]

On appeal, Olson Farms first argued that there was insufficient evidence to warrant submission of the case to the jury, suggesting that the only possible evidence showing price fixing was the existence of price parallelism between the prices paid by Olson Farms to egg producers and the prices paid by its named coconspirators. The court agreed that price parallelism alone would not establish a conspiracy to fix prices.[45] However, price parallelism becomes significant when it is accompanied by evidence of behavior to fix prices.[46] There was sufficient evidence of a course of conduct to fix prices to submit the issue to the jury.

Olson Farms also argued that there was insufficient evidence to establish the relevant geographical market. The court noted there was a difference of opinion as to what constituted the relevant geographic market[47] and held that in this case it was best for the trial judge to submit the issue to the jury.[48] The Tenth

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[43] 541 F.2d 242 (10th Cir. 1976).

[44] The jury found defendant violated all three claims. Damages were awarded to four of the plaintiffs under claim (1). The remaining ten plaintiffs were awarded damages under claim (2). No damages were awarded under claim (3). The plaintiffs also originally alleged violations of the Robinson-Patman Price Discrimination Act, 15 U.S.C. §§ 13-13c, 12a (1970) and the antitrust laws of Utah. However, these claims were withdrawn prior to trial.

[45] 541 F.2d at 245.

[46] *Id.* The court pointed to numerous telephone calls and meetings between Olson Farms and the coconspirators, and to intracompany correspondence which permitted the inference that Olson Farms was acting in concert with others to depress the prices paid to the egg producers.

[47] *Id.* Olson Farms urged inclusion of Southern California in the market because from time to time it served as a source of eggs when there was a shortage in Utah. Plaintiffs argued that Utah and the southern part of Idaho constituted the geographic market.

[48] It is interesting to note the ease with which the court was able to handle the problem of relevant geographic market given the problems encountered in *Delaney*. How-

Circuit also rejected Olson Farms' contention that there was no damage to the egg producers.[49] The voluminous record from the two month trial was such as to allow the jury to find and infer that plaintiffs suffered legal injury.[50]

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ever, the court seemed to imply that, during the two month jury trial in *Olson Farms*, much evidence had been introduced by the parties concerning the relevant geographic market, in stark contrast to what the court characterized as a total lack thereof in *Delaney*.

[49] The court held:

> [P]roof of economic damage to their "business or property" is a necessary precondition to their recovery of treble damages under the Clayton Act. . . . We think there was sufficient evidence of the *fact* that the plaintiffs did sustain some damage since there was ample statistical data and expert testimony describing depressed producer prices and the necessary concomitant—lost profits. As to the *quantum* of damage, the plaintiffs were under no burden to establish it with mathematical precision so long as the extent of such damage was not left to jury speculation.

541 F.2d at 246 (citations omitted) (emphasis in original).

[50] The opinion also resolves an apparent inconsistency in the verdicts returned by the jury on the special verdict forms. *Id.* at 246-47.