Denver Law Review

Volume 53
Issue 1 *Tenth Circuit Surveys*

Article 11

January 1976

Antitrust

Charles P. Leder

Antitrust

ANTITRUST

In *American Oil Co. v. McMullin*[1] the Tenth Circuit considered whether a consignment contract was violative of the Sherman Act[2] and concluded that the particular contract was not. Early in 1967, American Oil Co. (American) entered into a contractual relationship with Lawrence McMullin whereby McMullin was to operate a bulk distribution plant, a service station, and a cafe owned by American.[3] He was designated in the contract as an "employee-agent of American" in the operation of the distribution plant and "was treated as an independent dealer" with regard to the service station and cafe, for which he paid a monthly rental.[4] The parties continued in this relationship for over 2 years, but McMullin was beset with financial difficulties from the outset which ultimately left him unable to meet his tax obligations and deeply in debt to American.[5]

American terminated the relationship and brought suit against McMullin to recover from him the money he owed the company.[6] McMullin counterclaimed and alleged monopolization

---

[1] 508 F.2d 1345 (10th Cir. 1975).

[2] 15 U.S.C. §§ 1-7 (1970) [hereinafter cited as the Sherman Act].

[3] 508 F.2d at 1347. McMullin was required to make an initial investment of $10,000, and he assumed operation of the facilities after receiving training from American. McMullin entered into a standard lease agreement with American by virtue of which he became "the lessee of all of the Elko facilities, including the truck stop, the cafe, the bulk distribution point, and all buildings, tanks, pumps, and other fixtures." *Id.* The rental for this was a charge on all gasoline sold and a percentage of the gross receipts from the restaurant operation. Under the bulk sales arrangement, "McMullin was compensated by a commission on all bulk plant sales" and "American retained ownership and risk of loss as to all products at the plant." *Id.* American retained the right to establish bulk plant prices and limited the geographical area in which the products could be sold. McMullin, however, was given the right to hire additional employees at his own expense and to extend credit to other customers at his own risk.

The remaining contracts dealt with the service station, which was the only American brand station in the area. While McMullin was "treated as an independent dealer with the latitude to set his own retail prices," the physical arrangement was such that access to the service station's fuel tanks was attainable only through the bulk distribution point. *Id.* McMullin participated in a variety of programs with American and the initial financing was provided by the oil company.

[4] *Id.*

[5] The financial difficulties were caused by McMullin's limited marketing position, uncontrolled costs, and his being "badly undercapitalized." *Id.* at 1348.

[6] The various claims on which American recovered $121,407.38 included a tax lien it paid for McMullin, money owed by McMullin for sales from the bulk plant to his own facilities, credit sales, and expenses connected with an attachment proceeding. *Id.* at 1349-50.

by American in violation of the Sherman Act. The basis for his claim was that the relationship between him and American was a consignment contract similar to that condemned by the Supreme Court as violative of the Act[7] in *Simpson v. Union Oil Co.*[8] In dismissing McMullin's counterclaim, the Tenth Circuit looked at the substance rather than the form of the relationship between the parties to conclude that "McMullin was an employee of American and not an independent businessman."[9] Thus, the arrangement was not impermissible under *Simpson*, because in that case independent businessmen were involved while in *McMullin* the only person involved was an employee of the defendant. The court was unable to find anything "in *Simpson* which would prohibit a manufacturer from distributing its own products and thereby controlling wholesale distribution prices."[10]

In *Beltronics, Inc. v. Eberline Instrument Corp.*[11] Beltronics had a 5-year renewable contract under which it was the exclusive agent for the sale of capacitators made by Eberline Instrument Corporation (Eberline). These capacitators were sold exclusively to Western Electric Company (Western), and in 1969 Western declined to have any further dealings with Eberline if it had to do so through Beltronics. Consequently, Eberline did not renew its contract with Beltronics and made other arrangements for the sale of its capacitators. Beltronics then brought suit against

---

[7] The plaintiff alleged that sections 1 and 2 of the Sherman Act were violated by the consignment contracts American had McMullin enter into. These sections, in part, provide that

> [e]very 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 . . . .
>
> . . . .
>
> 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 . . . .

15 U.S.C. §§ 1, 2 (1970).

[8] 377 U.S. 13 (1964).

[9] In looking at substance rather than form, the Tenth Circuit followed settled law in determining whether "the scheme . . . involved although on its face a bona fide lease and consignment agreement is actually and in effect 'a resale price maintenance' or 'some coercive arrangement.'" 2 R. CALLMANN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES § 11.03 (3d ed. 1967) [hereinafter cited as CALLMANN], *quoting* Simpson v. Union Oil Co., 377 U.S. 13, 17 (1964).

[10] 508 F.2d at 1352.

[11] 509 F.2d 1316 (10th Cir. 1974), *cert. denied*, 421 U.S. 1000 (1975).

Western and Eberline, and alleged, among other things, a violation of the Sherman Act.[12]

Beltronics alleged that the restrictions placed upon Eberline's contract with Western violated section 1 of the Sherman Act within the meaning of *United States v. Arnold, Schwinn & Co.*[13] *Schwinn,* which involved restrictions on the sale of bicycles by distributors after the manufacturer had parted with dominion, was held by the Tenth Circuit to be inapplicable because there was no restriction on competition involved in *Beltronics.* The court said, "Eberline purchased cable from Western, used the cable in making capacitators, and sold the capacitators to Western. In effect Western bought the cable back, albeit in a different form. *Schwinn* has no application."[14] Because all that was involved was "elimination of a non-competing middleman" that could not "be stretched into a claim of a § 1 . . . violation,"[15] the Tenth Circuit also rejected Beltronics' claim that it was the victim of a group boycott.

In *Board of County Commissioners v. Wilshire Oil Co.*[16] the Tenth Circuit considered the validity of venue in an antitrust action[17] brought in the Western District of Oklahoma against a

---

[12] Beltronics sued for breach of contract, tortious interference with contractual relations, and the antitrust violations discussed in the text accompanying notes 18-20 *infra.* The district court, in an opinion reported at 369 F. Supp. 295 (D. Colo. 1973), held for the defendant on all counts, and the Tenth Circuit affirmed both the findings of fact and the conclusions of law reached by the lower court.

[13] 388 U.S. 365 (1967). In *Schwinn* the manufacturer of bicycles assigned specific territories to each of its 22 distributors who were instructed to sell only to franchised accounts in their own territories. The Court noted that the case involved "vertical restrictions as to territory and dealers." *Id.* at 372. In *Beltronics* there was no such vertical relationship and the two cases are distinguishable on that basis. *See* 16H J. VON KALINOWSKI, BUSINESS ORGANIZATIONS: ANTITRUST LAW AND TRADE REGULATIONS § 67.02[1] (1972) [hereinafter cited as VON KALINOWSKI] where the author says that "vertical price maintenance includes arrangements between the various persons in the chain of distribution . . . ."

[14] 509 F.2d at 1320.

[15] *Id.*

[16] 523 F.2d 125 (10th Cir. 1975).

[17] The sole question involved was whether venue was proper in the Western District of Oklahoma "in view of the fact that the appellee . . . is a Kansas corporation having its home office in . . . Kansas." *Id.* at 126-27. The trial court initially held that the evidence was insufficient to support a conclusion that venue was proper. It then held that while the appellee had transacted business in the Northern District, "this was insufficient to constitute venue in the *Western* District of Oklahoma where the suit had been filed." *Id.* at 127.

Kansas corporation which "made assiduous efforts to avoid any appearance of doing business in Oklahoma."[18] The trial court granted the defendant's motion to dismiss the action on the grounds that while the contacts may have been sufficient to justify venue in the Northern District of Oklahoma, they were insufficient to constitute transaction of business in the Western District of Oklahoma within the meaning of section 22 of the Clayton Act.[19] In reaching this conclusion, the district court held that the general venue statutes[20] were inapplicable and did not supplement the venue requirements of section 22.

In reversing the trial court, the Tenth Circuit first affirmed the lower court's determination that the defendant's contacts with the Northern District of Oklahoma were sufficient to constitute transaction of business within the meaning of section 22.[21] The court of appeals then applied settled law[22] in holding that "the provisions of the general venue statute supplement all other special venue statutes."[23] If section 1392(a) were applicable to this fact situation, then venue would be proper in the Western

---

[18] *Id.*

[19] Venue in antitrust actions is controlled by 15 U.S.C. § 22 (1970) [hereinafter cited as section 22], which provides as follows:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found *or transacts business;* and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

(Emphasis added).

[20] The pertinent section in *Wilshire Oil* is 28 U.S.C. § 1392(a) (1970) [hereinafter cited as section 1392(a)], which provides as follows: "Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts."

[21] 523 F.2d at 129. In reaching this decision the Tenth Circuit relied on United States v. Scophony Corp., 333 U.S. 795 (1948), which the appellate court said "holds that in determining whether a corporation is transacting business within a district, practical business conceptions are to be considered rather than hair-splitting legal technicalities." 523 F.2d at 128. Therefore, the fact that asphalt produced in Kansas was being regularly sold and used in Kansas meant that the corporation was transacting business in Oklahoma even though the transactions were technically completed in Kansas. *See also* B.J. Semel Associates v. United Fireworks Mfg. Co., 355 F.2d 827 (D.C. Cir. 1965); McCrory Corp. v. Cloth World, Inc., 378 F. Supp. 322 (S.D.N.Y. 1974); Fashion Two Twenty, Inc. v. Steinberg, 339 F. Supp. 836 (E.D.N.Y. 1971); Illinois v. Harper & Row Publishers, Inc., 308 F. Supp. 1207 (N.D. Ill. 1969); Crusader Marine Corp. v. Chrysler Corp., 281 F. Supp. 802 (E.D. Mich. 1968); United States v. Burlington Indus., Inc., 247 F. Supp. 185 (S.D.N.Y. 1965).

[22] *See* 523 F.2d at 129-30 nn.4-7.

[23] *Id.* at 130.

District of Oklahoma because that section provides that venue is proper in "one district if one defendant resides in that district and another defendant resides in the same state but in another judicial district."[24] The question to be determined, then, was whether any of the defendants resided in either the Northern *or* Western District of Oklahoma within the meaning of section 1392(a).

To determine this question, the appellate court looked at the purpose of section 1392(a), which "is to prevent two law suits in different districts within the same state where one suit would suffice,"[25] and the purpose of the Clayton Act, which is to "liberalize rather than restrict venue in antitrust actions as far as corporations are concerned."[26] In accomplishing these dual purposes, the Tenth Circuit held, in effect, that transacting business within the meaning of section 22 is the functional equivalent of residing in a district within the meaning of section 1392(a).[27] Because one of the defendants transacted business in the Western District and two of the defendants transacted business in the Northern District, they resided in both of those districts for the purposes of section 1392(a). Venue was, therefore, proper in the Western District. By so deciding, the Tenth Circuit has expanded the meaning of the term "residing" in section 1392(a) by holding that the

---

[24] *Id.*

[25] *Id.*, *citing* C. WRIGHT, LAW OF FEDERAL COURTS at 154 (1970). *See also* Hawks v. Maryland & Pa. R.R., 90 F. Supp. 284 (E.D. Pa. 1950).

[26] 523 F.2d at 130, *citing* United States v. National City Lines, Inc., 334 U.S. 573 (1948); United States v. Scophony Corp., 333 U.S. 795 (1948); Eastman Kodak Co. v. Southern Photo Material Co., 273 U.S. 359 (1927).

[27] The court did not deal with the question of whether "reside" was limited to the three meanings of 28 U.S.C. § 1391(c) (1970) and, therefore, did not include "transact business" within the meaning of section 22. Instead of resolving this issue, the court simply acknowledged that some courts do recognize a difference between the two terms and held as follows:

> We are aware that some courts hold that there is a difference—that fewer contacts are required in order to transact business than are required in order to do business.
>
> On the other hand, numerous decisions hold that the two terms are the same. It is unnecessary, however, for this question to be determined within the context of the present problem. *It is sufficient to hold, which we do, that § 1392 . . . supplements 15 U.S.C. § 22.* We need not therefore agonize over whether transacting business and doing business are identical.

523 F.2d at 131 (emphasis added) (footnotes omitted). *Compare* Friends of Animals, Inc. v. American Veterinary Ass'n, 310 F. Supp. 620 (S.D.N.Y. 1970), (Ohio-Midland Light & Power Co. v. Ohio Brass Co., 221 F. Supp. 405 (S.D. Ohio 1962), *with* Fashion Two Twenty, Inc. v. Steinberg, 339 F. Supp. 836 (E.D.N.Y. 1971), City of Philadelphia v. Morton Salt Co., 289 F. Supp. 723 (E.D. Pa. 1968), *and* cases cited in note 38 *supra*.

term encompasses transacting business in a district as defined in section 22.[28] The court has achieved a liberal interpretation of both venue sections by allowing section 1392(a) to supplement section 22 and by making section 22 amplify the meaning of section 1392(a).

In *Telex Corp. v. IBM Corp.*[29] the Tenth Circuit reversed a $259.5 million judgment[30] awarded to Telex by a federal district court.[31] Telex based its claim on an alleged violation by IBM of sections 1 and 2 of the Sherman Act[32] and section 2 of the Clayton Act.[33] Specifically, Telex charged IBM "with monopolization in the manufacture, distribution, sale, and leasing of plug compatible products which are attached to IBM central processing units."[34] The district court first held that there was "a definable market for all peripheral devices plug compatible with IBM processing units" and "individual submarkets for each particular type of peripheral product."[35] Because IBM was at first the only manufacturer of peripheral products, it naturally had 100 percent of the market; however, as other manufacturers entered the market, IBM's share of this market eroded. In attempting to prevent further erosion of its market share, IBM engaged in several acts[36]

---

[28] The court also considered the question of whether the fact that the appellee had ceased doing business as of the filing of the complaint should remove venue from the Western District of Oklahoma. 523 F.2d at 131. The court held that it did not because "[t]he vast weight of authority supports the rule that the crucial time is when the cause of action arose." It cited authority from the Fourth, Eighth, and Ninth Circuits, as well as "an indication from the Tenth Circuit that the time when the action arises is determinative. *Id.* (footnote omitted).

[29] 510 F.2d 894 (10th Cir. 1975). For a more extended analysis of this decision, see Norgaard, *Relevant Market in Computer Monopolization*, 53 DENVER L.J. ____ (1976).

[30] The particular elements of damage as found by the district court were as follows:

1. $70 million attributable to loss of market share which the court held Telex would have retained had it not been for the illegal acts of IBM.
2. $39 million in loss of rental profits.
3. $8.5 million in loss of sales profits.

Id. at 908. These amounts were adjusted and then trebled. The district court awarded IBM its counterclaim against Telex for misappropriation by Telex of IBM's trade secrets. This counterclaim was reduced by the court of appeals to $17.5 million and was affirmed. *Id.* at 933; *see id.* at 910-12, 928-33. *See also* Patents, Trademarks, Copyrights, and Unfair Competition section of the *Tenth Circuit Survey*.

[31] For a discussion of the procedural aspects of this case, see 510 F.2d at 898.

[32] 15 U.S.C. §§ 1, 2 (1970).

[33] *Id.* § 13.

[34] 510 F.2d at 898.

[35] *Id.* at 899.

[36] The specific acts found by the district court to be in violation of the antitrust laws were as follows:

which the district court concluded were contrary to section 2 of the Sherman Act in that, by so acting, IBM exercised monopoly power.

On appeal, IBM first challenged the district court's definition of what the relevant market included.[37] The trial court limited this market "to peripheral products plug compatible with IBM central processing units"[38] while IBM sought a determination that the relevant product market should include peripheral devices that are plug compatible with equipment marketed by other systems manufacturers.[39] The basis for the contention by IBM was that

> the "plug compatible" peripheral equipment marketed for use in one system is the same as that marketed for use in another system, except for a necessary charge in the "interface." IBM [claimed] that the cost of modifying an interface so that it can be used with another system amounts to less than 1% of the product's purchase price.[40]

The court of appeals relied on *United States v. E. I. du Pont de Nemours & Co.*[41] for the proposition "that if one product may substitute for another in the market it is 'reasonably interchangeable.' "[42] In *Telex,* the Tenth Circuit was of the opinion that the peripheral products of the other manufacturers were reasonably interchangeable with those manufactured by IBM.[43] Thus, the

---

1. Announcement and institution of the 2319A disk storage facility in September 1970.

2. The announcement of the 2319B disk storage facility in December 1970.

3. The announcement of the Fixed Term Plan long term leasing program in May 1971.

4. The announcement and implementation of the Extended Term Plan, which was also a leasing plan, in March 1972.

5. IBM's pricing policies with regard to its memory products during 1970 and 1971.

Id. at 900. For a more extended discussion of these acts, see Norgaard, *supra* note 29, and 510 F.2d at 900-09.

[37] *Id.* at 912-14.

[38] *Id.* at 914.

[39] *See id.*

[40] *Id.* at 912 n.11.

[41] 351 U.S. 377 (1956).

[42] 510 F.2d at 917.

[43] The court cited United States v. Grinnell Corp., 384 U.S. 563, 571 (1966), and said *Grinnell Corp.* "recognizes that substitute products are to be included within the definition of relevant market . . . ." 510 F.2d at 919.

district court erred in not including them in its definition of a reasonable market and there could "be no ruling of monopolization."[44]

Charles P. Leder

[44] *Id.* The court of appeals also rejected the district court's finding that IBM exercised illegal monopoly power. The court of appeals noted from the facts presented in *Telex* that "IBM did not *use* monopoly power even if it [were to be] assumed that it had such power." *Id.* at 926.