ANTITRUST

*by Jerry L. Beane**

During the survey period,[1] the Fifth Circuit Court of Appeals rendered five opinions involving the federal antitrust laws. Four decisions concerned substantive antitrust matters.[2] One decision involved the procedural issue of taxable costs.[3] Defendants posted a hall of fame batting average. In the four substantive decisions, the circuit affirmed three dismissals of antitrust claims. The other decision reversed the district court's dismissal. Exemptions and immunities to the antitrust laws dominated the decisions.

I. SHERMAN ACT: COMMERCE REQUIREMENT

"A Little Dab Will Do Ya'"[4]

The Sherman Act prohibits restraints or monopolies of "commerce among the several States, or with foreign nations."[5] The Commerce Clause is the constitutional basis for the antitrust laws. The Sherman Act is coextensive with the power of Congress under that clause.[6] In *Cowan v. Corley*,[7] the Fifth Circuit considered the nature of interstate commerce necessary to invoke jurisdiction. Cowan operated a wrecker service in Montgomery County, north of Houston.[8] Two major "federal"[9] highways run through the county.[10] They

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1. June 1, 1986 through May 31, 1987.

2. Woolen v. Surtran Taxi Cabs, Inc., 801 F.2d 159 (5th Cir. Sept. 1987), *cert. denied*, ___ U.S. ___, 107 S. Ct. 1567, 94 L. Ed. 2d 759 (1987); Kaplan v. Clear Lake Water Auth., 794 F.2d 1059 (5th Cir. July 1987); Cowan v. Corley, 814 F.2d 233 (5th Cir. April 1987); North Mississippi Communications v. Jones, 792 F.2d 1330 (5th Cir. June 1986).

3. J.T. Gibbons v. Crawford Fitting Co., 790 F.2d 1193 (5th Cir. June 1986), *aff'd*, ___ U.S. ___, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987).

4. With apologies to the folks at Brylcream.

5. 15 U.S.C. §§ 1-2 (1982).

6. *See* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 201 (1974); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 558-62 (1944).

7. 814 F.2d 223 (5th Cir. April 1987), *cert. denied*, ___ U.S. ___, 107 S. Ct. 1567, 94 L. Ed. 2d 759 (1987).

8. *Id.* at 224.

9. Presumably meaning financed substantially by federal funds.

10. 814 F.2d at 224.

are the main north-south traffic arteries in the eastern part of Texas.[11] Sheriff Corley initiated the formation of the Montgomery County Wrecker Association.[12] The sheriff, after formation of the Association, issued Emergency Wrecker Requirements, including a requirement that only members of the Association would be permitted to tow vehicles from public property.[13]

Cowan was limited to three wreckers in a small area of Montgomery County.[14] He complained that wrecker assignments, made through the sheriff's office and the Association's dispatcher, were not being evenly distributed.[15] He was summarily expelled from the Association without warning or a hearing.[16] Cowan's claims under sections 1 and 2 of the Sherman Act were dismissed by the district court for lack of jurisdiction.[17] The Fifth Circuit, in an opinion by Judge Politz, initially noted the basic requirement that conduct violative of the Sherman Act "must have a substantial connexity to interstate commerce."[18] The court then quoted from *McClain v. Real Estate Board*[19] the long recognized concept that the Act not only reaches activities in interstate commerce, but also reaches "other activities that, while wholly local in nature, nevertheless substantially *affect* interstate commerce."[20] Again quoting from *McClain*, the court framed the issue to be whether the challenged activities "which allegedly have been infected by a price-fixing conspiracy [can] be shown 'as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved."[21]

Without benefit of any detailed analysis, the Fifth Circuit held that the challenged actions directly related to the competitive pricing, marketing, and furnishing of towing services to the interstate vehicle movement of people and goods through Montgomery County, Texas.[22] A substantial effect on interstate commerce was found.[23]

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11. *Id.*
12. *Id.*
13. *Id.* at 224-25.
14. *Id.* at 225.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. 444 U.S. 232 (1980).
20. 814 F.2d at 225-26 (quoting *McClain*, 444 U.S. 232, 246 (1980)).
21. 814 F.2d at 226 (quoting *McClain*, 444 U.S. 232, 246 (1980)).
22. *Id.* at 226.
23. *Id.* The court cited its prior opinion, United States v. Young Bros., Inc. 728 F.2d

The *Cowan* decision is important in several respects. First, the court did not discuss the amount of commerce involved. Second, the opinion makes no reference to the total volume of towing services conducted by the association, or third, to the amount of business conducted by Cowan. The decision may, therefore, signal that the dollar amount of commerce involved is of little, if any, significance in determining Sherman Act jurisdiction. Additionally, the court did not demand detailed allegations concerning the interstate commerce involved in the restraint. The court was content to rest its decision on the fact that the activities concerned two major federal highways which carried substantial vehicular traffic in interstate travel.[24] Allegations which assert interstate travel are apparently *per se* sufficient to invoke commerce jurisdiction.

II. SHERMAN ACT: SECTION 1

"To Be Or Not To Be—Anticompetitive"[25]

Section 1 of the Sherman Act prohibits every "contract, combination . . . or conspiracy, in restraint of trade."[26] Only unreasonable restraints of trade having anticompetitive effects violate the section.[27] Conduct allegedly violating section 1 of the Sherman Act is analyzed by one of two tests: the *per se* rule or the rule of reason. Conduct which is "plainly anticompetitive," so that no elaborate study of the industry is needed to establish unreasonableness, is deemed "illegal *per se*."[28]

Conduct not illegal *per se* is tested under the "rule of reason." The anticompetitive effect in those instances is evaluated by consid-

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682 (5th Cir.), *cert. denied*, 469 U.S. 881 (1984) which held that a conspiracy to fix bids on a state highway project affected interstate commerce, as a basis for its decision. *Id.* at 689.

24. 814 F.2d at 225.

25. With no apologies to Bill Shakespeare.

26. 15 U.S.C. § 1 (1982).

27. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

28. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978). *See also* United States v. Topco Ass'n, Inc., 405 U.S. 596 (1972) (market division); United States v. Trenton Potteries Co., 273 U.S. 392 (1972) (horizontal price fixing); United States v. Flom, 558 F.2d 1179 (5th Cir. 1977) (bid rigging); *and see* United States v. Parke, Davis & Co., 362 U.S. 29 (1960) (vertical price fixing); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (some group boycotts); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958) (various tying arrangements).

ering the facts peculiar to the business, the history of the restraint, and the reasons why the restraint was imposed.[29]

The Fifth Circuit considered an alleged rule of reason violation in *North Mississippi Communications, Inc. v. Jones*.[30] The dominant newspaper in DeSoto County, Mississippi asserted antitrust claims against a competing newspaper, a local bank, and the County Board of Supervisors.[31] The president of the dominant newspaper, the *Times*, owned an interest in a local bank.[32] He complained about the impropriety of advertisements of the Hernando Bank (the Bank) which were run in his newspaper.[33] The Bank then stopped all further advertising in the *Times* and contracted with the competing newspaper, *The Tribune*, to distribute free six-month subscriptions to all bank customers.[34] The Bank advertised in *The Tribune*, and required *The Tribune* to change its name and to provide distribution throughout the entire county.[35] The Bank also loaned $60,000 to *The Tribune* for the construction of a new building.[36] The Bank's free subscription campaign began on the same date which the *Times* used as the renewal date for all of its subscriptions.[37] The antitrust claims of the *Times* were based on this conduct.[38]

The plaintiffs[39] claimed that the free-subscription agreement between the Bank and *The Tribune* violated Section 1.[40] Since they did not claim a *per se* violation, the circuit analyzed the district court's non-jury decision on a rule of reason basis.[41] Quoting from a prior

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29. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. at 692. This decision also raised the issue of whether the restraint promotes or suppresses competition. *Id.* at 691.

30. 792 F.2d 1330 (5th Cir. June 1986).

31. *Id.* at 1331.

32. *Id.* at 1332.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. The *Times* sued the County Board of Supervisors for withdrawal of county advertising from the paper, alleged threats to other *Times* advertisers to also withdraw their business from the *Times*, and alleged participation in distributing a libelous letter concerning the publisher of the *Times*. *Id.* The Fifth Circuit affirmed the district court's non-jury trial finding that there was no evidence of a conspiracy between the members of the Board of Supervisors and *The Tribune*. *Id.* at 1336.

39. The newspaper *Times* and its publisher Ivy. *See id.* at 1332.

40. *Id.* at 1334.

41. *Id.*

decision, the court noted that to prove an antitrust violation under the rule of reason, the plaintiff must show that the conduct of the defendants adversely affected competition.[42] This concept, although classic in antitrust lore, has proved elusive in application. Courts often speak of the requirement that the anticompetitive effect of the challenged conduct must be established by showing an impact on competition and not merely injury to competitors.[43] Injury to competition should always result in injury to competitors. An injury to a competitor, however, does not necessarily result in injury to competition. The *Times* had been a virtual monopoly and the actions of the Bank and *The Tribune* resulted in a new competitive paper of nearly equal size to the *Times*.[44] This is the essence of competition.

The *Times* was not able to prove that it had lost any subscriptions because of the free six-month subscription program of the Bank.[45] Absent such a finding, the Fifth Circuit affirmed the district court's non-jury trial decision that the subscription agreement did not have any anticompetitive effect.[46]

The *North Mississippi* decision does not break any new ground. It merely applies the long-standing rule of reason analysis. Absent the establishment of an anticompetitive effect, restraints analyzed under the rule of reason will be upheld.

III. SHERMAN ACT: SECTION 2

"Intent Means Illegitimate"

Section 2 of the Sherman Act condemns three types of conduct: (1) monopolization; (2) attempt to monopolize; and (3) conspiracy to monopolize.[47] In *North Mississippi*, the *Times* plaintiffs asserted attempt and conspiracy to monopolize charges against the Bank defendants based on the free subscription program.[48]

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42. 792 F.2d at 1334 (quoting Northwest Power Prods. v. Omark Indus., 576 F.2d 83, 90 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979)).

43. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) ("The antitrust laws, however, were enacted for the protection of *competition*, not *competitors*.").

44. 792 F.2d at 1334.

45. *Id.* at 1335.

46. *Id.*

47. 15 U.S.C. § 2 (1982).

48. 792 F.2d at 1335.

In order to establish an illegal attempt to monopolize, a plaintiff must prove that the defendant: (1) had the specific intent to monopolize; (2) took overt acts in furtherance of a scheme to monopolize; and (3) had a dangerous probability of success.[49] To establish a conspiracy to monopolize, a plaintiff must prove: (1) the existence of a specific intent to monopolize; (2) the existence of a combination or conspiracy to achieve that end; (3) overt acts in furtherance of the conspiracy; and (4) an effect upon a substantial amount of interstate commerce.[50]

A specific intent to monopolize is an essential element of both the offense of attempted monopolization and conspiracy to monopolize.[51] The district court believed the testimony of the Bank and *Tribune* defendants that the free-subscription campaign was conducted for legitimate business reasons.[52] The Fifth Circuit affirmed that finding, holding that the conclusion was one for the fact-finder based on an assessment of the credibility of the witnesses.[53]

The Fifth Circuit distinguished two cases cited by the plaintiffs.[54] The plaintiffs argued that those decisions compelled a finding that the blanket use of free newspapers establishes a specific intent to monopolize.[55] The Fifth Circuit distinguished those decisions on the ground that both involved blanketing by a *dominant* newspaper in an attempt to drive its lesser competitors out of business.[56] In the *North Mississippi* case, the distribution of free newspapers by a "fledgling newspaper" which was seeking to enter a monopoly market did not compel the same conclusion.[57]

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49. *See, e.g.*, Multiflex, Inc. v. Samuel Moore & Co., 709 F.2d 980, 990 (5th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

50. United States v. Yellow Cab Co., 332 U.S. 218 (1947); American Tobacco Co. v. United States, 328 U.S. 781 (1946); J. T. Gibbons, Inc. v. Crawford Fitting Co., 704 F.2d 787, 796 (5th Cir. 1983).

51. The prohibited act of monopolization requires only a general intent to do the act, while the intent necessary in an attempt to monopolize or conspiracy to monopolize case is a specific intent to destroy competition or build a monopoly. *See* Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953).

52. 792 F.2d at 1335-36.

53. *Id.* at 1335.

54. *Id.* at 1336 (distinguishing Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc., 601 F.2d 48 (2nd Cir. 1979), and Morning Pioneer, Inc. v. Bismarck Tribune Co., 493 F.2d 383 (8th Cir.), *cert. denied*, 419 U.S. 836 (1974)).

55. 792 F.2d at 1336.

56. *Id.*

57. *Id.*

IV. EXEMPTIONS AND IMMUNITIES

A. *"State Action"*

The Sherman Act does not apply to the anticompetitive conduct of a state acting through its legislature.[58] This is known as the *Parker* concept, and has been commonly labeled the "state action" doctrine. It has been the subject of conflicting and inconsistent Supreme Court and lower court decisions for more than forty years. The extent to which a municipality, not a sovereign but created by a sovereign state, can claim the benefits of the state action doctrine has long been a judicial morass. Since the 1978 Supreme Court decision in *City of Lafayette v. Louisiana Power & Light Co.*,[59] it has generally been thought that municipalities could claim the state action exemption if they met a two-prong test: (1) a clearly articulated and affirmatively expressed state policy to displace competition; and (2) the policy was actively supervised by the state.[60] A general home rule provision in a state constitution which allocated general authority to municipalities to govern local affairs was held not to satisfy the "clear articulation" portion of the state action test.[61]

In *Town of Hallie v. City of Eau Claire*,[62] the Supreme Court reiterated that the state action exemption applies whenever the state legislature has "clearly articulated and affirmatively expressed" a state policy to displace competition in the regulated area.[63] The Court explained that there is no requirement of "compulsion" by the state against the municipality in order to satisfy this criterion.[64] The Court concluded that active state supervision is not required where the actor is a municipality.[65]

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58. Parker v. Brown, 317 U.S. 341 (1943) (upholding, against an antitrust attack, a California statutory scheme for which the admitted purpose was to maintain prices and restrict competition among raisin growers).

59. 435 U.S. 389 (1978). A subsequent Ninth Circuit case holds that this decision has been overruled by the Local Government Antitrust Act of 1986. Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285, 1288 (9th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S. Ct. 1457, 89 L. Ed. 2d 715 (1986).

60. *See* 435 U.S. at 394-95.

61. Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982).

62. 471 U.S. 34 (1985). A subsequent Ninth Circuit case holds that this decision has been overruled by the Local Government Antitrust Act of 1986. *Sakamoto*, 764 F.2d at 1288.

63. *Id.* at 39.

64. *Id.* at 45.

65. *Id.* at 47.

In *Woolen v. Surtran Taxicabs, Inc.*,[66] the Fifth Circuit again applied *Town of Hallie*.[67] Before the Dallas-Fort Worth Regional Airport opened in 1974, the Cities of Dallas and Fort Worth, as owners of the airport, established by contract the D/FW Surtran System.[68] Its purpose was to provide ground transportation for the airport.[69] The cities accepted competitive bids to provide taxi service to the airport for the privilege of picking up passengers.[70] The winning bid was submitted jointly by Yellow Cab of Dallas and the Fort Worth Cab and Baggage Company.[71] Those corporations formed Surtran Taxicabs, Inc., which then contracted with the Surtran System for the privilege of picking up taxicab passengers at the airport for transportation to points in the ten counties surrounding the airport.[72] The Cities of Dallas and Fort Worth, by ordinance, adopted a plan which allowed only holders of permits issued by the Airport Board to provide ground transportation from the airport.[73] Since Surtran Taxicabs, Inc. held the sole permit, the effect of the ordinance was that only Surtran Taxicabs, Inc. could pick up taxi passengers at the airport. A class of excluded taxicab drivers asserted that the arrangement among the Cities of Dallas and Fort Worth and Surtran Taxicabs violated the Sherman Act.[74]

A year earlier, the Fifth Circuit decided *Independent Taxicab Driver's Employees v. Greater Houston Transportation Co.*[75] The City of Houston had entered into a contract with the Greater Houston Transportation Corporation by which the city granted an exclusive concession over passenger service at Houston Intercontinental Airport.[76] Two groups of taxicab owners and operators asserted claims under the Sherman Act, seeking damages and injunctive relief from the city and its private contractor.[77] The Fifth Circuit affirmed the

66. 801 F.2d 159 (5th Cir. Sept. 1986) (per curiam), *cert. denied*, ___ U.S. ___, 107 S. Ct. 1567, 94 L. Ed. 2d 759 (1987).

67. *See id.* at 161 (discussing *Town of Hallie*).

68. The Factual Background is set forth in an earlier opinion at 461 F. Supp. 1025 (N.D. Tex. 1978).

69. *Id.* at 1027.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. 760 F.2d 607 (5th Cir.), *cert. denied*, 474 U.S. 903 (1985).

76. *Id.* at 608.

77. *Id.* at 609.

district court's summary judgment which held that Houston was immune from antitrust scrutiny under the state action exemption.[78]

In *Independent Taxicab Driver's*, the court of appeals considered provisions out of the Texas Municipal Airport Act authorizing municipalities to establish and operate airports both within and without their boundaries.[79] That act, article 46d-4, grants municipalities the authority to confer the privilege of supplying goods, commodities, services, or facilities at any such airport.[80] The act also authorizes a municipality to "establish the terms and conditions and fix the charges, rentals or fees for the privileges or services. . . ."[81]

The Fifth Circuit Court of Appeals, in *Woolen*, followed its prior decision. It rejected an argument that sought to distinguish *Independent Taxicab* on the basis that Houston Intercontinental Airport was wholly owned by the City of Houston whereas the Dallas/Fort Worth Regional Airport is jointly owned by the Cities of Dallas and Fort Worth.[82] The court noted that the Municipal Airport Act specifically authorizes a joint board, and thus, the fact that two cities rather than one granted exclusive taxicab privileges was immaterial.[83] Additionally, the court rejected a statutory interpretation argument to the effect that no governmental entity in Texas had the power to regulate taxicab service at an airport until September of 1983.[84] The court interpreted recent amendments to the Municipal Airport Act as "clarifying legislation" relating to the role of the Railroad Commission in establishing licensing requirements under the Motor Bus Act.[85] Dallas, Fort Worth, and other municipalities implementing the single taxicab operator plan were thus entitled to the state action exemption and the antitrust claims against them were dismissed.[86]

Private, that is non-governmental defendants, such as Surtran Taxicabs, Inc., must meet different criteria to fall within the state

78. *Id.* at 609, 613.
79. *See id.* at 607.
80. TEX. REV. CIV. STAT. ANN. art. 46d-4 (Vernon 1969).
81. *Id.* art. 46d-4(a)(3).
82. *Woolen*, 801 F.2d at 162.
83. *Id.* (citing Texas Municipal Airport Act, TEX. REV. CIV. STAT. ANN. art. 46d-14 (Vernon 1964)).
84. *Id.* at 162-63.
85. *Id.*
86. *Id.* at 163.

action exemption. Private defendants must establish: (1) that the challenged restraint was one clearly articulated and affirmatively expressed as state policy; and (2) that the state will actively supervise any private anticompetitive conduct.[87]

In *Woolen*, the Fifth Circuit had little difficulty in finding both criteria were satisfied. Relying on its analysis of state statutory authority, the court held that the single-operator taxicab "concept resulted from the state's clearly articulated and affirmatively expressed 'desire to abdicate in favor of municipal action with regard to airport management.' "[88]

With respect to the active supervision requirement, the court pointed to the details of taxicab service at the airport which were set forth comprehensively in the contracts between D/FW Surtran System and Surtran Taxicabs, Inc.[89] These detailed contracts were held to satisfy the "active supervision" portion of the two-prong test.[90] The private defendants were dismissed since they were also entitled to the state action exemption.[91]

B. Local Government Antitrust Act of 1984

The Fifth Circuit decided two cases during the survey period[92] dealing with the Local Government Antitrust Act of 1984.[93] The Act affords municipalities relief from the Supreme Court decision of *Community Communications Co. v. City of Boulder*.[94] In *Boulder*, the Court decided that home-ruled cities do not enjoy a special exemption from the antitrust laws simply by virtue of their home rule status.[95] Responding to intense municipal lobbying efforts, Congress protected local governments from monetary damages resulting from an antitrust violation by passing the Local Government Anti-

87. Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 57 (1985).

88. 801 F.2d at 164 (citing Independent Taxicab Drivers' Employees v. Greater Houston Transp. Co., 760 F.2d 607, 610 (5th Cir.), *cert. denied*, 474 U.S. 903 (1985).

89. *Id.* at 164.

90. *Id.*

91. *Id.* at 164-65.

92. Kaplan v. Clear Lake Water Auth., 794 F.2d 1059 (5th Cir. July 1986); and Woolen v. Surtran Taxicabs, Inc., 801 F.2d 159 (5th Cir. Sept. 1986).

93. 15 U.S.C. §§ 34-36 (Supp II. 1984).

94. 455 U.S. 40 (1982).

95. *Id.* at 52-54.

trust Act. The Act provides, "No damages, interest on damages, cost or attorney's fees may be recovered under section 15, 15a or 15c of this title from any local government, or official or employee thereof acting in an official capacity."[96] With respect to its application to pending cases, the Act provides as follows:

> Subsection (a) of this section shall not apply to cases commenced before the effective date of this Act unless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that subsection (a) of this section shall not apply.[97]

The court considered the application of the Act to two decisions which were pending when the Act was passed.

In *Kaplan v. Clear Lake City Water Authority*,[98] the plaintiff alleged that the defendants conspired to prevent him from constructing multi-family housing on a thirty-acre tract of land by preventing him from obtaining water and sewer services for the property.[99] The Clear Lake City Water Authority instituted a moritorium on water and sanitary sewer services in 1978 until a new sewage treatment plant was constructed.[100] Kaplan's undeveloped land was located within the City of Pasadena, Texas.[101] The water authority provided water and sewer services to Pasadena.[102] After completion of its new treatment plant, the water authority again denied service to Kaplan because of concerns about potential violations of federal regulations.[103] Furthermore, the water authority and the adjacent City of Taylor Lake Village opposed Kaplan's efforts to provide his own utilities for the tract.[104]

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96. 15 U.S.C. § 35(a) (Supp. II 1984).
97. *Id.* § 35(b).
98. 794 F.2d 1059 (5th Cir. July 1986).
99. *Id.* at 1062.
100. *Id.* at 1061.
101. *Id.*
102. *Id.*
103. *Id.* at 1061-62.
104. *Id.* at 1062.

Kaplan initiated his action more than a year prior to the enactment of the Local Government Antitrust Act.[105] His antitrust claim, however, was added by amendment some months after the effective date of the Act.[106] The Fifth Circuit affirmed the district court's determination that it would be inequitable not to apply the statute to bar Kaplan's claims.[107]

Initially, the court noted that it must consider all of the circumstances appropriate to resolution of the retroactivity issue.[108] In a footnote, the court noted that most district courts have concluded that the two factors specified in the statute are not exclusive.[109] The court, however, upheld dismissal primarily on the basis of the two statutory factors.[110] With respect to the "stage of litigation" factor, the court noted that pretrial discovery was ongoing at the time the defendants moved to dismiss under the Act.[111] With respect to the "availability of alternative relief under the Clayton Act" factor, the Fifth Circuit noted that injunctive relief under the Clayton Act would be available and would offer partial relief to Kaplan, even though he did not plead it.[112]

Finally, the court emphasized that Kaplan did not amend his complaint to assert antitrust claims until months after the effective date of the Act even though he knew the factual basis for his antitrust claims at the time he filed his original complaint.[113] Thus, the court easily found that it would be inequitable not to apply the Act to the claims of Kaplan.[114]

In *Woolen v. Surtran Taxicabs, Inc.*,[115] the Fifth Circuit also considered the question of whether it would be inequitable not to apply the Act to the claims of the excluded taxicab drivers. Relying

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105. *Id. See supra* notes 96-97 and accompanying text. Kaplan's initial allegations involved violations of the due process and equal protection clauses of the fourteenth amendment. 794 F.2d at 1062.

106. 794 F.2d at 1062.

107. *Id.* at 1063.

108. *Id.*

109. *Id.* n.6.

110. *Id.* at 1063.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. 801 F.2d 159 (5th Cir. Sept. 1986) (per curiam), *cert. denied*, ____U.S. ____, 107 S. Ct. 1567, 94 L. Ed. 2d 759 (1987).

extensively on legislative history, the circuit noted that a court should expressly consider at least three factors in addition to the two factors specified in the statute, in deciding the equitable issue.[116] First, the court should consider whether the local government was acting within its normal legislative, regulatory, executive, administrative, or judicial authority.[117] Second, the court should consider the financial harm which a treble damage award could inflict on the municipality and its taxpayers.[118] Third, the court should consider whether the municipal action was predicated on or in furtherance of federal or state laws, policies, or regulations.[119] When combined with the two statutory factors, stage of litigation and availability of alternative relief, there are at least five specific factors to consider in determining the applicability of the Act pending litigation. The Fifth Circuit discussed each of these factors.

The Stage of Litigation: Noting that completion of pretrial discovery would take at least another year and that the status of the case had not changed since the effective date of the Act, the court held that this factor weighed toward application of the Act.[120]

The Availability of Alternative Relief Under the Act: In assessing this factor, the court considered "whether a plaintiff could recover damages from a private party and whether an injunction would be sufficient to halt any continuing injury caused by an ongoing antitrust violation."[121] Both factors were met since the defendants were not local governments, and any continuing injury could have been halted by injunctive relief which would have prevented the cities from excluding the plaintiffs from the outbound taxicab market at the airport.[122]

Exercise of Normal Regulatory Authority & Action and Furtherance of State Law: Since the Fifth Circuit held that the "state action" exemption applied, it automatically followed that the cities were exercising their normal regulatory authority and acting in furtherance of state law.[123]

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116. *Id.* at 165-66.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 166-67.
121. *Id.* at 167 (quoting 130 Cong. Rec. 13,105 (daily ed. Oct. 4, 1984) (remarks of Sen. Cranston)).
122. *Id.*
123. *Id.*

Financial Harm of a Treble Damages Award: Treble damages would amount to $21,000,000 if the plaintiffs were successful.[124] The Fifth Circuit noted, that although such an award would have an adverse impact on the defendant municipalities, they would not be crippled in their provision of services or forced into bankruptcy.[125] Thus, this factor did not weigh in favor of application of the Act.

The court held, in light of all the enumerated circumstances, that it would be inequitable not to apply the Local Government Antitrust Act of 1984 to the claims of the plaintiffs.[126]

C. *Noerr-Pennington*

In a series of decisions, the Supreme Court has held that the antitrust laws do not apply to the conduct of citizens or business entities to influence, or to petition, public officials to take official action that will harm or eliminate competition.[127] Known as the *Noerr-Pennington* doctrine, the concept is premised on the first amendment's guarantee of a right to assemble and petition the government, and was summarized by the Court as follows: "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."[128]

The single operator concept in *Woolen* originated in an independent consultant's report prepared for the Cities of Dallas and Fort Worth in 1964.[129] Even if the private defendants actively lobbied for that concept, their activities would be protected by the *Noerr-Pennington* doctrine.[130] The Fifth Circuit found no difficulty in applying that doctrine as an additional basis for dismissal of the antitrust claims.[131]

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124. *Id.*
125. *Id.*
126. *Id.*
127. *See* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern R.R. President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).
128. *Pennington*, 381 U.S. at 670.
129. 801 F.2d at 169.
130. *Id.*
131. *Id.* at 168-69.

V. Taxable Costs: Expert Witness Fees

In *J. T. Gibbons v. Crawford Fitting Co.*,[132] the Fifth Circuit held that expert witness fees of a successful defendant cannot be awarded in an amount greater than that authorized by statute.[133]

The court held that section 4 of the Clayton Act, which provides for the award of attorney's fees and costs of suit to an unprevailing plaintiff, does not apply to a prevailing defendant.[134] The Fifth Circuit added its decision to that of other circuits, holding that section 4 of the Clayton Act does not authorize the taxing of excess expert witness' fees as costs.[135]

On the same day it decided *Gibbons*, the Fifth Circuit decided *International Woodworkers' of America, v. Champion International Corp.*[136] In *International Woodworkers'*, the court also held that expert witness fees in excess of those specified by statute could not be awarded.[137]

Both *Gibbons* and *International Woodworkers'* were appealed to the Supreme Court.

In *Crawford Fitting Co. v. J. T. Gibbons, Inc.*[138] the Supreme Court held that "when a prevailing party seeks reimbursement for fees paid to its own expert witness, a federal court is bound by the limits of [28 U.S.C.] § 1821, absent contract or explicit statutory authority to the contrary."[139] The Court rejected an argument that section 1920, which prescribes fees which may be taxed as costs, authorizes the awarding of additional cost.[140] The Court further rejected a contention that Rule 54(d) of the Federal Rules of Civil Procedure[141] was a separate source of power to tax costs above those prescribed in section 1920.[142]

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132. 790 F.2d 1193 (5th Cir. June 1986), *cert. denied*, ___ U.S. ___, 107 S. Ct. 568, 93 L. Ed. 2d 573 (1986).

133. *Id.* at 1194-95 (relying on 28 U.S.C. §§ 1821(b), (c)(1-4), (d)(1-4) (1982) which authorizes $30.00 per day for witness fees, as well as travel expense and subsistence allowance).

134. 790 F.2d at 1195 (relying on Clayton Act § 4, 15 U.S.C. § 15 (1982)).

135. *See* Illinois v. Sangamo Constr. Co., 657 F.2d 855, 864-65 (7th Cir. 1981); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 309 n.75 (2nd Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); Ott v. Speedwriting Publishing Co., 518 F.2d 1143, 1149 (6th Cir. 1975).

136. 790 F.2d 1174 (5th Cir. June 1986), *aff'd*, ___ U.S. ___, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987).

137. *Id.* at 1181.

138. ___ U.S. ___, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987).

139. *Id.* at ___, 107 S. Ct. at 2497, 96 L. Ed. 2d at 390.

140. *Id.* at ___, 107 S. Ct. at 2497, 96 L. Ed. 2d at 391.

141. Rule 54(d) provides in pertinent part:

In affirming the Fifth Circuit, the Supreme Court made it very clear that expert witness fees, other than those of a court-appointed expert, were limited to the statutory fees set out in section 1821.[143] Neither the provisions of Title 28 nor the Federal Rules of Evidence authorize any additional expert witness fees.

CONCLUSION

The decisions by the Fifth Circuit during the survey period did not break any new ground. They did, however, continue an apparent trend in favor of a more narrow application of the antitrust laws. Treble damage claimants will be strictly held to meeting their burdens of establishing the requisite elements of an antitrust violation. Exemptions and immunities to the antitrust laws will be broadly construed to permit state governments, their political subdivisions, and those who do business with them, to have a relatively free rein in conducting their affairs. Invitations to expand the reach of the antitrust laws and narrow the scope of exemptions and immunities will be rejected.

Costs. Except when express provision therefor is made either in a statute . . . or in the rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; . . . .

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142. *Id.* at ____, 107 S. Ct. at 2497, 96 L. Ed. 2d at 391.

143. *Id.* at ____, 107 S. Ct. at 2497, 96 L. Ed. 2d at 391.