Antitrust: Systemcare, Inc. v. Wang Laboratories Corp.: Evaluating Unilateral Behavior in the Tenth Circuit

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NOTES

Antitrust: Systemcare, Inc. v. Wang Laboratories Corp.: Evaluating Unilateral Behavior in the Tenth Circuit*

I. Introduction

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions.1

Section 1 of the Sherman Act prohibits "combinations, contracts, or conspiracies in restraint of trade"2 in order to simultaneously limit unfair exploitation of market power and protect aggressive trade practices.3 The United States Court of Appeals for the Tenth Circuit, in City of Chanute v. Williams Natural Gas Co.,4 held that a plaintiff and a single seller, as co-conspirators in a vertical tying arrangement, do not form the requisite combination in violation of section 1 of the Sherman Act.5 This position is inconsistent with prior Tenth Circuit holdings and United States Supreme Court precedent. In Systemcare, Inc. v. Wang Laboratories Corp. (Systemcare I),6 the Tenth Circuit incorrectly affirmed Chanute.7 In the process, the court not only disregarded existing precedent but also effectively expanded Chanute, concluding vertical conspiracies involving a third party and single seller as co-conspirators do not form the combination required by section 1. Fortunately, in June 1997, an en banc hearing of the Tenth Circuit (Systemcare II)8 vacated its...
previous holding, reversed and remanded the lower court decision, and overturned Chanute.

Actions for antitrust violations are brought under three major antitrust laws: the Sherman Act,9 the Clayton Act,10 and the Federal Trade Commission Act.11 Such actions may be brought by the Federal Trade Commission (FTC), Department of Justice, or by private citizens.12 When bringing private action for an antitrust violation, a plaintiff's source of enforcement is limited.13 For plaintiffs involved in service industries that are not bringing action against a monopoly defendant, section 1 of the Sherman Act is the most frequently used source of private antitrust protection.

This note examines the effect of the current position of the United States Court of Appeals for the Tenth Circuit as it relates to national antitrust policy established by other circuits and the United States Supreme Court. Part II of this note presents the relevant case law defining independent behavior according to section 1 of the Sherman Act, particularly in the case of tying arrangements. Part III analyzes Systemcare I, wherein the Tenth Circuit affirmed its previous decision, solidifying a controversial standard for evaluating independent vertical behavior in tying arrangements.14 Part IV evaluates the rationale behind the Systemcare I decision and suggests contradictory reasoning. Part V examines alternative justifications for the Systemcare I decision. Part VI considers the Tenth Circuit's recent change of course in Systemcare II, which recognizes vertical conspiracies between a buyer and seller in tying arrangements. Finally, part VII discusses potential implications of the Tenth Circuit position.

II. Bringing an Antitrust Action Under Sherman Act Section 1: Tying Arrangements

Section 1 of the Sherman Act is a primary enforcement mechanism for private antitrust actions.15 The section is designed to allow extensive judicial involvement in law making.16 To bring an action under section 1 of the Sherman Act, a

12. See SULLIVAN & HOVENKAMP, supra note 3, at 75.
15. See supra note 13 and accompanying text.
plaintiff must establish: (1) a "combination, contract, or conspiracy",17 (2) "in restraint of trade".18 However, before a plaintiff's allegations of unreasonable restraint of trade can be examined, the court must first find that a combination, contract, or conspiracy exists.19

Two main structural categories of trade restraints exist: horizontal restraints of trade and vertical restraints of trade. A horizontal violation involves an agreement between two competitors to restrain trade.20 A vertical violation involves an agreement between two dealers on separate levels of a distribution chain.21 A conspiracy between a manufacturer and a retailer is an example of a vertical agreement, while a conspiracy between two manufacturers is horizontal in nature.

A. Independent Versus Concerted Action

The purpose of section 1 of the Sherman Act is to prevent combinations or conspiracies that restrict other individuals' freedom to trade or conduct business.22 Congress recognized the difficulty in distinguishing between healthfully robust competition and conduct that is anticompetitive in nature.23 For example, conduct that is harmful to competition is frequently more resource-efficient or cost-effective to consumers or other segments within that market.24 Consequently, section 1 only prohibits combinations unreasonably restraining trade.25

Thus, section 1 does not restrict individual acts.26 Restricting individual competitive business efforts could potentially deter aggressive competition and entrepreneurial goals upon which business innovation is based.27 Concerted action, on the other hand, is discouraged because of its anticompetitive effects.28 Combinations or other concerted actions typically reduce independent decision making that is essential to the competitive process.29 Any potential resource efficiencies or savings to consumers created by concerted behavior are outweighed by overall anticompetitive effects.30

18. Id.
24. See id. at 768.
25. See id. at 767-69.
26. See id. at 767-68.
27. See id. at 767.
28. See id. at 768.
29. See id.
30. See id.
Consequently, proof of a combination or conspiracy is a prerequisite to finding a section 1 violation, regardless of a defendant's trade restraining actions. For example, a seller may independently announce, in advance, the conditions upon which he will sell, or refuse to sell, a product. The seller, acting independently, may set conditions that, when set by a monopoly or group of sellers, would otherwise be illegal restraints of trade.

Despite courts' favor for independent competition, some limitations have been placed upon unilateral actions. For example, under United States v. Parke, Davis & Co., once a seller steps beyond mere announcement of conditions for sale and attempts to enforce those conditions through coercion, the seller's acts fall within section 1. A typical coercive enforcement mechanism by a seller is a threat of terminated future dealing if the buyer does not comply with anticompetitive trade practices. At that point, the vertical agreement between the buyer and seller is considered an illegal combination in restraint of trade.

In addition to courts' recognition of the danger of unilateral conduct when coupled with coercion, barriers to prosecution of unilateral action are also recognized. One example of the United States Supreme Court's support for unilateral activity is through its rejection of "intra-enterprise" liability in Copperweld Corp. v. Independence Tube Corp. A corporation and its wholly-owned subsidiary are not considered separate entities for the purpose of finding concerted action between multiple parties under the Sherman Act. Further, in Monsanto Co. v. Spray Rite Service Corp., the United States Supreme Court significantly increased a plaintiff's evidentiary burden. Only evidence that excludes the possibility of independent action between manufacturers and nonterminated distributors will be allowed. Mere showing of complaints by a

33. See id. The Colgate Court stated:
   In absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell.

Id.
35. See Parke, Davis & Co., 362 U.S. at 44.
37. See id. at 753. The Copperweld Court provided: "In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their own common benefit." Id. at 769. To the contrary, a corporation and its wholly-owned subsidiary consistently maintain common interests, thus a combination or conspiracy cannot result from their action. See id. at 753.
39. See id. at 764.
40. See id.
distributor to a manufacturer followed by subsequent termination of the business relationship will not sufficiently prove the existence of a vertical conspiracy between a manufacturer and other distributors.\textsuperscript{41} Thus, the Court established a high standard for a plaintiff attempting to prove a coerced vertical conspiracy.

B. Tying Arrangements

Protection of individual behavior creates unique difficulties to bringing a section 1 action against a seller for an improper tying arrangement. A tying arrangement is an agreement by one party to sell a desirable product (the "tying product"), but only on the condition that the buyer purchases a second, less desirable product (the "tied product").\textsuperscript{42} Not all conditional sales, however, constitute anticompetitive tying arrangements. If no separate market for the second product exists, then the sale conditions merely amount to competitive product packaging.\textsuperscript{43}

A tying arrangement becomes an unreasonable restraint of trade when a seller extends its market power in the first product to force the buyer to purchase the second, less desirable product.\textsuperscript{44} This extension of market power is essential to proving an illegal tying arrangement.\textsuperscript{45} Even if the buyer wants only the first product, he still must purchase the second product. Thus, buyers' choices in the second product's market are effectively limited.\textsuperscript{46} The benefits of the natural competition in the second product market are mitigated and other competitors' efforts to provide alternative choices within that market are undercut.\textsuperscript{47}

Even if a tying arrangement is considered anticompetitive, barriers still exist to section 1 enforcement. For example, a seller may unilaterally tie one product to another without entering into a conspiracy with another party.\textsuperscript{48} If a seller never needs to act in concert with another party, then section 1 is of little significance.\textsuperscript{49}

\textsuperscript{41} See id.
\textsuperscript{43} For example, the sale of a right shoe is typically conditioned upon the sale of a left shoe. Production efficiencies and consumer demand, however, prevent a viable individual market for either shoe, by itself. The conditioned sale is not considered a tying arrangement. See HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 353 (1994).
\textsuperscript{44} See Jefferson Parish, 466 U.S. at 9-10.
\textsuperscript{45} See id. at 13-14; see also Fortner Enter., Inc. v. United States Steel Corp., 394 U.S. 495, 503-04 (1969) (discussing "sufficient economic power"). If both products exist within perfectly competitive markets, then buyers may freely decide to individually purchase either product from another seller, without concern for the conditions of the tying arrangement set by the first seller. See HOVENKAMP, supra note 43, at 354.
\textsuperscript{46} See Jefferson Parish, 466 U.S. at 13-14.
\textsuperscript{47} See id.
\textsuperscript{48} See McKenzie v. Mercy Hosp., 854 F.2d 365, 368 (10th Cir. 1988), overruled on other parts by Systemcare, Inc. v. Wang Laboratories Corp., 117 F.3d 1137 (10th Cir. 1997); see also Sargent Welch Scientific Co. v. Ventrion Corp., 567 F.2d 701, 709 (7th Cir. 1977) (discussing unilateral tying under section 2 of the Sherman Act).
\textsuperscript{49} See supra notes 22-33 and accompanying text.
Proving that a combination or conspiracy exists is a difficult barrier to overcome when alleging a tying arrangement.\(^5\)

Typically, the existence of a single seller and single buyer will be indicative of unilateral behavior on the part of the seller. However, a plaintiff alleging a tying arrangement by a single seller may establish a vertical conspiracy under section 1 by proving one of two exceptions.\(^6\) The United States Supreme Court, in *Perma Life Mufflers, Inc. v. International Parts Corp.*\(^7\) created these exceptions through the logical extension of principles previously established in *Parke, Davis.*\(^8\)

First, a plaintiff may show that he unwillingly complied with an anticompetitive trade practice, such as a tying arrangement, in response to a refusal to deal\(^9\) by the defendant.\(^10\) In *part delicto*, the equal fault of the plaintiff, will not prevent a plaintiff from bringing action against a defendant.\(^11\) Second, the plaintiff can show that, while he did not comply with a tying arrangement, another third-party buyer was coerced into a tying arrangement by a defendant's refusal to deal.\(^12\) Forced acquiescence of a third-party will not prevent the establishment of an illegal conspiracy.\(^13\) Thus, *Perma Life* recognized two types of vertical conspiracies to be alleged by a plaintiff: (1) agreements involving a single seller and the coerced plaintiff, as a buyer; and (2) agreements between a single seller and a coerced third-party buyer. These two classifications are consistent with prior holdings relating to unilateral action and were not overruled by *Copperweld* or *Monsanto.*\(^14\)

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52. 392 U.S. 134 (1968).
54. See supra notes 34-35 and accompanying text.
55. See supra notes 34-35 and accompanying text.
56. Courts acknowledge a public policy encouraging competition over the particular wrongdoing of a plaintiff. The threat of suit by the plaintiff deters anticompetitive behavior and furthers antitrust policy objectives. See *Perma Life*, 392 U.S. at 138; see also Simpson v. Union Oil Co., 377 U.S. 13, 16 (1964) (coerced participant in unlawful conspiracy can bring suit); Keifer-Stewart v. Joseph E. Seagram & Sons, 340 U.S. 211, 214 (1951) (plaintiff cannot be barred from recovery by proof of involvement in unrelated conspiracy).
57. See *Perma Life*, 392 U.S. at 138.
59. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 765-66 (expressly holding that *Perma Life* was not overruled); Image Technical Servs., Inc. v. Eastman Kodak, 903 F.2d 612, 619 (9th Cir. 1990), cert. granted, 503 U.S. 1215 (1991) (holding that *Monsanto* did not exclude coerced tying arrangements); Will v. Comprehensive Accounting Corp., 776 F.2d 665, 670 (7th Cir. 1985) (holding that *Perma Life* was not overruled by either Supreme Court decision); Black Gold, Ltd. v. Rockwool Indus., 732 F.2d 779, 780 (10th Cir. 1984) (finding *Perma Life* was not overruled by *Monsanto*).
C. Tenth Circuit Position Prior to Systemcare I

Consistent interpretation of antitrust policy is not as prevalent within the Tenth Circuit. In 1992, the United States Court of Appeals for the Tenth Circuit, in City of Chanute v. Williams Natural Gas Co., held that a plaintiff could not prove an illegal tying arrangement under section 1 of the Sherman Act without showing a conspiracy between the seller and a party other than the plaintiff. In Chanute, eight cities in Kansas and Oklahoma (the Cities) alleged Williams Natural Gas Company (Williams) unlawfully tied its own natural gas products to the use of its natural gas pipeline. The Cities claimed that Williams forced them to buy its natural gas when the Cities would have preferred a third-party's gas they had purchased previously.

The majority found that the only other parties to the tying arrangement were the plaintiffs themselves. Relying heavily upon McKenzie v. Mercy Hospital, the majority entered summary judgment in favor of Williams because the plaintiffs did not show the requisite conspiracy under section 1 of the Sherman Act. The court held that a plaintiff can only establish a conspiracy between the seller and another party. Barring that, the conspiracy did not meet section 1 requirements. Subsequently, the majority discarded the issue of force or coercion of the tying arrangement as "moot."

The Chanute majority rendered its decision despite alternate decisions from the Tenth Circuit in Black Gold, Ltd. v. Rockwool Industries (Black Gold I and Black Gold II) and Smith Machinery v. Hesston Corp. However, Judge Seymour's concurrence in Chanute discussed the inconsistency between the Chanute majority opinions along with Perma Life, the Supreme Court opinion upon which the Tenth Circuit based these decisions. Combined, these decisions establish that a vertical conspiracy can exist between a seller and the plaintiff. Judge Seymour opined that a plaintiff can establish a section 1

60. 955 F.2d 641 (10th Cir. 1992), overruled by Systemcare, Inc. v. Wang Laboratories Corp., 117 F.3d 1137 (10th Cir. 1997).
61. See id. at 650-51.
62. See id. at 650.
63. See id. at 645-46.
64. See id. at 650-51.
65. 854 F.2d 365 (10th Cir. 1988), overruled by Systemcare, Inc. v. Wang Laboratories Corp., 117 F.3d 1137 (10th Cir 1997). The McKenzie court stated: "[W]e are not concerned with the legal possibility of a single entity imposing a tying arrangement on its customers. The question before the court — and to which we have replied in the negative — is whether such an arrangement is proscribed by Section One of the Sherman Act." Id. at 368.
66. See Chanute, 955 F.2d at 651.
67. See id. at 650.
68. See id. at 651 n.11.
69. 729 F.2d 676 (10th Cir. 1984) and 732 F.2d 779 (10th Cir. 1984).
70. 878 F.2d 1290 (10th Cir. 1989).
71. See Chanute, 955 F.2d at 658-59 (Seymour, J., concurring). See generally supra notes 51-59 and accompanying text.
72. See id. at 659 (Seymour, J., concurring); see also Perma Life Mufflers, Inc. v. International Parts
conspiracy between himself and a single defendant, provided coercion is involved in forming that conspiracy. In Chanute, the Cities failed to establish a conspiracy because they did not prove coercion, not because a plaintiff cannot be a co-conspirator under section 1. In other words, the issue of force or coercion was not only relevant but also essential in evaluating a conspiracy according to Perma Life. Additionally, Judge Seymour also distinguished McKenzie, finding the decision inapplicable to the factual situation of Chanute.

III. Systemcare, Inc. v. Wang Laboratories Corp.: Statement of the Case

Wang Laboratories Corporation (Wang) manufactures "VS" minicomputers along with copyrighted software designed by Wang for use with the minicomputer. Additionally, Wang provides hardware and software support services. Wang's software copyright allows it to be the exclusive provider of software support systems.

Systemcare, Inc. (Systemcare) is an Independent Service Operator (ISO) of computer hardware manufactured by other companies, including Wang computer hardware. Systemcare and Wang are competitors in the "VS" computer hardware support services market. Systemcare alleged that Wang offered "VS" minicomputer support services in contract packages known as Wang Software Services (WSS). Under WSS contracts, software support services were only obtainable with the purchase of hardware support services. According to Systemcare, the WSS contract constituted a tying arrangement whereby Wang used legitimate market power in the software support services market to illegally eliminate competition in the hardware support services market.

Corporation, 392 U.S. 134, 142 (1968) (stating that a plaintiff "can clearly charge a combination between [defendant] and himself"); Smith Mach., 878 F.2d at 1294-95 (implying that a conspiracy between a plaintiff and a seller can be found if the plaintiff succeds to coercion); Black Gold, Ltd., 729 F.2d at 686 (implying agreement with Perma Life and the possibility of conspiracy between plaintiff and seller).

73. See Chanute, 955 F.2d at 659 (Seymour, J., concurring).
74. See id. (Seymour, J., concurring).
75. See id. (Seymour, J., concurring). In McKenzie, the plaintiff was not able to agree to the alleged tying arrangement nor did he allege that a third-party had agreed to an arrangement. See id.
77. Support services for hardware included maintenance and repair. Software support services provided maintenance services, software updates, technical assistance, remote link assistance and rights to copy of software. See id.
78. See id.
79. See id.
80. See id.
81. See id. Wang claimed the software services were available outside the package on an instance-specific basis. Systemcare alleged that the price and quality of the instance-specific services precluded their purchase over the WSS package. Thus, the price and quality effectively foreclosed the availability of the market to ISO's. The Court did not reach a decision as to the accuracy of these claims due to the summary judgment of the "concerted-action" issue. See id.
82. See id.
In 1989, Systemcare filed a complaint against Wang for illegal restraint of trade in violation of section 1 of the Sherman Act. Systemcare alleged a conspiracy existed between Wang and its purchasers. The district court, relying on the decision from Chanute, granted summary judgment for Wang based upon Systemcare's inability to show the requisite concerted action from section 1 of the Sherman Act.

On appeal, Systemcare argued against the application of Chanute. Systemcare alleged that the Tenth Circuit's position toward concerted action in tying arrangements was improper. Systemcare proposed three methods to avoid the precedent set by Chanute: (1) overturn the decision of the Chanute Tenth Circuit panel; (2) use dicta from Eastman Kodak Co. v. Image Technical Services, Inc. to effectively overturn Chanute; and, (3) distinguish Chanute to render it inapplicable to Systemcare.

The court rejected all three of Systemcare's contentions. Rather, the court upheld Chanute, holding that "a plaintiff must establish a conspiracy between two or more entities to force such [a tying] agreement upon a third party." First, the court refused to overturn the previous panel precedent from Chanute without either en banc consideration or a superseding contrary United States Supreme Court holding. Second, the court found Kodak not only factually distinct from Chanute, but also "several steps away from overruling ... Chanute." Third, the court did not recognize Systemcare's proposed factual distinctions of Chanute. The majority found "no intellectually honest way to distinguish Chanute from Systemcare I" and considered Chanute applicable precedent.

83. See id.
84. See id.
85. See id. The District Court deferred ruling on the summary judgment motion until parties submitted briefs regarding Chanute. See id.
86. See id. at 470. The court stated:
   Thus, according to Chanute, a tying arrangement imposed by a single entity is not proscribed by section 1 of the Sherman Act, even if that arrangement is embodied in a contract between seller and buyer. Instead, a plaintiff must establish a conspiracy between two or more entities to force such an agreement upon a third party.

87. See id. at 469-70.
88. See id.
90. See Systemcare I, 85 F.3d at 470.
91. Id.
92. See id. at 469-70.
93. Id. at 470.
94. See id.
95. Id.
96. See id.
IV. Critique of Systemcare Reasoning

The Systemcare I court missed an opportunity to mitigate the Chanute opinion's treatment of vertical conspiracies in tying arrangements. First, the Systemcare I court incorrectly accepted Chanute as valid Tenth Circuit precedent and Tenth Circuit decisions prior to Chanute did not receive adequate consideration. Second, the Systemcare I court underestimated the influence of Kodak and other United States Supreme Court decisions. Third, Chanute is factually distinct from Systemcare I. The Systemcare I court's broad interpretation effectively expands Chanute to bar virtually all "buyer-seller" vertical conspiracies from section 1 consideration.

A. Chanute as Invalid Tenth Circuit Precedent

En banc consideration procedures are designed to reinforce respect for panel decisions while maintaining uniformity and continuity within circuit decisions. In the Tenth Circuit, granting of en banc procedures occurs only in extraordinary situations involving: (1) an issue of exceptional public importance or (2) a panel decision that allegedly conflicts with precedent established by the Supreme Court or of the Court of Appeals for the Tenth Circuit. The Systemcare I court, a three-judge panel, held that it could not issue a ruling inconsistent with the Chanute panel absent en banc consideration or a conflicting Supreme Court ruling.

However, Chanute, also decided by a three-judge panel, conflicts with previous decisions from both the United States Supreme Court and two other Tenth Circuit panels. Specifically, the Chanute court found that the requisite conspiracy under section 1 does not exist when an agreement involves only a single seller and a plaintiff. In other words, a plaintiff and defendant cannot be co-conspirators. In Perma Life, on the other hand, the United States Supreme Court expressly validated a plaintiff as a legitimate co-conspirator under section 1. The Court held that a plaintiff, when faced with a refusal to deal, may establish the requisite combination or conspiracy under section 1 by showing that she, herself, unwillingly complied with the agreement.

98. See 10th Cir. R. 35.1; Fed. R. App. P. 35(a).
99. See Systemcare I, 85 F.3d at 470.
100. See Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 142 (1968) (stating that a plaintiff "can clearly charge a combination between [defendant] and himself").
101. See Black Gold, Ltd. v. Rockwool Indus., Inc., 729 F.2d 676, 686 (10th Cir. 1984) (implying agreement with Perma Life and the possibility of conspiracy between a plaintiff and a seller); Smith Mach. v. Heeston Corp., 378 F.2d 1290, 1294-95 (10th Cir. 1969) (implying that a conspiracy between plaintiff and seller can be found if the plaintiff accedes to coercion).
103. See Perma Life, 392 U.S. at 142.
104. See id.; see also Chanute 955 F.2d at 659 (Seymour, J., concurring) (citing Perma Life, 392 U.S. at 142).
Previous three-judge panels of the Tenth Circuit have also verified the formation of a conspiracy between a single seller and a buyer coerced by "threat of termination."\(^{105}\) In *Black Gold I* and *Smith Machinery*, the Tenth Circuit provided implied acceptance of the first type of vertical conspiracy\(^ {106}\) from *Perma Life*.\(^ {107}\) Likewise, in *Black Gold I* and *Smith Machinery*, the Tenth Circuit discussed the second type of vertical conspiracy,\(^ {108}\) also recognizing *Perma Life* as authority.\(^ {109}\) In a supplementary opinion, the *Black Gold II* court held that *Perma Life* survived the heavy section I evidentiary burden from *Monsanto*.\(^ {110}\) *Chanute*, however, is in conflict with these decisions.

Thus, the question arises: how did *Chanute* become precedent over *Black Gold I* and II or *Smith Machinery*? The *Chanute* majority does not even mention those opinions, let alone distinguish or invalidate them. The *Systemcare* court neither reinforces the *Chanute* majority by providing additional precedent as support nor asserts that *Perma Life* had been overturned. Further, the court did not reconcile opposing arguments from Judge Seymour's concurring opinion in *Chanute* or the district court in *Systemcare I*.\(^ {111}\)

Just as the *Systemcare I* court could not overturn a previous panel, the *Chanute* majority should not establish precedent over previous Tenth Circuit decisions.\(^ {112}\) The *Systemcare I* court did not recognize an important inconsistency between *Chanute* and both the United States Supreme Court and previous Tenth Circuit panels. Following the logic established by the *Systemcare I* court, *Chanute* is invalid precedent in the face of previous Tenth Circuit panels in *Black Gold I* and II and *Smith Machinery*. Thus, the *Systemcare I* court erred in relying upon *Chanute* as valid, controlling Tenth Circuit precedent.

### B. Supreme Court & Superseding Law from Kodak

The Tenth Circuit also disagreed with *Systemcare's* second contention that the United States Supreme Court effectively overturned *Chanute* in *Eastman Kodak*

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105. See *Smith Mach.*, 878 F.2d at 1294; *Black Gold I*, 729 F.2d at 686-87;
106. The first type of vertical conspiracy is conspiracy between a defendant seller and a coerced plaintiff buyer.
107. See *Smith Mach.*, 878 F.2d at 1294 (implying that a conspiracy between a plaintiff and a seller can be found if the plaintiff accedes to coercion); *Black Gold I*, 729 F.2d at 686 (implying agreement with *Perma Life* and the possibility of conspiracy between a plaintiff and a seller).
108. The second type of vertical conspiracy is conspiracy between a defendant seller and a coerced third-party buyer.
109. See *Smith Mach.*, 878 F.2d at 1294 (accepting the second type of conspiracy under *Perma Life*); *Black Gold I*, 729 F.2d at 686-87 ("If Rockwool used the refusal to deal with Black Gold to induce adherence by other customers to a tying arrangement that violates the antitrust laws, Rockwool would be liable under section 1 of the Sherman Act for unlawfully combining to restrain trade.").
In *Kodak*, in an effort to reduce Independent Service Operators (ISOs) in the market, Kodak instituted a policy to only sell replacement parts for micrographic and copying machines to buyers of Kodak equipment who used Kodak service or repaired their own machines. To support this policy, Kodak entered into agreements with parts manufacturers, distributors, and owners to not sell parts to ISOs. Before the Court, Kodak maintained that its dealings with parts purchasers constituted unilateral behavior by Kodak and not a conspiracy or combination. The Supreme Court, in footnote 8 of the opinion, disagreed: "Assuming, arguendo, that Kodak's refusal to sell parts to any company providing service can be characterized as a unilateral refusal to deal, its alleged sale of parts to third parties on condition that they buy service from Kodak is not [unilateral behavior]."114

The *Systemcare I* court discounted Kodak's precedential value on two levels. First, the Tenth Circuit claimed Kodak was factually distinct from *Systemcare I*.115 The court stated: "[The plaintiff] in *Kodak* alleged that Kodak reached agreements with other independent companies that manufactured Kodak parts to bar sale of replacement parts to Plaintiff. Such a conspiracy among multiple parties is precisely what Systemcare has failed to allege."116

Comparing the tying arrangements involved in both cases, however, *Kodak* is not sufficiently distinct from *Systemcare I*. The *Systemcare I* court misconstrued which third parties (parts manufacturers as opposed to equipment owners) were participants in tying arrangements in *Kodak*. The *Systemcare I* court assumed the alleged conspiracy was horizontal, between Kodak and licensed manufacturers117 who refused to sell to anyone, including the plaintiffs, but Kodak. The manufacturers' refusal to sell parts to ISOs, however, was not weighed by the *Kodak* Court as part of the tying arrangement. The manufacturers were not alleged as horizontal co-conspirators with Kodak to coerce a tying arrangement with Image Technical.

Rather, the conspiracy alleged in *Kodak* was vertical, between Kodak and equipment owners. In other words, Kodak tied the purchase of Kodak service with the sale of replacement parts to equipment owners. The *Kodak* court provided that "Kodak implemented a policy of selling replacement parts . . . only to buyers of Kodak equipment who use Kodak service or repair their own machines."118 The Supreme Court confirmed that Kodak and an equipment owner, as a buyer coerced into purchasing service tied with Kodak replacement parts, were co-conspirators in the tying arrangement. Clearly, the distinction made by the *Systemcare I* court is not valid when considered in the context of the tying arrangement from *Kodak*.

114. *Id.* at 463 n.8 (citing *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 619 (9th Cir. 1990)).
116. *Id.* (emphasis added) (citation omitted).
117. The licensed manufacturers are referred to by the *Kodak* court as "original-equipment manufacturers" or "OEM's". *See Kodak*, 504 U.S. at 457.
118. *Id.*
The *Systemcare I* court looked to the wrong parties in evaluating the tying arrangement conspiracy in *Kodak*.

The second major argument by the *Systemcare I* court directly refutes the precedential validity of the United States Supreme Court's dicta from footnote 8 of *Kodak*. While this dicta does provide oblique support for Systemcare's position, it is several steps away from overruling the rule established in *Chanute*. Unfortunately, while the *Systemcare I* court obviously did not feel the statement was definite enough to be superseding authority, the court hesitated to make any other reference to the analysis of the *Kodak* Court. The court gave no further indication of its reason for dismissing the *Kodak* rationale.

The *Systemcare I* court could have looked to *Image Technical Services, Inc. v. Eastman Kodak Co.* (1990) the Ninth Circuit opinion cited by the Supreme Court in footnote 8 of *Kodak*. The Ninth Circuit noted that

Kodak entered into agreements with equipment owners . . . that it will sell parts only to users "who service their own Kodak equipment." If such conduct were to be labelled "independent", virtually all tying arrangements would be beyond the reach of Section 1. We do not believe that *Monsanto*, without discussing the courts' tying decisions, meant to overturn them.

Ironically, this *Monsanto* interpretation is the same as that described by Judge Seymour within her concurring opinion in *Chanute*. Thus, the Supreme Court, in a logical extension of *Image Technical*, was endorsing Judge Seymour's criticism of the *Chanute* majority.

Additionally, the *Systemcare I* court could have looked to other courts for more concrete interpretations of the *Kodak* dicta. In *Datagate, Inc. v. Hewlett-Packard Co.* (1995) the United States Court of Appeals for the Ninth Circuit dealt directly with the precise unilateral conduct decision at issue with the *Systemcare I* court; "[Kodak footnote 8] simply means that, for the purposes of tie-in analysis, the defendant may

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119. Regarding unilateral action by a single seller, the *Kodak* Court stated: The record indicates that Kodak would sell parts to third parties only if they agreed not to buy service from ISO's . . . Kodak contends that this practice is only a unilateral refusal to deal which does not violate the antitrust laws. Assuming, arguendo, that Kodak's refusal to sell parts to any company providing service can be characterized as a unilateral refusal to deal, [Kodak's] alleged sale of parts to third parties on condition that they buy service from Kodak is not. *Kodak*, 504 U.S. at 463 & n.8 (citing *Image Technical*, 903 F.2d at 619) (citations omitted).

120. See *Systemcare I*, 85 F.3d at 470.

121. 903 F.2d 612 (9th Cir. 1990).

122. Id. at 619.


124. 60 F.3d 1421 (9th Cir. 1995).
sell the tying product to anybody or nobody at all. What it may not do is condition the sale of the tying product upon the purchase of the tied product.\textsuperscript{125} The Datagate court found that the Supreme Court intended to prevent the resulting forced sale from a coerced tying arrangement.\textsuperscript{126} A coerced tying arrangement prevents the buyer from acting independently, resulting in concerted action between the single buyer plaintiff and single seller defendant.\textsuperscript{127} To arbitrarily dismiss the analysis of several courts, including the Supreme Court and previous Tenth Circuit opinions, as "oblique" without further justification or reference is clearly insufficient.

The Systemcare I court also dismissed the Supreme Court dicta as being "several steps away from overruling the rule established in Chanute."\textsuperscript{128} The Tenth Circuit, by disregarding the history of previous Supreme Court rulings referenced by the Ninth Circuit in Image Technical, avoids the issue.\textsuperscript{129} The plaintiffs do not need to rely upon Kodak dicta as authority because the Supreme Court previously dealt with vertical conspiracies in Perma Life and Parke, Davis.\textsuperscript{130}

The dicta from Kodak validates the Ninth Circuit's reliance upon those previous Supreme Court decisions when it cites to the Ninth Circuit opinion. Further, Perma Life dealt directly with the coerced vertical conspiracies at issue in Systemcare I. Its authority is neither mere dicta nor "several steps away" from overturning Chanute. Neither court in Systemcare I or Chanute directly contends that Perma Life is no longer valid law. Both Perma Life and Parke, Davis recognized the importance of coercion in establishing a vertical conspiracy. By dismissing the issue of force as "moot," Chanute is in direct conflict with these decisions. The court clearly erred in dismissing the Supreme Court's dicta from Kodak without further evaluation.

C. Factual Distinctions between Systemcare I & Chanute

Systemcare attempted to factually distinguish Chanute as the third method of avoiding the Tenth Circuit decision from that case.\textsuperscript{131} As before, the Systemcare I court disagreed.\textsuperscript{132} While several proposed factual distinctions were correctly discouraged,\textsuperscript{133} the court overlooked the factual distinctions of Chanute and Systemcare I within the context of the two types of vertical conspiracies described

\textsuperscript{125} Id. at 1426 (analyzing Kodak, 504 U.S. at 463 n.8).
\textsuperscript{126} See id.
\textsuperscript{127} See id. (discussing Monsanto).
\textsuperscript{128} Systemcare, Inc. v. Wang Labs. Corp., 85 F.3d 465, 470 (10th Cir. 1996), vacated, 117 F.3d 1137 (10th Cir. 1997).
\textsuperscript{129} The Image Technical court stated: "We do not believe that Monsanto, without discussing the court's tying decisions, meant to overturn them." Image Technical Servs., Inc. v. Eastman Kodak Co., 903 F.2d 612, 619 (9th Cir. 1990).
\textsuperscript{130} See supra notes 34-35, 51-59 and accompanying text.
\textsuperscript{131} See Systemcare, 85 F.3d at 470.
\textsuperscript{132} See id. ([We] see no intellectually honest way to distinguish Chanute from the facts of [Systemcare].)
\textsuperscript{133} See id. The defendants' two main contentions were that (1) "any case can be distinguished" and (2) the Chanute majority actually intended to generally disallow contracts as tying agreements as opposed to disallowing a single-seller conspiracy. See id.
in *Perma Life*.\(^{134}\) Specifically, *Perma Life* developed two distinct types of conspiracies: (1) a coerced tying arrangement between the seller and the plaintiff and (2) a coerced tying arrangement between the seller and a third-party buyer.\(^{135}\)

Some commentators interpret *Chanute* as a blanket standard requiring a horizontal conspiracy to establish a section 1 violation.\(^{136}\) However, without support from *McKenzie v. Mercy Hospital*,\(^ {137}\) factually distinguished by Judge Seymour in her concurring opinion,\(^ {138}\) the subject matter of *Chanute* is strictly limited to conspiracies between a single plaintiff and a single defendant,\(^ {139}\) the first type of vertical conspiracy under *Perma Life*. A narrow reading of the *Chanute* opinion would not include restrictions on the *Perma Life* Court's second type of vertical conspiracy, involving agreements between a coerced third-party buyer and a single defendant.

Systemcare, however, alleged that a third-party buyer and a single seller were co-conspirators. Thus, the plaintiff was invoking the second type of conspiracy under *Perma Life*, not the first. The factual distinction the *Systemcare I* court should have reconciled involves the difference between the first and second types of conspiracies, on whether the buyer is the plaintiff or a third-party buyer. The *Systemcare I* court presumed *Chanute* prohibits a plaintiff from establishing a conspiracy between a coerced third-party buyer and a single seller.\(^ {140}\)

*Chanute*, however, did not mention disallowing such a conspiracy, nor does the court specifically mention the second type of conspiracy from *Perma Life*. By not recognizing the factual distinction between the first and second types of conspiracies under *Perma Life*, the *Systemcare I* court effectively expanded

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134. See generally supra notes 51-59 and accompanying text.
137. 854 F.2d 365 (10th Cir. 1988).
138. See *supra* note 73 and accompanying text.
139. The *Chanute* court stated:

   [T]he plaintiff must make a preliminary showing of a conspiracy between two persons . . .

   The Cities have not shown Williams acted in concert with any other entity. The Cities name only one defendant. The other parties to the allegedly illegal contracts to establish the conspiracy are the Cities themselves. We conclude the Cities have failed to make the requisite preliminary showing of a conspiracy to go forth with their tying claims under § 1 of the Sherman Act.

140. See *Systemcare, Inc. v. Wang Labs. Corp.*, 85 F.3d 465, 469 (10th Cir. 1996), vacated, 117 F.3d 1137 (10th Cir. 1997). In *Systemcare I*, the court provided:

   Thus, according to *Chanute*, a tying arrangement imposed by a single entity is not proscribed by section one of the Sherman Act, even if that arrangement is embodied in a contract between seller and buyer. Instead, a plaintiff must establish a conspiracy between two or more entities to force such an agreement upon a third party.

   *Id.*
Chanute to eliminate conspiracies between a coerced third-party buyer and a single seller from section 1 consideration. Thus, the court's broad interpretation of Chanute eliminated virtually all vertical conspiracies in tying arrangements from consideration under section 1.

V. In Defense of Systemcare I

By requiring a horizontal conspiracy for a section 1 tying arrangement claim, the Tenth Circuit adopted a minority view.\(^{141}\) However, Service & Training, Inc. v. Data General Corp.\(^{142}\) does provide some support for the Tenth Circuit position. Soon after the Ninth Circuit's holding in Image Technical Services, Inc. v. Eastman Kodak Co.,\(^{143}\) the Fourth Circuit criticized the Ninth Circuit for being overly broad and missing the point of Monsanto.\(^{144}\) The Fourth Circuit specifically criticized the opinion on two main points. First, the court disagreed with the Image Technical court's classification of the illegal tying arrangement.\(^{145}\) The court found that a seller could unilaterally ban parts sales to a group of customers who "service their own equipment" without actually tying the parts to service.\(^{146}\) Secondly, the Data General court disagreed with the Image Technical interpretation of the Monsanto evidentiary standard.\(^{147}\)

In Datagate,\(^{148}\) however, the Ninth Circuit responded to the Fourth Circuit's contentions. The Datagate court maintained that the Data General court merely analyzed the evidentiary standard involved in proving a conspiracy exists as opposed to classifying the activity as unilateral or concerted.\(^{149}\) In other words, were the plaintiff able to meet the Data General evidentiary standard to prove a conspiracy existed between the defendant and a third party buyer, then a conspiracy would exist. The Datagate court further implied that Data General is, nonetheless, consistent with the Ninth Circuit interpretation of Monsanto.\(^{150}\)

In the final analysis, applying the Data General opinion to the defense of Systemcare I provides little help. The opinion provides little more than support for a stricter standard in judging evidence proving conspiracies. The opinion does not disallow vertical conspiracies in tying arrangements altogether, which is what the Systemcare I opinion does. The most important distinction between the Tenth Circuit and the Fourth Circuit positions is found in Chanute where the court held that "forcing of a tying arrangement . . . [is] moot."\(^{151}\) The Fourth Circuit did not

141. See Whalley & Handler, supra note 136, at 111.
142. 963 F.2d 680 (4th Cir. 1992).
143. 903 F.2d 612, 619 (9th Cir. 1990).
144. See Data General, 963 F.2d at 686 n.12.
145. See id.
146. Id.
147. See id.
148. Datagate, Inc. v. Hewlett-Packard Co., 60 F.3d 1421 (9th Cir. 1995); see also notes 124-27 and accompanying text.
149. See Datagate, 60 F.3d at 1427.
150. See id.
151. City of Chanute v. Williams Natural Gas Co., 955 F.2d 641, 651 n.11 (10th Cir. 1992),
hold that coercion is irrelevant in section 1 claims, but rather contended only that forcing is difficult to prove under the Monsanto standard.\textsuperscript{152}

In any event, the Tenth Circuit declined to bring up Data Systems, Monsanto, or any other support for its decision. The court's arguments stayed strictly within the context of its own opinions from McKenzie and Chanute. In essence, the court has disregarded some thirty years worth of antitrust law dating back to Perma Life and Parke, Davis.

\textbf{VI. Tenth Circuit Position After Systemcare II}

The en banc court met to resolve the conflict between Black Gold I and II and the Systemcare I panel which was based upon Chanute and McKenzie.\textsuperscript{153} Initially, the Systemcare II court recognizes Black Gold I and II, previously unmentioned by the Systemcare I panel, as valid Tenth Circuit precedent.\textsuperscript{154} The court notes the Chanute majority also failed to reference Black Gold I or II despite Judge Seymour's concuring opinion.\textsuperscript{155}

Fortunately, the en banc proceeding unequivocally settles the conflict. Chanute and McKenzie are overruled to the extent they disagree with the en banc endorsement of Black Gold I and II.\textsuperscript{156} Systemcare I is vacated and its district court predecessor, no longer burdened by Chanute or McKenzie, is remanded.\textsuperscript{157}

[A] contract between a buyer and seller satisfies the concerted action element of section 1 of the Sherman Act where the seller coerces a buyer's acquiescence in a tying arrangement imposed by the seller. The essence of section 1's contract, combination, or conspiracy requirement in the tying context is the agreement, however reluctant, of a buyer to purchase from a seller a tied product or service along with a tying product or service. To hold otherwise would be to read the words "contract" and "combination" out of section 1.\textsuperscript{158}

The Systemcare II court found this position poses no threat to traditional views of unilateral behavior or independent business activity.\textsuperscript{159} Tying arrangements coerce the buyer to purchase the tied product through the seller's market power in the

overruled by Systemcare, Inc. v. Wang Laboratories Corp., 117 F.3d 1137 (10th Cir. 1997).

\textsuperscript{152} See Datagate, 963 F.2d at 686 n.12.

\textsuperscript{153} Id. The court did not deal with possible implications of footnote 8 from Kodak, but this issue becomes academic at the point the Tenth Circuit is in line with Perma Life. Likewise, discussion possible factual distinctions between Chanute and Systemcare I are unnecessary as these opinions have been overruled and vacated, respectively.

\textsuperscript{154} Systemcare, Inc. v. Wang Laboratories Corp., 117 F.3d 1137, 1140-41, 1145 (10th Cir. 1997). "Thus, under Black Gold I and II, a plaintiff satisfies section 1's concerted action element by showing a tying agreement between a seller and a buyer." Id. at 1141.

\textsuperscript{155} Id. at 1142.

\textsuperscript{156} Id. at 1145.

\textsuperscript{157} Id.

\textsuperscript{158} Id. at 1142-43.

\textsuperscript{159} Id. at 1143.
tying product. Independent decision-making power of a buyer to act within his own best interests are, therefore, destroyed. Thus, the competitive benefits of independent behavior are removed, satisfying the conspiracy requirement under section one. The Systemcare II court agreed that this position does not dilute the evidentiary standard established in Monsanto.

VII. Impact of Decision

The conflict between Systemcare and Wang is not unique. ISOs are the source of much recent litigation against hardware/software manufacturers. ISOs maintain foreclosure from hardware service markets vis-à-vis manufacturer hardware/software service policies. The conflict involves an estimated $100 billion service industry.

The Systemcare I decision was inconsistent with the two main goals of the Sherman Act: increasing productive competition and improving consumer choice. By excluding coerced vertical conspiracies, the Tenth Circuit was eliminating a segment of tying arrangement claims allowed by other circuits. Tying arrangements increase barriers to entry for other service providers, thus decreasing competition.

Likewise, under the Systemcare I fact scenario, purchasers of hardware service were given less choices from which to select their service provider. Coercion eliminates independent consumer decision making vital to the competitive process. If both "seller-plaintiff" and "seller-third party" vertical conspiracies are disallowed, however, then courts within the Tenth Circuit will never reach decisions evaluating coercion. Systemcare I made coercion an obsolete issue and potentially opened the door for very anticompetitive interaction between sellers and buyers. Systemcare II, however, avoids the pitfalls of Systemcare I and brings the Tenth Circuit in line with antitrust doctrines supported by the Supreme Court.

Notably, the district court on remand could recognize the coerced vertical conspiracies between a single buyer and single seller, but utilize a stricter evidentiary standard for proving coercion. In this way, the court could still

160. Id. at 1144.
161. Id. at 1143.
162. Id.
163. Id. at 1144-45.
165. See id.
166. See id.
significantly reduce the number of recognized conspiracies without threatening healthy competition or contradicting United States Supreme Court antitrust policy.

Interestingly, Systemcare I and II may be of less significance in Oklahoma than in other states. The Oklahoma antitrust statute is slightly different than the Sherman Act. The statute prohibits any "act . . . in restraint of trade."170 In 1996, the Tenth Circuit Court of Appeals interpreted the statute to forbid individual acts as well as combinations.171 Thus, for actions brought under Oklahoma state law, a combination need not be proven. For federal claims, however, the Sherman Act will still apply and individual behavior is still protected.

VIII. Conclusion

Seldom does the opportunity present itself to correct an err in judgement. The Tenth Circuit Court of Appeals took advantage of this opportunity in June of 1997 in Systemcare, Inc. v. Wang Laboratories Corp. The en banc court resolved an important inconsistency in antitrust decisions. Thus, the Tenth Circuit is now consistent with prior circuit precedent and is "in harmony with both the law of the Supreme Court and our sister circuits."172 By overruling the standard for establishing independent behavior set by Chanute and McKenzie, the Tenth Circuit reinforces Supreme Court antitrust decisions dating back to *Parke, Davis*.

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171. See *Harolds Stores, Inc. v. Dillard Dep't Stores, Inc.*, 82 F.3d 1533, 1549-51 (10th Cir. 1996). However, the Oklahoma Supreme Court has not addressed whether the statute prohibits unilateral acts. See *id.* at 1549.