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D. Kent Meyers

Jennifer A. Dutton

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RECENT DEVELOPMENTS IN OKLAHOMA ANTITRUST LAW

D. KENT MEYERS* & JENNIFER A. DUTTON**

This Article covers six antitrust topics of interest addressed by Oklahoma state and federal courts within the past decade. Part I discusses the doctrine of a single actor, which is one of the distinctions between federal and Oklahoma antitrust law. Part II addresses state action immunity and the uncertainty regarding antitrust liability in Oklahoma. Next, Part III focuses on the exclusive jurisdiction of the Oklahoma Corporation Commission and the consequential preclusion of state antitrust claims. Part IV provides the latest ruling on per se analysis in below-cost pricing. Part V confirms the requirement of proof of market power under a rule of reason standard. Finally, Part VI gives guidance on how to define a relevant market and submarket under Oklahoma antitrust law.

I. Doctrine of Single Actor

Although the Oklahoma Antitrust Reform Act¹ (Act) is “similar to federal antitrust legislation,”² it is not identical. Unlike its federal counterpart, Section 1 of the Sherman Act,³ Section 203(A) of the Act provides that

* Director, Crowe & Dunlevy, a Professional Corporation, Oklahoma City, Oklahoma. B.A., University of Oklahoma, 1960; J.D., University of Oklahoma, 1964; LL.M., Harvard Law School, 1976. Adjunct Professor (Antitrust), Oklahoma City University School of Law, University of Oklahoma College of Law, and University of Tulsa Law School.

** Associate, Crowe & Dunlevy, a Professional Corporation, Oklahoma City, Oklahoma. B.A., Oklahoma City University, 2000; J.D., Oklahoma City University, 2003.

1. See 79 OKLA. STAT. §§ 201-212 (2001).

2. *Oakridge Invs., Inc. v. S. Energy Homes, Inc.*, 1986 OK CIV APP 8, ¶ 8, 719 P.2d 848, 850.

3. See 15 U.S.C. § 1 (2000).

unilateral anticompetitive conduct by a defendant is actionable as an unreasonable restraint of trade.⁴

This key distinction was first recognized in 1996 by the U.S. Court of Appeals for the Tenth Circuit in *Harolds Stores, Inc. v. Dillard Department Stores, Inc.*⁵ In *Harolds*, the court noted that while Section 1 of the Sherman Act prohibits only concerted action between two or more entities,⁶ the Act specifically prohibits “[e]very act . . . in restraint of trade.”⁷ The Tenth Circuit held that “[b]ecause the Oklahoma antitrust legislation differs from the relevant federal statute on this key point, federal authority . . . does not govern this particular issue of Oklahoma statutory law.”⁸ Recently, the U.S. District Court for the Northern District of Oklahoma and the Tenth Circuit in *Green Country Food Market, Inc. v. Bottling Group, LLC*,⁹ as well as the U.S. District Court for the Western District of Oklahoma in *Opitz, Inc. v. Tri-State Chemicals, Inc.*,¹⁰ affirmed this important distinction.

II. Doctrine of State Action Immunity

Both Oklahoma state and federal courts have issued decisions within the last few years regarding the applicability of the federal doctrine of state action immunity within antitrust law in Oklahoma. Although these decisions have redefined and redirected Oklahoma antitrust law, they have also created uncertainty.

*Fine Airport Parking, Inc. v. City of Tulsa*¹¹ presents a novel and unprecedented holding — “that municipalities are not immune from the Oklahoma Antitrust Reform Act under the federal doctrine of state action immunity.”¹² In this case, the plaintiff, Fine, operated an off-airport parking service and competed with the defendant, Tulsa Airport Authority (Tulsa),

4. See 79 OKLA. STAT. § 203(A).

5. 82 F.3d 1533 (10th Cir. 1996).

6. See 15 U.S.C. § 1 (prohibiting “every contract, combination . . . or conspiracy”).

7. *Harolds*, 82 F.3d at 1549-50 (quoting 79 OKLA. STAT. § 203(A)).

8. *Id.* at 1550. The Tenth Circuit also held that the difference between the Sherman Act and the Act prevented federal courts’ decisions from providing “valuable assistance in interpreting the provisions of the Oklahoma [antitrust] statutes.” *Id.* (quoting *Teleco, Inc. v. Ford Indus., Inc.*, 1978 OK 159, ¶ 3, 587 P.2d 1360, 1362).

9. 371 F.3d 1275, 1278 (10th Cir. 2004) (stating that section 203(A) of the Act “prohibits unilateral acts in restraint of trade”).

10. CIV-96-0174, slip op. at 5-7 (W.D. Okla. June 17, 1999) (stating that under Oklahoma antitrust law unilateral conduct alleged to be an unreasonable restraint of trade is actionable and subject to per se analysis).

11. 2003 OK 27, 71 P.3d 5.

12. *Id.* ¶ 20, 71 P.3d at 12.

which operated an on-airport parking service.¹³ Fine filed suit alleging that Tulsa's operations constituted exclusionary practices that violated Oklahoma antitrust statutes.¹⁴ Tulsa then filed a motion to dismiss Fine's petition, arguing that Tulsa's operation of the airport parking facility was specifically authorized by state statute¹⁵ and, therefore, immune.¹⁶ The trial court granted the motion, holding that the Act incorporated the federal doctrine of state action immunity, also known as the *Parker* doctrine,¹⁷ and that Tulsa's conduct was therefore immune from antitrust liability.¹⁸ The Oklahoma Court of Civil Appeals affirmed, and the Oklahoma Supreme Court granted certiorari review.¹⁹

On review, Tulsa argued that the Oklahoma legislature intended the federal doctrine of state action immunity to apply to a municipality acting pursuant to state law because the legislature required the courts to interpret the Act according to federal antitrust law.²⁰ The Oklahoma Supreme Court disagreed, however, holding that municipalities are not immune from the Act by virtue of the *Parker* doctrine.²¹ The court based its decision on the fact that the Act clearly expressed the legislature's intent for the Act to apply to municipalities because it specifically defined a "person" covered by the statute to include a "municipal corporation."²²

The court also held that federal antitrust law did not intend for such an immunity to apply because the principles of federalism, which formed the foundation of the federal state action immunity doctrine, were meaningless when determining municipal liability under state antitrust laws.²³ In so holding, the court elaborated on why the federalism principles, which were intended to protect the relationship between the sovereign federal and sovereign state governments, did not apply to Tulsa's situation:

The *Parker* decision rested on general principles of federalism involving the relationship of the federal government to the sovereign states, and on the specific constitutional limits on federal

13. *Id.* ¶ 2, 71 P.3d at 8.

14. *Id.* ¶ 3, 71 P.3d at 8.

15. See Municipal Airports Act, 3 OKLA. STAT. §§ 65.1-65.22 (2001).

16. *Fine* ¶ 3, 71 P.3d at 8.

17. For further information, see *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny.

18. *Fine* ¶ 4, 71 P.3d at 8.

19. *Id.* ¶ 5, 71 P.3d at 8.

20. *Id.* ¶ 15, 71 P.3d at 10.

21. *Id.* ¶¶ 20, 29, 71 P.3d at 12, 14.

22. *Id.* ¶¶ 14, 20, 71 P.3d at 10, 14.

23. *Id.* ¶ 18, 71 P.3d at 11.

power contained in the tenth and eleventh amendments. These principles are not present in this case. The relationship between the federal government and the states is not parallel to the relationship between the state government and the cities. Cities are creatures of the state, derive their power from it, and are not recognized as independent sovereigns. The concern in *Parker* and recent United States Supreme Court cases applying it has to do with potential conflicts between the laws of two different sovereigns — federal and state governments.

By contrast, the present case involves a conflict between the state laws dealing with municipalities and the state antitrust law. The rationale behind the *Parker* exemption is not applicable to this type of case²⁴

The court ultimately held that the trial court did not err in dismissing Fine's petition. Although Tulsa was not immune from antitrust liability under the *Parker* doctrine, the court held that Tulsa was not subject to the Act because its operations were authorized by the Municipal Airports Act.²⁵

Other important cases regarding state action immunity are *Telecor Communications, Inc. v. Southwestern Bell Telephone Co.*²⁶ and *Pittsburg County Rural Water District No. 7 v. City of McAlester*.²⁷ In *Telecor*, Telecor filed suit alleging that Southwestern Bell engaged in monopolistic behavior in violation of both federal and state antitrust laws.²⁸ Based in part on evidence of Southwestern Bell's lobbying of the Oklahoma Corporation Commission (OCC) and its conduct before November 1996, when its legal monopolization ended as a result of OCC rulemaking, the jury found Southwestern Bell guilty of monopolistic behavior in violation of Oklahoma antitrust law.²⁹ Southwestern Bell thereafter filed a motion for judgment as a matter of law or for a new trial, arguing that the verdict violated the federal state action doctrine because the doctrine barred the use of such conduct to prove an antitrust violation.³⁰ The U.S. District Court for the Western District of Oklahoma held that the federal state action doctrine only applies to federal

24. *Id.* ¶ 19, 71 P.3d at 11-12 (quoting *Town of Hallie v. City of Chippewa Falls*, 314 N.W.2d 321, 324 (Wis. 1982) (internal citations and alterations omitted)).

25. *See id.* ¶¶ 24-29, 71 P.3d at 13-14.

26. 305 F.3d 1124 (10th Cir. 2002).

27. 358 F.3d 694 (10th Cir. 2004).

28. *Telecor*, 305 F.3d at 1128-29.

29. *Id.*

30. *Id.* at 1130, 1139.

antitrust claims, not state antitrust claims.³¹ Because Southwestern Bell was only found to have violated Oklahoma law, its argument failed.³² On appeal, the Tenth Circuit “decline[d] to address whether the state action doctrine applies to state antitrust claims.”³³

In *Pittsburg County Rural Water District*, the City of McAlester competed with a rural county water association, Pittsburg County, in providing water to rural residents, allegedly in violation of both federal and state antitrust laws.³⁴ Contrary to the Western District’s holding in *Telecor*, the U.S. District Court for the Eastern District of Oklahoma implicitly held that the federal state action doctrine applies to both federal and state antitrust claims when it dismissed Pittsburg County’s antitrust claims upon a finding that McAlester’s conduct fell within the *Parker* doctrine.³⁵ On appeal, the Tenth Circuit affirmed the district court’s dismissal on other grounds,³⁶ and once again declined to address whether the state action doctrine applies to state antitrust claims.³⁷

III. Exclusive Jurisdiction of the Oklahoma Corporation Commission

Two federal decisions issued within the past few years address the preclusion of state antitrust claims because of the exclusive jurisdiction of the OCC. In *Trigen-Oklahoma City Energy Corp. v. Oklahoma Gas & Electric Co.*,³⁸ Trigen and OG&E competed indirectly for cooling equipment

31. *Id.* at 1139.

32. *Id.*

33. *Id.*

34. *Pittsburg County Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 700 (10th Cir. 2004).

35. *Id.* at 721; *see also* *Pittsburg County Rural Water Dist. No. 7 v. City of McAlester*, No. 97-185-P, 2002 WL 32297921, at *5 (E.D. Okla. June 7, 2002).

36. The Tenth Circuit upheld the district court’s grant of summary judgment based on the essential facilities doctrine. Under this doctrine, a business or a group of businesses that control a “scarce facility” must grant competitors reasonable access to the facility. *See Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1519 (10th Cir. 1984); *see also* WILLIAM C. HOLMES, *ANTITRUST LAW HANDBOOK* § 3:11 (2004 ed. 2003) (stating that the doctrine holds that “it can be an act of actual or attempted monopolization for a monopolist (or near monopolist, in attempt situations) to unreasonably deny competitors access to an essential facility or resource that it controls, where it does so for the purpose of further entrenching or acquiring a monopoly position”). Here, the court found that the defendant was not a “monopolist” under the doctrine, and therefore, could not be held liable. *Pittsburg County Rural Water Dist.*, 358 F.3d at 721-22. For more on *Pittsburg County Rural Water District’s* application of, and recent developments in, the essential facilities doctrine, *see infra* note 68.

37. *Pittsburg County Rural Water Dist.*, 358 F.3d at 721.

38. 244 F.3d 1220 (10th Cir. 2001).

customers in Oklahoma City.³⁹ Trigen sued OG&E, alleging that its actions constituted monopolization and attempted monopolization in violation of federal antitrust law and an unreasonable restraint of trade in violation of state antitrust law.⁴⁰ The jury returned a verdict in favor of Trigen on all claims except its attempted monopolization claim.⁴¹ On appeal, the Tenth Circuit reversed the judgment and remanded the case with directions to dismiss the complaint based in part⁴² upon its holding that the state antitrust claim was a “collateral attack[] on OG&E’s filed rates,”⁴³ and therefore “within the exclusive jurisdiction of the OCC.”⁴⁴

One year later in *Telecor*, Southwestern Bell cited *Trigen* in support of its argument that *Telecor*’s claims were likewise precluded because of the exclusive jurisdiction of the OCC.⁴⁵ The Tenth Circuit readily distinguished and limited its *Trigen* holding. The court held that exclusive jurisdiction of the OCC was inapplicable because *Telecor*, unlike *Trigen*, complained about Southwestern Bell’s unilateral conduct, not an OCC order or Southwestern Bell’s conduct ordered by the OCC.⁴⁶ Moreover, the court found that Southwestern Bell “fail[ed] to offer any basis for concluding that such an appeal from agency *inaction* was available.”⁴⁷

IV. *Per Se Analysis in Below-Cost Pricing*

Recently, in *Crest Foods of Edmond, L.L.C. v. Wal-Mart Stores, Inc.*,⁴⁸ the U.S. District Court for the Western District of Oklahoma held that under the Act, courts should not apply a *per se* analysis to below-cost pricing that violates the Oklahoma Unfair Sales Act.⁴⁹

Under Oklahoma antitrust law, a *per se* analysis is appropriate when restraints of trade, “because of their pernicious effect on competition and lack

39. *Id.* at 1223.

40. *Id.* at 1223-24.

41. *Id.*

42. The court dismissed the federal antitrust claims based on the state action immunity doctrine. *See id.* at 1225-27.

43. *Trigen*’s state antitrust claim was a collateral attack on the OCC because “the heart of *Trigen*’s complaint [was] that OG&E’s rates [were] too low and that *Trigen* either had to lower its own rates in response or lose business.” *Id.* at 1229.

44. *Id.* at 1225, 1229.

45. *Telecor Communications, Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1140 (10th Cir. 2002).

46. *Id.*

47. *Id.*

48. CIV-00-1659 (W.D. Okla. Feb. 26, 2003).

49. *Id.* at 9.

of any redeeming value, are conclusively presumed to be unreasonable and, therefore, are deemed *per se* violations of the antitrust laws without proof of the challenged conduct's effect on competition."⁵⁰ Under the Oklahoma Unfair Sales Act, evidence of below-cost pricing constitutes "prima facie evidence" of "intent to injure competitors and the result of a substantial lessening of competition."⁵¹ Using these two principles, Crest argued that because below-cost pricing violates the Oklahoma Unfair Sales Act and because such conduct gives rise to presumptions of an intent to injure a competitor and results in a substantial lessening of competition, below-cost pricing is, as a matter of law, "a sufficient predicate for applying a *per se* analysis to determine whether that below-cost pricing violates Oklahoma's Antitrust Act as an illegal restraint of trade."⁵²

The district court refused to accept Crest's argument and held that the prima facie presumptions created under the Oklahoma Unfair Sales Act are to be applied narrowly and only to the Oklahoma Unfair Sales Act.⁵³ The court determined that while the presumptions were effective for purposes of the Oklahoma Unfair Sales Act, which is "essentially protectionist legislation," they were not effective for purposes of the Act, which is "pro-competitive legislation."⁵⁴ The court concluded that Crest's attempts to satisfy the *per se* requirements of antitrust law with an Oklahoma Unfair Sales Act provision regarding prima facie evidence of violating *that act* "stretch[ed] the bootstrap too far."⁵⁵

50. *Id.* at 8 (citing *Beville v. Curry*, 2001 OK 1, ¶ 12, 39 P.3d 754, 759). While Oklahoma antitrust law recognizes the existence of a *per se* violation, courts are more likely to adopt a rule of reason analysis in determining if an unreasonable restraint of trade exists. *See Opitz, Inc. v. Tri-State Chems. Inc.*, CIV-96-0174, slip op. at 2 (W.D. Okla. Mar. 4, 1998) (noting that "the Oklahoma Supreme Court . . . has not yet found [a *per se*] violation in a reported decision, but has held that the area of *per se* violations must be 'carefully limited'") (quoting *Bd. of Regents of Univ. of Okla. v. Nat'l Collegiate Athletic Ass'n*, 1977 OK 17, ¶ 15, 561 P.2d 499, 506); *see also Beville* ¶ 12, 39 P.3d at 759 (stating that "[o]ur analysis must proceed under the rule of reason").

51. *Crest*, CIV-00-1659, slip op. at 10; *see also Diehl v. Magic Empire Grocers Ass'n*, 1964 OK 234, 399 P.2d 460; 15 OKLA. STAT. § 598.5(c) (2001).

52. *Crest*, CIV-00-1659, slip op. at 8-9.

53. *Id.* at 11; *see also id.* at 10 (holding that "*Diehl* applies only where the issue is whether un rebutted evidence supports a prima facie violation of the [Oklahoma] Unfair Sales Act").

54. *Id.*

55. *Id.* Of note, however, is *Harolds Stores, Inc. v. Dillard Department Stores, Inc.*, 82 F.3d 1533, 1548-49 (10th Cir. 1996), a case in which the court allowed the plaintiff, under a rule of reason analysis, to "stretch the bootstrap" in almost the exact same way that the court prohibits here. In *Harolds*, the court permitted, and the Tenth Circuit affirmed, the plaintiff's expert's testimony that by "selling garments below cost in violation of the Oklahoma Unfair

V. Requirement for Proof of Market Power

In *Beville v. Curry*,⁵⁶ the Oklahoma Supreme Court expressly adopted the principles espoused in federal case law regarding market power as a prerequisite to antitrust liability under a rule of reason standard. In this case, Beville, a radiologist, filed suit against numerous health care providers, their trustees, and an administrator, alleging various violations of the Act.⁵⁷ The defendants filed motions for summary judgment, which the trial court granted.⁵⁸ Even though the trial court did not specify its reasons for granting summary judgment, it was apparent from the record that “the defendants’ lack of market power was deemed to be the controlling issue in the case.”⁵⁹ The Oklahoma Court of Civil Appeals affirmed based on the defendants’ lack of the requisite market power.⁶⁰

The Oklahoma Supreme Court granted certiorari and also affirmed the trial court’s summary judgment grant because Beville “failed to refute the defendants’ prima facie showing of lack of market power.”⁶¹ As a foundation for its decision, the court recognized many essential principles of federal antitrust law:

(a) The essential element of an antitrust claim is injury to competition. To prove this, the plaintiff may show “either 1) the potential for genuine adverse affect on competition by possession of sufficient market power in the relevant market, or 2) evidence of actual detrimental effects on competition”;

(b) To prove the potential for genuine adverse affect on competition, the plaintiff must “define the relevant market and establish that the defendant possessed market power”; and,

(c) “Market power is the preliminary threshold inquiry and is often dispositive of antitrust cases.”⁶²

Moreover, the court discussed *Levine v. Central Florida Medical Affiliates, Inc.*,⁶³ a federal case in which the U.S. Court of Appeals for the Eleventh Circuit held that “even if [the plaintiff] had adequately defined the relevant

Sales Act, [defendant] not only injured [plaintiff], but harmed competition in general.” *Id.* at 1548-49.

56. 2001 OK 1, 39 P.3d 754.

57. *Id.* ¶ 1, 39 P.3d at 756.

58. *Id.* ¶ 5, 39 P.3d at 757.

59. *Id.*

60. *Id.*

61. *Id.* ¶ 1, 39 P.3d at 756.

62. *Id.* ¶ 13, 39 P.3d at 759-60 (internal citations omitted).

63. 72 F.3d 1538 (11th Cir. 1996).

market, . . . ‘absent evidence that the defendants had sufficient market power to affect competition,’” the plaintiff’s unreasonable restraint of trade claims must fail.⁶⁴

After establishing the necessity of defining the market and proving defendants’ market power, the court assessed the evidence concerning the defendants’ market power and held it to be insufficient to invoke antitrust liability.⁶⁵ In so doing, the court recognized many federal antitrust cases applying the rule of reason that refused to hold defendants with minimal market power — ranging between 25% and 50.1% — liable.⁶⁶ In response to one of Beville’s arguments, the court expressly adopted the federal principle that a plaintiff must prove the defendant’s market power to prevail on an attempt to monopolize claim.⁶⁷

VI. Relevant Product Market (Submarket) Defined

Most recently, in *Green Country Food Market, Inc. v. Bottling Group, LLC*, the U.S. Court of Appeals for the Tenth Circuit extensively addressed how to define a relevant market under the Act. In *Green Country*, the plaintiffs, a group of retail grocery stores owned by two individuals and operated in Tulsa, filed suit under the Act against the only local distributor of Pepsi and Pepsi-affiliated products and its holding company. The plaintiffs alleged that the defendants monopolized, attempted to monopolize, conspired to monopolize, and denied access to an essential facility⁶⁸ after discontinuing its sales to the

64. *Beville* ¶ 13, 39 P.3d at 760 (citing *Levine*, 72 F.3d at 1553).

65. *See id.* ¶¶ 14-18, 39 P.3d at 760-61.

66. *Id.* ¶ 18, 39 P.3d at 761.

67. *Id.* ¶ 24, 39 P.3d at 763 (citing *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993)). The court also addressed the use and application of the Herfindahl-Hirschman Index (HHI), which is used to measure market concentration in determining probable market power. *See also* SCFC ILC, Inc. v. Sears, Roebuck & Co., 36 F.3d 958 (10th Cir. 1994).

68. The essential facilities doctrine is another example of the differences that exist between federal antitrust laws and Oklahoma antitrust laws. Under the Act, an “essential facility” is defined as a facility:

- a. which is controlled by an entity that possesses monopoly power,
- b. that a competitor would be unable to practically or reasonably duplicate,
- c. the use of which has been unreasonably denied to a competitor *or a customer* of the entity that possesses monopoly power, and
- d. that it would be feasible to allow the competitor *or customer* to use or have access to without causing harm to or unreasonably interfering with the entity that possesses monopoly power.

79 OKLA. STAT. § 203(D)(3) (2001) (emphasis added). As is evident from the statutory text, Oklahoma’s definition specifically includes customers. The Sherman Act, however, does not cover “a customer” within its essential facility definition. *See Aspen Highlands Skiing Corp.*

plaintiffs.⁶⁹ The district court granted the defendants' motion for summary judgment, holding that the plaintiffs failed to prove the beverage products distributed by the defendants constituted a relevant product market.⁷⁰ On appeal, the plaintiffs argued that the district court erred in requiring proof of a relevant product market, and alternatively, challenged the court's definition of the relevant product market.⁷¹ The Tenth Circuit affirmed the district court's dismissal.⁷²

In analyzing how to define the relevant product market under the Act, the appellate court applied federal case law.⁷³ The court cited federal law for the fundamental antitrust principle that the relevant market consists of two elements: the product market and the geographic market.⁷⁴ The court then discussed the standard for defining a relevant product market as articulated in the federal landmark case of *United States v. E.I. du Pont de Nemours & Co.*⁷⁵ and its progeny,⁷⁶ as well as the standard for determining the existence of submarkets within a relevant product market as set out in *Brown Shoe Co. v. United States*.⁷⁷ The court ultimately held that "the general standard articulated in *du Pont*, in conjunction with the specific factors announced in

v. Aspen Skiing Corp., 738 F.2d 1509, 1520 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985); *see also* Pittsburg County Rural Water Dist. No. 7 v. City of McAlester, 358 F.3d 694, 721 (10th Cir. 2004) (citing the proper federal standard, but in dicta, erroneously applying the federal standard to the plaintiff's Oklahoma antitrust claim). Consequently, the Oklahoma essential facilities doctrine is more expansive than the federal doctrine.

69. *Green Country Food Mkt., Inc. v. Bottling Group, LLC*, 371 F.3d 1275, 1277-78 (10th Cir. 2004). The defendants discontinued sales to the plaintiffs after two of the plaintiffs sued one of the defendants' predecessors-in-interest for price discrimination in violation of the Oklahoma antitrust laws. The defendants' discontinuation resulted in the plaintiffs' lack of access to Pepsi and Pepsi-affiliated products other than through retail purchases. *Id.*

70. *Id.* at 1278.

71. *Id.*

72. *Id.* at 1277.

73. *See id.* at 1281-82. The court first noted that the Act was to be construed according to federal antitrust law and that sections 203(B) and 203(C) of the Act "both require[d] that the plaintiff prove a relevant market." *Id.* at 1281.

74. *Id.* at 1282.

75. 351 U.S. 377 (1956).

76. *See Green Country*, 371 F.3d at 1282.

77. 370 U.S. 294 (1962). Although this is the first time that federal law has been adopted as the standard for determining the existence of a submarket under Oklahoma antitrust law, it is not the first time that the concept of submarkets has been recognized under state law. *See Oakridge Invs., Inc. v. S. Energy Homes, Inc.*, 1986 OK CIV APP 8, ¶ 14, 719 P.2d 848, 851; *Teleco, Inc. v. Ford Indus., Inc.*, 1978 OK 159, ¶ 11, 587 P.2d 1360, 1363.

Brown Shoe, provide[] the applicable standard for defining the relevant product market [under the Act].”⁷⁸

The Tenth Circuit also adopted federal law in declining to accept the plaintiffs’ argument that the defendants’ products alone constituted a relevant product market.⁷⁹ The court referenced federal cases when applying the general rule that “[e]ven where brand loyalty is intense” a manufacturer’s own product or a single-branded product cannot establish a relevant product market.⁸⁰ In dicta, the court recognized the soft drink industry as a “prototypical example” of an industry in which a manufacturer’s own product or a single-branded product cannot establish a relevant product market.⁸¹

The Tenth Circuit further adopted federal law in declining to accept the plaintiffs’ alternative argument that the defendants’ full line of products constituted a cluster market over which the defendants had monopoly power.⁸² The court relied on federal cases in support of the fundamental antitrust principles that “[a] ‘cluster market’ exists where a seller provides a full line of products or services that create a separate product market consisting of that ‘cluster’ of products or services” and that “[a] cluster market exists only when the ‘cluster’ is *itself* an object of consumer demand.”⁸³ Thereafter, the court held:

[T]he fact that an entity distributes a number of different products does not of itself give it monopoly power in a “cluster market”; it merely defines the product(s)/service(s) offered by the distributor

78. *Green Country*, 371 F.3d at 1282.

79. *See id.* In support of its argument, the plaintiffs offered evidence that consumers were “brand loyal” to Pepsi products. The court found that such evidence was “an insufficient basis for concluding that Pepsi constitute[d] a relevant product market” and that the “[p]laintiffs ha[d] offered no evidence — other than their own testimony pertaining to brand loyalty — to prove that Pepsi branded products constitute[d] a market distinct from other soft drink products.” *Id.*

80. *See id.* at 1282. The court noted, however, that in rare circumstances a manufacturer’s products can constitute a relevant product market. *See id.* at 1283 (citing *Eastman Kodak, Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481-82 (1992), as an example of such an instance).

81. *See id.* at 1283.

82. *See id.* at 1284. The court noted two key problems with the plaintiffs’ argument: the plaintiffs did not present evidence that the different products distributed by the defendant together met the definition of a market cluster, and even if a cluster market existed, the plaintiffs failed to argue that the defendant had monopoly power in that market.

83. *Id.* at 1283-84.

as a package and then limits the relevant product market to those entities that can offer a competitive package.⁸⁴

VII. Conclusion

Throughout the past decade, Oklahoma antitrust law has evolved and taken on a life of its own. In some areas, it has continued to adopt and expand federal antitrust law. In other areas, however, it has declined to follow federal law, and instead has created and implemented its own principles.

84. *See id.* at 1284-85.