Antitrust: *Harold's v. Dillard*: It Takes Two to Tango—Except in Oklahoma: The Tenth Circuit Interprets Oklahoma Antitrust Law to Reach Unilateral Activity

Eric Scott Smith

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NOTES

Antitrust: *Harold's v. Dillard*: It Takes Two to Tango — Except in Oklahoma: The Tenth Circuit Interprets Oklahoma Antitrust Law to Reach Unilateral Activity

I. Introduction

The businessman tends to view our antitrust laws with restrained enthusiasm. In *principle*, he reluctantly acknowledges that he should favor their provisions; but, as a *principal*, he seldom displays any fondness for their prohibitions. He admits that he must live with this legislation, for better or for worse, yet he finds it difficult to return its embrace with any degree of affection.¹

The Sherman Antitrust Act provides the general principles defining American antitrust policy, promoting competition, and restricting monopolistic behavior.² These principles restrict at times and liberate at others, thus creating the businessperson's "restrained enthusiasm." The Oklahoma Antitrust Act substantially parallels the Sherman Act but differs in the scope of activities affected. Section 1 of the Sherman Act prohibits only contracts, combinations or conspiracies in restraint of trade.³ The Oklahoma Antitrust Act, in contrast, provides that "every act...in restraint of trade" is illegal.⁴

In *Harold's Stores, Inc. v. Dillard Department Stores, Inc.*⁵, the Tenth Circuit Court of Appeals considered, as a matter of first impression, whether the Oklahoma Antitrust Act prohibits unilateral acts in restraint of trade. By holding that Oklahoma law does reach unilateral activity, the court recognized a break from federal precedent interpreting the seemingly less restrictive Sherman Act.

As a result, the court defined a new state antitrust standard with potentially far-reaching effects. Those ramifications include the possibility of increased antitrust litigation as courts apply Oklahoma's narrower, yet arguably more equitable, statute. In addition, the *Harold's* decision creates a unique antitrust environment for the businessperson operating in or considering Oklahoma. This note examines

¹. JERROLD G. VAN CISE, THE FEDERAL ANTITRUST LAWS 1 (1967).
⁴. 79 OKLA. STAT. § 1 (1991) (emphasis added).
⁵. 82 F.3d 1533 (10th Cir. 1996), cert denied, 117 S. Ct. 297 (1996).
the Harold's case, the substance and backgrounds of the Federal and Oklahoma antitrust statutes, and future implications of the decision.

II. Law Prior to the Case

A. The Sherman Act

The Sherman Antitrust Act of 1890 represents the federal government's original attempt to promote legitimate and healthy competition in interstate commerce. The Supreme Court has characterized it as a "charter of freedom [with a] generality and adaptability comparable to that found desirable in constitutional provisions." As a result of that expansive construction, the Sherman Act has remained substantially intact since its inception. The substantive provisions of the Act are sections 1 and 2.

Section 1 provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." To restrain trade, an act must "[p]rejudice public interests by unduly restricting competition, or unduly obstructing the due course of trade, or . . . injuriously restrain[ing] trade." Section 1's requirement of concerted activity signals its focus on restrictive agreements.

Section 2 creates liability for "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce." Courts define monopoly power as the power to control prices or exclude competition. A plaintiff may recover upon proof that the defendant possesses monopoly power in the relevant market and willfully acquired or maintained that power. Unlike section 1, section 2 can apply to a single entity's activity. Unilateral activity, as a result, receives a more

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6. See In re Grand Jury, 62 F. 840, 841 (N.D. Cal. 1894). It should be noted that the Interstate Commerce Commission, created in 1887, was the first legislative endeavor to protect competitive markets. The Commission was responsible for assuring just and reasonable railroad rates. The Sherman Act was the first attempt to regulate the whole of interstate commerce. See ERNEST GELMHORN, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 16 (1986).


8. Congress has increased the fines and criminal penalties under the Act. See KINTNER, supra note 2, at 7.


permissive scrutiny because liability arises only when a firm's market power could create a dangerous probability of monopolization.\textsuperscript{16}

The dual nature of the Sherman Act creates a "gap" in coverage which has been recognized by the United States Supreme Court\textsuperscript{17} and critiqued by commentators.\textsuperscript{18} Section 1 requires two actors and deals with restraints of trade which are the result of contract, combination or conspiracy. Section 2 reaches unilateral activity only when the offending entity has sufficient market power to constitute a monopoly or a credible attempt to monopolize. Consequently, the Act does not reach trade restraints by single entities that do not possess or immediately threaten to possess monopoly power.\textsuperscript{19}

The gap created by the Sherman Act remains untouched as courts refuse to narrow its scope.\textsuperscript{20} Commentators suggest that courts inexplicably regard the gap "as an important principle in antitrust policy."\textsuperscript{21} When considering the gap in Copperweld Corp. v. Independence Tube Corp.,\textsuperscript{22} the Supreme Court declared that Section 2 of the Sherman Act and 15 U.S.C. § 45 were adequate to control dangerous unilateral anticompetitive conduct.\textsuperscript{23} Title 15 U.S.C. § 45, also known as section 5 of the Federal Trade Commission Act,\textsuperscript{24} prohibits unfair methods of competition and unfair or deceptive practices in or affecting commerce.\textsuperscript{25} Despite the Court's pronouncement in Copperweld, however, 15 U.S.C. § 45 has not been used to reach nonconcerted restraints of trade.\textsuperscript{26} Though it would seem to cover trade restraints caused by unilateral and concerted activity, 15 U.S.C. § 45 has not been so applied.\textsuperscript{27}


\textsuperscript{17} See Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 774-75 (1984).

\textsuperscript{18} In fact, the gap was discussed in a law review article as early as 1950, forty-five years before its recognition by the Supreme Court. See James A. Rahl, Conspiracy and the Anti-Trust Laws, 44 ILL. L. REV. 743, 744-46 (1950).


\textsuperscript{20} See id.

\textsuperscript{21} Id. at 593.

\textsuperscript{22} 467 U.S. 752 (1984).

\textsuperscript{23} See id. at 777.


\textsuperscript{25} See id. § 45(a)(1).

\textsuperscript{26} See Robinson, supra note 19, at 593.

\textsuperscript{27} See id. (citing Russel Stover Candies, Inc. v. FTC, 718 F.2d 256 (8th Cir. 1983)). Russel Stover provides a thorough discussion regarding the vitality of the single entity defense. In Russel Stover, the Federal Trade Commission originally brought a 15 U.S.C. § 45 action against Russel Stover for illegal price fixing. See In re Russel Stover Candies, 100 F.T.C. 1, 2-3 (1982). The FTC did not, however, argue that 15 U.S.C. § 45 prohibited unilateral activity. See id. at 18-19. Instead, the FTC deferred to a 15 U.S.C. § 1 analysis, accompanied by the plurality of actors requirement. See id. The Eighth Circuit discussed in detail the viability of the plurality of actors requirement, but left the responsibility of rejecting it to the Supreme Court. See Russel Stover, 718 F.2d at 260. The Russel Stover cases symbolize courts' hesitancy to apply 15 U.S.C. § 45 to bridge the gap.
B. The Oklahoma Antitrust Act

In article 5, section 44, the Oklahoma Constitution grants the state legislature the power to "define what is an unlawful combination, monopoly, trust, act or agreement, in restraint of trade" and enact laws to punish persons engaged in any such activity. The legislature exercised that power through the Oklahoma Antitrust Act.28

The first section of the Oklahoma Antitrust Act practically duplicates section 1 of the Sherman Act except for the addition of the words "act" and "agreement" to the list of activities that could restrain trade.29 Section 1 of the Oklahoma act provides: "Every act, agreement, contract, or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this state is hereby declared to be against public policy and illegal."30

In previous cases, the Oklahoma Supreme Court has recognized section 1 of the Oklahoma Antitrust Act as the statutory equivalent31 to section 1 of the Sherman Act and has acknowledged the analogous relationship between the two.32 Moreover, Oklahoma courts rely on judicial interpretation of the Sherman Act in applying the Oklahoma Antitrust Act.33 In *Teleco, Inc. v. Ford Industries*,34 the Oklahoma Supreme Court described federal precedent as "particularly useful in interpreting section 1 of title 79 (the Oklahoma Antitrust Act), as those two sections are virtually identical."35

The similarities in the Oklahoma and federal statutes end, however, with their respective first sections. While section 2 of the Sherman Act regulates monopolies and attempts to monopolize, the Oklahoma legislature declined to create a measure with similar language. The primary condemnation of monopolies appears in the Oklahoma Constitution. Article 2, Section 32 states that "[p]erpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed."

C. The Rule of Reason v. The Per Se Test

Courts have long recognized that every agreement and regulation regarding trade will inevitably restrain trade to some extent.36 If taken literally, section 1 of the Sherman Act and section 1 of the Oklahoma Antitrust Act would make illegal every possible agreement concerning trade or commerce.37 Consequently,
both federal and Oklahoma courts have adopted two tests, the "rule of reason" and the "per se" rule, to determine whether a given activity constitutes an unreasonable and thus illegal restraint of trade. The United States Supreme Court introduced the "per se" rule in United States v. Socony-Vacuum Oil Co., Inc.38 The Court reserved this rule for activities which have no legitimate justification and lack any redeeming competitive purpose.39 Examples of those activities include: price-fixing,40 division of markets,41 group boycotts,42 and tying arrangements.43 The courts view activities governed by the "per se" rule as presumptively anticompetitive and illegal.44

When the "per se" rule is not applicable, courts default to the "rule of reason" test. In Chicago Board of Trade v. United States,45 Justice Brandeis provided this oft-cited definition for the rule of reason:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied . . . .46

When applying the rule of reason, courts consider whether the activity promotes or restrains competition in light of its history, potential evil and purpose.47 For a restraint of trade to be unreasonable, the restraint must have a detrimental effect on more than just the plaintiff's business.48 In other words, a party can not successfully bring an antitrust action against another party just because the defendant has taken business or market share away from the plaintiff. Rather, the conduct must injure competition.

III. Harold's v. Dillard

Harold's presented a novel application of the rule of reason test. By concluding that the Oklahoma Antitrust Act reaches unilateral activity, the Harold's court created an opportunity to apply the rule of reason test to a single entity's conduct. This decision represents a split from federal law and the creation of a unique antitrust environment for Oklahoma.

38. 310 U.S. 150, 218 (1940).
45. 246 U.S. 231 (1918).
46. Id. at 238.
47. See id.
A. A Tale of 37,000 Skirts

On May 10, 1993, Harold's executives learned that Dillard stores were offering for sale skirts with fabric patterns identical to skirts Harold's had sold during the 1991 to 1992 sales season. Dillard offered the skirts for sale at less than half of Harold's prices.

Harold's filed suit on July 6, 1993, claiming Dillard violated the Copyright Act, the Oklahoma Antitrust Act, and the Oklahoma Unfair Sales Act. Regarding the Oklahoma Antitrust Act, Harold's argued that Dillard's unilateral acts of copyright infringement and sales below cost unreasonably restrained trade. Harold's made no attempt to prove that Dillard acted in concert with any other entity.

Dillard stipulated that its merchandise managers obtained nineteen of Harold's copyrighted print fabrics and arranged for manufacture of 37,000 skirts which infringed Harold's copyrights. At trial, the jury returned a verdict in favor of Harold's on all three claims and awarded Harold's $372,000 in damages.

B. Issue

Both parties appealed on several issues. The issue germane to this note was Dillard's claim that Harold's failed to establish an Oklahoma Antitrust Act violation. Dillard based that contention, in part, on the claim that the Oklahoma Antitrust Act requires proof of concerted action, not unilateral conduct.

Dillard presented four arguments to support the requirement of concerted action. First, Dillard stated that no Oklahoma case law sustained the position that section 1 of the Oklahoma Antitrust Act can be violated by unilateral conduct. Second, Dillard cited two early cases which, in Dillard's opinion, held that Oklahoma courts have required concerted action that restrained trade in order to violate section 1 of the Oklahoma Antitrust Act.

49. See Harold's Stores, Inc. v. Dillard Department Stores, Inc., 82 F.3d 1533, 1539 (10th Cir. 1996).
50. See id. Dillard later reduced the prices to less than 15% of Harold's original price. See id.
51. See id.
52. See id. at 1549.
53. See id.
54. See id. at 1539.
55. See id. at 1540. Harold's received $260,220 in damages for the copyright infringement and $21,780 on the Unfair Sales Act claim. The jury awarded $30,000 on the Antitrust Act claim, which was trebled to $90,000. Harold's received total damages of $372,000. See id.
56. See id. at 1540-41. Dillard claimed that the district court erred by: (1) concluding that § 301 of the Copyright Act did not preempt Harold's Oklahoma Antitrust Act claim; (2) admitting a survey submitted by a marketing professor produced by Harold's; and (3) denying its renewal motion for judgment as a matter of law. Harold's claimed that the district court erred in deciding two attorneys' fees issues. See id.
57. See id. at 1547.
58. See id.
60. See id. at 43-44. Dillard cited Nissen v. Andres, 63 P.2d 47 (Okla. 1936) and Thomas v. Belcher,
Oklahoma's reliance on the Sherman Act and cases interpreting the Sherman Act. These cases, of course, required concerted action under section 1 of the Sherman Act. Finally, Dillard proposed that the word "acts" in section 1 of the Oklahoma Antitrust Act encompassed concerted activity.

Harold's countered by arguing that the Oklahoma legislature chose a different statutory construction specifically to reach unilateral conduct. In addition, Harold's pointed out that the Oklahoma cases cited by Dillard involved interpretations of the Sherman Act, not the Oklahoma Antitrust Act. Lastly, Harold's argued that interpretation of section 1 of the Sherman Act was not applicable because the statutes were clearly different in at least this one respect. The word "act", according to Harold's, did not encompass any form of concerted action.

C. The Tenth Circuit Court's Opinion

Judge Baldock, writing for the United States Court of Appeals for the Tenth Circuit, recognized that the Oklahoma Supreme Court had not addressed whether the Oklahoma Antitrust Act prohibited unilateral acts in restraint of trade. Nonetheless, the court concluded that the Oklahoma legislature did intend for the Oklahoma Antitrust Act to reach unilateral conduct. The court, citing Black's Dictionary for support, found that the ordinary meaning of the word "act" encompasses unilateral activity. Although Judge Baldock recognized Oklahoma's deference to federal court precedent, the court declined to apply Sherman Act authority in light of the clear difference in statutory construction. Moreover, the court refused to second-guess the Oklahoma legislature's decision to draft the statute to reach unilateral conduct. Judge Baldock stated: "Simply put, it takes two to tango under § 1 of the Sherman Act, while the plain language of § 1 of the Oklahoma Antitrust Act reaches unilateral conduct in restraint of trade."

87 P.2d 1084 (Okla. 1939).
61. See Brief for Appellant at 44 n.52, Harold's Stores, Inc. v. Dillard Department Stores, Inc., 82 F.3d 1533 (10th Cir. 1996) (No. 95-6133, 95-6160).
62. See id. at 44.
63. See Brief for Appellee at 33, Harold's Stores, Inc. v. Dillard Department Stores, Inc., 82 F.3d 1533 (10th Cir. 1996) (No. 95-6133, 95-6160).
64. See id. at 33-34.
65. See id. at 34.
66. See id.
68. See id. at 1549-50.
69. See id. at 1550.
70. See id.
71. Id.
IV. Analysis

On its face, section 1 of the Oklahoma Antitrust Act differs from the Sherman Act in only one material way: the addition of the word "act" in the Oklahoma statute. Such a small difference in construction would seem, at first glance, immaterial. However, the Oklahoma law's extended reach creates a substantial consideration for businesses, potential plaintiffs, and consumers. A study of the statutes' backgrounds provides insight as to why they are different.

A. Legislative and Historical Background

1. Sherman Act

A discussion of the difference between the first sections of the Sherman Act and the Oklahoma Antitrust Act begs the question of why each legislature chose the language it did. A brief overview of the environments which produced the two antitrust statutes proves helpful in understanding their differences. 72 Congress enacted the Sherman Act in 1890 amid a public outcry for action against trusts. 73 Trusts arose following the rapid industrial and economic expansion of the post-Civil War era. 74 A laissez-faire government policy towards corporations resulted in combinations that reduced competition through their aggregate economic power. 75 Chief Justice White, in Standard Oil Co. v. United States, 76 described the attitudes surrounding the Act's passage:

[T]he main cause which led to the legislation was the thought that it was required by the economic condition of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals . . . and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally. 77

Trusts were viewed as monstrous evils which tended to "crush out individual independence and to hinder or prevent the free use of human faculties and full development of human character." 78 Consequently, the Sherman Act fulfilled a politically expedient objective 79 of condemning these combinations. 80

72. See generally Standard Oil Co. v. United States, 221 U.S. 1, 50 (1911) (stating that debates may be used as a means of ascertaining the environment at the time of the enactment of a particular law).
73. See ERNEST GELHORN, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 18-19 (3d ed. 1986).
74. See KINTNER, supra note 2, at 9.
75. See id.
76. 221 U.S. 1 (1911).
77. Id. at 50.
78. W.W. THORNTON, A TREATISE ON THE SHERMAN ANTITRUST ACT 237 (1913) (citing Message by President Grover Cleveland, 9 MESSAGES & PAPERS OF PRESIDENTS 744 (Dec. 7, 1896)).
79. Antimonopoly sentiment was so strong that the final version of the Sherman Act passed both houses of Congress with only one dissenting vote. See E.R. W. KINTNER, AN ANTITRUST PRIMER 11 (2d ed. 1973).
The Fifty-first Congress created the statute such that unilateral activity that did not constitute a monopoly was exempt from liability. Historians suggest two main reasons for this construction. First, the Sherman Act's framers meant to adopt the common law principles of the day. The term restraint of trade, as applied by the common law, always involved situations requiring a plurality of actors. It seems the legislators prohibited contracts, combinations, and conspiracies because those were the entities which could, at the time, legitimately restrain trade.

Second, Sherman Act legislators likely did not consider that individual entities might eventually be able to affect competition as significantly as the trusts and combinations of the day. At the time of the Sherman Act's enactment, the effects of the Industrial Revolution were not fully realized and few individuals had the ability or means to influence market forces. As one commentator suggested, "[t]he danger perceived was the concern of the law." In fact, during Congressional debates prior to the bill's passage, a Senator proposed to limit 15 U.S.C. § 2 (the portion of the Sherman Act condemning monopolies) to concerted combinations or conspiracies to monopolize, thus corresponding to the "contract, combination . . . or conspiracy" requirement of section 1. The motion failed.

It should be noted that, despite the criticism of trusts, Congress stopped short of denouncing corporations. To the contrary, Senator Sherman extolled their virtues and promoted their value to the public: "The combination of labor and capital in the form of a corporation to carry on any lawful business is a proper and useful expedient, especially for great enterprises of a quasi public character, and ought to be encouraged and protected as tending to cheapen the cost of production . . . ."

2. The Oklahoma Antitrust Act

It can safely be stated that the Oklahoma legislature held no similar fondness for corporations. While no formal legislative history exists for Oklahoma statutes, an understanding of the public attitude at the time of passage may shed light on why section 1 of the Oklahoma Antitrust Act is more restrictive than the Sherman Act.

The Oklahoma Antitrust Act passed in 1907, the year of statehood and creation of the Oklahoma Constitution. The Oklahoma Constitutional Convention reflected the prevailing populist sentiment of the day. "[U]nquestionably the dominant

81. See 21 CONG. REC. S2456 (daily ed. Mar. 21, 1890) (statement of Sen. Sherman) ("It [the Sherman Antitrust Act] does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government.").
83. See id. at 746-47.
84. See id. at 746.
85. Id. at 747.
86. See 21 CONG. REC. S3152 (daily ed. April 8, 1890) (statement of Sen. Gray).
87. See id.
89. See Larry Derryberry & Patrick D. Shore, Public Utility Regulation in Oklahoma: An Historical
political philosophy of the new state envisioned a democratic equality of opportunity protected by governmental process against corporate and monied interests. The Oklahoma Constitution, a document known for its "legendary" antibusiness character, reflects this attitude.

Articles 9 and 10 of the Oklahoma Constitution embody the Convention's hostility toward corporations. The laundry list of restrictions on corporations included, among other things, prohibition of corporations owning rural land, being exempted from property taxes, and making political contributions. The State of Oklahoma could not invest in private enterprise, grant tax exemptions for corporations, or release corporations from indebtedness. Moreover, the State of Oklahoma reserved the right to change or revoke any corporation's charter whenever "it [the corporation] may be injurious to the citizens of this State." These measures all reflect the State's attempt "to create a commonwealth for the poor man." The added scope of the Oklahoma Antitrust Act, when set against this backdrop, is more easily understood as an extension of the pervasive corporate suspicion defining the State's political attitude at the time.

B. Future Implications

1. When Does the Oklahoma Antitrust Act Apply?

To best recognize the future significance of the Harold's decision, it is important to understand if, and when, the Oklahoma Antitrust Act applies. As a general rule, state antitrust law applies to commerce which takes place completely within a state. The Sherman Act governs when the "activity is itself in interstate commerce or, if it is local in nature, . . . has an effect on some other appreciable activity demonstrably in interstate commerce." If both intrastate and interstate commerce are involved, the Sherman Act does not preempt state jurisdiction over the intrastate activity. Determining the applicable law proves especially important due to the Oklahoma Antitrust Act's broader focus.

93. See id.
94. OKLA. CONST. art. IX, § 47. The original draft of the Constitution provided that any corporation that removed state court decisions to federal court would lose its charter. See Robert H. Henry, Preface to IRVING L. FAUGHT, OKLAHOMA BUSINESS ORGANIZATIONS, FORMATION AND REPRESENTATION xi-xii (1995).
95. FEDERAL WORKS AGENCY, OKLAHOMA, A GUIDE TO THE SOONEER STATE 30 (1941).
98. See Jack, 76 P. at 915-16.

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2. Activities Which Receive Different Treatment Under the Oklahoma Antitrust Act

In light of the differences in the two statutes, the obvious question becomes: What activities are now illegal in Oklahoma that might not be under the Sherman Act? Harold's presents the most apparent example. The Harold's court found that Dillard violated section 1 of the Oklahoma Antitrust Act by (1) infringing Harold's' copyrights, (2) in restraint of trade. Had the case arisen under the Sherman Act, regardless of whether Dillard's actions actually restrained trade, Dillard would not have faced federal antitrust liability. Section 1 of the Sherman Act would not apply because Dillard acted unilaterally. Likewise, section 2 of the Sherman Act would not apply because Dillard did not have the market power to create a dangerous probability of monopolization. Consequently, Dillard encountered a higher level of scrutiny because its activity affected Oklahoma intrastate commerce.

In addition to the scenario presented in Harold's, certain types of vertical restrictions, including resale price maintenance arrangements, might receive different treatment under the tougher Oklahoma rule. Resale price maintenance involves an agreement between parties in the distribution process which has a price-constraining effect. A supplier may refuse to deal with any customer who fails to comply with the supplier's terms. The United States Supreme Court declared these resale price arrangements per se illegal in Dr. Miles Medical Co. v. John D. Park & Sons Co. The per se prohibition of resale price maintenance has been limited to the actual setting of retail prices or price levels. Nonprice vertical restrictions, such as territorial divisions, are not per se illegal, but are instead subject to a rule of reason inquiry. Further, it should be noted that any type of vertical restriction must have a detrimental effect on interbrand competition in order to be illegal.

100. Vertical restraints are imposed by the seller on the buyer (or vice versa) or on what is called the vertical relationship. Manufacturers and dealers are the parties which usually make up a vertical relationship.
102. 220 U.S. 373, 404-09 (1911).
104. See Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57-59 (1977). Sylvania presented a new, economics-based analysis which focused on the difference between interbrand and intrabrand competition. The Court recognized that the benefits of enhancing interbrand competition outweigh limitations on intrabrand rivalry. As a result, the court set up a two part standard for determining whether the rule of reason standard has been satisfied: (1) whether the arrangement is likely to have a permanent effect on interbrand competition, and (2) whether the restraint has "redeeming virtues." Id. at 54-57.
105. Interbrand competition is the competition among the manufacturers of the same generic product and is the primary concern of antitrust law. Intrabrand competition is the competition between the wholesale or retail distributors of the product of a particular manufacturer. See id. at 52 n.19.
106. See id.
In United States v. Colgate & Co.,107 the Supreme Court created an exception to Dr. Miles for unilaterally imposed price restraints by requiring some form of agreement between the manufacturer and another party to render the arrangement illegal.108 Under the Colgate rule, a supplier can unilaterally set resale prices without violating the Sherman Act by announcing those prices and terminating dealers that do not comply. The Court stated that the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."109

In Colgate, the Court distinguished between unilateral and concerted activity and prohibited only the latter. Critics describe this distinction as inexplicable and the Court's subsequent treatment of the Colgate doctrine expresses their own dissatisfaction with it.110 As a result, the Court has attempted to circumvent the concerted activity requirement by "show[ing] great creativity in finding the requisite agreement or other concerted action."111 Nevertheless, the Colgate requirement of concerted activity remains, and unilateral price restraints survive federal antitrust scrutiny.112

Under the Oklahoma Antitrust Act, however, the concerted activity safety net disappears. A manufacturer who terminated a supply relationship with a dealer might face an antitrust suit even if no agreement ever existed. For example, Nissen v. Andres,113 an early Oklahoma case decided under the Sherman Act, might have been resolved differently under state law.114 In Nissen, a group of ice dealers refused to deal with a certain retailer.115 The Oklahoma Supreme Court found no conspiracy between the wholesalers, and thus no violation under the Sherman Act.116 Today, the more restrictive Oklahoma statute might attach liability for the unilateral refusal to deal.

The aforementioned examples present two avenues for potential litigation resulting from the Harold's decision. Whether plaintiffs take advantage of them remains to be seen, but Harold's has set the stage for a more litigious antitrust environment in Oklahoma.

3. Increased Litigation

Before the Harold's decision, potential antitrust plaintiffs probably believed that the Sherman Act and its judicial interpretation foreclosed any antitrust suit,
federal or state, against a single entity. Moreover, someone who did suspect that the Oklahoma law reaches unilateral activity may not have had the resources necessary to risk verifying that suspicion at trial. Harold's removed that doubt and, at the very least, removed one obstacle to bringing a state antitrust action.

As a result, plaintiffs may be encouraged to initiate suits that once were dismissed from consideration because of misconceptions about the Oklahoma Antitrust Act. At the very least, attorneys can follow Harold's lead and add antitrust allegations to any petition claiming violations of a trade-protecting statute.

In addition, Oklahoma law gives plaintiffs two more monetary incentives to add an antitrust claim. Under title 79, section 25 of the Oklahoma Statutes, a successful antitrust plaintiff can recover treble damages and the cost of the suit, including attorney's fees. Federal law provides the same inducements. The treble damage provision serves to deter antitrust violations and to provide incentive for private parties to instigate costly and uncertain litigation, thus supplementing governmental enforcement.

Inherent with these incentives exists the possibility of frivolous or misdirected suits. In the majority opinion in Copperweld, Chief Justice Burger stated that eliminating the intra-enterprise conspiracy doctrine would "simply eliminate treble damages from private state tort suits masquerading as antitrust actions." Harold's, in a sense, accomplished the opposite. Oklahoma plaintiffs can now receive treble damages for attaching an antitrust claim that might not have been added before Harold's was decided.

In fact, Harold's presents an interesting example. Opponents of the Harold's court interpretation of the Oklahoma Antitrust Act might argue that Harold's could have found relief without the antitrust claim. One could suggest that Harold's received adequate compensation under its copyright infringement and Unfair Sales Act claims. The antitrust claim added $90,000 to what might be considered an otherwise satisfactory judgment. It is this type of situation that Chief Justice Burger predicted in Copperweld. An interpretation of the Oklahoma Antitrust Act that awards unnecessary damages, according to this argument, can have only a negative effect on the judicial system.

However, an effective rebuttal suggests that antitrust law exists to protect a different interest than, for example, a copyright law. As pointed out in the Harold's opinion, "the 'restraint of trade' element of 79 Okla. Stat. § 1 supplies the 'extra element' that qualitatively distinguishes an Oklahoma Antitrust Act

119. See Lehman v. Gulf Oil Corp., 500 F.2d 659, 667 (5th Cir. 1974).
122. See supra note 55.
claim from a claim for copyright infringement under the Copyright Act."\textsuperscript{123} The survival of the antitrust claim, therefore, remains necessary to prevent injury to competition. Moreover, the antitrust claim's validity hinges upon a rule of reason analysis. This judicial inspection safeguards against attachment of frivolous antitrust claims.

The two perspectives present another example of the fine line that separates effective and excessive regulation. Striking an appropriate balance greatly affects the judicial system, and, viewed in a different way, businesses located in or considering Oklahoma.

4. Effect on Oklahoma Businesses

The potential effects on business resulting from the Harold's decision were discussed, curiously enough, in a case interpreting the Sherman Act. In \textit{Copperweld Corp. v. Independence Tube Corp.},\textsuperscript{124} the United States Supreme Court confronted whether a parent corporation and its wholly owned subsidiary are capable of conspiring in violation of section 1 of the Sherman Act. The Court decided the entities could not conspire, and in so doing provided a detailed discussion of the distinction between concerted and independent action.\textsuperscript{125} The \textit{Copperweld} majority and dissenting opinions present an excellent backdrop for discussing the differences between the Sherman Act and the Oklahoma Antitrust Act.

(a) The Argument Against the Harold's Decision

In the majority opinion, Chief Justice Burger cited a number of reasons that the Sherman Act's framers struck an appropriate balance in the regulation of concerted and unilateral conduct. In fact, the majority considered the difference in potential harm between the two types of conduct to be "readily appreciated."\textsuperscript{126}

It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster. In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in

\textsuperscript{123} Harold's Stores, Inc. v. Dillard Dept Stores, Inc., 82 F.3d 1533, 1544 (10th Cir. 1996).
\textsuperscript{124} 467 U.S. 752 (1984).
\textsuperscript{125} Id. at 767-77.
\textsuperscript{126} Id. at 768.
this manner reduces the risk that the antitrust laws will dampen the
competitive zeal of a single aggressive entrepreneur.127

Regarding intra-enterprise conspiracy, the Copperweld majority rationalized that
coordination between a corporation and its division should not be regulated by
section 1 because it does not represent a sudden joining of two independent
sources of economic power.128 To punish coordinated conduct would discourage
corporations from creating divisions, which might deprive consumers of more
efficient production.129 The Court judged concerted behavior more sternly
because it deprives the marketplace of the independent decision making that
competition demands.130 The Court reasoned that the anticompetitive potential
of concerted behavior deserves Sherman Act scrutiny even if no potential
monopoly exists.131

In addition, the majority opinion recognized the gap132 in Sherman Act
coverage and declared that Congress created it "for eminently sound reasons."133
Single firms, Chief Justice Burger opined, would be subject to judicial scrutiny
for every action if section 1 encompassed unilateral activity.134 Such rigorous
regulation would defeat the competitive spirit which the Sherman Act was
designed to foster.135 Moreover, the majority pointed to section 2 of the
Sherman Act and section 5 of the Federal Trade Commission Act136 as
safeguards to bridge the gap.137

Application of Chief Justice Burger's opinion to section 1 of the Oklahoma
Antitrust Act provides at least three objections to the regulation of unilateral
activity: (1) the difficulty in distinguishing vigorous competition from conduct
with long-run anticompetitive effects; (2) the harmful effect on the "competitive
zeal" of a single aggressive entrepreneur that the Sherman Act was supposed to
protect; and (3) the absence of a sudden consolidation of two previously
autonomous sources of economic power.

At a time when Oklahoma's per capita income falls well below the national
average138 and the state's brightest college graduates consistently leave the

127. Id. at 767-68 (footnote omitted).
128. See id. at 770-71.
129. See id. at 771.
130. See id. at 769.
131. See id.
132. See supra text accompanying notes 17-27.
133. Copperweld, 467 U.S. at 775.
134. See id.
135. See id. at 768.
137. See Copperweld, 467 U.S at 777; supra text accompanying notes 20-27.
138. See John Perry, Candidates Target Deficit Low Wages, DAILY OKLAHOMAN, Oct. 9, 1996, at
6 (quoting Robert Dauffenbach, director of University of Oklahoma's Center for Economic and
Management Research).
state, Oklahoma hardly needs another disincentive for existing local businesses or firms considering locating in the state.

This measure, if considered to be bad for business, would not be the first state law to hold that title. As previously discussed, Oklahoma's antibusiness history is well established. However, at least in one instance, the legislature has recognized a statutory handicap and worked to correct it.

Oklahoma's original corporate law, as set out by the Constitution, was highly restrictive and protective. Consequently, these policies "caused Oklahoma to lag dangerously behind other states in economic development policy." The antibusiness nature of these statutes was gradually eased and finally eliminated in 1986, when the Oklahoma legislature adopted the General Corporation Act. This act mirrors the Delaware General Corporation Law, whose probusiness provisions have helped Delaware become the preeminent state in corporate law matters.

Oklahoma has proven its ability to recognize and change, albeit slowly, law which inhibits corporate involvement in Oklahoma. With respect to the Oklahoma Antitrust Act, the question is now whether the difference in statutory construction will produce detrimental effects so severe that the statute should be changed. Most likely, it will not. Firms considering where to locate clearly do not base their decision solely on a state's antitrust law. Nevertheless, the more restrictive statute provides one more disincentive for businesses to locate in Oklahoma. The statute's full effect might not be realized until subsequent cases applying Harold's bring the difference in federal and state law to the attention of those considering Oklahoma.

(b) The Argument in Favor of the Harold's Decision

In his Copperweld dissent, Justice Stevens argued that the section 1 plurality of actors requirement has no economic significance. He argued that unilateral conduct by a firm with market power has as much, or more, anticompetitive potential than concerted activity. "From a competitive standpoint, a decision of a single firm possessing power to reduce output and raise prices above competitive levels has the same consequence as a decision by two firms acting together who have acquired an equivalent amount of market power" through

140. See supra text accompanying notes 89-95.
141. See supra text accompanying notes 92-95.
144. See IRVING L. FAUGHT, OKLAHOMA BUSINESS ORGANIZATIONS, FORMATION AND REPRESENTATION § 1.2 (1995).
146. See id. at 789-90.
147. Market power is the ability to raise prices above those that would be charged in a competitive
an agreement not to compete.\(^{148}\) Justice Stevens asserted that market power, not the number of people involved, is the operative variable in examining restraints of trade.\(^{149}\)

In effect, Justice Stevens argued for an interpretation of the Sherman Act which would operate very much like the Oklahoma Antitrust Act. Justice Stevens' view places the emphasis on the ability of unilateral or concerted activity to affect competition. A party unreasonably restraining trade would not avoid liability solely because it did not enter into an agreement to do so with another party. Thus, the Oklahoma statute and Justice Stevens' interpretation close the gap left by the Copperweld majority because they prevent firms from escaping liability solely because they do not possess monopoly power.

The Harold's decision fulfills Justice Stevens' call for removing an ineffectual distinction between unilateral and concerted activity — at least in Oklahoma. As a result, the Oklahoma Antitrust Act may be viewed as a positive incentive for businesses evaluating Oklahoma. Firms can benefit from the statute because it develops a level playing field for businesses of all sizes. As evidenced by Harold's, the statute provides special protection against unreasonable barriers to entry that might be created by larger firms.\(^{150}\) The resulting business environment potentially benefits consumers through lower prices and increased selection.

The Oklahoma Antitrust Act creates such an environment because it allows courts to more precisely apply the rule of reason. The statute permits courts to decide whether unilateral activity unreasonably restrains trade. The Sherman Act's "contract, combination, or conspiracy" requirement removes unilateral activity from a court's consideration. Moreover, the Sherman Act's drafters created this restriction because its drafters did not believe that a single entity could affect competition in the same way as the trusts of the day.\(^{151}\) Over time, though, this outdated assumption has lost its practicality. Consequently, the Sherman Act prevents a court from considering a single actor that might not have monopoly power but does have the ability to unreasonably restrain trade.

The Oklahoma Antitrust Act, on the other hand, prevents any gap in coverage for single firms that do not have monopoly power. Oklahoma courts cannot automatically dismiss all unilateral activity — but must apply the rule of reason to both types of activity. In essence, the Oklahoma law provides essentially the

\(^{148}\) See id. at 789.  
\(^{149}\) Id. at 789-90.  
\(^{150}\) See id. at 789.  
\(^{151}\) See id. at 1549. In its opinion, the court cited the opinion testimony of one Dr. Murty, an economics professor at the University of Oklahoma:

[If a company . . . can essentially take the intellectual property of another company, or take the copyrights . . . it sends a signal to anybody else that wants to enter this market, that if you come in here, you're going to get squashed because this big company will exercise its power and take your copyrights. In that regard, in economics, we would say it raises a barrier to entry. That itself is anti-competitive. That . . . is an unreasonable restraint of trade.]

Id.  
\(^{151}\) See supra text accompanying notes 81-85.
same protection afforded by the Sherman Act, except that it provides an arguably more complete protection — both against parties who have combined to restrain trade and a single entity with the ability to restrain trade on its own.

Consequently, potential businesses may view Oklahoma's antitrust law as a valuable aid to competition and commercial development. The next step, then, is efficient enforcement by Oklahoma courts.

C. Where Do Courts Look for Guidance When Applying the Rule of Reason to Unilateral Activity?

The Harold's decision provides a starting point for parties and attorneys who are trying to predict whether a unilateral restraint of trade is unreasonable. In Harold's, the court looked to Oklahoma precedent set in cases dealing with concerted activity. The court focused on an activity's effect on competition in general.

The fundamental test of the reasonableness of an action, which, by its nature, restrains trade, is its effect on the public. To amount to an unreasonable restraint of trade the anticompetitive conduct must have an effect greater than its effect upon the plaintiff's business. . . . An antitrust plaintiff must show that the challenged conduct adversely impacts competition in general because "the antitrust laws . . . were enacted for the protection of competition, not competitors." When determining reasonableness, a court must first determine the relevant market and then determine whether an unreasonable restraint exists in that market. The reasonableness test includes a balancing of the restraint against the public's and the individual's need and entitlement to free commerce and the necessity of the restraint to protect and effectuate the basic transaction. Thus, when confronting unilateral activity, a court must place special emphasis on finding a restraint of trade that affects more than just the plaintiff's business. A court should pay special attention to this requirement in order to prevent unjustified treble damage awards for suits that are more appropriately tort or contract suits.

153. See id. at 1548.
154. Id. (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977)).
155. A relevant market is defined by two elements: (1) the relevant geographical territorial area involved; and (2) a relevant product market the type or area of goods or services in which the product which is subject to the restraint effectively competes. See Teleco, Inc. v. Ford Indus., 587 P.2d 1360, 1364 (Okla. 1978).
156. See id.
V. Conclusion

The Tenth Circuit's decision in *Harold's* that the Oklahoma Antitrust Act reaches unilateral activity is not likely to create an avalanche of new state antitrust litigation. It does, however, create opportunities for increased regulation and restriction on Oklahoma businesses and, at the same time, a fairer playing field for those businesses.

The Oklahoma Constitution granted the legislature the right to make the Oklahoma Antitrust Act as broad or as narrow as it desired. It is unclear, however, why the framers made the Oklahoma act's reach broader than its predecessor, the Sherman Act. The state's antibusiness background provides a potential explanation of why the statute is more restrictive. Due to the different construction, the legislature may have, unwittingly or not, bridged the gap in coverage that was left by the two-pronged Sherman Act. Oklahoma, as a result, should be able to avoid the judicial confusion and endless commentary that has accompanied the void in the Sherman Act.

Time will tell, however, whether this holding will "dampen the competitive zeal" of the state's entrepreneurs. Most likely, any such dampening will not occur until a few of those entrepreneurs are called into court and introduced to the concepts of unilateral activity and restraint of trade. The results of that litigation will determine whether Oklahoma's business environment suffers or improves due to the *Harold's* decision.

_Eric Scott Smith_

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158. See OKLA. CONST. art. V, § 44.