

SHORT TITLE: Trusts and pools; creating the Oklahoma Antitrust Reform Act. Effective date.

STATE OF OKLAHOMA

2nd Session of the 46th Legislature (1998)

SENATE BILL NO. 1357

By: Brown

AS INTRODUCED

An Act relating to trusts and pools; amending 17 O.S. 1991, Section 141, which relates to procedure and appeals in actions under Anti-Trust Laws prosecuted before the Corporation Commission; creating the Oklahoma Antitrust Reform Act and providing short title; defining terms; prohibiting certain acts which restrain or monopolize trade or commerce; prohibiting certain discrimination in prices; declaring certain businesses to be subject to state control; requiring certain persons to offer certain services and goods without discrimination; providing for certain civil action by Attorney General; authorizing injunctive and other relief; requiring certain notice; allowing certain persons to bring action for injunctive or other relief; allowing certain damages; providing criminal penalty; providing for service of subpoenas; prohibiting certain persons from owning certain stock; declaring act to be cumulative; providing procedure for civil investigative demands and stating contents; deleting obsolete language; repealing 79 O.S. 1991, Sections 1, 2, 3, 4, 5, 6, 7, 21, 22, 23, 24, 25, 26, 27, as amended by Section 591, Chapter 133, O.S.L. 1997, 28, 29, 30, 31, 32, 33, 34, 35, 36, 81, 82, 83, 84, 85, 86 and 87 (79 O.S. Supp. 1997, Section 27), which relate

to combinations in restraint of trade and unfair discrimination or competition; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 201 of Title 79, unless there is created a duplication in numbering, reads as follows:

Sections 1 through 11 of this act may be cited as the "Oklahoma Antitrust Reform Act."

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 202 of Title 79, unless there is created a duplication in numbering, reads as follows:

As used in this act:

1. "Attorney General" means the Attorney General of Oklahoma;
2. "Commodity" means any tangible personal property, article, or good;
3. "Essential goods or services" means any commodity or service the provision of which is necessary to protect the public health, welfare, and safety, including, but not limited to, those commodities and services traditionally provided by public utilities or public service corporations such as telecommunications, electricity, and natural gas;
4. "Person" means a natural person, corporation, partnership, proprietorship, association, municipal corporation, or other political subdivision of this state, or any other legal entity, but does not include the State of Oklahoma, its departments, and its administrative agencies;

5. "Relevant geographic market" means the geographical area of actual or potential competition in a line of trade or commerce within this state;

6. "Services" means any work or labor, including, but not limited to, work or labor furnished in connection with the sale, lease, or repair of commodities; and

7. "Trade or commerce" means the conduct of a business, for profit or not for profit, producing or providing commodities or services, and includes, but is not limited to advertising, franchising, solicitation, and offering for sale, lease, or distribution of a service or commodity or any other article of commerce.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 203 of Title 79, unless there is created a duplication in numbering, reads as follows:

A. Every act, agreement, contract, or combination in the form of a trust, or otherwise, or conspiracy in restraint of trade or commerce within this state is hereby declared to be against public policy and illegal.

B. It is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce in a relevant market within this state.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 204 of Title 79, unless there is created a duplication in numbering, reads as follows:

It shall be unlawful for any person engaged in the production, manufacture, distribution, purchase, or sale of any commodity of general use, or engaged in rendering any service to the public, or engaged in the sale or furnishing of advertising or advertising service or space for advertisements in publications thereof to, directly or indirectly, discriminate in price, after making due allowance for the difference, if any, in the grade, quantity, or

quality, and in the actual cost of transportation from the point of production or manufacture, between different persons or between different relevant geographic markets where the effect of the discrimination may be substantially to lessen competition or tend to create a monopoly in any line of trade or commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of the discrimination, or with customers of either of them; provided, that nothing shall prevent persons engaged in the production, manufacture, distribution, purchase, or sale of any commodity of general use, or engaged in rendering any service to the public, or engaged in the sale or furnishing of advertising or advertising service or space for advertisements in publications thereof, from selecting their own customers in bona fide transactions and not in restraint of trade; provided further, that nothing shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the commodities or services concerned, including, but not limited to, actual or imminent deterioration of perishable commodities, obsolescence of seasonal commodities, distress sales under court process, or sales in good faith in discontinuance of business in the commodities or services concerned.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 205 of Title 79, unless there is created a duplication in numbering, reads as follows:

Any person engaged in the trade or commerce of essential goods or services, in which, by reason of its nature or extent, the trade or commerce constitutes a virtual monopoly in any relevant geographic market, or essential goods or services are offered or taken by purchase or sale in a manner which makes it of public consequence or to affect the public in any relevant geographic market as to supply, demand, or price or rate thereof, or the trade

or commerce is conducted in violation of subsection B of Section 3 of this act shall be deemed a public business, and subject to be controlled by the state, by the Corporation Commission as a Public Service Corporation pursuant to the provisions of Section 34 of Article IX of the Oklahoma Constitution or by an action in any district court of the state, as to all of its practices, prices, rates, and charges. It is hereby declared to be the duty of any person engaged in any public business to render its services and offer its commodities or either upon reasonable terms without undue discrimination and adequately to meet the needs of the public, considering the facilities of the business.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 206 of Title 79, unless there is created a duplication in numbering, reads as follows:

A. 1. The Attorney General may bring a civil action for violation of this act as *parens patriae* on behalf of a person or persons, excluding municipal corporations or other political subdivisions of the state, residing in the state in any state district court which has jurisdiction of a defendant.

2. In any civil action brought by the Attorney General as *parens patriae*, the Attorney General may seek injunctive or other appropriate equitable relief to enjoin temporarily or permanently any activity or contemplated activity that violates or threatens to violate any of the provisions of this act, and, in lieu of or in addition to injunctive relief, shall recover three times the actual damages sustained, interest on the actual damages from the date of the petition, and the cost of the suit, including reasonable attorney's fees.

3. In any civil action brought pursuant to this subsection, the Attorney General shall, at such times, in such manner, and with such content as the court may direct, cause notice thereof to be given by publication. Any person on whose behalf an action is brought may

elect to exclude from adjudication the portion of the claim for monetary relief attributable to him or her by filing notice of this election with the court within the time specified in the notice given pursuant to this paragraph.

4. In a civil action brought pursuant to this subsection, the final judgment shall be res judicata as to any claim under this section by any person on behalf of whom the action was brought and who fails to give notice within the period specified in the notice given pursuant to paragraph 3 of this subsection.

B. The Attorney General, on behalf of the state, a political subdivision, or any public agency threatened with injury or injured directly or indirectly in its business or property by a violation of this act, may bring an action for appropriate injunctive or other equitable relief, actual damages sustained by reason of a violation of this act, interest on actual damages from the date of the complaint, and reasonable attorney's fees.

C. Any person threatened with injury or injured directly or indirectly in his or her business or property by a violation of this act may bring an action for appropriate injunctive or other equitable relief, three times the actual damages sustained by reason of a violation of this act, interest on the actual damages from the date of the complaint, and reasonable attorney's fees.

D. Any person or governmental entity who or which obtains a judgment for damages under 15 U.S.C. Section 15 or any other provision of federal law comparable to this section may not recover damages in a suit under this section based on substantially the same conduct that was the subject of the federal suit.

E. Any action to recover damages under this section is barred unless commenced within four (4) years after the cause of action accrued or was discovered, whichever is later.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 207 of Title 79, unless there is created a duplication in numbering, reads as follows:

A. Any person, other than a municipal corporation, who violates any provision of this act is guilty of a felony pursuant to the state sentencing matrix. A violator shall, upon conviction, be subject to a fine not exceeding Ten Thousand Dollars (\$10,000.00) per violation.

B. The Attorney General or any district attorney may file a criminal information or seek a criminal indictment to enforce the provisions of subsection A of this section.

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 208 of Title 79, unless there is created a duplication in numbering, reads as follows:

It shall be the duty of the court before whom any proceeding under this act, may be brought, upon the application of the Attorney General, to cause to be issued by the clerk of the court subpoenas for witnesses as may be named in the application, and cause the same to be served by the sheriff of the county where the subpoena is issued; and the witnesses shall be compelled to appear before the court or judge, at the time and place set forth in the subpoena, and shall be compelled to testify as to any knowledge they may have of the violations of any of the provisions of this act; and any witness who fails or refuses to attend and testify shall be punished as for contempt, as provided by law. The evidence of all the witnesses shall, at the option of the Attorney General, be taken down and shall be transcribed and placed in the hands of the Attorney General, and the Attorney General shall be authorized to prosecute a violator or violators of this act. Witnesses subpoenaed as provided in this section shall be compelled to attend from any county in the state.

SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 209 of Title 79, unless there is created a duplication in numbering, reads as follows:

No person engaged in trade or commerce in this state shall acquire or control, in any manner whatever, the stock or the whole or any part of the assets of any competing person engaged in the same or similar line of trade or commerce, in or out of this state, where, in any relevant market in this state or in any line of trade or commerce in this state, the effect of the acquisition or control is to substantially lessen competition or to tend to create a monopoly; provided, however, that this section shall have no application to corporations owning or holding the stock of subsidiary corporations when the ownership of stock in subsidiary corporations does not violate Section 3 of this act.

SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 210 of Title 79, unless there is created a duplication in numbering, reads as follows:

The remedies provided by this act shall be cumulative to all other remedies at law or in equity.

SECTION 11. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 211 of Title 79, unless there is created a duplication in numbering, reads as follows:

A. As used in this section:

1. "Antitrust investigation" and "investigation" mean any inquiry conducted by the Attorney General for the purpose of ascertaining whether any person is or has been engaged in or is actively preparing to engage in activities which may constitute an antitrust violation;

2. "Antitrust violation" means any act or omission in violation of any of the prohibitions contained in this act or in violation of any of the antitrust laws set forth in 15 U.S.C. Section 12A;

3. "Civil investigative demand" and "demand" mean any demand issued by the Attorney General under subsection B of this section;

4. "Documentary material" and "material" include the original or any copy of any contract, agreement, book, booklet, brochure, pamphlet, catalog, magazine, notice, announcement, circular, bulletin, instruction, minutes, agenda, study, analysis, report, graph, map, chart, table, schedule, note, letter, telegram, telephone or other message, product of discovery, magnetic or electronic recording, and any other written, printed, or recorded matter;

5. "Person" means a natural person, proprietorship, partnership, corporation, municipal corporation, association, or any other public or private group, however organized, and includes any person acting under color or authority of state law; and

6. "Product of discovery" includes without limitation the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature; any digest, analysis, selection, compilation, or other derivation thereof, and any index or manner of access thereto.

B. Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or may have any information relevant to a civil antitrust investigation, the Attorney General may, prior to the institution of a civil proceeding, issue in writing and serve upon the person a civil investigative demand requiring the person to produce the documentary material for inspection and copying, to answer in writing written interrogatories, to give oral testimony, or to provide any combination of material, answers, and testimony.

C. 1. Each demand shall describe the nature of the activities that are the subject of the investigation and shall set forth each

statute and section of that statute that may have been or may be violated as a result of the activities. Each demand shall advise the person upon whom the demand is to be served that the person has the right to object to the demand as provided for in this section.

2. Each demand for production of documentary material shall:

- a. describe the class or classes of material to be produced with reasonable specificity so that the material demanded is fairly identified,
- b. prescribe a return date or dates which will provide a reasonable period of time within which the material is to be produced, and
- c. identify the individual or individuals acting on behalf of the Attorney General to whom the material is to be made available for inspection and copying.

3. Each demand for answers to written interrogatories shall:

- a. propound the interrogatories with definiteness and certainty,
- b. prescribe a date or dates by which answers to interrogatories shall be submitted, and
- c. identify the individual or individuals acting on behalf of the Attorney General to whom the answers should be submitted.

4. Each demand for the giving of oral testimony shall:

- a. prescribe a reasonable date, time, and place at which the testimony shall begin, and
- b. identify the individual or individuals acting on behalf of the Attorney General who will conduct the examination.

5. No demand for any product of discovery may be returned until twenty (20) days after the Attorney General serves a copy of the demand upon the person from whom the discovery was obtained.

D. 1. A demand may require the production of documentary material, the submission of answers to written interrogatories, or the giving of oral testimony only if the material or information sought would be discoverable under any law of this state relating to discovery;

2. Voluntary disclosure of a product of discovery under this section does not constitute a waiver of any right or privilege, including any right or privilege which may be invoked to resist discovery of trial preparation materials, to which the person making the disclosure may be entitled.

E. 1. Service of any demand or of any petition filed under subsection F or H of this section may be made upon any natural person by delivering a duly executed copy of the demand or petition to the person to be served or by mailing a copy by registered or certified mail, return receipt requested to the person at his or her residence or principal office or place of business.

2. Service of any demand or of any petition filed under subsection F or H of this section may be made upon any person other than a natural person by delivering a duly executed copy of the demand or petition to a person to whom delivery would be appropriate under state law if the demand or petition were process in a civil suit.

3. A verified return by the individual serving any demand or any petition filed under subsection F or H setting forth the manner of service shall be proof of such service. In the case of service by registered or certified mail, the return shall be accompanied by the return post office receipt of delivery of the demand or petition.

F. At any time before the return date specified in a demand or within twenty (20) days after the demand has been served, whichever period is shorter, the person who has been served and, in the case of a demand for a product of discovery, the person from whom the

discovery is sought, may file a petition for an order modifying or setting aside the demand in the district court in the county of the person's residence or principal office or place of business. Any such petition shall specify each ground upon which the petitioner relies in seeking the relief sought. The petition may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of the petitioner. The petitioner shall serve a copy of the petition upon the Attorney General. The Attorney General may submit an answer to the petition. In ruling on the petition, the court shall presume absent evidence to the contrary that the Attorney General issued the demand in good faith and within the scope of his or her authority.

G. 1. A person on whom a demand is served shall comply with the terms of the demand unless otherwise provided by court order.

2. The time for compliance with the demand in whole or in part shall not run during the pendency of any petition filed under subsection F of this section; provided, however, that the petitioner shall comply, with any portions of the demand not sought to be modified or set aside.

3. a. Any person upon whom any demand for the production of documentary material has been duly served under this section shall make the material available to the Attorney General for inspection and copying during normal business hours on the return date specified in the demand at the person's principal office or place of business or as otherwise may be agreed upon by the person and the Attorney General. The Attorney General shall bear the expense of any copying. The person may substitute copies for originals of all or part of the requested documents so long as the originals are made available for inspection. The person shall indicate

under his or her direction and in his or her presence record the witness's testimony. At the expense of the Attorney General, the testimony shall be taken stenographically and may be transcribed.

- b. The oral testimony of any person taken pursuant to a demand served under this section shall be taken in the county where the person resides, is found, transacts business, or in such other place as may be agreed upon by the person and the Attorney General.
- c. Any person compelled to appear under a demand for oral testimony under this section may be accompanied, represented, and advised by counsel. Counsel may advise the person in confidence, either upon the request of the person or upon counsel's own initiative, with respect to any question arising in connection with the examination.
- d. The individual conducting the examination on behalf of the Attorney General shall exclude from the place of examination all other persons except the person being examined, the person's counsel, the counsel of the person to whom the demand has been issued, the person before whom the testimony is to be taken, any stenographer taking the testimony, and any persons assisting the individual conducting the examination.
- e. During the examination, the person being examined or his or her counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may properly be made, received, and entered upon the record when it is claimed that the person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or

privilege, including the privilege against self-incrimination. Neither such person nor his or her counsel shall otherwise object to or refuse to answer any question or interrupt the oral examination. If the person refuses to answer any question, the Attorney General may petition the district court in the county where the examination is being conducted for an order compelling the person to answer the question.

- f. If and when the testimony has been fully transcribed, the person before whom the testimony was taken shall promptly transmit the transcript of the testimony to the witness and a copy of the transcript to the Attorney General. The witness shall have a reasonable opportunity to examine the transcript and make any changes in form or substance accompanied by a statement of the reasons for the changes. The witness shall then sign and return the transcript, unless he or she is ill, cannot be found, refuses to sign, or in writing waives the signing. If the witness does not sign the transcript within fifteen (15) days of receiving it, the person before whom the testimony has been given shall sign it and state on the record the reason, if known, for the witness's failure to sign. The officer shall then certify on the transcript that the witness was duly sworn and that the transcript is a true record of the testimony given by the witness and promptly transmit a copy of the certified transcript to the Attorney General.
- g. Upon request, the attorney general shall furnish a copy of the certified transcript to the witness.

h. The witness shall be entitled to the same fees and mileage that are paid to witnesses in the district courts of this state.

H. 1. Whenever any person fails to comply with any demand duly served on that person under this section, the Attorney General may file in the district court in the county in which the person resides, is found, or transacts business and serve on the person a petition for an order of the court for enforcement of this section. If the person transacts business in more than one county, the petition shall be filed in the county of the person's principal office or place of business in the state or in any other county as may be agreed upon by the person and the Attorney General.

2. Any person, who, with intent to avoid, evade, or prevent compliance in whole or part with a demand issued under this section, removes from any place, conceals, withholds, destroys, mutilates, alters, or by any other means falsifies any documentary material or otherwise provides inaccurate information is guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than Five Thousand Dollars (\$5,000.00) or by confinement in the county jail for not more than one (1) year or by both such fine and imprisonment.

I. 1. Except as provided in this section or ordered by a court for good cause shown, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies or contents thereof, shall be available for examination or used by any person without the consent of the person who produced the material, answers, or testimony and, in the case of any product of discovery, of the person from whom the discovery was obtained.

2. The Attorney General may make available for inspection or prepare copies of documentary material, answers to interrogatories, or transcripts of oral testimony in his or her possession as he or

she determines may be required by the state in the course of any investigation or a judicial proceeding in which the state is a party.

3. The Attorney General may make available for inspection or prepare copies of documentary material, answers to interrogatories, or transcripts of oral testimony in his or her possession as he or she determines may be required for official use by any officer of this state or of the United States charged with the enforcement of the laws of this state or the United States.

4. Upon request, the Attorney General shall make available copies of documentary material, answers to interrogatories, and transcripts of oral testimony for inspection by the person who produced the material or information and, in the case of a product of discovery, the person from whom the discovery was obtained or by any duly authorized representative of the person, including his or her counsel.

5. Not later than fifteen (15) days prior to disclosing any documentary material or answers to written interrogatories designated as containing trade secrets or confidential information under this subsection, the Attorney General shall notify the person who produced the material of the Attorney General's intent to make the disclosure. The person who produced the documentary material or answers to written interrogatories may petition a district court in any county of this state in which the person resides, does business, or maintains its principal office for a protective order limiting the terms under which the Attorney General may disclose the trade secrets or confidential information.

6. Upon written request, the Attorney General shall return documentary material produced under this section in connection with an antitrust investigation to the person who produced it whenever:

- a. any case or proceeding before any court arising out of the investigation has been completed, or

b. the Attorney General has decided after completing an examination and analysis of the material not to institute any case or proceeding before a court in connection with the investigation.

J. Whenever any petition is filed in the district court in any county as provided for in this section, the court shall have jurisdiction to hear and determine the matter presented and to enter any order or orders required to implement the provisions of this section. Any final order shall be subject to appeal. Failure to comply with any final order entered by a court under this section is punishable by the court as a contempt of the order.

SECTION 12. AMENDATORY 17 O.S. 1991, Section 141, is amended to read as follows:

Section 141. In all ~~cases where not otherwise provided by specific legislation, for actions arising under the Anti-Trust Laws Section 5 of this act,~~ and prosecuted before the Corporation Commission, ~~to wit: Section 45, Article 9, Constitution of Oklahoma and Chapter 79, Sections 8220 - 8241, both inclusive, Revised Laws of Oklahoma, 1910, (Sections 529 - 551, both inclusive, Corporation Commission Laws, 1917), and Chapter 114, Session Laws, 1913 (Section 552 - 558, both inclusive, Corporation Commission laws, 1917),~~ the ~~same~~ laws and rules ~~as to~~ of procedure, notice, and appeal ~~shall apply as are~~ prescribed for transportation and transmission companies in the Constitution ~~of Oklahoma~~ and ~~other~~ laws of ~~the~~ this state ~~applicable thereto~~ shall apply.

SECTION 13. REPEALER 79 O.S. 1991, Sections 1, 2, 3, 4, 5, 6, 7, 21, 22, 23, 24, 25, 26, 27, as amended by Section 591, Chapter 133, O.S.L. 1997, 28, 29, 30, 31, 32, 33, 34, 35, 36, 81, 82, 83, 84, 85, 86 and 87 (79 O.S. Supp. 1997, Section 27), are hereby repealed.

SECTION 14. This act shall become effective November 1, 1998.

46-2-2380

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