

**FORC QUARTERLY JOURNAL  
OF  
INSURANCE LAW AND REGULATION**

**Summer 1998 June 20, 1998 Vol. X, Edition II**

**THE ANTI-TRUST IMPLICATIONS IN AN ACQUISITION OF AN INSURER,**

J. Angela Ables, Esq.  
(405) 272-9221

All of us have, in our regulatory practices, handled the acquisition of a domestic insurer by filing and taking to Hearing a Form A Registration Statement on behalf of the acquiring party. What few of us have encountered is a state which seeks to challenge the Form A based upon its belief that the acquisition violates the provision in the statutory scheme relating to monopoly or the lessening of competition. Most states have adopted the Model NAIC Holding Company Registration Act which contains the statutory reasons an Insurance Department may disapprove a Form A acquisition statement:

The Commissioner shall approve any merger or other acquisition of control referred to in Subsection A, unless, after a public hearing, the Commissioner finds that:

After the change of control, the domestic insurer . . . would not be able to satisfy their requirements for the issuance of a license to write the line or lines of insurance for which it is presently licensed;

The effect of the merger or other acquisition of control would be **substantially to lessen competition in insurance in this state or tend to create a monopoly. . . .**

- (c)
- (d)
- (e)

1. . . . (See NAIC Model Holding Company System Regulatory Act) (Vol. II-440-1, NAIC Model Regulations).

This paper will focus on the statutory section relating to the "substantially lessening of competition or tending to create a monopoly" language.

***State Statutes***

The various Insurance Commissioners may deny an acquisition of control of a domestic insurer, or merger with a domestic insurer if, after a public hearing, he/she finds "the effect of the merger or other acquisition of control would be to substantially lessen competition in insurance in this state or tend to create a monopoly therein."<sup>1</sup> The language found in the NAIC Model Act, as well as the language adopted by most states, has incorporated antitrust language found in federal law, specifically the Sherman Act<sup>2</sup> and the Clayton Act,<sup>3</sup> which most states have also adopted in their individual state Antitrust Acts. Generally, each individual state also has restrictions against monopolies in its state Constitution also, so one must review not only the language of the Holding Company Act, the state Antitrust Act, the State Constitution, but also the federal

review not only the language of the Holding Company Act, the state Antitrust Act, the State Constitution, but also the federal Sherman and Clayton Acts. Typically, the state statutes will "mirror" the Sherman and Clayton Act language where there is a great deal of case law interpreting what constitutes a monopoly or a lessening of competition. In determining whether an Insurance Commissioner may deny an acquisition or merger based upon this statutory antitrust criteria, an analysis should begin with a discussion of monopolies as set forth in the Sherman Act 2 and then a concomitant review of the Clayton Act's "lessening of competition" language and case law.

### **Monopoly**

A "monopoly" is illegal conduct in which a single firm or entity seeks to either obtain or retain market power. "Market power" has been defined as the ability of an entity to obtain higher profits by reducing output and selling at a higher price. Two factors must be examined to determine if a monopoly exists: first, the actor must have possession of monopoly power in the relevant market, and secondly, the power must be due to the intentional acquisition of market power. Courts have held that both of these factors must be present for a monopoly to exist; thus, if there is insufficient evidence to prove one factor, there is no showing of monopoly power, according to a rather recent Tenth Circuit Court case.<sup>4</sup> Many state Constitutions also deem monopolies to be an evil device, as best described in the Oklahoma Constitution which provides very direct language deeming monopolies to be illegal:

Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, . . .<sup>5</sup>

While state statutes and Constitutions prohibit monopolies, there is very little case law on these state enactments, while there is extensive case law addressing and interpreting the federal Sherman Act 2 monopoly power prohibition. Therefore, an analysis of the federal case law provides one with the best analysis of these various state enactments due to the similarity in the prohibitive monopoly language.

The Sherman Antitrust Act specifically makes it illegal for an unauthorized monopoly to exist. The Sherman Act states, in 2:

#### 2. Monopolizing trade a felony; penalty.

Every 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 among the several states, or with foreign nations, shall be guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Federal Court cases interpreting the Sherman Act have consistently held that in order to have monopoly power, the actor must first have "possession of monopoly power in the relevant market."<sup>6</sup> This power is an ability to "control prices or exclude competition."<sup>7</sup> Consequently, the courts have held that "monopoly power is the ability to raise prices significantly above the competitive level without losing all of one's business and to exclude competition from a relevant market."<sup>8</sup> The possession of monopoly power is usually established by presenting evidence that the defendant has a dominant market share in the relevant market. The Courts in the Tenth Circuit have held that to prove "monopoly power," a plaintiff must prove both the "power to control prices" *and* the "power to exclude competition."<sup>9</sup>

#### 1. Market Share.

The most dominant factor in determining monopoly power is the percentage of market share a particular company has in the relevant market. One of the most frequently cited and influential cases regarding market share was written by Judge Learned Hand in the case of *United States v. Aluminum Co. of America*.<sup>10</sup> Judge Hand stated that a market share over 90 percent is enough to constitute a monopoly; however, he concluded, "it is doubtful whether 60 or 64

share over 90 percent is enough to constitute a monopoly; however, he concluded, "it is doubtful whether 60 or 64 percent would be enough; and certainly 33 percent is not 'enough for a monopoly to exist.'"<sup>11</sup> While an extremely high market share of a participant may carry at least an inference of monopoly power<sup>12</sup> the Supreme Court has refused to specify a minimum percentage for this requirement of "monopoly power"<sup>13</sup> and Courts are divided on exactly what is an "adequate market share" for this purpose. Lower court decisions indicate the minimum market share required for a direct inference of monopoly power from evidence of market share alone is approximately 70 to 80 percent.<sup>14</sup> Courts have been reticent to set forth any specific percentage amounts as each case must rely on its own foundational facts, especially as it relates to the business of insurance, which will be discussed in more detail hereinafter. Market share percentages may give rise to market power, but "rarely will conclusively establish or eliminate market or monopoly power."<sup>15</sup> One Court has held that even though a market participant may maintain a 99.8 percent market share, an inference of market power may exist, but this does not conclusively establish market power or the *intent to exclude competition*.<sup>16</sup> Additionally, many Courts have held that while a large market share may create an inference of monopoly power, this inference is rebuttable by showing a lack of barriers to entry.<sup>17</sup>

## B. Barriers to Entry.

If the defendant's market share is in the range where neither the presence nor absence of monopoly power can be inferred, Courts will look to other factors such as barriers to entry in determining monopoly power. Other factors the Courts have examined include the number and strength of competitors, difficulty in entering the market, consumer sensitivity to price changes, market developments and multi-marketing by defendant.<sup>18</sup> One of the dominant factors in an analysis of monopoly power is the market structure under scrutiny and the barriers created by market participants attempting to block the entry of competition. Market structure is defined by the size and distribution of buyers and sellers, the presence of barriers to entry, and the extent of vertical integration of buyers and sellers.<sup>19</sup> The main factor in market structure analysis is the prevention, or barrier to entry into the market, by competitors.<sup>20</sup> The Ninth Circuit Court of Appeals has held that in addition to substantial market share, a showing of significant entry barriers and incapacity of competitors to expand into the market is necessary to establish market power.<sup>21</sup> The Ninth Circuit further defined the main entry barriers as: (1) legal license requirements, (2) control of essential or superior resources, (3) entrenched buyer preferences, (4) high capital investment required for entry, and (5) economies of scale.<sup>22</sup> In the event that a market participant maintains a one hundred percent (100%) market share, it does not confer monopoly power where a defendant cannot maintain its monopoly position because of an absence of entry barriers.<sup>23</sup> Consequently, low barriers to entry rebut the inference of monopoly power<sup>24</sup> and nowhere is this more important than in an analysis involving insurance companies and the competitive impact on the insurance market in a state.

Another factor to review in determining whether a monopoly exists is the business conduct of the participants. Business conduct factors such as remarkably high or low prices or frequent price changes may indicate the ability to control prices.<sup>25</sup> Another factor for review is the loss of competitors through attrition, which may be indicative of the ability to exclude competition.<sup>26</sup> Thus, the Courts have held that if entry barriers are low, and a participant is not utilizing monopolist business conduct, nor has monopolist market power, restrictions will not be imposed on a participant's actions. In insurance, barriers to entry are created by the State itself and not by the competitors; therefore, a monopoly or anti-competitive effect on the insurance industry can rarely be found to exist.

## 2. Relevant Market.

As the federal cases have held, in order to have monopoly power, the actor must have the possession of monopoly power in the relevant market. To determine the relevant market, several factors must be examined. Decisions on whether to include or exclude a product, a group of "like" products, or products within a homogeneous group must be determined. Some Courts have held the relevant market to be one "encompassing merely the defendant's product."<sup>27</sup> The "relevant market" is determined by a careful analysis of the facts and circumstances that show monopoly power by proof of relevant product and geographic markets.<sup>28</sup> The burden of proof to establish the "relevant market" is always upon the plaintiff<sup>29</sup> and the determination of the "relevant market" is a factual determination<sup>30</sup> and is subject to the clearly erroneous standard of review.<sup>31</sup>

#### D. The Relevant Product Market.

To define the relevant product market, it must be determined which products have a sufficient competitive impact on the product of the defendant whose actions are being scrutinized, to be considered collectively. The relevant standard for inclusion of products in the relevant market is that of "reasonable interchangeability."<sup>32</sup> This standard of "reasonable interchangeability" is comprised of three criteria: (1) functional interchangeability, (2) reactive interchangeability, and (3) supply substitutability.<sup>33</sup>

The first criteria, "functional interchangeability," refers to the degree to which various products are able to perform the same functions.<sup>34</sup> The second criteria, "reactive interchangeability" refers to the extent to which consumers will react to changes in relative prices between goods by substituting one good for another,<sup>35</sup> otherwise known as "cross-elasticity" of demand for products.<sup>36</sup> The last criterion, "supply substitutability" refers to the ability of manufacturers to substitute the production of goods in the relevant market for the production of the goods currently being produced by the entity under review for monopolistic behavior.<sup>37</sup> However, the U.S. Supreme Court has not recognized this factor in a relevant product market analysis for Section 2 of the Sherman Act. Thus, in a review of insurance products, the types of policies written or marketed by the insurers under review will determine the product market and a review should be limited to those products.

#### E. The Relevant Geographic Market.

The relevant geographic market must "correspond to the commercial realities" of the industry under scrutiny and must be economically significant.<sup>38</sup> This market has been described as the narrowest market which is wide enough so that products from adjacent areas cannot compete on substantial parity with those included in the market.<sup>39</sup> The determination of the boundaries of the geographic market is always a question of fact to be determined within the context of each case.<sup>40</sup> Consequently, in a Form A context, the proper relevant geographic market would be the individual state wherein the Form A is held for the acquisition of control of a domestic insurer.

#### *The Clayton Act, Section 7*

The Clayton Act makes acquisitions that lessen competition or create a monopoly illegal, similar to the Sherman Act. The Clayton Act provides, in pertinent part, as follows:

[That] [n]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged in commerce in any section of the country, **the effect of such acquisition may be to substantially lessen competition, or to tend to create a monopoly.**<sup>41</sup>

In order to test the legality of an acquisition or merger, a three step analysis is required. Courts, or Insurance Commissioners, must: (1) define the relevant product market in which the transaction may have anti-competitive effects; (2) define the relevant geographic market for such products; and finally, (3) determine whether there is a reasonable probability of the specified adverse effects on competition.

#### A. Market Share.

Market share is the primary indicia of market power that district courts use in determining whether there is a reasonable probability that an acquisition would substantially lessen competition or tend to create a monopoly.<sup>42</sup> However, other

substantially lessen competition or tend to create a monopoly.<sup>42</sup> However, other economic and historical factors such as concentration in the industry, ease of entry into the market, strength of remaining firms, supply and demand in the market, and post-acquisition events may be examined to determine if a violation exists.<sup>43</sup>

#### B. Other Factors.

In the absence of market share, there are a multitude of other factors that may be examined in determining if a violation of anti-competition laws or tendencies, has occurred. These factors include: barriers to entry, expansion of the relevant market, history of industry toward concentration, legal barriers which prevent other potential competitors' entry into the relevant market,<sup>44</sup> the number and power of competitors, and the deprivation of a fair opportunity to compete in the relevant market.<sup>45</sup> Additional factors for consideration in a Clayton analysis are the number and power of competitors, background of their growth, power of corporations to be merged, relationship of their lines of commerce, competition between them, power of the other entity, setting and creation of merger, reason and necessities of merger, adaptability of line of commerce of merged entities to noncompetitive practices, and potential power of merged entities in the relevant market.<sup>46</sup>

Determining whether corporate mergers or acquisitions may substantially lessen competition in a particular line of commerce in any section of the country may be different in each case, since the facts will likely differ and the framework of each industry, likewise, is likely to be unique.<sup>47</sup> Therefore, each case must stand or fall on its own facts viewed within the framework of industry pattern.<sup>48</sup>

Insurance Commissioners, seeking to determine whether an acquisition or merger has anti-competitive effects should look to the Hart-Scott-Rodino filing made by insurers with the Federal Trade Commission. The Federal Trade Commission reviews all such acquisitions as does the Department of Justice for federal implications relating to anti-competitive tendencies. Since the various state statutes "mirror" the language of the Clayton Act, one could assume that the FTC and DOJ review of acquisitions should be persuasive to the various insurance departments in their own individual review. Since there is not much state case law relating to the Holding Company Act and its implications relative to the anti-competitive effect of mergers and acquisitions, the federal case law interpreting the Clayton and Sherman Acts should be controlling in such individual state reviews.

Each state will also have to analyze its own state antitrust act, although, once again, the federal case law relating to the Sherman and Clayton Acts should be controlling and persuasive, especially, when coupled with the near pre-emption of the subject matter by the federal government. State antitrust statutes generally prohibit "every act, agreement, contract, or combination in the form of a trust, or conspiracy in restraint of trade or commerce."<sup>49</sup> Oklahoma's Antitrust Act has been interpreted as reaching purely unilateral conduct in restraint of trade.<sup>50</sup>

To prove a violation of Oklahoma's Antitrust Act, a plaintiff must establish that the defendant committed: (1) an act, (2) in restraint of trade,<sup>51</sup> in the relevant market.<sup>52</sup> An act restrains trade in the State of Oklahoma if that act "prejudice[s] public interests by unduly restricting competition, or unduly obstruct[s] the due course of trade, or . . . injuriously restrain[s] trade."<sup>53</sup> Therefore, if a contract in restraint of trade is not contrary to public policy, then it does not violate the law.<sup>54</sup>

The Oklahoma Supreme Court has determined that a "rule of reason" will determine "if an act, contract, agreement or combination prejudices public interest by unduly obstructing the due course of trade, or which injuriously restrains trade, as being unlawful."<sup>55</sup> In *Teleco, Inc.*, the Oklahoma Supreme Court stated:

It has long been recognized that every agreement concerning trade, and every regulation of trade, restrains trade to some extent, and that the very essence of such agreements is to bind or restrain. As a literal application of the provisions of Okla. Stat. Tit 79 1 would outlaw every conceivable contract or combination which could be made concerning trade or commerce, courts have read into such statute a 'rule of reason,' under which only those acts, contracts, agreements, or combinations which prejudice public interest by

those acts, contracts, agreements, or combinations which prejudice public interest by unduly restricting the due course of trade, or which injuriously restrain trade, are unlawful.<sup>56</sup>

Therefore, only "unreasonable restraints of trade, as measured by the 'rule of reason' violate the Oklahoma Antitrust Act."<sup>57</sup> The test of "reasonableness" is determined by the action of a market participant's effect upon the public.<sup>58</sup> For a violation of anti-competitive laws to exist, it must be shown that "the challenged conduct adversely impacts competition in general," not just effect on individual competitors.<sup>59</sup> Therefore, to amount to an "unreasonable" restraint of trade, the anti-competitive conduct must have an effect greater than its effect upon the plaintiff's business.<sup>60</sup>

Under the rule of reason analysis, several factors should be examined to determine reasonableness: (1) market power, (2) facts particular to the business, (3) the nature of the restraint and its effect, (4) the history of the restraint, (5) the reason for its adoption,<sup>61</sup> or (6) the surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices.<sup>62</sup> This test requires a precise and thorough analysis of the market and market power in the relevant market.<sup>63</sup> Consequently, in a Form A competitive review, the insurer or entity acquiring the domestic insurer must have the power to control prices and to exclude competition.<sup>64</sup> The focus of an antitrust complaint or inquiry should be based upon a determination of whether the acquiring party of a domestic insurer has the ability to control prices and to exclude others from the competitive market. This analysis is applicable regardless of whether the review or inquiry is for a determination of monopoly or restraint upon competition. If an insurer cannot maintain market power, or exclude competition, the acquiring party of a domestic insurer should not be deemed to be engaging in monopolistic activity, nor will it have the ability to exclude competition.

Since the business of insurance is so highly regulated by the various state insurance departments, no insurer has the ability to exclude competitors from entering the insurance market in a particular state; in fact, the only entity that has this ability is the insurance department itself as it is responsible for licensing insurers to do business in the state and approving the policies they seek to market in that state. State insurance department rules and regulations, as well as statutory provisions, set forth the manner in which insurers must do business and market their products; it cannot be said that the competitors set these requirements and consequently, this inability to control the market or entry into the market should suffice for a negative response to whether an acquisition has the effect of "lessening competition" or "tending to create a monopoly."

The various insurance codes throughout the United States provide a defined method of conducting business within the confines of each state; consequently, an insurer cannot control the prices of the relevant products, i.e. insurance policies. Many states even control the prices at which the policies may be sold if they have "prior approval" authority within the confines of their Insurance Code. Medicare Supplement insurance, by its very nature must have a loss ratio of 65 percent as required by federal, and consequently, state law. Therefore, for a medicare supplement insurer to be guilty of a "monopoly" or anti-competitive behavior, is nearly impossible. The amount of commission that may be paid on Medicare Supplement policies is also mandated, taking any independent behavior away from the insurers; these rigid guidelines prevent one market participant from obtaining monopoly profits. The various Insurance Codes provide for such a controlled environment that practically no competitor could be deemed as having the ability to control the price of the relevant product.

The Insurance Codes of the various states create the barriers to entry that exclude market participation, not the market participants themselves. Licensing of companies and agents; contract provisions regulation; marketing regulation; and, in some states, rate regulation, create the barriers which affect competition, not the competitors themselves. The various Insurance Departments affect the barriers to entry as they are responsible for determining the licensure of competitors, not the insurers or acquiring parties of domestic insurers. Therefore, this inability to maintain a dominant market share or to exclude competitors from the market should defeat any claim of monopoly or anti-competitive behavior by an Insurance Department in an acquisition or merger.

#### **Endnotes**

1. See Section 3(D), NAIC Model Holding Company Registration Statement Act.
2. See 15 U.S.C. 1.
3. See 15 U.S.C. 15.
4. *Tarabishi v. McAlester Regional Hospital*, 951 F.2d 1588 (10<sup>th</sup> Cir. 1991).
5. Oklahoma Constitution, Article 2, 32.

6. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04 (1966); *Reazin v. Blue Cross and Blue Shield*, 899 F.2d 951, 973 (10<sup>th</sup> Cir. 1990), *cert. denied* U.S. , 110 S.Ct. 3241 (1990) (quoting *Bright v. Moss Ambulance Service*, 824 F.2d 819, 823 (10<sup>th</sup> Cir. 1987); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1514 n. 4 (10<sup>th</sup> Cir. 1984); *aff'd* U.S. , 105 S.Ct. 2847 (1985).
7. *Grinnell*, 384 U.S. at 571, 86 S.Ct. At 1704, 16 L.Ed.2d at 786 quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391-92, 76 S.Ct. 994, 1005, 100 L.Ed 1264, 1278 (1956); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 174, 68 S.Ct. 915, 937, 92 L.Ed. 1260, 1301 (1948).
8. *E.I. Dupont*, 351 U.S. 377, 391 , 76 S.Ct. 994, 1004, (1956); *Ass'n. Of Independent T. V. v. College Football Ass'n.*, 637 F.Supp. 1289, 1302 (W.D. Ok., 1986); *Shoppin' Bag of Pueblo, Inc. v. Dillion Companies, Inc.* 783 F.2d 159 (10<sup>th</sup> Cir. 1986).
9. *Tarabishi*, 951 F.2d at 1569; *Reazin*, 899 F.2d at 967; *Bright*, 824 F.2d at 824; *Shoppin' Bag of Pueblo, Inc. v. Dillon Co's.*, 783 F.2d 159, 163 (10<sup>th</sup> Cir. 1986).
10. 148 F.2d 416 (2d Cir. 1945).
11. *ALCOA*, 148 F.2d at 424.
12. *United States v. Grinnell Corp.*, 383 U.S. 563, 571, 86 S.Ct. 1698, 1704, 16 L.Ed 778, 786 (1966).
13. *United States v. Columbia Steel Co.*, 334 U.S. 495, 527-28, n. 25, 68 S.Ct. 1007, 1124, 92 L.Ed. 1533, 1554 (1948).
14. *International Audiotext Network, Inc. v. American Tel. & Tel. Co.*, 893 F.Supp. 1207, 1218 (S.D.N.Y. 1994); *aff'd*, 62 F.3d 69 (2d Cir. 1995); See *Houser v. Fox Theaters Mgmt. Corp.*, 854 F.2d 1225, 1230 (3<sup>rd</sup> Cir. 1988) discussing 66%; *Cowley v. Braden Indus.*, 613 F.2d 751, 756 (9<sup>th</sup> Cir.), *cert. denied* 446 U.S. 965, 100 S.Ct. 2942, 64 L.Ed.2d 824 (1980); *Pacific Coast Agricultural Export Ass'n. v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1124 (9<sup>th</sup> Cir. 1975) discussing 45% - 70%; *Moore v. Jas. H. Mathews & Co.*, 473 F.2d 328, 332 (9<sup>th</sup> Cir. 1973) discussing 65 to 70 %; *United States v. Otter Tail Power Co.*, 331 F.Supp. 54, 59 (D. Minn., 1971), *aff'd in part, vacated in part on other grounds*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed 2d 359 (1973) discussing 75.6 percent.
15. *Reazin v. Blue Cross and Blue Shield*, 899 F.2d 951, 968 (10<sup>th</sup> Cir. 1990), *cert. denied*, 497 U.S. 1005, 110 S.Ct. 3241 (1990); *Shoppin' Bag v. Dillion Cos.*, 783 F.2d 159, 162 (10<sup>th</sup> Cir., 1986).
16. *Spence v. Southeastern Alaska Pilot's Ass'n.*, 789 F.Supp. 1014, 1026 (D. Alaska, 1992) (*emphasis added*).
17. *Southern Pacific Communications Co. v. American Tel. & Tel. Co.*, 556 F.Supp. 825, 878 (D.D.C. 1983), *aff'd*, 740 F.2d 980 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 105, 105 S.Ct. 1359, 84 L.Ed. 2d 380 (1985).
18. *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 44 F.3d 1465, 1482 (10<sup>th</sup> Cir. 1995) quoting *Shoppin' Bag*, 783 F.2d at 162 (10<sup>th</sup> Cir., 1986).
19. F. Scherer, *INDUSTRIAL MARKET STRUCTURE and ECONOMIC PERFORMANCE* (1970). See also, *United States v. Columbia Steel Co.*, 334 U.S. 495, 527-28, 68 S.Ct. 1107, 1124, 92 L.Ed. 1533, 1554 (1948).
20. *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1425 (9<sup>th</sup> Cir., 1993) holding that 100% market share of bowling centers "does not demonstrate power to control prices or exclude competition in the absence of any evidence that it could prevent entry of other market participants," *cert. denied*, U.S., 114 S.Ct. 1307, 127 L.Ed. 2d 658 (1994); *Metro Mobile CTS, Inc. v. New Vector Communications, Inc.* 892 F.2d 62 (9<sup>th</sup> Cir. 1989), holding cellular phone company lacked market power to monopolize, despite 100% market share, when defendant's position in the market was the result of government regulation, barriers to entry were low, and very large untapped market potential existed; *Fabrication Enters. v. Hygienic Corp.*, 848 F.Supp. 1156, 1160 (S.D.N.Y., 1994), holding even 100% of market would not assure monopoly power "ease of entry or availability or readily activated potential competition, cannot be ignored," *revs'd on other grounds*, 64 F.3d 53 (2<sup>nd</sup> Cir. 1995).
21. *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1439 (9<sup>th</sup> Cir.), *cert. denied*, U.S., 116 S.Ct. 515, 133 L.Ed.2d 424 (1995).
22. *Rebel Oil*, 51 F.3d at 1439.
23. *Sunbelt Television, Inc. v. Jones Intercable, Inc.*, 795 F.Supp. 333, 335-336 (C.D. Cal. 1992); *United States v. Jas. H. Mathews & Co.*, 1989 - 1 Trade Cas. (CCH) 68, 441, at 60,435 (W.D. Pa. 1989) holding even 90% market share does not necessarily indicate that an entity has monopoly power if there are low barriers to entry.
24. *Southern Pacific Communications Co. v. American Tel. & Tel. Co.*, 556 F.Supp. 825, 878-884 (D.D.C. 1982), *aff'd*, 740 F.2d 980 (D.C. Cir. 1984), *cert. denied* 470 U.S. 1005, 105 S.Ct. 1359, 84 L.Ed.2d 380 (1985).
25. *American Tobacco Co. v. United States*, 328 U.S. 781, 796-797, 66 S.Ct. 1225, 1133-38, 90 L.Ed. 1575, 1587 (1946); *Bellman v. Clayton County Hospital Authority*, 785 F.Supp. 1488 (N.D. Ga. 1990) holding price increase which did not exceed competitive level is not evidence of monopoly.
26. *Greyhound Computer Corp. v. International Business Machines Corp.*, 559 F.2d 488, 497 (9<sup>th</sup> Cir. 1977), *cert. denied*, 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978).
27. *Carlock v. Pillsbury Co.*, 719 F.Supp. 791, 843 (D. Minn. 1989).
28. *Tarabishi v. McAlester Regional Hospital*, 951 F.2d 1558, 1567 (10<sup>th</sup> Cir., 1991).
29. *Tarabishi*, 951 F.2d at 1568.

30. *Aspen Highlands Skiing Corp.* 738 F.2d at 1514, n.4; *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1561 (10<sup>th</sup> Cir., 1984), *reversed on other grounds*, 782 F.2d 855 (10<sup>th</sup> Cir., 1986) *en banc*.
31. *Westman Comm'n. Co. v. Hobart Int'l. Inc.*, 796 F.2d 1216, 1220 (10<sup>th</sup> Cir., 1986), *cert. denied*, 486 U.S. 1005, 108 S. Ct. 1728 (1998).
32. *E.I. duPont*, 351 U.S. at 395, 76 S.Ct. At 1007, 100 L.Ed at 1280-81.
33. *E.I. duPot*, 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956); *United States v. Aluminum Co. of America*, 148 F.2d 416, (2<sup>nd</sup> Circ., 1945); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953); *Grinnell*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed 2d 778 (1966).
34. *United States v. Continental Can Co.*, 378 U.S. 441, 84 S.Ct. 1738, 12 L.Ed.2d 953 (1964); *Diamond International Corp. v. Walterhoefer*, 289 F.Supp. 550 (D.Md. 1986); *Huron Valley Publishing Co. v. Booth Newspapers, Inc.* 336 F.Supp. 659 (E.D. Mich., 1972).
35. *United States v. Continental Can Co.*, 378 U.S. 441, 84 S.Ct. 1738, 12 L.Ed.2d 953 (1964); *Diamond International Corp. v. Walterhoefer*, 289 F.Supp. 550 (D.Md. 1986); *Huron Valley Publishing Co. v. Booth Newspapers, Inc.* 336 F.Supp. 659 (E.D. Mich., 1972).
36. *United States v. Charles Pfizer & Co.*, 246 F.Supp. 464, 468 (E.D.N.Y., 1965).
37. *Telex Corp. v. International Business Machines Corp.*, 510 F.2d 894, 915-19 (10<sup>th</sup> Cir., 1990), *cert. denied*, 423 U.S. 802, 96 S.Ct. 8, 46 L.Ed 2d 244 (1975).
38. *Brown Shoe Co., v. United States*, 370 U.S. 294, 336-37, 82 S.Ct. 1502, 1530, 8 L.Ed. 2d 510, 542 (1962) (Clayton Act 7).
39. *Westman Comm'n. Co. v. Hobart Int'l., Inc.* 796 F.2d 1216, 1222 (10<sup>th</sup> Cir., 1986), *cert. denied*, 486 U.S. 1005, 108 S.Ct. 1728, 100 L.Ed.2d 192 (1988).
40. *United States v. Penn-Olin Chem. Co.*, 217 F.Supp. 110, 119 (D.Del. 1963), *vacated on other grounds*, 378 U.S. 158, 84 S.Ct. 1710, 12 L.Ed.2d 775 (1964), *complaint dismissed*, 246 F.Supp. 917 (D.Del. 1965), *aff'd by a equally divided Court*, 389 U.S. 308, 88 S.Ct. 502, 19 L.Ed 2d 545 (1967).
41. The Clayton Act, 7, 15 U.S.C. 18 (*emphasis added*).
42. *Remington Products, Inc. v. North American Philips Corp.*, 717 F.Supp. 36 (D.Conn., 1989), *on reconsideration*, 755 F.Supp 52 (1989).
43. *Remington Products*, 717 F.Supp. 36 (D. Conn. 1989).
44. *U.S. v. First National Bank of Sunbury*, 311 F.Supp. 374 (M.D. Pa. 1970).
45. *U.S. v. Bethlehem Steel Corp.*, 168 F.Supp. 576 (S.D.N.Y., 1958).
46. *U.S. v. Chrysler Corp.*, 232 F.Supp. 651 (D.C.N.J., 1964).
47. *Brown Shoe Co.*, 179 F.Supp. 721 (E.D.Mo. 1959); *U.S. v. Continental Can Co.*, 217 F.Supp. 761 (S.D.N.Y. 1963), *reversed on other grounds*, 84 S.Ct. 173, 378 U.S. 441, 12 L.Ed.2d 953 (1964).
48. *U.S. v. Brown Shoe Co.*, 179 F.Supp. 721 (E.D.Mo. 1959); *U.S. v. Continental Can Co.*, 217 F.Supp. 761 (S.D.N.Y. 1963), *reversed on other grounds* 84 S.Ct. 173, 378 U.S. 441, 12 L.Ed 2d 953 (1964).
49. Okla. Stat. tit. 79 1.
50. *Harolds Stores, Inc., CMT Enterprises, Inc. v. Dillard Department Stores, Inc.* 82 F.3d 1533, 1549 (10<sup>th</sup> Cir. 1996).
51. Okla. Stat. tit. 79, 1971, 1; *Harold's Stores, Inc.* 82 F.3d 1533 (10<sup>th</sup> Cir. 1996); *Board of Regents of the University of Oklahoma v. National Collegiate Athletic Ass'n.*, 561 P.2d at 505-06.
52. *Teleco, Inc., v. Ford Industries, Inc.* 587 P.2d at 1364 (Okla. 1978).
53. *Oakridge Investments, Inc.*, 719 P.2d at 850; *Crown Paint Co. v. Bankston*, 640 P.2d 948, 950 (Okla. 1981), *cert. denied*, 455 U.S. 646, 102 S.Ct. 1444, L.Ed.2d 659 (1982).
54. *Board of Regents, etc. v. National Collegiate Athletic Ass'n.* 561 P.2d at 505.
55. *Teleco*, 587 P.2d at 1362-63.
56. *Teleco, Inc.* 587 P.2d at 1362-63; *See also Crown Paint Co.*, 640 P.2d at 950.
57. *NCAA v. Bd. of Regents of the University of Oklahoma*, 468 U.S. 85, 103, 104 S.Ct. 2948, 2961 (1984); *E.I. du Pont*, 351 U.S. 377, 76 S. Ct. 994, 100 L.Ed. 1264 (1956); *Oakridge Investments, Inc.* 719 P.2d at 850; *Crown Paint Co.*, 640 P.2d at 950; *Teleco, Inc.* 587 P.2d at 1363.
58. *Krebsbach v. Henley*, 725 P.2d 852, 858 (Okla. 1986).
59. *Krebsbach*, 725 P.2d at 858; *quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690 (1977).
60. *Harolds Stores, Inc.*, 82 F.3d at 1548.
61. *Board of Regents, etc. v. National Collegiate Athletic Ass'n.*, 561 P.2d at 506.
62. *NCAA v. Bd. Of Regents of the University of Oklahoma*, 468 U.S. 85, 103, 104 S.Ct. 2948, 2961 (1984) *quoting National Society of Professional Engineers v. United States*, 435 U.S. 679, 690, 98 S.Ct. 1355, 1364 (1978)).
63. *NCAA*, 468 U.S. at 104, 104 S.Ct. At 2961.

64. *Oakridge Investments, Inc.* 719 P.2d at 851.