

THE FOX IS GUARDING THE HENHOUSE: THE FOWL-ACY OF *JAMES V. TYSON*

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I. INTRODUCTION

The family farm is disappearing, and replacing it are large, vertically integrated corporate farms. In the early 20th century, concerns over packer monopolies setting prices and taking advantage of farmers prompted passage of the Packers and Stockyards Act.¹ This Act made “deceptive practices in the poultry business” unlawful.² Later, Congress also sought to loosen antitrust restrictions in the packer industry, thus allowing farmers to collectively respond to the market.³ The Capper-Volstead Act⁴ was a particularly important development in light of an individual farmer’s limited bargaining power over the prices of his or her goods.⁵ Beginning in the mid 1900s, states, including Oklahoma, began enacting consumer protection laws and modeling them after the Federal

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1. *Stafford v. Wallace*, 258 U.S. 495, 514–15 (1922).

2. *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197, 200 (E.D.N.C. 1996).

3. *Nat’l Broiler Mktg. Ass’n v. United States*, 436 U.S. 816, 824–26 (1978) (“[Farmers] were subject to the vagaries of market conditions that plague agriculture generally, and they had no means individually of responding to those conditions. . . . Farmers were seen as being caught in the hands of processors and distributors who, because of their position in the market and their relative economic strength, were able to take from the farmer a good share of whatever profits might be available from agricultural production. By allowing farmers to join together in cooperatives, Congress hoped to bolster their market strength and to improve their ability to weather adverse economic periods and to deal with processors and distributors.” (footnotes omitted)).

4. Capper-Volstead Act, 7 U.S.C. §§ 291–292 (2012).

5. See *Nat’l Broiler Mktg. Ass’n*, 436 U.S. at 824–26.

Trade Commission Act.⁶ The Oklahoma Consumer Protection Act (OCPA), enacted in 1972, made deceptive and misleading practices in consumer transactions unlawful in Oklahoma.⁷

Recently, in *Lumber 2, Inc. v. Illinois Tool Works, Inc.*, the Oklahoma Supreme Court was asked to determine the meaning of “consumer” and the OCPA’s scope.⁸ In *Lumber 2, Inc.*, a case that involved the sale of reconditioned welder/generators, the Court held that a business that had purchased goods for ultimate resale to its customers was not a consumer entitled to the protections of the OCPA.⁹ The Court did note, however, that a business could be a consumer within the OCPA’s meaning under a different set of facts.¹⁰ In *James v. Tyson Foods, Inc.*, the Court was once again called to interpret the meaning of “consumer” under the OCPA.¹¹ This time, the plaintiffs were several individual and commercial chicken growers who had production contracts with Tyson.¹² Ultimately, the Court determined that the growers were not consumers under the OCPA’s scope.¹³ The rest of this Comment will be devoted to surveying the history of the Acts that protect farmers as well as the *Lumber 2, Inc.* and *James* cases, Oklahoma Supreme Court decisions that operate to remove those Acts’ protections.

II. HISTORY OF PROTECTION FOR CONTRACT GROWERS

A. *Disappearance of the Family Farm*

The family farm is a relic of the past. Now, vertically integrated corporations are steadily beginning to control America’s agriculture.¹⁴ “Vertical integration” refers to a business structure where one firm has control over each stage of production.¹⁵ Corporate agribusiness and the

6. *Patterson v. Beall*, 2000 OK 92, ¶ 27, 19 P.3d 839, 846 (citation omitted); *see also James v. Tyson Foods, Inc.*, 2012 OK 21, ¶ 25, 292 P.3d 10, 17.

7. OKLA. STAT. tit. 15, § 753 (OSCN through 2014 Leg. Sess.).

8. *Lumber 2, Inc. v. Ill. Tool Works, Inc.*, 2011 OK 74, ¶ 1, 261 P.3d 1143, 1144.

9. *Id.* ¶¶ 22–23, 261 P.3d at 1149.

10. *Id.* ¶ 21, 261 P.3d at 1149.

11. *James*, 2012 OK 21, ¶ 1, 292 P.3d at 12.

12. *See id.* ¶¶ 4, 6, 292 P.3d at 12–13.

13. *Id.* ¶ 29, 292 P.3d at 18.

14. Randi Ilyse Roth, *Redressing Unfairness in the New Agricultural Labor Arrangements: An Overview of Litigation Seeking Remedies for Contract Poultry Growers*, 25 U. MEM. L. REV. 1207, 1208 (1995).

15. MARCELO BUCHELI, *THE POLITICS OF VERTICAL INTEGRATION IN EXTRACTIVE INDUSTRIES: BUSINESS HISTORY AND POLITICAL ECONOMY* 7 (2007), *available at*

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vertically integrated business model have flourished in the poultry industry.¹⁶ An estimated “99% of the poultry produced in America is produced by vertically integrated companies.”¹⁷

From their pioneering beginnings, Americans have identified with the agrarian lifestyle.¹⁸ Only in the last century has farming technology started to replace the quintessential American homestead with large industrial farming plants and feed lots.¹⁹ In 1935, the number of American farms peaked at 6.8 million; since then, that number has been drastically declining.²⁰ In 2007, the Agricultural Census revealed that fewer “than 1% [of the United States population] claim[s] farming as an occupation.”²¹ That census also suggested a rise in corporate agribusiness because “[under 10% of the farms account] for 63% of sales of agricultural products.”²² Although the number of farms may be on the decline, the demand for agriculture is increasing.²³ The rise of so-called factory farming creates a slew of new issues. Chief among them is ensuring that American farmers are legally protected and have satisfactory means of redress. Accordingly, state and federal legislatures have enacted a number of statutes to that end.

A. Federal Acts Aim to Protect the Farmer

In 1921, concern over packer monopolies and their ability to arbitrarily and unduly lower prices to shippers—who would then sell the goods just to arbitrarily and unduly increase prices to consumers who bought the goods—prompted passage of the Packers and Stockyard Act (PSA).²⁴ Congress enacted the PSA with the goal of punishing “unfair,

http://www.business.uiuc.edu/Working_Papers/papers/07-0112.pdf (“[W]hen a firm vertically integrates its operations, it is internalizing otherwise external markets, endowing it with a power that its competitors d[o] not have (what [has been] defined as *internalization advantages*).”).

16. See Roth, *supra* note 14, at 1208.

17. *Id.*

18. Keith D. Haroldson, *Two Issues in Corporate Agriculture: Anticorporate Farming Statutes and Production Contracts*, 41 *DRAKE L. REV.* 393, 398 (1992) (footnotes omitted).

19. See *Ag 101: Demographics*, U.S. ENV'T PROT. AGENCY, <http://www.epa.gov/agriculture/ag101/demographics.html> (last updated Apr. 14, 2013).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Stafford v. Wallace*, 258 U.S. 495, 514–15 (1922).

discriminatory, or deceptive practices in [interstate] commerce, or [practices that] subject any person to unreasonable prejudice therein, or to do any of a number of acts to control prices or establish a monopoly in the business.”²⁵ The absence of the stipulation that monopoly power is “acquired willfully and include[s] the power to exclude competitors” suggests that Congress intended the PSA to fill in the gaps left by antitrust.²⁶ Instead of requiring proof of some nefarious intent to create a monopoly, the PSA is satisfied by showing either that certain alleged practices “have the *effect* of injuring competition or are likely to do so.”²⁷

Congress added PSA’s § 192(a) in 1935 as a “broad mandate against unfair, unjustly discriminatory or deceptive practices in the poultry business,”²⁸ but the Act only applies to those discriminatory or deceptive practices that could harm competition.²⁹ Section 192 provides:

It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or

(b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or

(c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling

25. *Id.* at 513.

26. *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1231 (10th Cir. 2007).

27. *Id.* & n.9.

28. *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197, 200 (E.D.N.C. 1996).

29. *Id.*

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prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices; or

(g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section.³⁰

Farmers have found themselves at the mercy of not only the economy but also the weather.³¹ They do not have time on their side while their crops rot in the sun, thus they cannot place themselves at a competitive advantage when deciding when and to whom they will sell their crops.³² Without any control over when they can bring their harvest to market, “[a] large portion of an entire year’s labor devoted to the production of a crop could be lost.”³³ The realities of farming create a terrible bargaining position. If Congress was to protect the American farmer, necessity called for giving farmers a far better bargaining position.

In 1922, Congress passed the Capper-Volstead Act to loosen antitrust restrictions, allowing for collective activity among processors and handlers in agricultural production.³⁴ The Capper-Volstead Act sought to create an atmosphere of voluntary, although not compulsory, cooperation among farmers.³⁵ The Act allows farmers “to combine with [their] neighbors and cooperate and act as a corporation, following [their] product from the farm as near to the consumer as [they can], doing away

30. Packers and Stockyards Act, 1921, 7 U.S.C. § 192 (2012). The United States Code defines *live poultry dealer* as “any person engaged in the business of obtaining live poultry by purchase or under a poultry growing arrangement for the purpose of either slaughtering it or selling it for slaughter.” *Id.* § 182. The statute does not define *live poultry handler*.

31. Nat’l Broiler Mktg. Ass’n v. United States, 436 U.S. 816, 825 (1978).

32. *Id.*

33. *Id.*

34. *Id.* at 824.

35. *Id.* at 831 (Brennan, J., concurring).

in the meantime with unnecessary machinery and unnecessary middle men.”³⁶

Congress did not abandoned its quest to protect farmers. By enacting the Agricultural Fair Practices Act of 1967, Congress sought “to protect the bargaining position of individual farmers by prohibiting handlers from interfering with the producers’ right to join together voluntarily in cooperative organizations as authorized by law.”³⁷ This Act and the various legislation before it represents Congress’s concern over protecting contract growers from producers.³⁸

B. States Enact Consumer Protection Laws

The 1960s saw a wave of states creating their own consumer protection laws, modeling them after the Federal Trade Commission (FTC) Act.³⁹ The FTC Act makes “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce . . . unlawful.”⁴⁰ Not to be outdone, Oklahoma enacted the Oklahoma Consumer Protection Act in 1972.⁴¹ Oklahoma’s version of the Consumer Protection Act allows for a private right of action.⁴² In the 1972 version of the Act, “consumer transaction” pertained to only “personal, household and family purposes.”⁴³ However, in 1980 the Oklahoma legislature deleted “family purpose” from the definition of “consumer transaction” and replaced it with “business oriented” purpose.⁴⁴ The Oklahoma Supreme Court stated in *Lumber 2, Inc. v. Illinois Tool Works, Inc.* that the legislature had presumably exchanged these phrases in order to give “corporations and other legal entities purchasing goods for business use” the “same level of

36. 62 CONG. REC. 2257 (1922) (remarks of Sen. Norris) (internal quotation marks omitted).

37. *Nat’l Broiler Mktg. Ass’n v. United States*, 436 U.S. 816, 837 (1978) (Brennan, J., concurring) (quoting Agricultural Fair Practices Act of 1967, 7 U.S.C. § 2301 (1976)) (internal quotation marks omitted).

38. *Id.*

39. *See Patterson v. Beall*, 2000 OK 92, ¶ 27, 19 P.3d 839, 846; *see also James v. Tyson Foods, Inc.*, 2012 OK 21, ¶ 25, 292 P.3d 10, 17.

40. Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (2012).

41. 1972 Okla. Sess. Laws 354 (codified as amended at OKLA. STAT. tit. 15, §§ 751–764.1 (OSCN through 2014 Leg. Sess.)).

42. *Brannon v. Munn*, 2003 OK CIV APP 33, ¶ 5, 68 P.3d 224, 227 (citing OKLA. STAT. tit. 15, § 761.1 (OSCN through 2003 Leg. Sess.)).

43. OKLA. STAT. tit. 15, § 752(B) (Supp. 1972) (internal quotation marks omitted).

44. OKLA. STAT. tit. 15, § 752(B) (Supp. 1980).

protection” already afforded to “individuals purchasing goods for personal or household use.”⁴⁵

In 1994, the Oklahoma Contract Growers Fair Practices (CGFP) Act was introduced in the legislature.⁴⁶ Although the Act did not become law, it does suggest the continuing concern in the legislature over the unfairness of poultry production contracts. The Oklahoma legislature directed the CGFP Act at protecting poultry growers and included definitions for “integrator” and “producer.”⁴⁷ Specifically, the CGFP Act prohibited unfair and discriminatory practices by integrators and identified prohibited actions.⁴⁸ The CGFP Act also contained provisions for notice of termination, dispute resolution, and notice to renegotiate contract terms.⁴⁹ Under the CGFP Act, the Commissioner of Agriculture would have had the power to investigate violations and enforce the law.⁵⁰

Farmers face a buyer’s market.⁵¹ They cannot wait for the forces of supply and demand to shift prices in their favor.⁵² When chickens reach eight to ten weeks of age, which is the maturity demanded by integrators, farmers have four short days after slaughter to sell their produce.⁵³ It is this perishability that causes farmers to have an inelastic supply of produce.⁵⁴ That is to say, a farmer cannot produce more in response to good prices or withhold a product in the face of bad prices. Supply is relatively fixed and unresponsive to changes in price. This inelastic supply, coupled with the power of the poultry buyers, leaves farmers susceptible to an oligopsony, which is a form of imperfect competition that exists when there are many sellers but few buyers.⁵⁵ In this situation,

45. *Lumber 2, Inc. v. Ill. Tool Works, Inc.*, 2011 OK 74, ¶ 12, 261 P.3d 1143, 1146.

46. S. 1094, 44th Leg., 2d Sess. (Okla. 1994).

47. *Id.* The Act defined an Integrator as “a person who contracts with a producer to grow out, raise, or otherwise produce poultry or poultry products and subsequently processes poultry and poultry products in the State of Oklahoma for commercial purposes.” *Id.* It defined a Producer as “a person who produces or causes to be produced poultry or poultry products by contracting with an integrator to provide management, labor, machinery, facilities, or any other production input for the production of poultry or poultry products.” *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Nat’l Broiler Mktg. Ass’n v. United States*, 436 U.S. 816, 843 (1978) (White & Stewart, JJ., dissenting).

52. *Id.*

53. *Id.* (footnote omitted).

54. *Id.* at 849.

55. THE OXFORD ENGLISH DICTIONARY 776 (R.W. Burchfield ed., 2d ed. 1991) (defining *oligopsony* as “[a] marketing state in which only a small number of buyers exists

buyers have the ability to set prices low and the farmers have little power but to accept these low prices because (1) there are few other buyers, and (2) the chickens have a short shelf life. Thus, it remains important that farmers be allowed to react collectively and be given tools to protect themselves.⁵⁶

C. Production Contracts

Production contracts, where farmers “raise crops or livestock under contract for someone else,”⁵⁷ have historically been utilized for “reproduction of seeds and for many vegetable and horticultural crops.”⁵⁸ Within the past 30 years, the poultry industry has begun to use production contracts.⁵⁹ Today, as much as 99% of the poultry industry is likely controlled by these vertically integrated producers.⁶⁰ These production contracts all follow a basic structure in which the integrator is to “provide[] the birds, feed, medicine, and management direction, while the [farmer] provides the land, buildings, equipment, utilities, and labor.”⁶¹

Once the grow-out period is complete, the farmer removes and weighs the birds.⁶² The integrator compensates the farmer according to his or her efficiency, which is calculated according to an efficiency formula.⁶³ An efficiency formula compares “the number and weight of chickens harvested [with] the number of chicks and pounds of feed delivered.”⁶⁴ The farmer’s compensation will also usually depend on his or her efficiency compared to other poultry farmers in the same area, at the same time, and processed by the same company.⁶⁵ Additionally, the contracts forbid farmers from raising birds for any other company.⁶⁶

for a product”); *see also Nat’l Broiler Mktg. Ass’n*, 436 U.S. at 849.

56. *See Nat’l Broiler Mktg. Ass’n*, 436 U.S. at 843 (White & Stewart, JJ., dissenting).

57. Neil D. Hamilton, *State Regulation of Agricultural Production Contracts*, 25 U. MEM. L. REV. 1051, 1053 (1995) (footnote omitted).

58. *Id.* at 1055.

59. *Id.*

60. Roth, *supra* note 14, at 1208.

61. *Id.* at 1209 (footnotes omitted).

62. *Id.* at 1210.

63. *Id.*

64. Neil D. Hamilton, *Broiler Contracting in the United States—A Current Contract Analysis Addressing Legal Issues and Grower Concerns*, 7 DRAKE J. AGRIC. L. 43, 45 (2002).

65. *Id.*

66. *Id.*

The typical farmer is no “spring chicken” when it comes to growing poultry: the average farmer has roughly 16 years of experience.⁶⁷ Further, nearly two-thirds of farmers make raising poultry their main form of employment, and “more than half receiv[e] over [50%] of their family income from raising poultry.”⁶⁸ The contributions made by farmers “add up to about 50% of the capital investment in the industry.”⁶⁹ On average, each farmer has between three and four houses for poultry production.⁷⁰ With the cost of a new house averaging somewhere between \$420,000 and \$560,000, a grower who must replace all of his houses is looking at a bill of around \$1.75 million.⁷¹ Indeed, these farmers have essentially bet the farm on their growing contracts. Despite their investment of both time and money, contracts only last one grow-out period (about seven weeks).⁷² This imbalance of power has caused some critics to draw parallels between contract growing and feudalism.⁷³

Since there has been increased usage of contract production, there has also been an increased interest in protecting farmers’ ability to voluntarily join forces with each other so that they may react to the market and “bargain for more favorable contract terms.”⁷⁴ As noted earlier, farmers face an oligopsony, with several sellers and few powerful buyers, or perhaps even a monopsony, as argued later. This market condition, coupled with poultry’s short shelf life, puts individual farmers in a difficult bargaining position.⁷⁵ The imperfect competition of the market gives companies the ability “to take unfair advantage of farmers with one-sided, poorly-written, or oppressive contracts.”⁷⁶ These concerns over vertical integration of agriculture and fairness of production contracts have ignited a public debate and spawned legislative proposals.⁷⁷ Critics of these production contracts “charge that contracting can reduce farmers to low-wage employees who assume

67. *Id.* at 65.

68. *Id.*

69. Roth, *supra* note 14, at 1210.

70. Hamilton, *supra* note 64, at 65.

71. *Id.*

72. Roth, *supra* note 14, at 1210.

73. Haroldson, *supra* note 18, at 414 (footnote omitted).

74. Hamilton, *supra* note 57, at 1068.

75. *Id.* at 1054.

76. *Id.*

77. *Id.* at 1060.

most of the financial risks without the potential for increased returns.”⁷⁸

In Europe, the current trend is to treat production contracts as an issue of consumer protection.⁷⁹ In France, instead of enforcing and regulating a legal relationship between the parties, such as an employment relationship, the “law requires full and detailed disclosure of the terms in the contract.”⁸⁰ Only when the contract for vertically integrated production passes the detailed disclosure threshold is it deemed legal.⁸¹ If the agreement fails to pass the disclosure threshold, “it is subject to annulment by the farmer, who may be entitled to the payment of damages.”⁸² Great Britain takes a similar approach, treating these contracts as a consumer protection concern and regulating them by “full disclosure of the risks and terms of the agreement.”⁸³

*D. The Oklahoma Supreme Court Addresses the Meaning of
“Consumers”:* *Lumber 2, Inc. v. Illinois Tool Works, Inc.*

The Oklahoma Supreme Court first addressed the definition of consumer and the scope of the OCPA in *Lumber 2, Inc.*⁸⁴ In that case, Fox—the owner of Lumber 2, a retail home and ranch supply store—attended a trade show in Houston.⁸⁵ The Illinois Tool Works, Inc. (ITW) sales representative asked Fox if he would be interested in buying some reconditioned Champ 10,000 welder/generators that ITW had available for sale.⁸⁶ Fox orally agreed to buy 11 of the reconditioned Champ 10,000s.⁸⁷ The ITW sales representative later called Fox to notify him that the sales manager at Hobart (the manufacturer of the welder/generators) refused to sell to Fox and Lumber 2.⁸⁸ Fox then bought new welder/generators from another retailer and advertised them for the same price that he had anticipated selling the reconditioned units.⁸⁹ Shortly thereafter, Fox received separate phone calls from two

78. *Id.*

79. *Id.* at 1101.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Lumber 2, Inc. v. Ill. Tool Works, Inc.*, 2011 OK 74, ¶ 1, 261 P.3d 1143, 1144.

85. *Id.* ¶ 4, 261 P.3d at 1145.

86. *Id.*

87. *Id.*

88. *Id.* ¶ 5, 261 P.3d at 1145.

89. *Id.* ¶ 6, 261 P.3d at 1145.

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ITW managers, one on the commercial side and another on the retail side, asking Fox to increase his asking prices for the new welder/generators.⁹⁰ Fox refused, but he eventually raised the price as requested.⁹¹ However, Lumber 2 lost money since it could not compete with the pricing strategies of larger retailers.⁹² Afterward, Fox alleged that ITW sold products at better prices to Lumber 2's competitors in retaliation of Fox's initial refusal to raise his asking price for the welder/generators.⁹³ Lumber 2 then sued for OCPA violations, among other claims.⁹⁴ The jury returned a verdict for Lumber 2 on its OCPA violation claims, but the Court of Civil Appeals reversed the OCPA judgment.⁹⁵ Lumber 2 then filed a writ of certiorari.⁹⁶

The Oklahoma Supreme Court held that the plaintiff, who had purchased welder/generators for the purpose of resale, was not a consumer under the plain and ordinary meaning of the word, thus the transactions were not consumer transactions as protected by the OCPA.⁹⁷ In coming to its conclusion, the Court relied on various definitions for *consume* and *consumer*:

Consumer. One who uses economic goods and so diminishes or destroys their utilities; opposed to producer.

consumer. A person who buys goods or services for personal, family, or household use, with no intention of resale; a natural person who uses products for personal rather than business purposes.

consumer—1. One that consumes. 2. *Economics*. One who acquires goods or services; a buyer.

consume—1. To eat or drink up; ingest. 2. To expend (fuel, for example); use up. 3. To waste; squander. 4. To destroy[;] to

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* ¶ 2, 261 P.3d at 1144.

95. *Id.* ¶¶ 2–3, 261 P.3d at 1144–45.

96. *Id.* ¶ 3, 261 P.3d at 1145.

97. *Id.* ¶ 20, 261 P.3d at 1149.

level. 5. To absorb[;] engross.⁹⁸

The Court noted that its holding did not suggest that a business would never be a consumer under the OCPA but that a business's "purchase would have to involve goods . . . bought to use in its own business" in order to qualify as a consumer.⁹⁹

III. *JAMES V. TYSON FOODS, INC.*

A. *Facts*

In *James v. Tyson Foods, Inc.*, the Court was once again asked what constitutes a consumer transaction under the OCPA.¹⁰⁰ The case involved a number of individuals and businesses under contracts to grow chickens for Tyson.¹⁰¹ In contracts of this type, Tyson typically provides the independent growers with chickens and feed.¹⁰² The growers then "raise the chickens to a target processing weight," after which Tyson collects the birds for transport to its processing plant.¹⁰³ Throughout this time, title to the birds, feed, and any other materials given to the growers to assist in the chickens' development throughout the grow-out period remains with Tyson.¹⁰⁴ Consequently, Tyson can "take possession of any feed remaining on the growers' farms at the end of the growing cycle."¹⁰⁵ The growers are paid according to their efficiency using a "formula that measures the relative productivity of the growers by comparing the amount of feed provided and the weight of the chickens at maturity."¹⁰⁶ This necessarily means that the quality of the feed and health of the chickens will greatly impact the ultimate amount that Tyson pays to a grower. Poor-quality feed that provides few nutrients to a developing

98. *Id.* ¶ 15, 261 P.3d at 1147 (quoting BLACK'S LAW DICTIONARY 389 (rev. 4th ed. 1968); BLACK'S LAW DICTIONARY 358 (9th ed. 2009); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 286 (William Morris ed., new college ed. 1980)).

99. *Id.* ¶ 21, 261 P.3d at 1149.

100. *See James v. Tyson Foods, Inc.*, 2012 OK 21, ¶ 24, 292 P.3d 10, 17.

101. *See id.* ¶¶ 4–5, 292 P.3d at 12–13.

102. *Id.* ¶ 4, 292 P.3d at 12–13.

103. *Id.* ¶ 4, 292 P.3d at 13.

104. *Id.* ¶ 5, 292 P.3d at 13 (citing Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816 (1978); Sanderson Farms Inc. v. Ballard, 917 So. 2d 783 (Miss. 2005)).

105. *Id.* ¶ 4, 292 P.3d at 13 (citing Terry v. Tyson Farms, Inc. 604 F.3d 272 (6th Cir. 2010)).

106. *Id.* ¶ 5, 292 P.3d at 13.

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chicken means a grower will have to give more feed to a chicken just to see average growth. This of course means that a chicken that may be only average weight at the end of the grow-out period required use of vastly more feed, thus the grower—based on the standard productivity formula—would receive far less pay.¹⁰⁷

B. Procedural History

The Growers alleged negligence, fraud, and violations of the OCPA.¹⁰⁸ They “insisted that they were targeted with poor quality birds and feed” in retaliation for their “refus[al] to upgrade their chicken houses from conventional to ‘cool cell’ facilities.”¹⁰⁹ Before the jury trial, the court ordered a division of the Growers so that there were seven farms represented by eleven Growers in each action.¹¹⁰ After a three-week trial, the jury found 9–3 in favor of the Growers on all counts and “awarded compensatory and punitive damages of approximately \$10 million.”¹¹¹ After the trial, the judge agreed to recuse himself following Tyson’s motion requesting the judge’s disqualification.¹¹² The new judge, who had been assigned by the Chief Justice, overruled Tyson’s motion for new trial.¹¹³

On appeal, the Oklahoma Supreme Court addressed two issues: 1) irregularities in voir dire, and 2) the meaning of “aggrieved consumers” for the purposes of the OCPA.¹¹⁴ The first issue is beyond the scope of this paper and will not be discussed here. With regard to the second issue, although the Court found that Tyson was ultimately entitled to a

107. See NEIL D. HAMILTON, FARMERS’ LEGAL ACTION GRP., ASSESSING THE IMPACT OF INTEGRATOR PRACTICES ON CONTRACT POULTRY GROWERS: A CURRENT BROILER CONTRACT ANALYSIS ADDRESSING LEGAL ISSUES AND GROWER CONCERNS 1 (2013).

108. See *James*, 2012 OK 21, ¶ 6, 292 P.3d at 13.

109. *Id.*

110. *Id.* ¶ 7, 292 P.3d at 13.

111. *Id.* ¶ 8, 292 P.3d at 13.

112. *Id.* ¶ 9, 292 P.3d at 13.

113. *Id.* ¶¶ 9–10, 292 P.3d at 13. It is important to note that the Oklahoma Supreme Court reviewed the case under the de novo standard rather than abuse of discretion. Since the second trial judge, who had been the one to deny the motion for a new trial, was in a different position than the first trial judge, who had presided over the original trial, heard the testimony, observed the witnesses, and had “full knowledge of the proceedings during the trial process,” the Oklahoma Supreme Court was “in as good a position to address the issues presented as the second” judge had been, thus it applied the de novo standard. *Id.* ¶ 13, 292 P.3d at 14.

114. *Id.* ¶¶ 15, 22, 292 P.3d at 15, 17.

new trial on the basis of the juror questionnaires, the Court addressed the definition of aggrieved consumers for purposes of the OCPA as a matter of public policy.¹¹⁵

C. Opinion

On appeal, Tyson claimed that the growers were not consumers and thus could not seek redress under the OCPA.¹¹⁶ Relying on the OCPA's definition of consumer transaction, the Growers countered that the legislature had not limited the OCPA "to transactions between buyers and sellers."¹¹⁷ They argued that the statute defines "consumer transaction" as the "distribution of any service[] . . . for purposes that are . . . business oriented."¹¹⁸ Unimpressed by this argument, the Court relied heavily upon its earlier decision in *Lumber 2, Inc.*¹¹⁹ in which it had used rules of statutory construction and concluded, from the OCPA's title and text, that the OCPA would only apply to buyers when they were also consumers.¹²⁰ Summarily applying its *Lumber 2, Inc.* reasoning and holding to the case at hand, the Court found the Growers' argument untenable.¹²¹

Because "[t]itle to the flocks, the food the fowl eat, and any medicine provided rests with Tyson," the Court concluded that the Growers had purchased nothing.¹²² The Court further concluded that the Growers had sold nothing.¹²³ Instead, "[t]he contracts entered into between the . . . [G]rowers and Tyson were nothing more than service contracts, in which the [G]rowers contracted to raise birds to maturity."¹²⁴ The Court held that Tyson simply pays growers for their efficiency in growing poultry by using a formula to compare the amount of feed Tyson provides to the weight the poultry gains.¹²⁵ For these reasons, the Court held "that the . . . [G]rowers [were] not aggrieved consumers entitled to the

115. *Id.* ¶¶ 21–22, 292 P.3d at 17.

116. *Id.* ¶ 24, 292 P.3d at 17.

117. *Id.*

118. *Id.* (quoting OKLA. STAT. tit. 15 § 752 (OSCN through 2014 Leg. Sess.)).

119. *Id.* ¶ 26, 292 P.3d at 17.

120. *See id.* ¶ 28, 292 P.3d at 18 (footnotes omitted).

121. *Id.* ¶¶ 28–29, 292 P.3d at 18.

122. *Id.* ¶ 29, 292 P.3d at 18 (footnote omitted).

123. *Id.*

124. *Id.* (footnote omitted).

125. *Id.*; *see also* Terry v. Tyson Farms, Inc., 604 F.3d 272, 274 (6th Cir. 2010).

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protections of the Oklahoma Consumer Protection Act.”¹²⁶

IV. CONSUMERS LOSE BIG

While the Oklahoma Supreme Court had warned that “statutes are not empty vessels into which [it] may pour a vintage better suiting [its] tastes,”¹²⁷ that is exactly what it seemed to do in *James*. Contrary to the Court’s holding in *James*, both the legislative history and the language of the statute suggest that the OCPA’s protection extends to poultry growers.

A. *The Statute’s Language*

First, the plain language of the OCPA suggests that growers are within the scope of its protection:

“Consumer transaction” means the advertising, offering for sale or purchase, sale, purchase, or *distribution of any services* or any property, tangible or intangible, real, personal, or mixed, or any other article, commodity, or thing of value wherever located, *for purposes that are personal, household, or business oriented*.¹²⁸

There was a great deal of evidence that the Growers in *James* distributed a service for business-oriented purposes.¹²⁹ Furthermore, the Growers used or consumed the feed, medicine, and other materials provided by Tyson for the poultry’s development as inputs in their poultry-growing business.¹³⁰

B. *Misreading of Lumber 2, Inc.*

In arriving at its conclusion that the Growers were not consumers under the OCPA definition, the Court relied heavily on its holding in *Lumber 2, Inc.* The Court stated in *James* that the Growers in *James*

126. *James*, 2012 OK 21, ¶ 29, 292 P.3d at 18 (footnote omitted) (internal quotation marks omitted).

127. *Id.* ¶ 31, 292 P.3d at 19 (footnote omitted).

128. OKLA. STAT. tit. 15, § 752 (OSCN through 2014 Leg. Sess.) (emphasis added).

129. *James*, 2012 OK 21, ¶ 4 & n.2, 292 P.3d at 12–13 & n.2.

130. Answer Brief of Plaintiffs/Appellees at 3, *James v. Tyson Foods, Inc.*, 2012 OK 21, 292 P.3d 10 (No. 109046), 2011 WL 3135338, at *3.

were in an even “less tenable” position than the company that had sought protection from the OCPA for its resale of welder/generators in *Lumber 2, Inc.*¹³¹ However, even by using the definitions of consumer that the Court had relied on in *Lumber 2, Inc.*, the Growers should still fall within the definition. The Growers had used the goods and services delivered by Tyson and diminished or destroyed the goods’ utility—this is the very definition of a consumer under two of the definitions on which the *Lumber 2, Inc.* Court relied.¹³²

Furthermore, the *Lumber 2, Inc.* Court was careful to note that a business could be a consumer under different facts. Specifically, a business could be a consumer under the scope of the OCPA when it bought goods meant “for use in its own business.”¹³³ *James* presented this precise factual scenario. Growers “use up” and “destroy the utility” of the feed they use in their businesses. The feed, medicine, and other materials that growers “use up” are no less of an input into their business than a copy machine is an input into any other business.

*C. Defining Purchase Narrowly Rewards the Trickery the OCPA
Attempts to Punish*

Additionally, the Growers purchase the feed, albeit in a roundabout fashion. “Tyson pays its growers according to a formula that measures the relative productivity of the growers by comparing the amount of feed provided and the weight of the chickens upon their return to the processing plant.”¹³⁴ Crucial to this formula is “the weight of the chickens at the end of the grow-out period,” thus necessarily the amount of feed the chickens have consumed will determine the amount of compensation a grower receives.¹³⁵ Heftier birds raised on less feed will fetch higher prices from Tyson. Essentially, growers are buying feed on credit from which the balance will be deducted from the growers’ earned profit. Growers are no less consumers than any person who makes purchases for their business on credit and then pays for them after sales

131. *James*, 2012 OK 21 at ¶ 29, 292 P.3d at 18.

132. *Lumber 2, Inc. v. Ill. Tool Works, Inc.*, 2011 OK 74, ¶ 15, 261 P.3d 1143, 1147 (citing BLACK’S LAW DICTIONARY 389 (rev. 4th ed. 1968); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 286 (William Morris ed., new college ed. 1980)).

133. *Lumber 2, Inc.*, 2011 OK 74, ¶ 21, 261 P.3d at 1149.

134. *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 274 (6th Cir. 2010).

135. *See id.*

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are made.¹³⁶

D. An Economic Argument

“Because the OCPA is remedial in nature it is to be liberally construed to effectuate its underlying purpose.”¹³⁷ The OCPA declares unlawful the commission of “an unfair or deceptive trade practice.”¹³⁸ The Act defines *unfair trade practices* as “any practice which offends established public policy . . . or [is] substantially injurious to consumers.”¹³⁹ Further, Oklahoma’s constitution forcefully establishes its public policy against monopolies and suppression of trade—“monopolies are contrary to the genius of a free government”¹⁴⁰ and “[t]he Legislature shall define what is an unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, and enact laws to punish persons engaged in” such unlawful activity.¹⁴¹ Taken together, restraints of trade violate public policy that the OCPA seeks to further.

Since the poultry market is a vertically integrated industry, and if Tyson is the only buyer-producer in a geographical market, the market might be a monopsony.¹⁴² A monopsony is a market situation that occurs where sellers are forced to sell to a single purchaser because no alternative buyers exist.¹⁴³ As such, because a buyer-producer does not have to compete with other buyers for the price it may offer to sellers, it can force a seller to accept lower prices.¹⁴⁴ Lower profitability means some growers face the decision of “either produc[ing] less or ceas[ing] production altogether, resulting in less-than-optimal output of the product or service, and over the long run higher consumer prices, reduced product quality, or substitution of less efficient alternative products.”¹⁴⁵ Thus, poultry integrators with monopsony power have the

136. *Lumber 2, Inc.*, 2011 OK 74, ¶ 21, 261 P.3d at 1149.

137. *Patterson v. Beall*, 2000 OK 92, ¶ 28, 19 P.3d 839, 846 (citation omitted).

138. OKLA. STAT. tit. 15, § 753 (OSCN through 2014 Leg. Sess.).

139. *Id.*

140. OKLA. CONST. art. II, § 32.

141. OKLA. CONST. art. V, § 44.

142. *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1231 (10th Cir. 2007).

143. THE OXFORD ENGLISH DICTIONARY 1028 (R.W. Burchfield ed., 2d ed. 1991); *see also* *Telecor Commc’ns, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1135–36 (10th Cir. 2002) (citations omitted).

144. *Been*, 495 F.3d at 1232 (citing PHILLIP E. AREEDA & HERBERT HOVENKAMP, IIIA ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION § 720a & n.1, at 3 (2008)).

145. *Telecor Commc’ns, Inc.*, 305 F.3d at 1136 (citing HERBERT HOVENKAMP,

frightening ability to fix and manipulate prices and to injure both the growers and the public.¹⁴⁶

Even worse, because integrators that possess monopsony power control growers' supply, integrators can "simply deliver fewer chicks to the growers, pay them the same low prices, and resell at the same or a higher price."¹⁴⁷ Output goes down and prices go up. Through their ability to manipulate both supply and price, "both the [farmers] and the end-[consumers] are adversely affected."¹⁴⁸ Yet both are the very consumers that the OCPA attempts to protect.

E. History Indicates Attempts to Protect Growers

Finally, the history of state and federal statutes aimed at protecting America's farmers and intended to protect consumers supports the inclusion of growers in the scope of the OCPA. Since the early 20th century, state and federal legislatures have been concerned with protecting farmers from unfair and deceptive practices created by the monopsony market.¹⁴⁹ Legislatures sought to level the playing field and protect the bargaining power of growers with the introduction of the PSA, the Capper-Volstead Act, and the Agricultural Fair Practices Act.¹⁵⁰

In the 1960s, individual states began to enact consumer protection laws.¹⁵¹ Oklahoma enacted the OCPA in 1972.¹⁵² As enacted in 1972, "consumer transaction" related entirely to "personal, household and family purposes" but was amended in 1980 to include "business oriented" to the list of purposes.¹⁵³ One could easily infer that the legislature made this change to protect consumers of goods for use as

ECONOMICS AND FEDERAL ANTITRUST LAW 17–18, at 14–18 (1985); Roger D. Blair & Jeffrey L. Harrison, *Monopsony: Antitrust Law and Economics* 42–43, 72 (1993).

146. *Been*, 495 F.3d at 1232.

147. *Id.*

148. *Id.*

149. *See, e.g.*, Capper-Volstead Act, 7 U.S.C. §§ 291–292 (2012); Packers and Stockyards Act, 1921, 7 U.S.C. § 192 (2012); Agricultural Fair Practices Act of 1967, 7 U.S.C. § 2301 (2012).

150. *See, e.g.*, Capper-Volstead Act, 7 U.S.C. §§ 291–292 (2012); Packers and Stockyards Act, 1921, 7 U.S.C. § 192 (2012); Agricultural Fair Practices Act of 1967, 7 U.S.C. § 2301 (2012).

151. *See Patterson v. Beall*, 2000 OK 92, ¶ 27, 19 P.3d 839, 846; *see also James v. Tyson Foods, Inc.*, 2012 OK 21, ¶ 25, 292 P.3d 10, 17.

152. OKLA. STAT. tit. 15, § 751 (OSCN through 2014 Leg. Sess.).

153. *Lumber 2, Inc. v. Ill. Tool Works, Inc.*, 2011 OK 74, ¶ 12, 261 P.3d 1143, 1146 (citing OKLA. STAT. tit. 15, § 752 (Supp. 1972); OKLA. STAT. tit. 15, § 752 (Supp. 1980)).

inputs in their business, such as the Growers in *James*. Furthermore, the introduction of the Oklahoma Growers Fair Practices Act, although it did not become law, suggests legislative concern over prohibiting the use of unfair or discriminatory practices by integrators.¹⁵⁴

The Oklahoma Supreme Court's refusal in *James* to include the Growers under the definition of consumer for the purposes of the OCPA could have very damaging future effects. First, the exclusion of growers from the definition of consumer in a factual scenario such as this suggests that companies that buy goods or services to use in their businesses will not be covered under the OCPA. To exclude such a large group of consumers from the protection of the OCPA seems ill-advised and without historical support. Further, the holding is contrary to historical legislative intent. The change of the definition of "consumer transaction" from "family purpose" to "business oriented" purpose suggests that the legislature made these changes to give businesses the same level of protection afforded to individuals.¹⁵⁵ Second, because of the perishability of the product, the short grow-out period, and the amount of capital investment growers have made in the industry, integrators have the unfair ability to write one-sided and oppressive contracts.¹⁵⁶ The Court's refusal to acknowledge that the Growers bought anything simply because the Growers compensated Tyson for the feed by using a feed-conversion formula rewards the very kind of deception and trickery the Act attempts to prohibit. *James*'s message is clear: companies may now take advantage of the market situation and write one-sided contracts that make use of an elaborate compensation scheme without fear of oversight by the courts.

V. CONCLUSION

The Oklahoma Supreme Court decision in *James* represents an imprudent departure from a long history of protecting farmers. The language of the OCPA itself defines "consumer transaction" as the "distribution of any service[] . . . for purposes that are . . . business oriented."¹⁵⁷ Furthermore, as the Court indicated in *Lumber 2, Inc.*, a business could be a consumer under the scope of the OCPA when it buys

154. See *supra* pp. 137–38.

155. OKLA. STAT. tit. 15, § 752(B) (Supp. 1980); see also *Lumber 2, Inc.*, 2011 OK 74, ¶ 12, 261 P.3d at 1146.

156. Hamilton, *supra* note 57, at 1056.

157. OKLA. STAT. tit. 15, § 752 (OSCN through 2014 Leg. Sess.).

goods meant for use in its own business.¹⁵⁸ While this is precisely what the Growers did in *James*, the Court's failure to extend the OCPA's protection to this situation ironically ends up protecting the very kinds of deception and trickery the Act seeks to prohibit.

158. *Lumber 2, Inc.*, 2011 OK 74, ¶ 21, 261 P.3d at 1149.