

**UNITED STATES DISTRICT COURT  
FOR THE  
EASTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,            )  
  )  
  *Plaintiff,*)  
  )

v.

Case No. CIV 96-196 B

  )  
CITY OF STILWELL, OKLAHOMA, ET )  
AL.,    )  
  )  
  *Defendants.)*

**GOVERNMENT'S MOTION TO  
STRIKE JURY TRIAL SETTING**

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By docket entry dated July 11, 1996, this case was set for jury trial on March 3, 1997. The government respectfully moves the Court, pursuant to FED. R. CIV. P. 39, to strike the jury trial setting and to reset the trial as a nonjury matter. As will be shown more fully in the accompanying brief, the issues in this equitable action are neither triable of right by a jury nor appropriate for submission to an advisory jury.

Respectfully submitted,

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Dated: August 19, 1996

**UNITED STATES DISTRICT COURT  
FOR THE  
EASTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA, )  
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*Plaintiff,*)  
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v. )

Case No. CIV 96-196 B

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CITY OF STILWELL, )  
OKLAHOMA, ET AL., )  
)  
*Defendants.*)

**BRIEF IN SUPPORT OF GOVERNMENT’S  
MOTION TO STRIKE JURY TRIAL SETTING**

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The government respectfully submits this brief in support of its motion to strike the jury trial setting in this docket and to reset the trial as a nonjury matter. The issues in this equitable action are not triable of right by a jury, and the Court is therefore precluded from trying it to a binding jury verdict without the consent of all parties. Nor is this case appropriate for submission to an advisory jury.

Although the defendants made no written jury demand when they filed their answer, their counsel orally requested during the status and scheduling conference that the case be tried to a jury. Government counsel declined to consent to the requested procedure. The government’s motion to strike reaffirms that position.

This action is brought pursuant to Section 4 of the Sherman Act, 15 U.S.C. §4, which authorizes the government to “institute proceedings in equity to prevent and restrain” violations of federal antitrust law. The complaint alleges that the “all-or-none” utility policy adopted and

implemented by the defendants violates Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 & 2, and seeks purely equitable relief.

Actions in equity seeking no monetary relief are not triable as of right to a jury. *See United States v. Louisiana*, 339 U.S. 699, 706, 94 L.Ed. 1216 (1950); *Bowdry v. United Airlines, Inc.*, 58 F.3d 1483, 1489 (10th Cir., 1995); *Howard v. United States*, 214 F.2d 759, 762 (10th Cir. 1954). Government antitrust cases are no exception to this principle. *See United States v. Lima News*, 244 F. Supp. 592, 594 (N.D. Ohio 1965); 5 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶38.37[2] at p. 38-342 (2d ed. 1995). Defendants thus are not entitled a jury trial on demand.

In an action such as this one — not triable as of right to a jury — FED. R. CIV. P. 39(c) authorizes a court to “order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right” only upon consent by all parties. Absent consent, the rule allows the court in its discretion to empanel an advisory jury, with the trial judge retaining fact-finding responsibility. *See Frostie Co. v. Dr. Pepper Co.*, 361 F.2d 124 (5th Cir. 1966).

Although advisory juries are potentially beneficial where predominantly equitable actions also include legal issues triable to a jury, the government sees nothing an advisory jury might bring to aid disposition of this case. *Compare with McKinney v. Gannett Co.*, 817 F.2d 659, 673 (10th Cir. 1987), *aff'g* 660 F. Supp. 984, 991-92 (D.N.M. 1981) (upholding trial court's decision to retain jury in an advisory role upon dismissal of legal claims after close of proof). The interests of judicial economy counsel against an advisory jury here. Compared to a bench trial, trying this case to an advisory jury would likely prolong the proceedings, add the costs associated with the jury's empanelment, and require resolution of additional evidentiary issues.

The jury trial setting should accordingly be stricken and the matter reset for trial to the Court.

Respectfully submitted,

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Dated: August 19, 1996

**Certificate of Service**

The undersigned hereby certifies that true and correct copies of the foregoing documents were served by overnight courier to counsel of record for defendants:

Lloyd E. Cole, Jr  
120 West Division Street  
Stilwell, Oklahoma 74960

this 19th day of August, 1996.

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Daniel C. Kaufman