1957

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TEXAS ANTITRUST LAWS AND THEIR ENFORCEMENT—COMPARISON WITH FEDERAL ANTITRUST LAWS†

by
Dan Moody* and Charles B. Wallace**

INTRODUCTION

ANTITRUST laws, state and federal, seem to become more and more important as time moves on although the day of the "trust buster" that brought these laws into being lies a half century in the background. A statement of the antitrust laws of a state and of the enforcement of them, compared with the federal statutes, may be of interest.

THE HISTORICAL BACKGROUND†

Senator Sherman himself stated that his act had as "its single object" to

... supplement the enforcement of the established rules of common and statute law by the courts of the several States in dealing with combinations that affect injuriously the industrial liberty of the citizens of these States.3

The senator evidently had in mind that the states would carry the greater part of the burden of breaking up combinations in restraint of trade.

Attorney General Javits further states that

Recent developments may have tended to obscure the fact that, prior to the advent of the Sherman Act of 1890, antitrust policy in this country was developed entirely by the common law and statutes of the several states. Thus, in a recently published treatise, an eminent

† Based upon a speech delivered before the Section on Antitrust Law, American Bar Association, Dallas, Texas, August 29, 1956.
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** LL.B., Southern Methodist University School of Law; General Counsel, Magnolia Petroleum Company, Dallas, Texas.
† Javits, The Role of State Antitrust Laws, ANTITRUST LAW SYMPOSIUM—1956, p. 56 (CCH).
3 Speech in the United States Senate, March 21, 1890, 21 CONG. REC. 2456, 2457.
authority on the subject states: "... the principles of common law were applied and developed by the several states." And again, still speaking of the development of antitrust concepts before 1890, he wrote:

"It must be remembered that, principally, all these doctrines and concepts were applied by state, and not by federal, courts. There was no federal common law, at least not in this field."

Mr. Javits further stated that

Prior to the passage of the Sherman Act, the antitrust movement had produced statutes in at least 13 states prohibiting monopolies, trusts, and other devices designed to fix prices and restrain competition, most of them enacted in the 1880's.

His further statement that

Although the impression still persists in some quarters that Middle Western States were the leaders, the fact is that New York and Texas far outstripped most of the other states during that era.

indicates why Texas antitrust laws and cases were selected as a subject of this paper.

**Texas Antitrust Laws**

The Texas antitrust laws consist of a part of Section 26 of Article 1, of the Texas Constitution, which was carried forward verbatim from the Bill of Rights of the Republic of Texas, declaring that "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed. . . ." The antitrust statutes are Articles 7426 to 7447, inclusive, of Texas Revised Civil Statutes (1925) and Articles 1632 to 1644 of the Texas Penal Code.

In March of 1889 the Texas legislature enacted a statute prohibiting trusts and conspiracies against trade. Much of the language and a considerable part of the restrictions found in that act appear in the Texas statute presently in force. It was among the first statutes prohibiting trusts, monopolies and combinations in restraint of trade enacted in this country.

The act of March 30, 1889, was replaced by an act of April 30, 1895. The new statute subjected a violator to a fine of not exceeding five thousand dollars and imprisonment not exceeding ten years, or either the fine or imprisonment. The criminal prosecutions under Texas antitrust laws can be disposed of quickly.

So far as the authors are aware, from 1895 to date, only three in-

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4 Id. at 53.
5 Id. at 263, 265.
dictments have been returned for violation of the Texas antitrust laws, one in 1896, one in about 1910 and another in about 1938. In the first case the defendant was charged with conspiring with such distinguished gentlemen as John D. Rockefeller, Henry Flagler and H. Clay Pierce, all engaged in selling “coal oil.” The defendant Hathaway was convicted; on appeal the conviction was reversed and the case ended there.

In the second case the defendant took leave of Texas and some fifteen years later, the district attorney moved for the dismissal of that indictment. In the third case the defendant was charged with participating in a conspiracy to fix prices. On writ of habeas corpus the Texas Court of Criminal Appeals held the penal statute valid against the claim of a denial of equal protection, since the act excepted from its terms “agricultural products or livestock while in the hands of the producer or raiser.” The defendant relied on Connolly v. Union Sewer Pipe Co.* On appeal to the Supreme Court, Mr. Justice Frankfurter held that “Connolly’s case has been worn away by the erosion of time and we are of the opinion that it is no longer controlling.” The Texas statute was held valid against that attack, but the defendant was never tried. It is supposed that the indictment has long since been dismissed.

The authors would not advise any violation of the penal statutes on antitrust, but it does appear that in Texas those charged with violation of the penal statutes have fared far better than some of those who have been sued for civil penalties.

In 1899 a statute was enacted prohibiting pools, trusts, monopolies and conspiracies to control business and prices. This act, approved May 25, 1899, was an extreme piece of legislation and, as is generally true of such, in recodification of the statutes and repeals the act has been lost to sight.

Another statute was enacted at the same session of the legislature which had the effect to impose rather extreme penalties; it, like the act last above referred to, has been tempered in the recodification of the Texas statutes.

Other amendments have followed in 1903, 1907, 1909, 1917, 1919, 1923, 1931, and 1947, and changes have been made in the recodification of the Texas statutes in 1911 and 1923. The Texas antitrust statutes, civil and penal, through these changes appear to be fair and reasonable.

*184 U. S. 540 (1902).
The civil statutes prohibit trusts, monopolies and conspiracies in restraint of trade, each of which is defined in the act. They declare that any contract or agreement made in violation of such laws shall be absolutely void and not enforceable either in law or equity. Penalties and procedures for enforcement are provided in the statutes.

The criminal statutes likewise prohibit trusts, monopolies and conspiracies against trade and provide a penalty for violation. Agricultural products and livestock while in the hands of the producer or raiser, and trade unions of persons engaged in any kind of work or labor are excepted from the statute. The Texas Supreme Court has held that the penal and civil statutes, while they comprehend the same general subject, are separate and distinct.

Even before the enactment of these statutes, trusts and contracts and conspiracies in restraint of trade were illegal if the restrictions were unreasonable and if the articles affected were of prime necessity to the public. These statutes enlarged materially the prohibitions of the common law.

Both the civil and criminal statutes dealing with antitrust are "subject to the rules of strict construction."

**Trusts**

A trust is defined by Article 7426 to be a "combination of capital, skill or acts by two or more persons" for any or all of seven specified purposes, including restricting the free pursuit of a business, fixing prices, preventing or lessening competition in the manufacture, sale or purchase of a commodity, and regulating the output of a commodity.

The types of contracts most frequently held to be in violation of this article are those fixing the resale price of goods and those restricting the territory in which the vendee may sell same.

If the facts specified in the statute exist, an unlawful intent...
or motive is not required. Also, it is immaterial that the immediate result of the combination may be a reduction of prices. Although the actual sale of a commodity was in interstate commerce, an agreement pertaining to the vendee’s handling of it after its purchase affects intrastate commerce, and the taint of illegality resulting from such agreement destroys the whole transaction.

It has been held that in order for a trust to exist there must be a “combination” of two or more competitors, or at least of persons capable of acting in competition with each other. A corporation cannot combine with its own officers, employees and agents. Although this article expressly forbids restrictions in “aids to commerce” as well as in trade or commerce, the “aids to commerce” provision has received, and necessarily must receive, a very narrow construction. It has been held that the statutes do not apply to contracts involving such things as a plant for compiling abstracts of land titles, an automobile hearse, or photo art calendars, or to the construction of a power plant.

Monopolies

A monopoly is defined by Article 7427 as a combination or consolidation of two or more corporations when effected in either of two ways:

1. Bringing them under the same management or control for the purpose of producing, or where the act tends to create, a trust as defined in Article 7426; or

2. Acquiring the shares, franchise or properties by one from the other for the purpose of preventing or lessening, or where the effect of the acquisition tends to effect or lessen competition.

This type of monopoly is not the monopoly condemned by the Texas Constitution. The monopoly referred to in the Constitution is a common law monopoly—originally a grant of an exclusive privilege

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22 State v. Fairbanks-Morse Co., 246 S.W. 2d 647 (Tex. Civ. App. 1951) error ref. n.r.e.
by the sovereign. But the constitutional provision is necessarily given a reasonable construction, and does not forbid contracts which are not in their express terms exclusive (although all others are precluded by the very nature of the contract from enjoying the right granted), or contracts granting exclusive privileges upon the grantor's premises.

The statutory monopoly applies only to corporations and not to individuals. But it does apply to corporations acting through trustees or others.

Mere ownership is not forbidden if the result does not create or tend to create a trust, or to lessen competition.

Conspiracies in Restraint of Trade

By Article 7428 any of the following acts are declared to be a conspiracy in restraint of trade:

(1) An agreement by two or more persons to refuse to buy from or sell to any other person;
(2) An agreement to boycott or to threaten to refuse to buy from or sell to any other person; and
(3) An agreement to boycott or to refuse to transport, deliver, use or work with products of any other person.

This statute hits particularly at agreements to buy from or sell to one person exclusively. It has been held in a recent case that this article contemplates an agreement between two concerns both of whom are at the time engaged in buying and selling, and does not apply where one of the parties is the ultimate consumer.

The Supreme Court has expressly declared that a manufacturer may at its pleasure sell, or refuse to sell, to any person; it has also been held that evidence of a refusal to sell does not establish a conspiracy.

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30 State v. Fairbanks-Morse Co., 246 S.W. 2d 647 (Tex. Civ. App. 1951) error ref. n.r.e.
ENFORCEMENT OF ANTITRUST LAWS

Certain conspiracies or agreements in restraint of trade were unlawful before the enactment of the antitrust laws. Some of those agreements or conspiracies, although not covered by the antitrust laws, are probably still illegal. However, it is believed that neither civil nor criminal penalties can be recovered in connection with them. A restraining injunction appears to be the only remedy.

**Selling Below Cost**

Article 1638 of the Texas Penal Code, for which there is no counterpart in the civil statutes, makes it unlawful to sell at less than cost of manufacture, or give away, or give secret rebates for the purpose of driving out competition or financially injuring competitors engaged in a similar business.

**Penalties**

Violations of the antitrust laws may be punished by the State of Texas by civil and criminal sanctions, and persons who have been damaged by such violations may maintain actions for the recovery of the damages sustained by them as a result of such violations.

The attorney general may restrain violations by injunction; or he may recover money penalties under the civil statutes ranging from $50 to $1,500 per day for each day of violation; or he may demand that the charters of domestic corporations and the permits of foreign corporations be forfeited. After a domestic corporation thus loses its charter, neither it nor its successor or transferee will afterwards be permitted to incorporate or do business in Texas. A foreign corporation which has lost its permit must wait five years and comply with the provisions of Article 7435 before it can again do business in Texas. The punishment for violating the criminal statutes is confinement in the penitentiary for not less than two nor more than ten years.

**Comparison of Federal and Texas Antitrust Laws**

The federal acts are cast in the most general terms; the generality of the language is a boon to the prosecutor, civil or criminal, and a plague to the defendant. The Texas statutes speak in terms of "thou shall not." Both the civil and criminal statutes outlaw trusts (seven specific kinds of combinations of capital, skill, and acts),

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31 See State v. Central Power & Light Co., 139 Tex. 51, 161 S.W. 2d 766 (1942), holding that penalties cannot be recovered for violation of the constitutional provision against monopolies.
monopolies (two specific kinds of combinations or consolidations of corporations), and conspiracies against trade (three specific classes of agreements such as boycotts, refusal to deal, etc.), and Article 1638 of the Texas Penal Code, which has no counterpart in our civil statutes, prohibits giving away merchandise, or giving secret rebates to injure competition.

Rule of Reason

While the United States Supreme Court in Standard Oil Co. v. United States liberally interpreted the prohibitions of the Sherman Act against every contract, combination, or conspiracy in restraint of trade to mean only such acts as unreasonably restrained trade, nevertheless, on this federal "rule of reason" ("standard of reason") has been engrafted the exception set forth in the "Madison" case to the effect that it is per se violation of the law to tamper with price structures, raise, depress, fix, peg, or stabilize prices, and the court will allow no inquiry into the reasonableness of the act, even though the public as a whole is benefited.

While now and then the statement is made that Texas professes to have no "rule of reason," it is a fact that both our civil and criminal courts have given these statutes a reasonable interpretation. It is a fact that our able attorneys general have, in nearly every instance, attempted to prosecute only such acts they at least believe to be real, substantial and clear violations of our laws. Actually, our Texas antitrust laws, as an exercise of the police power, must be reasonably applied both by the legislature and by the courts; otherwise they would be unconstitutional.

Aids to Commerce

The Texas act declares illegal any combination of capital, skill or acts which create or carry out restrictions in trade or commerce or aids to commerce. Some highly competent lawyers have construed it to declare illegal combinations of capital, skill or acts to create or carry out aids to commerce. So construed, if this provision of Article 7426 is not unconstitutional, it is so senseless as to be unenforceable.

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40 221 U.S. 1, 60 (1911).
43 For example, sales of business and good will with an agreement not to compete, exclusive sales agreements at one location, etc.
44 9 Tex. Jur., Constitutional Law § 80 (1941); Neel v. Texas Liquor Control Board 259 S.W. 2d 312 (Tex. Civ. App. 1953) error ref. n.r.e.
It is difficult to say that statutes erode through the lapse of time, but fifty years of atrophy have dulled this threat to any form of commercial activity. Does it outlaw all partnerships? Literally interpreted, it would give one pause in assisting the blind, aged or crippled purchaser across a crowded street. What about chambers of commerce in this state? Their avowed purpose is to "aid commerce."

**Antimerger Laws**

Since 1914 the Clayton Act has prohibited corporations in interstate commerce from acquiring the *stock or share capital* of other corporations where it had the effect of substantially lessening competition or of tending to create a monopoly. In December, 1930, this act was amended to add to its prohibitions the purchase by corporations subject to the jurisdiction of the Federal Trade Commission of the *assets* of other corporations engaged also in commerce. Texas has, under some circumstances, prohibited the acquisition of one corporation of the stock and physical properties of another corporation.

**Circumstantial Evidence and Conscious Parallelism**

The biggest Texas antitrust case of all (the judgment, not including costs or interest, was a fine of $1,623,900) was to some extent based on circumstantial evidence. Federal antitrust cases have also been predicated on circumstantial evidence. There does not appear to be any reason why circumstantial evidence should not suffice. Other cases, civil and criminal, can be proved by circumstances. But the circumstances should amount to greatly more than similar action or conscious parallelism.

Particular attention should be called to the circumstantial evidence rule in conspiracy cases. While conspiracies are expressly prohibited by the Sherman Act, conspiracies against trade are directed primarily against agreements to boycott, refusals to buy or sell, etc. The
Texas statute on trusts is directed against trusts as an actual combination of capital, skill, or acts.

The questions in these cases usually are: (1) what kind of evidence can be admitted; (2) what inference can be drawn from this evidence; and (3) the quantum of evidence necessary to prove such issues as combination, monopoly or restraints of trade.

Conscious parallelism in its more virulent form has been rejected by the United States Supreme Court and has also been rejected by the Texas Supreme Court.

**Interstate versus Intrastate Commerce**

Manufacturers and marketers in Texas are caught between the expanding universe of interstate commerce and a continuous, rigorous enforcement of Texas state antitrust laws. Such manufacturers and marketers, to preserve any semblance of a sense of security, must view every single one of their acts as though they were subject both to the state and federal antitrust acts, even though this is an apparent legal impossibility.

Some attention must be given to the specific wording of the statutes involved and to the cases construing them, respectively, such as "in commerce," or "in the flow or stream of commerce."

While we may not expect one over-all operation to be subject both to the antitrust laws of a state and the federal government, it is not unlikely to suppose that some local and preliminary aspects of a single transaction may be subject to state antitrust laws and other and ultimate aspects of it to be subject to federal antitrust laws. The difficulty is the unlikelihood of a definitive case. The state courts will likely find the act to be intrastate commerce and the federal courts will likely find it to be interstate commerce.

**Labor, Agricultural, and Other Exemptions**

As stated by Toulmin, "the general public has the impression that only the Sherman, Clayton and Federal Trade Commission Acts are to be considered in connection with monopoly and restraint of trade; this is error." As a matter of fact, an entire volume of Toulmin's treatise on antitrust law is devoted to related and collateral provisions of the antitrust laws of the United States. There are more than

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64 3 Toulmin, THE ANTI-TRUST LAWS OF THE UNITED STATES (1949).
thirty other federal statutes which must be read in connection with possible antitrust questions. 53

Since 1914 our federal laws have exempted labor, agricultural or horticultural organizations where instituted for mutual help and in lawfully carrying out their legitimate objects. 54 The cases have covered secondary boycotting, violence, intimidation, price fixing by labor organizations, and amicable and external restrictive agreements between labor and management. Our Texas antitrust acts have also exempted agricultural and labor organizations. 55

In addition to other amendments, 56 the Texas Penal Code 57 was amended in 1947 when the legislature provided for what has been commonly called the Right to Work Act or the Anti-Racketeering Act. In Texas, whether by injunction or criminal prosecution, illegal activities of labor unions have been before the courts of Texas in the larger cities almost monthly.

Single Trader—Bathtub Conspiracies

In the ordinary affairs of life it has been understood that it takes two to combine or conspire. Can a corporation conspire with itself? Can its officials conspire in an intramural venture? Can the parent conspire with a wholly-owned subsidiary? May the affiliates conspire with themselves? Though strong arguments can be made for single trader in federal cases, these arguments so far have been rejected. 58 Bearing in mind the particular wording of our antitrust laws, we have some peculiar facets of this theory in Texas. 59 One writer has dealt with relations with affiliated customers. 60


55 Arts. 1642, 1644, TEX. PEN. CODE (1925).

56 Arts. 1634, 1644, TEX. PEN. CODE (1925).

57 Art. 1621b, TEX. PEN. CODE (1921).


60 Schwartz, Relations with Affiliated Customers, ANTITRUST LAW SYMPOSIUM—1953, p. 214 (CCH).
Choosing Customers and Refusal to Deal

The right to choose customers or to refuse to sell certainly exists in the abstract. The practical exercise of this right shades into troublesome questions. At least the Colgate doctrine has never been overruled. In fact, the Colgate case has just been cited, apparently with approval, in a recent opinion of the Supreme Court. Assuming no combination, no conspiracy, no public utility, no operation affected with the public interest, no monopoly, no tie-ins, no negative covenant, no condition and no full-line forcing, an ordinary wholesale druggist ought to be able to choose his customers or refuse to further deal with a price cutter. We do have the benefit of the thinking of the Department of Justice. Part of the Robinson-Patman Act expressly recognizes the right of a seller to select his own customer “in bona fide transactions.” The Supreme Court of Texas in the Ford Motor Co. case, stated without qualification that there is nothing in our laws that requires the manufacturer to sell, and that he can sell or refuse to sell at his pleasure.

Exclusive Dealing

In this age of assembly-line production, such as automobile production and continuous-run, multi-products refining, there must be a constant source of raw materials and an assurance that the manufactured product can be immediately disposed of. Long-term contracts not only give assurance of supply and disposition but they assist in price-hedging and advance cost accounting. One-year contracts may be legal and five-year contracts may be illegal. It can be stated positively with fair certainty that exclusive dealing between one individual and another individual is legal where the contract is limited to one geographic location, is for a reasonable period of time, achieves ordinary business ends, occasions no monopoly in fact, and produces no unreasonable restraint in trade. The essential elements

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65 But even a one-man refusal to deal, coupled with other acts, may be a boycott under the Sherman Act. United States v. N. Y. Great A&P Tea Co., 173 F. 2d 79 (7th Cir. 1949).
68 Ford Motor Co. v. State, 143 Tex. 5, 175 S.W. 2d 230 (1943).
70 Richfield Oil Corp. v. United States, 343 U.S. 922 (1952); Standard Oil Co. of Calif. v. United States, 337 U.S. 293 (1949); Mathews, Texas Antitrust Laws, INSTITUTE ON ANTITRUST LAWS AND PRICE REGULATIONS, pp. 19, 50 (Sw. Legal Foundation 1950); ANTITRUST LAW SYMPOSIUM—1910, p. 43 (CCH). It should be noted that the current case of...
are so many that in any event there remains some hazard in exclusive dealing.

Exclusive dealing becomes especially questionable when there are many dealers involved and a substantial part of the market is foreclosed to competition.

Particular attention should be given to the nature of the complaint against exclusive dealing, whether under Section 1 of the Sherman Act, or Section 2 of the Sherman Act, or Section 3 of the Clayton Act, or Section 5 of the Federal Trade Commission Act. The same is true of the Texas Antitrust Act, whether the suit is brought under Article 7426 or Article 7428.

As to the parties in Texas who are amenable to our antitrust laws in exclusive dealing contracts and the function that they occupy not only in the industry but as related one to the other, the current Fairbanks-Morse case must be read in detail. In interpreting and applying our Texas antitrust statutes the Fairbanks-Morse case stands for this: (a) the combination of capital, skill, or acts contemplated by Article 7426 must be in relation to articles or commodities of merchandise, produce, or commerce; (b) Article 7428 contemplates an agreement by two concerns both of whom are, at the time in question, engaged in buying or selling, and it does not apply when one of the parties is the ultimate consumer; and, (c) Article 7426 applies only to a combination of competitors which might have been otherwise independent and competing.

**Entire Output and Requirements Contracts**

Output and requirement contracts are closely related to exclusive dealing and perhaps a part thereof, but the Portland case in Texas is of current and extreme importance. The Texas Supreme Court upheld this entire output contract as against an attack for alleged want of mutuality and for alleged violation of Article 7428 of our statutes. It is noteworthy that the Cox case was cited with approval.

There is a current American Law Reports annotation, “Restrictive agreements or covenants in respect of purchase or handling of petroleum products by operator of filling station,” which concerns in part

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the frequent challenges to these contracts on the basis that they are in restraint of trade at common law or within the provisions of antitrust statutes.

**Relations with Resellers**

In Texas many manufacturers continue to be unaware of the fact that their products cannot be "fair-traded" in this state. The dividing line is when title passes or whether title passes. Prices can be controlled if the distribution is through an agency or consignee, with title remaining in the manufacturer or primary distributor and with the agent or consignee merely the physical medium through which delivery is made.

Where title is passed, any attempt by the manufacturer to fix, maintain, or control prices or allocate territory in the State of Texas is per se illegal.

On the other hand the manufacturer still has at stake the good will involved in the product bearing his name or trade-mark, even though title is passed, and some relations may still be maintained, even in this state.78

The 1953 *Antitrust Law Symposium* of the New York State Bar Association has two learned articles on allied problems.78

**Consent Decree**

Of the civil cases instituted by the United States, a great majority of them were settled by consent decrees.77 Many hundreds of stipulations have now been entered into with the Federal Trade Commission.78

The leading case on consent decrees in federal antitrust proceedings is *Swift and Company v. United States*.78

Only some ten years ago it was considered proper by the Department of Justice to institute both criminal and civil proceedings and dismiss the criminal proceedings if a consent decree would be agreed to; or to file a civil suit and threaten the defendant with ad-

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77 CCH, *The Federal Antitrust Laws* (1949); CCH Trade Reg. Serv., p. 1521 et seq. and p. 15,001 et seq.

78 CCH Trade Reg. Rep., p. 41, 101 et seq.; CCH Trade Reg. Serv., Id.

79 276 U.S. 311 (1928).
ditional criminal proceedings unless he or it entered into a consent decree. The practice was both unfair and unjust.

But once the consent decree in the federal court is entered into it is very difficult for a defendant to obtain a modification of this decree, even though it may be ambiguous and contains a “potential lawsuit in every word.”

Though no formal system of consent decrees exists in Texas, nevertheless, two of our most important antitrust cases were finally disposed of by an “agreed judgment” and a “consent decree,” and the nature and character of such decrees were so styled and as such enforced by the Austin Court of Civil Appeals. The ratio of the state cases disposed of by agreement, whether formal or informal, is about the same as the percentage of federal cases actually disposed of by consent decrees. It is a fact that nearly all of the penalties imposed in civil antitrust suits in the district courts at Austin are inherently agreed or consent decrees—even though the state goes through the routine of introducing evidence en masse—because in fact and in nearly every instance there are no real, contested, and actually adversary proceedings.

3 D’s—Dissolution, Divorcement and Divestiture

In addition to injunction, dissolution, divorcement and divestiture may be decreed in civil federal cases where necessary to put an end to the combination or conspiracy or to deprive the defendants of the fruits of their conspiracy, where necessary to render impotent the monopoly power, and where necessary to restore competitive conditions in the market.

Sometimes a fourth D is added—that of “Disaffiliation.” One of the early and leading cases employed this additional equitable relief.

Dissolution is expressly provided for in our Texas civil antitrust statutes and was actually employed in an early and leading Texas case.

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81 Note, 63 HARV. L. REV. 320 (1949).
82 WOLBERT, AMERICAN PIPE LINES 163 (1912).
85 Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1910).
86 Art. 7430, TEX. REV. CIV. STAT. (1921).
Suggested List or Retail Prices

Price suggestions take varied forms, such as separate price lists, prices quoted in national advertising, or flat prices printed on packages or containers. Troublesome problems arise where there are no fair trade contracts in jurisdictions which would otherwise permit them, or, as in Texas, where no fair-trading is allowed at all.

Probably mere suggestions are valid in any instance, but mere suggestions tend to become pressure, remonstrances, warnings, threats and sanctions. The greater the pressure on the retailer to maintain list prices, the more stringent become the measures adopted to police price cutting and the more dangerous become refusals to deal.

It will be assumed that such attempts at control are something less than common law control, but common law control is not necessary to give rise to antitrust proceedings. We certainly know that this kind of activity may give rise to chain store tax cases in Texas under our chain store tax law." A recent case on this phase was decided in Texas.89

Savings or Disclaimer Clauses

Savings or disclaimer provisions have also been called "bootstrap" clauses. A provision, however, which merely agrees to do a certain thing "in so far as it is lawful . . . to so agree . . ." on its face constitutes no agreement to do the thing mentioned if it is unlawful so to do.90

Similar provisions have been litigated where usurious interest was involved."91

These clauses must be read in connection with a provision of our state antitrust laws92 which provides that any contract or agreement in violation of our antitrust laws shall be absolutely void and not enforceable either in law or in equity.

Foreign Parent Corporations—Domestic Subsidiaries—Voting Stock and Control as within Antitrust Laws

Foreign corporations without a permit to do business in Texas have, under Article 1533a, express authority to own and vote stock in a Texas corporation, and participate in the management and con-

91 Nevels v. Harris, 129 Tex. 190, 102 S.W. 2d 1046; 109 A.L.R. 1464 (1937).
control of the business and affairs of Texas corporations, as other stockholders:

Voting stock and participating in management of domestic corporation. That when any foreign corporation without a permit to do business in this state lawfully owns or may lawfully own or acquire stock in Texas corporations, it shall not be unlawful for such foreign corporation to vote said stock and participate in the management and control of the business and affairs of such Texas corporation, as other stockholders, subject to all laws, rules and regulations governing Texas corporations, and especially subject to the provisions of the Antitrust Laws of the State of Texas. Acts 1925, 39th Leg., ch. 185, p. 455, Sec. 1.

The plain terms of this statute give foreign corporations, by such ownership, the same rights (but no greater rights) as other stockholders. Note especially the concluding clause dealing with the antitrust laws.

The control of Texas corporations for more than seventy-five years has been vested in Article 1327:

The directors shall have the general management of the affairs of the corporation.

There are two leading cases in Texas where the domestic subsidiaries were able to continue their existence because they had maintained their own integrity:

State v. Humble Oil & Refining Co.:93

These officers are in complete control and management of the business of appellee, Humble Oil & Refining Company. The testimony does not disclose any effort on the part of the Standard Oil Company of New Jersey to exercise, control, or manage appellee. . .

State v. Swift & Co.:94

Does the evidence show that Swift through such stock ownership actually dominated and controlled Consumers so as to be in fact itself engaged in the cottonseed oil mill and gin business in Texas without a permit to do so? The trial court found that it was not so engaged, and we hold that the evidence adduced sustains such finding. Stated differently, the trial court held that the separate corporate identity of Consumers had not been ignored by Swift under the facts adduced on the trial of the case. . .

Doing business questions and antitrust questions as between foreign parent corporation and domestic subsidiary tend to become indistinguishable.

93 263 S.W. 319 (Tex. Civ. App. 1924) error ref.
Negative Covenants

A simple current example of the danger of negative covenants is in Vann v. Toby." Toby sued Vann for actual and exemplary damages for something less than $20,000, growing out of an alleged breach by Vann of a partly written and partly oral contract for the sale of an unpatented street marker. By an oral portion of these dealings, Vann represented to Toby that if he would permit him to distribute the street markers he, Vann, would not handle or distribute any other street markers during the life of their contract. The Dallas Court of Civil Appeals held that, because of this illegal portion, the entire contract was void. The Dallas Court of Civil Appeals would have upheld the mere exclusive sales right to Vann, but the court went on to emphasize that the illegal covenant not to handle competitive street markers tainted the whole contract with this illegality.

Criminal Prosecutions

Though venue of both civil prosecutions and criminal prosecutions is laid in Travis County," nevertheless in nearly fifty years only three criminal prosecutions have been brought." They are referred to above. The federal practice of jointly filing civil and criminal prosecutions was never utilized in this state.

Patents, Trade-marks, Trade Names, Unfair Competition

Article I, Section 8, Clause 8 of the Federal Constitution gives Congress the following power:

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Note that there is nothing said in the Federal Constitution about trade-marks, trade names, unfair competition, secret formulas, trade secrets, etc.

Though the federal courts very early held that legislation respecting trade-marks was not authorized by this clause," it was suggested that under the commerce clause perhaps Congress had the power to legislate with reference to trademarks in interstate commerce. Thereafter, under the Act of 1881, Congress did legislate and provide for registration of trade-marks "in commerce."

Notwithstanding, there is language in the so-called Coca-Cola

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85 260 S.W. 2d 114 (Tex. Civ. App. 1953) error ref. n.r.e.
87 FINTY, ANTITRUST LEGISLATION IN TEXAS 31 (1916).
88 Trade-mark Cases, 100 U.S. 94 (1879).
Company case\textsuperscript{99} which has plagued cautious lawyers for more than thirty-five years:

The owner of a patent right, copyright, or trade-mark, having the exclusive right to manufacture and sell the article protected thereby, and being under no legal obligation to grant such right to another, may impose upon his assignee such restrictions as he may see proper, and to which his assignee will agree, including the price at which the article may be sold, the territory in which it may be manufactured and sold, the material that may be used in its manufacture, or in connection therewith.

The Coca-Cola case was cited with approval by the Waco Court of Civil Appeals in Shaddock \textit{v. Grapette}.\textsuperscript{100}

Doubt is now thrown on the Coca-Cola case by the Supreme Court of Texas in Patrizi \textit{v. McAninch},\textsuperscript{101} in which a contract dealing with a patented machine was held to be within the Texas antitrust laws even notwithstanding the presence of the so-called “bootstrap” clause.

The Coca-Cola case was merely mentioned in one sentence: “We do not interpret Coca-Cola Co. \textit{v. State} . . . as holding to the contrary.” In the words of law schools, we would “put a big question mark after the Coca-Cola case today.”

The Lanham Act\textsuperscript{102} itself is applicable to “a trade-mark used in commerce.”

\textbf{Administrative Enforcement and Treble Damages}

Texas has no administrative enforcement similar to the Federal Trade Commission, nor does our state antitrust law provide for treble damages.

\textit{Minerals—Pooling, Unitization, Processing, and Joint Operations}

Pooling, unitization, processing and joint operations were made for the purpose of conservation, prevention of waste, and adjustment and protection of correlative rights in the production of oil and gas. Most ordinary pooling, unitization, operating, and processing contracts, even in the absence of federal or state legislative sanction or administrative immunity, are accepted as valid.\textsuperscript{103} In

\begin{itemize}
  \item \textsuperscript{100} 259 S.W. 2d 231 (Tex. Civ. App. 1953).
  \item \textsuperscript{101} 153 Tex. 389, 269 S.W. 2d 343 (1954).
  \item \textsuperscript{102} 60 STAT. 427 (1946), 15 U.S.C. §§ 1051-1127 (1952).
  \item \textsuperscript{103} HARDWICKE, ANTITRUST LAWS, ET AL. \textit{v. UNIT OPERATION OF OIL OR GAS POOLS,}
\end{itemize}
fact, the attitude of most state conservation commissions, as typified in the order of the Texas Railroad Commission shutting down the whole Spraberry Field until all the casinghead gas was put to a legal use and not flared (even though the Supreme Court has just held it void),\(^{104}\) means that these joint operations must be undertaken voluntarily and co-operatively. Oil and gas do present these "thorny problems" and we may well expect the federal courts, at least, to adhere to somewhat of a hands-off policy.\(^{103}\)

Texas does provide for permissive but not mandatory pooling or unitization\(^{106}\) with these explanatory and qualifying clauses:

No such agreement shall provide, directly or indirectly, for the co-operative refining of crude petroleum, distillate, condensate, or gas, or any by-product of crude petroleum, distillate, condensate or gas. The extraction of liquid hydrocarbons from gas, and the separation of such liquid hydrocarbons into propanes, butanes, ethanes, distillate, condensate, and natural gasoline, without any additional processing of any of them, shall not be considered to be refining.

No such agreement shall provide for the co-operative marketing of crude petroleum, condensate, distillate or gas, or any by-products thereof.

No provisions of this Act shall be construed as requiring the approval of the Commission of voluntary agreements for the joint development and operation of jointly owned properties.

Nothing herein shall restrict any of the rights which persons now may have to make and enter into unitization and pooling agreements.

The approval of any such agreement shall not of itself be construed as a finding that operations of a different kind or character in the portion of the field outside of the unit are wasteful or not in the interest of conservation.

Exhausting First Administrative Remedies—Primary Jurisdiction; Regulated Industries

In this day of administrative controls over railroads, aviation, power, motor carriers, radio, television, farm crops, communication, shipping, pipe lines, conservation of natural resources, etc., can there be antitrust law violations when the act complained of is done pursuant to such administrative controls? Or, if this act complained of is

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\(^{104}\) Railroad Commission of Texas v. Rowan Oil Co., 152 Tex. 439, 259 S.W. 2d 173 (1953).

\(^{105}\) Burford v. Sun Oil Co., 319 U.S. 315 (1943); Parker v. Brown, 317 U.S. 341 (1943); Railroad Commission v. Rowan & Nichols Oil Co., 311 U.S. 570 (1941)—but the pending "Pacific Coast" antitrust case does not bear out some of this optimism. State and federal questions on joint refining and marketing are open.

subject to the actual or potential jurisdiction of the administrative agency, should not the powers of the administrative agency be first invoked for a ruling? This last question can be answered "yes" with some force and certainty. The federal cases, however, do not decide these questions with quite the same force and certainty. This requirement is in the process of evolution and development and has received some recent treatment in legal periodicals. An analogy can be drawn to the abstention applied by some federal courts where equitable relief involves state laws. There is almost no state antitrust authority on the question involving state statutes and state boards.

**Pleading**

In Texas an indictment under our state antitrust laws must inform the defendant of the nature of the accusation against him and must contain the constituent elements of the offense and every fact or circumstance necessary to a complete description. Perhaps a criminal indictment in Texas must be more elaborate than an indictment or information under the federal antitrust laws because Texas allows no bill of particulars under our Code of Criminal Procedure and the various methods of discovery under the Federal Rules of Criminal Procedure have not been adopted as yet in Texas.

The petition in civil antitrust suits instituted by the state usually includes a count for an injunction and a count for a penalty. Peculiar rules are applicable to both of these counts, which are succinctly summarized by the Dallas Court of Civil Appeals in *State v. Fairbanks-Morse Co.*

The State's antitrust suit for final injunction and penalties (against Fairbanks-Morse, $50 to $1,500 per day from January 1, 1938 to date

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110 246 S.W. 2d 647, 654 (1951).
of petition, June 9, 1948) is for all practical purposes a criminal action and subject to the same rules of strict construction. Ford Motor Co. v. State, 142 Tex. 5, 175 S. W. 2d 230; also subject to the stringent rule of pleading applicable to injunctions "that 'the averments of material and essential elements must be sufficiently certain to negative every inference of the existence of facts under which petitioner would not be entitled to relief;'" Powell v. City of Baird, Tex. Civ. App., 132 S. W. 2d 464, 468; the petition, in other words, being nowise aided by presumption or intendment.

Illegality of Contracts in Violation of Antitrust Law

Article 7437 of the Texas Revised Civil Statutes provides:

Any contract or agreement in violation of any provision of this subdivision shall be absolutely void and not enforceable either in law or equity.

Doubtless this legislation is probably declaratory of the existing common law and not basically different from results reached in cases arising under the federal antitrust laws. Certainly Texas cases have read into this statute not only the common law itself but to a great extent a rule of reason.111

Miscellaneous—Trade Regulations Law

Texas has not availed itself of the federal McGuire Act and consequently has no fair trade law. Texas did not have any sales-below-cost or unfair competition legislation prior to the enactment of a "Sales Limitation Act," applicable to grocery stores only.112 There is nothing in the civil portion of the Texas antitrust laws analogous to any part of the federal Robinson-Patman Act.

Trade Associations

Only a dozen or so of the trade associations, out of the thousands which have existed, have ever been convicted of any illegal activity. This is at least as good a record percentagewise. Most of these few cases were instances of reckless behavior, such as price fixing, division of markets, elimination of competition, group action against price cutters, boycotting, and other instances of per se violations under any theory. There has grown up a mass of literature which can assist in separating the legal from the illegal in the activities of these associations.118

111 Breckenridge, Some Phases of the Texas Antitrust Law, 3 Texas L. Rev. 335 (1925); 4 Texas L. Rev. 129 (1926); Nutting, The Texas Antitrust Law: A Post Mortem, 14 Texas L. Rev. 293 (1936).
113 Hawkins, Trade Association Practices: Lawful and Unlawful, Institute on Antitrust Laws and Price Regulations 173 (Sw. Legal Foundation 1950); Rugg, Trade Associations, Antitrust Law Symposium—1932, p. 143 (CCH); House Select Committee
The Texas cases have touched on this problem occasionally. In fact, trade associations were the nuclei of allegations of combination, conspiracy, or group activity in two of the most important antitrust cases filed in recent years, each of which involved the petroleum industry.

**ENFORCEMENT**

At least until recently, the story has been told and retold in Texas that our attorneys general have filed more antitrust suits and collected more moneys under Texas antitrust laws than did the Attorney General of the United States in all the states and under all the federal antitrust statutes. Whether or not this is literally true is beside the point, but probably the statement can be made safely that the state antitrust laws of Texas are more vigorously enforced by state officials than antitrust statutes of any other state.

In the space allotted no detailed study can be made of Texas' enforcement of its own antitrust laws except to refer to three existing studies, namely, (1) Finty, *Antitrust Legislation in Texas*; (2) Mathews, "History, Interpretation, and Enforcement of Texas Antitrust Laws" in Institute on Antitrust Laws and Price Regulations 19-70. (S.W. Legal Foundation 1950); and (3) Report of Antitrust Investigations and Litigation of the Administration of Honorable Price Daniel, former Attorney General of the State of Texas, 1947-1952, inclusive, prepared for use in the 1953 Fall Antitrust Clinic, Dallas Bar Association.

The last-mentioned report summarized reveals that as many as one thousand preliminary investigations of alleged antitrust violations have been made by the office of Attorney General of Texas during the period 1947-1952 involving almost every conceivable commodity from clothing, soap, cosmetics and razor blades, to chili products and poultry feed, gasoline, automobile tires and air con-

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ditioning equipment. Separate files were opened on 321 investigations, the facts in perhaps two out of three matters originally investigated not being deemed of sufficient importance to justify the opening of a separate file. Since 1947 the Attorney General has filed 33 suits for antitrust violations, practically all of them involving price fixing and territorial restrictions. In 1953 six of these suits were still pending in the trial or appellate courts. In practically all of the others judgments were rendered resulting in the assessment of penalties and the granting of permanent injunction against the practice complained of.

CONCLUSION

This paper might well conclude with some “Do’s” and “Don’ts” for lawyers with clients doing business in Texas.116

Don’t tell your client to make an oral contract containing invalid provisions instead of a written one. It is true that an oral contract is more difficult to prove in court than a written one. It would follow that the parties would have more difficulty in establishing their rights under an oral contract; but this would not mean that they would be immune from prosecution under the antitrust laws as the statutes can be violated by an oral contract as well as by a written one.117

Don’t advise your client to control prices by written instructions delivered to its customers from time to time, but not set forth in the contract. In the case of Ford Motor Company v. State,118 the Supreme Court held that if Ford pursued a general policy of determining the prices which were to be charged for its product by its dealers and then accomplished this result by a course of conduct designed and intended for that purpose and calculated to accomplish it, in so doing it had violated the antitrust laws just as effectively as if it had accomplished such result by direct contract.

Don’t advise your client to call its customers “sales agents” or other such appellations in the hope that thereby they will be exempted from the antitrust laws. Unless the contract is really one of agency, calling it that will not help the parties.119

Don’t advise your client that no holds are barred in connection with patented, copyrighted and trademarked articles. While the own-

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116 Acknowledgment is made to Mr. Sol Goodell for much of the material that follows, taken from his paper delivered September 26, 1953, on The Texas Antitrust Laws before the 1953 Fall Antitrust Clinic of the Dallas Bar Association.
117 Vann v. Tobey, 260 S.W. 2d 114 (Tex. Civ. App. 1953) error ref. n.r.e.
118 142 Tex. 5, 175 S.W. 2d 250 (1943).
er of a patent, copyright or trademark possesses many rights and privileges not held by others, he is not exempt from the operation of the antitrust laws, and has no more right than any other manufacturer to control the resale price of his products after he parts with title.  

Don't advise your client to obligate his dealers to pay a "service charge" for the benefit of the aggrieved dealer if he sells outside the territory intended for him. It has been held that while this arrangement on its face does not violate the antitrust laws, it might with other facts and under certain conditions be evidence of a violation.

Don't advise your client to put pressure on anyone else not to sell or to deal with a competitor. Although every business can in the usual situation pick its customers, it is unlawful to let someone else have a hand in the selection.

The best advice a lawyer can give a client doing business in Texas is to forget, if it is possible, that there are such things as fair trade laws, fair trade agreements, territorial restrictions, and exclusive dealing contracts, to familiarize himself with the Texas antitrust laws and the effect of the cases construing such laws, to realize that such laws are generally enforced, and to abide by them.

Your client may not be satisfied with that advice. He may be, and probably will be, "territory minded" and worried about territorial mix-ups among his dealers. There is nothing to prevent him from appointing as few dealers as he pleases, located in strategic spots, just as he would if territories were fixed by contract. The chances are his dealers, if they make money in handling his product, will take the hint and stay out of the territories in which other dealers are located. An occasional violation would not hurt anyone and would serve as proof that no territorial restrictions exist.

Your client may have dealers who cannot remember where they are supposed to operate and may insist on defining the territory of each dealer. This is unwise, as with other facts it might be construed as evidence of territorial restrictions. But if your client nevertheless insists on it let it be merely a suggestion of the territory in which the manufacturer expects the dealer to operate. This can be justified on the grounds that the dealer desires an outlet for his product in the specified area and that the manufacturer is entitled to be assured that purchasers of his product in the specified area will receive

120 Breckenridge, *Phases of Texas Antitrust Law (Part II)*, 4 Texas L. Rev. 129, 141 (1926).
121 Ford Motor Co. v. State, 142 Tex. 5, 175 S.W. 2d 230 (1943).
proper servicing, replacements and repairs. We would add to the document outlining the suggested area a provision to the effect that nothing herein (or in any other contract or instructions between the parties) shall be construed as confining the dealer to the specified area in the sale of his products, but it is expressly agreed and understood that he shall be allowed to sell his products wherever he pleases.

Suggested resale prices are more difficult to justify. Stay away from them altogether. Suggested prices (even with a clause similar to that suggested above expressly recognizing the right of the dealer to sell for any price he pleases), together with a provision for termination upon notice could very easily be construed as an “intentional course of conduct by the parties . . . enabling the seller to dictate or control the resale price . . .”

Your client may wish to reconsider his marketing arrangements in Texas in order to determine whether in the light of the restrictions upon his operations he might better accomplish his purpose by establishing bona fide sales agencies or by shipments on consignment.

The attorney should be familiar with all of the exceptions to the Antitrust Act so that his client may take advantage of any appropriate exceptions in making contracts with his dealers.

A helpful device, the so-called “disclaimer” or “bootstrap” clause which has been used to great advantage in contracts that might otherwise be usurious, might be of help in protecting against antitrust violations.

In Ford Motor Company v. State, the contract under scrutiny provided that “insofar as it is lawful for dealers so to agree,” the dealer would not resell Ford products at less than the established retail prices and the Supreme Court held that “this contract provision, on its face, does not violate our antitrust laws. It only obligates the dealer if it is lawful for him to be obligated. If it is unlawful, no obligation is assumed. If no obligation is assumed, no violation of law is contracted for.”

This provision may be used in doubtful cases. The writers do not know whether it would be effective in cases where the contract provides for a clear violation of the law.

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123 Ford Motor Co. v. State, 142 Tex. 5, 175 S.W. 2d 239 (1943).
124 Nevels v. Harris, 129 Tex. 190, 102 S.W. 2d 1046 (1937).
125 142 Tex. 5, 175 S.W. 2d 230 (1943).