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The Status of State Antitrust Laws with Federal Analysis

John J. Hanson and Julian O. von Kalinowski

The recent submission to the National Conference of Commissioners on Uniform State Laws of a First Tentative Draft of a uniform state antitrust act is indicative of a growing interest in the enactment and enforcement of state antitrust laws.¹

Another example of this renewed interest is shown by the legislative and enforcement activity in California in the past few years. As late as 1949, the California Cartwright Act had been referred to as the "Sleeping Beauty."² This is no longer true.³ Other states have had similar experiences. Hawaii, Wisconsin, and Colorado have enacted new antitrust laws. Wisconsin, New York, and Texas have increased antitrust enforcement.⁴

The purpose of this article is to analyze the trends in the state antitrust field as compared to federal law. In so doing the authors shall review the state decisions, with particular emphasis on those activities which have been the frequent target of antitrust enforcement. Analysis has been focused on the states of California, Ohio, New York, Wisconsin, and Texas. The antitrust laws of these states


2. See von Kalinowski & Hanson, The Cartwright Act — California Sleeping Beauty, 2 STAN. L. REV. 200 (1949). In 1949 there were only three reported cases in which this law had been invoked by the state, and the latest of these was in 1919. Id. at 201.

3. In 1959 the California Attorney General established what might be called a "formal" antitrust division. Since that time there have been up to eight lawyers in the Attorney General's office who have devoted a substantial portion of their time to antitrust matters. There are two offices, one in San Francisco and one in Los Angeles. Some of these lawyers also handle what might be deemed "consumer fraud" cases. Hence, it is somewhat difficult to determine the exact amount of manpower being used in antitrust enforcement.

Since March of 1960, the state has instituted ten proceedings alleging violations of the Cartwright Act, eight of which were civil and two of which were criminal. In one of the criminal cases, all of the defendants, except one, pleaded guilty, and fines totaling $40,000
appear to be representative of the laws of some forty states which have general antitrust laws. In addition, these states appear to be among those most active in antitrust enforcement.\textsuperscript{6}

After analyzing the trends, the authors shall comment briefly as to whether there is a need for a uniform act.

**THE APPLICABLE STATUTES**

The first state antitrust statute was passed by Kansas on March 30, 1889, and similar Texas legislation followed shortly thereafter in 1889.\textsuperscript{6}

were imposed. The other criminal case is pending. In the eight civil cases, all or some of the defendants entered into consent decrees generally similar to the federal consent decree. One of the cases (involving a bid depository) was tried, and the court found a violation of the law. The state has appealed because it feels the relief granted by the trial court was inadequate. No decision apparently has been rendered in the balance of the civil case.

Most of the cases filed by the state so far involve allegations of price fixing, allocation of customers, or group boycotts. Most of the cases, directly or indirectly, involve sales of products or services to governmental bodies from the following industries: utensils, ceramic tile, real estate brokers, liquid chlorine, concrete blocks, furnishing of testing services, locks, other finished hardware, flowers, and bowling alleys.

There have been several legislative changes since 1959, including the following: injured private parties are entitled to recover treble damages, rather than double damages, and are also entitled to reasonable attorneys' fees. See CAL. BUS. & PROF. CODE § 16750. This section was also amended in 1961 to permit the state, as well as private persons, to bring treble damage actions. The legislature in 1961 also added an exclusive dealing section generally similar to § 3 of the Clayton Act. CAL. BUS. & PROF. CODE § 16712.


5. Some of the more recent literature dealing with state antitrust laws includes the following:


   - New York: N.Y.S.B.A., REPORT OF THE SPECIAL COMMITTEE TO STUDY THE NEW YORK ANTITRUST LAWS (1957); Wilcox, A REPORT BY THE COMMITTEE ON NEW YORK ANTITRUST LAW SYMPOSIUM 186 (1959).


6. For a brief summary of the background of the passage of the early state antitrust laws see Wilson, *The State Antitrust Laws*, 47 A.B.A.J. 160 (1961). Wilson indicates that a Texas legislative committee was among the first to propose a state antitrust statute.
The key provision of the 1889 Texas statute was section 1 which defined a trust as

a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or of either two or more of them, for either, any, or all of the following purposes: First, to create or carry our restrictions in trade; second, to limit or reduce the production, or increase or reduce the price, of merchandise or commodities . . . ; fifth, to make or enter into or execute or carry out any contract, obligation, or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected. 7

The Texas antitrust laws have been amended many times, but the present statute is still similar to the 1889 act. 8

The key provision of the California Cartwright Act, originally passed in 1907, is substantially the same as the above quoted provisions of the Texas act. 9

The key provision of the Ohio antitrust law, the Valentine Act, is also generally similar to the original Texas and California statutes. 10

The basic provisions of the New York law read as follows:

1. Every contract, agreement, arrangement or combination whereby
A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby

Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby

For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void. 11

The key provision of the Wisconsin statute provides:

8. TEX. REV. CIV. STAT. art. 7426 (1960); TEX. PEN. CODE art. 1632 (1953).
10. See OHIO REV. CODE § 1331.01.
(1) Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal. Every combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, to be produced or sold therein or constituting a subject of trade or commerce therein, or which combination, conspiracy, trust, pool, agreement or contract shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in this state, or fix any standard or figure in which its price to the public shall be in any manner controlled or established, is hereby declared an illegal restraint of trade.

Many of the state antitrust statutes now in force are generally similar to the original Texas act. Included in this group of states are Arizona, Florida, Kansas, Michigan, Mississippi, Nebraska, New Hampshire, North Dakota, and Virginia.

The key provisions of the Sherman Act were enacted in 1890 and have not been changed since. Section 1 provides simply:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 2 states:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty of a misdemeanor.

The legislative history of the Sherman Act is a long story. One point, however, is worthy of mention here. One of the first antitrust bills in Congress was introduced by Senator Reagan of Texas in August 1888 and again in December 1889. The key provision of Senator Reagan’s bill is strikingly similar to the 1889 Texas act. Thus, although the provisions of the many state antitrust laws vary considerably, it seems safe to say that their general purpose is the same as that of the federal antitrust laws. This is confirmed by the fact that many of the state statutes, including those of Colorado, Idaho, Louisiana, Maine, and Washington, have provisions incorporating the language of Sections 1 and 2 of the Sherman Act. Based on the review of the cases discussed

17. See Thorelli, supra note 16, at 169, 175.
below, it seems that, as a general rule, the precise wording of the state antitrust statutes has not been a significant factor in determining the outcome of cases.

THE PERSUASIVENESS OF FEDERAL DECISIONS AND STATE ANTITRUST CASES

Some of the states have found federal decisions most persuasive in interpreting state acts. Many California cases have stated that the Cartwright Act merely articulates in greater detail the common law regulating restraints of trade; that the Sherman Act is basically a codification of the common law; and that federal cases, accordingly, are persuasive in determining the meaning of the Cartwright Act.19 The most recent judicial expression of this reliance on federal law by the California courts is found in Shasta Douglas Oil Co. v. Work, where the court stated: "It is well settled that [federal decisions] are authoritative in cases under the Cartwright Act."20 Courts in other states also have relied on federal cases in determining the legality of conduct under their state statutes.21

THE RULE OF REASON IN STATE ANTITRUST LAW

Although section 1 of the Sherman Act states that every restraint of trade is unlawful, the United States Supreme Court has long held that only unreasonable restraints of trade are illegal.22 Certain activities by reason of their nature or character are conclusively presumed to be

18. See 3 TRADE REG. REP. 59 30801 (Colo.), 31502 (Idaho), 32102 (La.), 32202 (Me.), and 35203 (Wash.).
22. Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911). See also Handler, The Judicial Architects of the Rule of Reason, 10 A.B.A. ANTITRUST SECTION REP. 21 (1957); Montague, Per Se Illegality on the Rule of Reason, 12 A.B.A. ANTITRUST SECTION REP. 69 (1958). The classic statement appears in Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918): "Every agreement concerning trade, every regulation of trade, restraints. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."
unreasonable restraints of trade under section 1 of the Sherman Act and are deemed illegal per se.23

Many of the states have applied the "rule of reason" test. California courts have stated that the broad prohibitions of the Cartwright Act "are subject to an implied exception similar to the one which validates reasonable restraints of trade under the Federal Sherman Antitrust Act."24

The key provision of the New York antitrust statute, though not phrased in terms of the Sherman Act, is also general and broad. If the statute were to be interpreted literally, nearly every contract would be found to be an illegal restraint. The New York courts have recognized this and have consistently held that reasonable restraints of trade are legal.25 Similarly, an Ohio court stated that "contracts in restraint of trade are not illegal except where unreasonable in character,"26 and a Wisconsin court has indicated that the rule of reason, as developed in the federal cases, is applicable in applying its statute.27

It is unclear whether the Texas courts purport to apply the rule of reason test. One writer noted that while the statement is occasionally made that "Texas professes to have no rule of reason — the courts in fact have given the Texas antitrust statutes a 'reasonable interpretation.'"28 Subsequent decisions, however, indicate rejection of the rule of reason.29

In summary, it seems likely that, in enforcing the state antitrust laws, most state courts will apply the rule of reason in appropriate cases. Failure to do so could result in declaring many normal and legitimate business arrangements illegal.

PRICE FIXING

Although there may be some question as to what activity constitutes price fixing30 it is clear that agreements which fix prices are

23. In Northern Pac. Ry. v. United States, 356 U.S. 1 (1956), the court noted that price fixing, division of markets, group boycotts, and tying arrangements are practices which the courts have "heretofore deemed to be unlawful in and of themselves."
illegal per se under the federal antitrust laws. States also have given attention to this activity in that there are provisions in most state statutes which specifically outlaw price fixing. Discussed below are some of the cases decided by the courts of five of these states.

California

Prior to the enactment of the Cartwright Act in 1907, price fixing agreements between competitors were illegal if most or all of the members of the industry affected were parties to the agreement. However, in the case of Herriman v. Menzies, a price fixing agreement entered into by a few members of an industry was held to be legal because there was no showing that the prices fixed were unreasonable or that there had been any interference with the freedom of others to engage in the business.

The cases decided since the enactment of the Cartwright Act have held uniformly that price fixing by competitors dominating the industry is illegal. It is not clear, however, whether price fixing is illegal regardless of the absence of market control. The court in People v. Building Maintenance Contractor's Ass'n considered a conspiracy to fix prices entered into by ninety per cent of the industry involved. In holding the conduct illegal under the Cartwright Act, the court stated that the Herriman case was "no longer controlling" because it was decided prior to the Cartwright Act. The court also distinguished Herriman on the ground that the defendants in the Building Maintenance case controlled ninety per cent of the industry, while the defendants in Herriman constituted only a few members of the industry.

New York

With regard to price fixing, the New York courts have found themselves in a dilemma. This dilemma is caused by the legislature's sanctioning of vertical price fixing arrangements between manufacturers and retailers while at the same time invalidating price fixing arrangements on the horizontal level between retailers themselves or among manufacturers. Thus, in Port Chester Wine & Liquor Shop v. Miller Bros.

33. 115 Cal. 16, 46 Pac. 730 (1896).
34. See People v. Building Maintenance Contractor's Ass'n, 41 Cal. 2d 719, 264 P.2d 31 (1953); People v. H. Jevne Co., 179 Cal. 621, 178 Pac. 517 (1919).
35. Supra note 34.
36. Id. at 728, 264 P.2d at 37. If the Cartwright Act "merely articulates in greater detail" the common law rules (see cases at note 19 supra), it is difficult to see why the Herriman case, even though decided prior to the Cartwright Act, would be "no longer controlling."
Fruiterers, Inc., the court permitted a retailer to seek redress against a competing retailer for violation of a vertical price fixing arrangement made with a manufacturer under the New York Fair Trade Act. The ultimate effect of this decision was to allow retailers to compel other retailers to maintain fixed price arrangements even though they cannot initially enter such arrangements.

In John D. Park & Sons Co. v. National W. Druggists Ass’n, an organization of retail druggists formed an association which petitioned manufacturers to adopt a plan whereby all members of the retail association would agree to purchase from the manufacturers at one stipulated price and then sell at another stipulated price. The court held that the plan was not a restraint of trade, as the manufacturers themselves could require said prices. In essence the plan was the creation of an agency relationship in which every druggist throughout the United States might receive and dispose of goods as the agent of the principal and receive a commission. It should be noted, however, that the retailers themselves solicited and achieved the price requirements from the manufacturers. However, in Pleaters, Stitchers & Embroiderers Ass’n v. Jaffe Pleating Co., a membership corporation filed suit against one of its members to recover a fine imposed for selling services at a lesser price than that stipulated in the “basic minimum cost schedule” published by the association. The defendant declared that the basic minimum cost schedule was in contravention of section 340 of the General Business Law. The court found for the defendant, stating that the basic cost schedule was a restraint of trade and interfered with the free activity of determining the price of services to be furnished by the association’s members. The same result was reached in Cline v. Consumers Co-op Gas & Oil Co., wherein the plaintiff sought an injunction to restrain the defendant from selling gas at a price lower than that allowed by the Code of Fair Competition for the oil industry, which was issued pursuant to the National Industrial Recovery Act. After holding that the President of the United States could not gain authority over intrastate commerce, the court then found that the plaintiff and defendant were retailers engaged in intrastate commerce. The court concluded that to allow the organization to restrain the defendant from selling at a lower price than that posted would be clearly in contravention of section 340 of the General Business Law.

38. N.Y. GEN. BUS. LAW §§ 369a-e.
39. 175 N.Y. 1, 67 N.E. 136 (1903).
In Marsich v. Eastman Kodak Co., however, a contract was made between an intrastate producer and a group of dealers, calling for the maintenance of a price scale on the producer's products. The agreement also prohibited the dealers from selling to anyone who violated the price scale or who in turn sold to one who violated the price scale. The court held that this contract did not conflict with section 340. The distinction is that while a manufacturer may require retailers to sell his products for at least X price, he cannot combine with other manufacturers to fix the price of goods at X price. This is the holding of Straus v. The Am. Publishers Ass'n, where ninety-five per cent of the book publishing industry organized to compel retailers to sell books at prices fixed by the publishers. If the retailers failed to conform to the agreement, the publishers would not supply them. The court found this to be a violation of the act.

Ohio

An agreement between two competing companies to pay a specified price for crude oil in a particular area was held illegal in an early Ohio case. Other cases have held that an agreement between a seller and a buyer specifying the price at which the buyer would resell is illegal.

The case of Clover Meadow Creamery v. National Dairy Creamery is worthy of note in that the court indicated that a restraint was illegal because of the effect it had on prices. In this case, an organization of milk distributors had adopted a plan whereby retailers would be able to obtain milk bottles free of charge instead of paying the normal deposit. While such action looked innocent without reference to any other circumstances, the evidence revealed that the association by such tactics would cause the ruination of many distributors who could not afford to sell milk at a reasonable price without requesting a deposit for the bottles. The court felt that the organization was attempting to drive these people out of business and was willing to lose money itself in order to accomplish its end. The court noted that persons in business have the right to join organizations to promote the interests of its members and to discuss pricing problems, but went on to hold that they do not have the right to restrain trade unreasonably. The public is prejudiced when such an organization adopts, as a coercive weapon, business methods

46. 29 Ohio N.P. (n.s.) 243 (C.P. 1932).
which have the inevitable effect of raising the cost of the commodity to the distributor while unreasonably limiting or restricting competition. The obvious effect of such an agreement would be to force an increase in the price of the commodity to the consumer. Thus, although involving an agreement relating to prices, this arrangement really was found to be illegal as one involving a combination to drive a competitor out of business.

**Texas**

Although there are numerous recorded cases in Texas involving the state antitrust laws, there do not appear to be any clear cut cases involving price fixing agreements between competitors. Texas does not have a state fair trade act, and resale price fixing agreements are illegal.47

**Wisconsin**

Price fixing has been held to be illegal in Wisconsin.48 In *State v. Golden Guernsey Dairy Co-op.*,49 the court held that an agreement by milk distributors to sell at specified prices and notify each other of any prospective price changes was illegal.

Resale price maintenance was held to be illegal in a case decided before the advent of the fair trade laws.50 One case involved an association of retail gasoline dealers which sent letters to dealers asking that prices remain stable. Personal visits were made to see that the prices charged were in accord with the desires of the association. The court found an illegal agreement.51

**Refusals to Deal and Group Boycotts**

An agreement between a group of competitors not to deal with a third person is a group or combination boycott and has long been condemned as an unreasonable restraint in violation of section 1 of the Sherman Act. In a recent case, the Supreme Court stated:


48. The Assistant Attorney General of Wisconsin has stated that most antitrust cases involve price fixing violations. He lists as a sample of Wisconsin prosecutions cases involving price fixing in the following enterprises: retail gasoline, dairies, contractors, typewriter manufacturers, a labor union, undertakers, bakers, and chemical companies. He also states that all of these cases resulted in judgments for the state. Sieker, *The Role of the States in Antitrust Law Enforcement — Some Views and Observations*, 39 Texas L. Rev. 873, 878 (1961).

49. 257 Wis. 254, 43 N.W.2d 31 (1950).


51. State v. Retail Gasoline Dealers Ass'n, 256 Wis. 537, 41 N.W.2d 637 (1949).
Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that traders fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality . . . .

A refusal to deal by an individual businessman does not violate section 1 of the Sherman Act because the element of a combination or conspiracy is absent. The act requires two or more persons to enter into an agreement or understanding. An individual refusal to deal, however, may constitute an attempt to monopolize or actual monopolization in violation of section 2 of the Sherman Act. For example, in Lorain Journal Co. v. United States, the Court held that section 2 was violated when a newspaper, as part of a pattern designed to stifle competition, refused to carry advertising by persons who used a competing radio station.

California

In general, the federal rules apply in California. An individual refusal to deal is not by itself illegal. The California courts have emphasized that a seller ordinarily has the right to sell his goods to whom he pleases and to refuse to sell to particular persons. Since California has no statute comparable to section 2 of the Sherman Act, it is difficult to see how any individual refusal to deal could violate the Cartwright Act. Group refusals to deal, however, probably are illegal, at least where they are part of a plan to control an industry.

New York

There has been a substantial amount of litigation in New York regarding refusals to deal. The law in this state is well established that individual refusals to deal are not illegal. An individual refusal to sell

54. See ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 30-36 (1955) for a discussion of the problems involved in determining if two or more persons are present within the meaning of section 1 of the Sherman Act. A corporation and its officers cannot conspire in restraint of trade within the meaning of section 1. See, e.g., Nelson Radio & Supply Co. v. Motorola Inc., 200 F.2d 911, 914 (5th Cir. 1952). More difficult problems are involved, however, when the charge is a conspiracy between a parent and its subsidiary or between two corporations, the stock of which is owned by the same natural persons.
55. 342 U.S. 143 (1951).
is legal even though it is the result of "mere caprice, prejudice or malice," since it is not within the power of the courts to compel an owner of property to sell it "without his consent and against his wishes, to any particular person."\footnote{60}

In one case, \textit{Locker v. American Tobacco Co.,} \footnote{61} it was held that an individual refusal to sell is legal even though the seller controls substantially the whole production or output of a staple produce. Here the court held that the seller could not be deprived of that right "simply because of the magnitude of his business or his wealth."\footnote{62}

The New York cases also make it clear, however, that a concerted refusal to sell by a group of competitors is illegal under the New York antitrust laws.\footnote{63} But a group boycott or a conspiracy to refuse to sell cannot be established merely by claiming that a single manufacturer and his employees refused to sell to the plaintiff. In rejecting a claim that such a "conspiracy" was illegal, the court stated that the act was aimed at agreements between different manufacturers or merchants engaged in a particular business.\footnote{64} The case of \textit{Alexander's Dept Stores v. Ohrbach's,} \footnote{65} presented an interesting question. Ohrbach's and Alexander's were two competing retail stores and were both long time customers of the defendant manufacturer. Ohrbach's finally convinced the manufacturer to cease selling a certain product to Alexander's and to sell it exclusively to Ohrbach's. The court held that the agreement was illegal, and stated that Ohrbach's could not use its superior buying power to eliminate a competitor in this manner.\footnote{66}

\section*{Texas}

Article 7428 of Vernon's Texas Civil Statutes expressly provides that an agreement by two or more persons to refuse to buy or sell to any other person is a conspiracy in restraint of trade. In \textit{Griffin v. Palatine Ins. Co.,} \footnote{67} it was held that an agreement of a group of insurance companies

\begin{itemize}
\item \footnote{60} Lepler v. Palmer, 150 Misc. 546, 550, 270 N.Y. Supp. 440, 444 (Sup. Ct. 1934).
\item \footnote{61} 195 N.Y. 565, 88 N.E. 289 (1909).
\item \footnote{62} Id. at 566, 88 N.E. at 289.
\item \footnote{64} Light Corrugated Box Corp. v. South Craft Corp., 20 N.Y.S.2d 66 (Sup. Ct. 1940).
\item \footnote{65} 266 App. Div. 535, 42 N.Y.S.2d 703, reversing 180 Misc. 18, 40 N.Y.S.2d 631 (Sup. Ct. 1943).
\item \footnote{66} For a contrary holding in federal cases involving a somewhat similar factual situation, see Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir. 1957); Schwab Motor Co. v. Hudson Sales Co., 239 F.2d 176 (4th Cir. 1956).
\item \footnote{67} 238 S.W. 637 (Tex. Comm'n of App. 1922).
\end{itemize}
not to insure a certain person was illegal. The Texas courts have held, however, that an individual manufacturer may refuse to sell to any person. 68

Ohio

No Ohio cases specifically dealing with individual or group refusals to sell were found.

Wisconsin

There appears to be little authority in Wisconsin regarding refusals to sell, either individual or group. In State v. P. Lorillard Co., 69 the court held an arrangement between tobacco manufacturers and jobbers illegal. The arrangement involved a conspiracy to regulate prices and to refuse to sell to those who would not maintain the prices.

Exclusive Dealing Contracts

The usual exclusive dealing contract requires the purchaser to buy all of his needs from the seller, with the result that the purchaser cannot deal with the seller's competitors. Under the federal antitrust laws, exclusive dealing and tie-in agreements generally are governed by section 3 of the Clayton Act, 70 which makes such contracts illegal where the effect "may be to substantially lessen competition or tend to create a monopoly." The principle issue in federal cases involving section 3 is whether the agreements have the requisite anti-competitive effect. Numerous tests have been suggested, but all of them involve an element of "substantiality." 71

Except for the recent California statute noted below, none of the five states have a statute comparable to section 3 of the Clayton Act.

Texas

The treatment of exclusive dealing contracts has an interesting history in Texas. Article 7428 of the Texas Civil Statutes provides that it is illegal for two persons who engage in selling any commodity to refuse to

69. 181 Wis. 347, 193 N.W. 613 (1923).
sell to any other person.\textsuperscript{72} In an early case, \textit{Wood v. Texas Ice & Cold Storage},\textsuperscript{73} the court held illegal under article 7428 a contract that required the buyer to purchase all of his requirements of ice from the seller. There was no showing of a lessening of competition or any undue restraint of trade. Thus, the court in this case outlawed all requirements contracts regardless of effect so long as the buyer expressly or impliedly agreed not to handle the competing products.\textsuperscript{74}

In \textit{Cox v. Humble Oil and Ref. Co.},\textsuperscript{75} the above rules were modified in a significant way. In this case, a retail gasoline dealer agreed to purchase from one seller all of the gas used by him at his filling station. The court held the agreement to be legal, finding the \textit{Wood} case distinguishable. The court stated that the buyer in \textit{Wood} agreed to buy all of the ice needed from the seller; in the \textit{Cox} case, the court stated that the buyer agreed to purchase all of his requirements needed at the filling station, but the buyer was free to purchase gas from others for other uses. This was deemed to be a limited restraint and hence valid.\textsuperscript{76} In \textit{Jones Inv. Co. v. The Great Atl. & Pac. Co.},\textsuperscript{77} the Texas courts demonstrated how far they will go to import the concept of limiting restraints into a case to save a requirements contract. In the \textit{A. & P.} case, the court held that a contract to purchase all of a commodity needed in a chain of grocery stores was not a general restraint because the buyer could purchase from someone else for stores built in the future or for stores not covered by the contract. A Texas court has applied the same distinction to a contract in which the seller agreed to sell all of the products produced at the seller's plant to one buyer.\textsuperscript{78}

\textit{State v. Fairbanks-Morse & Co.}\textsuperscript{79} was decided shortly thereafter. In this case, the state contended in effect that an agreement whereby a buyer

\begin{footnotes}
\item[72.] Tex. Rev. Civ. Stat. art. 7428 (1960) provides in part:

"Either or any of the following acts shall constitute a conspiracy in restraint of trade:

"1. Where any two or more persons, firms, corporations or associations of persons, who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation or association of persons, any article of merchandise, produce or commodity."

"2. Where any two or more persons, firms, corporations or associations of persons, shall agree to boycott or threaten to refuse to buy from or sell to any person, firm, corporation or association of persons for buying from or selling to any other person, firm, corporation or association of persons."

\item[73.] 171 S.W. 497 (Tex. Civ. App. 1914).
\item[74.] Wright v. Southern Ice Co., 144 S.W.2d 933 (Tex. Civ. App. 1940).
\item[75.] 16 S.W.2d 285 (Tex. Comm'n of App. 1929).
\item[77.] 65 S.W.2d 495 (Tex. Comm'n of App. 1933).
\item[78.] Portland Gasoline Co. v. Superior Mkting. Co., 243 S.W.2d 823 (Tex. 1951). An agreement to buy all the butane-protane mixture produced at the seller's plant (but only at that plant) was a "limited" restraint and not illegal.
\item[79.] 246 S.W.2d 647 (Tex. Civ. App. 1952).
\end{footnotes}
(a consumer) would purchase all of its requirements of certain products from one seller was illegal. The state relied on the *Wood* case, but the court stated that it has been "severely limited if not actually overruled" by the *Cox* decision and similar cases. In holding that the agreement was not illegal, the court stated that it was not within the scope of article 7428 because that section requires two concerns "both of whom are engaged in buying or selling..." Thus, an exclusive dealing contract does not appear to be within the scope of article 7428. The question of whether such a contract is within the purview of some of the other provisions of the Texas antitrust laws will not be treated in this article.

A more recent case, *Turner v. Rhea*, returned to a holding of illegality. In this case, the contract provided that the seller would sell a number of chinchillas to the buyer, who agreed "not [to] offer for sale, trade or exchange animals from sources" other than the seller. In holding the agreement to be illegal, the court noted that there was "no limitation as to place or time, and... that appellant is by the contract forever restricted..." with respect to purchasing chinchillas from others. The court concluded that the *Fairbanks* case was not controlling and described that decision as holding that "no violation occurred when the purchaser is the 'ultimate consumer' of the commodities sold..." The above cases indicate one of the rare instances in which form, rather than substance, affects the outcome of an antitrust case. As a practical matter, a "limited" restraint of the type referred to above is the same as a general restraint. It may be that a limited restraint to be valid can cover only stores or outlets owned by the buyer at the time of the contract. If one were careful in drafting the contract and made sure that he did not state that the buyer could not handle competing products, the contract would be valid.

**New York**

The only New York case which appears to deal with arrangements of the type covered by section 3 of the Clayton Act involved an agreement whereby a landlord in a summer recreation area required his tenants to purchase all supplies from him or other tenants in the area. The court held the agreement to be a reasonable way to protect the tenants in this summer colony and upheld it.

80. *Id.* at 657.
81. *Ibid*.
83. *Id.* at 231.
84. *Ibid*.
Ohio

One Ohio case upheld an agreement between a lessor and a lessee whereby the latter agreed not to sell any beer on the leased premises other than that which was made and sold by the lessor.\(^{86}\)

Wisconsin

A number of Wisconsin cases have considered exclusive dealing contracts. An agreement by a retailer to purchase all of his ice cream and other dairy products from one manufacturer was upheld in *Wisconsin Creameries, Inc. v. Johnson.*\(^{87}\) A similar result was reached in cases involving patterns and beer.\(^{88}\) However, where an exclusive dealing contract is merely a part of an overall combination in restraint of trade, the agreement is illegal if the combination is found to be illegal.\(^{89}\)

California

There are a number of California cases which have considered the legality of exclusive dealing contracts. All of these cases, however, were decided prior to 1961 when California enacted a provision substantially similar (except for commerce requirements) to section 3 of the Clayton Act.\(^{90}\) But it is too early to tell exactly how this new provision will be interpreted by the California courts. Prior to the enactment of this statute, exclusive dealing contracts were held legal or illegal,\(^{91}\) depending on the circumstances.

Exclusive Territorial Arrangements

The federal antitrust cases clearly distinguish between exclusive *dealing* and exclusive *territorial* contracts. Under the usual exclusive dealing contract, the buyer agrees, expressly or impliedly, that he will not handle products which are competitive with those obtained from the seller. The

\(^{86}\) Chris-Diehl Brewing Co. v. Konst, 79 Ohio St. 469, 87 N.E. 1137 (1905).

\(^{87}\) 208 Wis. 444, 243 N.W. 498 (1932).

\(^{88}\) Rose v. Gordon, 158 Wis. 414, 149 N.W. 158 (1914); Butterick Publishing Co. v. Rose, 141 Wis. 533, 124 N.W. 647 (1910).


\(^{90}\) CAL. BUS. & PROF. CODE § 16723.

\(^{91}\) The following cases held such arrangements to be legal: Great W. Distillery Prods. Inc. v. John A. Wathen Distillery Co., 10 Cal. 2d 442, 74 P.2d 745 (1947); Associated Oil Co. v. Myers, 217 Cal. 297, 18 P.2d 668 (1933); Rolley Inc. v. Merle Norman Cosmetics, Inc., 129 Cal. App. 2d 844, 278 P.2d 63 (1954). Cases holding such arrangements illegal are: Getz Bros. & Co. v. Federal Salt Co., 147 Cal. 115, 81 Pac. 416 (1905) (where the agreement was apparently part of a plan to monopolize an industry); Coombs v. Burk, 40 Cal. App. 8, 180 Pac. 59 (1919).
legality of such contracts is usually determined under section 3 of the Clayton Act.\textsuperscript{92} In the usual exclusive territorial arrangement, the seller agrees to sell only to the buyer in a specified territory and not to others in the territory. Thus, the restraint is on the seller. In many cases, a contract contains both restrictions. The legality of an exclusive territorial arrangement generally is determined under the Sherman Act; it is not within the scope of section 3 of the Clayton Act.

In the absence of power to control the market, an exclusive territorial arrangement generally is held to be legal under California law.\textsuperscript{93} However, if the exclusive territorial arrangement is part of a plan to give a person a monopoly in the area involved, and the parties have substantial market control of the product, the arrangement is illegal in California.\textsuperscript{94} The rules are similar under the federal antitrust laws.\textsuperscript{95}

There appear to be very few cases in New York, Ohio, or Wisconsin involving this type of arrangement. One lower New York court upheld such arrangement. In \textit{Revlon Prod. Corp. v. Bernstein},\textsuperscript{96} the manufacturer sold to retailers and jobbers under contracts limiting the jobbers to a specific territory and limiting their right of resale to beauty parlors and beauty schools. Defendant, a retailer, knowing of the contract, induced the jobber to sell to him. Plaintiff sued for injunctive relief and damages for inducing the breach of contract. The defendant moved to dismiss on the grounds that the contract between the manufacturer and jobber was an illegal restraint of trade. The motion was denied, the court holding that a provision restricting a jobber to sell within allotted territory does not restrain trade.

One Ohio court held such an arrangement to be legal. In \textit{Federal Sanitation Co. v. Frankel},\textsuperscript{97} the contract granted exclusive selling rights in two states and two cities in other states, and provided that the salesmen should neither engage in other business nor aid any competitors' business within the territory assigned for a period of twelve months after the termination of his employment. The court, however, found no restraint of trade in this case. The contract, therefore, could be enforced

\textsuperscript{92} See page 21 \textit{supra}. (Section re exclusive dealing contracts.)
\textsuperscript{94} Moczy v. Paladini, 187 Cal. 727, 203 Pac. 760 (1922); Santa Clara Valley Mill & Lumber Co v. Hayes, 76 Cal. 387, 18 Pac. 391 (1888).
\textsuperscript{95} ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 29 (1955). Compare White Motor Co v. United States 372 U.S. 253 (1963), which involved a specific agreement by the distributor not to sell to persons outside the disputed territory.
\textsuperscript{96} 204 Misc. 80, 119 N.Y.S.2d 60 (Sup. Ct. 1953).
\textsuperscript{97} 34 Ohio App. 331, 171 N.E. 339 (1929).
with an injunction so long as it was supported by sufficient consideration, the terms were not oppressive, and the restraint was only partial.

No Wisconsin cases dealing with this subject were located.

Texas courts appear to have ruled on exclusive territorial agreements more than any other type of arrangement, and they have uniformly held such contracts to be illegal, regardless of the circumstances.

A 1919 case, American Brewing Ass'n v. Woods, 98 involved an exclusive distributorship arrangement for the city of Orange, Texas. There had been a previous distributor for the Association in Orange, but he was indebted to the group for $2400. Woods agreed to pay off the debt, and in exchange the Association agreed to have him act as the exclusive distributor in Orange. The size of the operation is indicated by the fact that Woods had one wagon, one horse, and employed one man. Woods sued to recover damages for breach of the agreement when the Association started selling to another distributor. The parties described Woods as an "agent," and most of the opinion was devoted to the question of whether Woods was an agent or a distributor. After concluding that Woods was not an agent, the court held the predecessor section to article 7428 applicable and the agreement illegal, stating that the transaction falls "literally within the language of the statute," and that the court is "not concerned with the policy of the law." 99 Numerous subsequent cases have reached the same result. 100

In Grand Prize Distrib. Co. v. Gulf Brewing Co., 101 a Texas court again held such an arrangement (involving most of one county) illegal. The appellant argued that the Woods case and other similar cases are no longer applicable and, citing Cox v. Humble, 102 urged that Texas now follows the so-called 'rule of reason test' in restraint of trade cases. The court rejected this contention, found the prior cases are squarely in point, and stated it was the court's "plain duty to follow them." 103

In the recent case of Climatic Air Distrib. v. Climatic Air Sales, 104 the Texas Supreme Court appears to have confirmed the old rule. Here the seller argued again that the rule of reason should be applied. The

99. Id. at 450-51.
104. 162 Tex. 237, 345 S.W.2d 702 (1961).
Hanson & von Kalinowski, *State Antitrust Laws*

The court interpreted this to mean that evidence should be admitted to see "whether in fact competition has been restricted." The court rejected this argument by stating that it was overruled in the *Grand Prize* case and that "we adhere to that decision."105

**Mergers**

Mergers under federal law are governed primarily by amended section 7 of the Clayton Act. The acquisition by one corporation of the stock or assets of another corporation is illegal under this section where the "effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."108 The general purpose of section 7 is to prohibit mergers or acquisitions which are economically significant and which may have a substantial adverse effect on competition. The legislative history shows that the purpose of amended section 7 was to "cope with monopolistic tendencies in their incipiency, well before they have attained such effects which would justify a Sherman Act proceeding."107 In short, the purpose is to "nip monopoly in the bud."108

Both the Department of Justice and the Federal Trade Commission have challenged a number of mergers since the 1950 amendment. The crucial but difficult issue in almost all of the merger cases is whether the requisite adverse effect on competition results.

The recent United States Supreme Court decisions indicate that section 7 is interpreted in such a manner as to prohibit a substantial number of mergers.109

During the past ten years it seems clear that both the Department of Justice and the Federal Trade Commission have devoted a substantial part of their time and effort to merger cases. The states, on the other hand, apparently have not brought any actions in the recent past challenging the legality of mergers.

There apparently have been no Ohio or Wisconsin cases of any kind involving the legality of a merger.

There are few California cases, however, which deal with this problem. The superior court in *People v. American Sugar Ref. Co.*,110 held that the defendant violated the common law by combining with a

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105. *Id.* at 243-44, 345 S.W.2d at 706.
110. 7 RAILWAY & CORPORATION L.J. 83 (1890). The California Supreme Court, however, reversed an order appointing a receiver of the property. Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac. 121 (1890).
"Sugar Trust" which controlled the major sugar companies in the United States. The case of San Diego Water Co. v. Flume Co.\textsuperscript{111} involved the legality under common law of what was in substance a merger of a company which owned a supply of water near San Diego and a company which owned a pumping plant and a system of mains and pipes for the distribution of water in San Diego. The court held the agreement legal because there was no injury to the public. The city could protect the public by regulating water rates.

Article 7427 of the Texas Revised Civil Statutes appears to be broad enough to cover mergers where the effect "tends to affect or lessen competition."

The court in San Antonio Gas Co. v. State\textsuperscript{112} held that a merger of the gas and electric companies in San Antonio violated the Texas antitrust laws.

One early New York case held that the New York antitrust laws are little more than a codification of the common law, and there is nothing in them to affect or limit acquisitions of the stock of one corporation by another.\textsuperscript{113} Another New York case, however, in ruling on a preliminary matter, held that the acquisition by one corporation of the stock of another corporation for the purpose of creating a monopoly would be illegal under the antitrust laws.\textsuperscript{114}

**Summary of Nature of State Antitrust Decisions**

The authors have not attempted to review all of the antitrust cases in the five states nor have they considered each of the cases dealing with the above discussed practices. However, a few generalizations might be suggested:

1. As might be expected, the states' decisions like the federal decisions hold ordinary price fixing agreements to be illegal.

2. Insofar as individual refusals to deal and group boycotts are concerned, the state decisions, although not numerous, generally are consistent with federal law.

3. The Texas courts have been particularly harsh in their treatment of exclusive dealing contracts and exclusive territorial contracts. The law in Texas contrasts quite sharply with the decisions in the other states and with federal decisions where legality turns on purpose and effect.

4. None of the states have shown any interest in mergers, while

\begin{itemize}
\item \textsuperscript{111} 108 Cal. 549, 41 Pac. 495 (1895).
\item \textsuperscript{112} 22 Tex. Civ. App. 118, 54 S.W. 289 (1899).
\item \textsuperscript{114} People ex rel. Morse v. Nussbaum, 32 Misc. 1, 66 N.Y. Supp. 129 (Sup. Ct. 1900), aff'd, 168 N.Y. 89, 61 N.E. 118 (1901).
\end{itemize}
the federal government has shown a substantial interest in this practice particularly during the past ten years.

5. Any substantial inconsistency between the state and federal antitrust decisions seems to stem primarily from the decisions in Texas, particularly those dealing with exclusive dealing contracts and exclusive territorial arrangements.

6. Activities considered illegal per se under the federal antitrust laws have been held or undoubtedly would be found illegal under the various state antitrust laws.

IS A UNIFORM STATE ANTITRUST LAW DESIRABLE?

The renewed vigor which has been demonstrated by the various state enforcement agencies, coupled with the multitude of state antitrust statutes, brings into sharp focus the question of whether there should be a uniform state antitrust law.

Any analysis of the problem must first start with a consideration of the basic objectives of antitrust laws. It has been said that "antitrust is a distinctive American means of assuring the competitive economy on which our political and social freedom under representative government in part depends." The economy of the United States is one essentially based upon the free enterprise system. Access to the market place and the fostering of market rivalry are basic tenets of economic organization. Antitrust is thus concerned with the promotion and protection of competition as a matter of public policy.

Fundamentally, our basic antitrust policy, as interpreted by the Supreme Court in *Northern Pac. Ry. v. United States*, rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

It is erroneous to say, however, that antitrust policy is oriented toward a single goal. On the contrary, as Kaysen and Turner said:

Antitrust policy may serve a variety of ultimate aims. We can divide the aims against which any policy proposal may be tested into four broad classes: the attainment of desirable economic performance by individual firms and ultimately by the economy as a whole; the achievement and maintenance of competitive processes in the market-regulated sector of the economy as an end in itself; the prescription of a standard of business conduct, a code of fair competition; and the prevention of an undue growth of big business, viewed broadly in terms of the distributions of power in the society at large.

How best are these aims to be achieved? The answer to this might be found in posing a threshold question. Is there a need for state antitrust laws at all? As our study has indicated, most state statutes were enacted years ago before expansion of the commerce power took place. Until recent years, state antitrust laws have received little attention while, on the other hand, federal law has been developing at an outstanding rate. Its influence has been felt strongly in all walks of our economic life.  

The scope of the federal law cannot be underestimated. It could be said that the present pervasive application of federal law leaves little reason for state antitrust laws; and that the instances in which state antitrust regulation will conflict with federal provisions will increase. Several additional arguments also have been advanced for removing antitrust from the states. These arguments run somewhat as follows: (1) The experience and capabilities of the federal judiciary and enforcement agencies, developed during the period of state inactivity, suggests that federal laws are better equipped to achieve the results that are being sought; (2) the private treble damage does not suffer since a treble damage action usually is available under the federal law no matter how local the restraints; (3) the state can recover for damages to the public under federal law; (4) exclusion of state control would eliminate the problem of double penalties in dual prosecution.  

We believe that reliance upon the pervasive scope of federal law as a reason for abrogating state antitrust law is unfounded and ill-advised.  

118. In recent years, the emphasis has moved from monopoly to mere attempt or intent to monopolize; from domination of the market or power to control the market to "not an insubstantial amount of commerce" or "any insignificant percentage of the business involved." In the case of tie-in contracts, the standard of illegality is whether the seller "has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product," and that crucial economic power may be inferred from the tying product's desirability to consumers, or from uniqueness in its attributes.  

In the field of resale price maintenance, a seller may announce in advance a refusal to deal with those persons who do not observe his suggested prices. But if the seller should go beyond this mere announcement and employ other means which effect adherence to resale prices, he has violated the law. These forbidden other means can take the form of soliciting assurances from the customer or inducing wholesalers to cut off a price-cutting retailer.  

And in the area of product pricing, a seller is now forbidden to reduce his price even to a small customer to enable that customer to meet the competition of a price-cutting competitor, irrespective of whether the poor customer eventually may be driven out of business; to do so "would discourage rather than promote competition." The seller's only remedy in that instance is to reduce his price equally to all competing dealers. A seller can take heart, however. "In cases in which the economic facts so indicate, carefully drawn area submarkets may be the proper measure of competitive impact among purchasers." Federal Trade Comm. v. Sun Oil Co., 371 U.S. 505, 521 (1963).  

Likewise, sales below cost without legitimate commercial objectives and with the intent of destroying competition or eliminating a competitor violates § 3 of the Robinson-Patman Act. In a recent case, United States v. National Dairy Prod. Corp., 372 U.S. 29 (1963), the Supreme Court gave some examples of legitimate objectives "such as liquidation of excess, obsolete or perishable merchandise, or the need to meet a lawfully equally low price of a competitor."  

119. See Comment, 61 COLUM. L. REV. 1469, 1494-95 (1961), where the problems posed by the renewed interest in state antitrust enforcement were reviewed.
Although it is said that Congress used all of its power to reach restraints affecting interstate commerce, there are areas of restraints it did not reach. Thus, in recent years, the Sherman Act has been held inapplicable to situations involving a conspiracy to exclude competition in the operation of local taxicabs; a combination of plastering contractors and employees to allocate and monopolize plastering contracts in Chicago; a price fixing combination of drive-in theatres; and a combination to drive a newspaper engaged in legal advertising out of business.

As one court recently observed:

However, despite the increased thrust of federal commerce power as business operations become more interrelated and complex, the courts have consistently required that in order for federal antitrust jurisdiction to be sustained the effect on interstate commerce of an alleged antitrust violation in a local area must be direct and substantial, and not merely inconsequential, remote or fortuitous.

There are numerous local activities which still are beyond the reach of federal law; such as those involving the local rendition of services, i.e., real estate brokers, dry cleaning establishments, building trades, local printing, and the like. Moreover, even as to those cases which theoretically are within the reach of federal law, federal agencies have admitted that they cannot deal comprehensively with the problem.

The argument that federal courts and enforcement agencies are better equipped to achieve the objectives of antitrust laws is not persuasive. Whether the federal enforcement agencies have the expertise which has been attributed to them is open to question. More important, however, there is a diversity of local economic conditions and business problems existing in many of the states, and the states are better equipped to deal with local questions than are their federal counterparts.

The real deficiency in state antitrust law does not lie in inadequacy or lack of expertise of the enforcement authorities, but in whether the state really wants an antitrust law at all. As Professor Rahl recently pointed out:

120. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 558 (1944); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).
123. United States v. Starlite Drive-In, Inc., 204 F.2d 419 (7th Cir. 1953).
125. Id. at 332.
The most important suggestion may be made at the outset very quickly. It is that for most of the states which now have a law, however antique it may be, a resolution of the legislature directing the Attorney General to enforce it and appropriating some money for that purpose would mean more than a carload of new substantive provisions. For the basic deficiency now is not lack of an ideal statute, but lack of a decision as to whether the state really wants any antitrust law at all.127

This is the real key to the problem. The authors believe that state antitrust laws are desirable to carry out basic antitrust policy, that state antitrust can form an integral part of overall antitrust policy, and that federal law alone is not equal to the task.

This brings us back to the question initially propounded. Should there be a uniform state antitrust act?

Analysis of the various statutes demonstrates that many of them use antiquated language such as “pools” and “trusts,” are verbose, and are riddled with archaic passages. Nevertheless, to some degree there are discernible common threads. Most of them outlaw price fixing, allocation of markets, limitation of production, group boycotts, and other commonly recognized anti-competitive restraints. The case law that has developed on these subjects has been surprisingly good overall and fairly uniform in approach. These factors provide a sound basis or starting point for a uniform law.

The authors believe that not only is there a need for a uniform law, but that one would be desirable. At the moment, there are 153 state statutes which can be characterized as antitrust in nature. Many of these statutes deal with such complex economic issues as mergers, exclusive arrangements, and price discriminations. The mistakes of federal laws have been parroted in their state counterparts. Repeated again is the strangulation of basic antitrust objectives by the soft competition concepts espoused in the Robinson-Patman Act. The recent Hawaiian statute is a striking example of this businessman’s nightmare.

The renewed vitality of state antitrust enforcement already has begun to develop inefficient duplication of effort by federal and state authorities, with dual investigation and prosecution of the same persons for the same acts.128 The burden on the businessman will increase and he will be required to operate at his peril, dependent upon the peculiarities of various state statutes and the whims of enforcement officials.

Even more important, the basic objectives of antitrust law are in serious danger of being frustrated, and our national economy may be gravely affected if the states should turn their enforcement guns on complex economic areas.

The adoption of a uniform state antitrust act will abate these dangers. Obviously, we cannot expect Utopia. The authors recognize that there are inherent difficulties in a proposed uniform act of this nature. There is the question of accommodation between federal and state authorities. This is particularly difficult because of dual enforcement within the federal scheme by the Department of Justice and the Federal Trade Commission. This problem at least can be partially solved by close cooperation between federal and state authorities in developing areas of prime responsibility. Basic guidelines could be laid down. Cooperation between federal and state authorities already has been initiated within the existing structure of the laws.\textsuperscript{129} There is no reason why this could not be expanded.

Another inherent difficulty is that of uniformity of enforcement and approach. This question could be asked. How can a single law handle widely varying conditions in some fifty states? The authors' analysis of state antitrust decisions has demonstrated that this problem is more theory than reality. It has been noted that there is no substantial inconsistency between state and federal antitrust decisions, except those decisions emanating from the state of Texas relating to exclusive dealing and exclusive territorial arrangements. There exists no reason why a simple uniform law would change this pattern. Indeed, if the uniform law were to exclude exclusive dealing and exclusive territorial arrangements — and the authors urge that it do so — then the inconsistency which now exists would be removed.

This raises the question as to what the uniform law should include. In general, it is felt that the law should have as its main thesis the outlawing of the traditional per se type of offenses, i.e., price fixing, group boycotts, allocation of markets, and production control. As to other restraints, it should retain the flexibility of the rule of reason. It should not include the types of offenses found in Clayton Act or Robinson-Patman Act. The act should provide adequate investigatory and remedial powers.

As to investigatory powers, it is felt that, at maximum, the uniform act should provide a provision comparable to the federal civil investigatory demand and limited to compelling the production of documents of persons under investigation.

With respect to remedial powers, the authors recommended that: (1) any provision dealing with forfeiture of the charter of a corporation found to have violated the law be discretionary; (2) that it provide for civil sanctions in lieu of criminal sanctions; and (3) that treble damages to injured private persons be discretionary instead of mandatory.

Within the above framework an effective state antitrust act can be drafted, one that would remove the businessman's burden of compliance with ambiguous, verbose statutes and inform him of the line of conduct that is forbidden.

State antitrust law stands at a crossroad. It can assume a responsible role in our federal system of government and become an integral part of our overall antitrust policy, or it can proceed along the road of confusion and darkness. It has the opportunity to benefit from the experience of the past and to help shape the road of antitrust law for the future. As Mr. Justice Holmes once said:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious . . . have had a good deal more to do than the syllogism in determining the rules by which men should be governed.\(^{130}\)

To paraphrase the words of Holmes, antitrust law has had the experience of important segments of our economic life. It is time to take advantage of that experience.

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