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The Valentine Act

Ritchie T. Thomas

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the above statutes constitutes an unfair trade practice. The only plausible explanation is that attorneys in Ohio are not cognizant of this possible cause of action. If attorneys throughout the state can be inculcated to its potentialities, this section should take its rightful place as a major weapon against unfair competition. The illegitimate businessman will be less anxious to embark on a policy of unfair trade practice if he knows that this section probably will be used against him. Of course, active enforcement also would reduce substantially the evils resulting when businessmen violate penal statutes to gain a competitive advantage. It is submitted that both the use of section 1.16 and active enforcement procedures are reasonable and necessary weapons which should and must be used if unfair trade practices are to be eliminated.

NEIL B. KURIT

The Valentine Act

A search of Ohio's legal arsenal for weapons to combat unfair trade practices would be incomplete if it failed to discover the Valentine Act, Ohio's antitrust statute. One of a number of state-enacted contemporaries of the Sherman Act, the Valentine Act was designed to blanket the area of intrastate commercial activity not reached by federal legislation. In 1898, this area appeared to be of greater scope and thus of more import than at present. Yet even in the period immediately following its enactment the Valentine Act seldom was applied.

Recently, the Valentine Act has been ignored almost completely. Attempting to disclose whether the act has present value, the author will review its provisions and the record of its interpretation and enforcement. This completed, the future of the act will be considered.

Jurisdiction of the Valentine Act

Congress accorded the Sherman Act a scope as broad as its constitutionally derived powers permitted. For the statute was made applicable to conspiracies in restraint of "trade or commerce among the several
States . . . .” At a time when the power to regulate interstate commerce was not thought so extensive as now, there appeared need for state antitrust regulations to complement those of the national government. Presently, however, the federal power is exercised in almost every sphere of commercial activity. This development would seem to suggest that state antitrust laws have no value.

Yet the conclusion would be unwarranted, as federal activity in the antitrust field does not preclude state activity. Perhaps states may not deal directly with combinations which monopolize and restrain interstate or foreign trade and commerce exclusively. Since the Sherman Act is not exclusive, however, state legislatures have the power to enact statutes intended to protect state trade and commerce, and, therefore, have the right to enact antitrust statutes to operate within their own jurisdictions.

The extent to which a state may exercise control over combinations which have some tie with interstate commerce is not completely clear. Apparently, a state antitrust statute is not invalid because it affects interstate commerce incidentally. Thus, it seems that federal and state antitrust laws have concurrent jurisdiction; and, in some instances, a single contract in restraint of trade may be offensive to both and therefore subject to dual restraint. For example, the subject-matter of a transaction either has been imported from outside the state or is initially intrastate

6. Populist agitation for antitrust measures provided some of the drive behind the movement to enact state antitrust statutes. Wilson, The State Antitrust Laws, 47 A.B.A.J. 160 (1961). The movement was stimulated by the Supreme Court’s holding that manufacture was not commerce. United States v. E. C. Knight Co., 156 U.S. 1 (1895).
7. See Hadley Dean Plate Glass Co. v. Highland Glass Co., 143 Fed. 242 (8th Cir. 1906).
8. Grenada Lumber Co. v. Mississippi, 217 U.S. 433 (1910); Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 (1909); Wessell v. Timberlake, 95 Ohio St. 21, 116 N.E. 42 (1916).
10. This subject cannot be given the extended treatment it deserves in this article. See generally N.Y.S.B.A., op. cit. supra, note 3, at 53a; Annot., 24 A.L.R. 787 (1923). Perhaps significant contacts with the combination will justify state control.
12. Standard Oil Co. v. State, 107 Miss. 377, 65 So. 468 (1914); State v. Southeast Tex. Chapter of Nat’l Elec. Contractor’s Ass’n, 358 S.W.2d 711 (Tex. Civ. App. 1962), cert. denied, 372 U.S. 969 (1963). Cf. State ex rel. Hogan v. Hocking Valley Ry., 8 Ohio App. 450 (1917). In this case, stocks in coal companies and a competing railroad had been disposed of by defendants under an order by a United States District Court because they had been held in restraint of interstate competition. The state, however, was entitled to have the dissolution made permanent as to intrastate traffic and to have supervision over the future conduct of defendants in respect thereto.
13. See Standard Oil Co. v. State, 107 Miss. 377, 65 So. 468 (1914). Contracts to purchase goods from outside the state for resale at stipulated prices within the state, whereby the purchaser agreed to buy goods only from that particular seller, have been held subject to state antitrust laws, as have contracts which restrict the seller. Fuqua v. Pabst Brewing Co., 90 Tex.
in character and later enters the stream of interstate commerce. Such an occurrence does not necessarily remove the transaction from the reach of the state antitrust law. As the volume of intrastate commercial activity is not inconsiderable, a significant area is subject to the mandates of the state.

Still, the range of the Valentine Act is restrained by traditional notions of jurisdiction, as well as by the Constitution. It obviously can have no extraterritorial operation. However, as the Valentine Act individually proscribes acts and contracts in restraint of trade, it has been held applicable not only to contracts and acts restraining trade within the state, but also to contracts which, although formulated outside the state, have an effect within it. Furthermore, it has been applied to contracts having their monopolistic effect outside the state although made in Ohio. The act's generalized terms might seem to give it an even broader area of applicability, but this is the realistic limit of its influence.

There is some similarity between the jurisdictional provisions of the federal antitrust statutes and those of the Valentine Act. The courts are not bound in either case by unusual territorial limitations. Under the Ohio Act, a summons may issue in any county, while the federal summons may issue in any district. But the Sherman Act is national in scope with attending greater power to bring before the court all parties to a widespread conspiracy, while the Valentine Act applies only in Ohio.

**CONTENT OF THE VALENTINE ACT**

**Prohibitions**

Could the Valentine Act be distilled to an essence, it would be a statement that combinations and acts in restraint of trade are illegal, and compacts designed to further their illegal ends are void. The provisions of the Valentine Act are quite detailed, however, unlike the simple statement of the Sherman Act. In the Ohio act, a trust is said to be unlawful...
ful and void. But in this instance the legislature meant more by "trust" than its ordinary meaning. It is defined in the Valentine Act as a combination of capital, skill, or acts by two or more persons for any of a number of unlawful purposes. Among those purposes are: (1) to effect restrictions in trade or commerce; (2) to reduce the production, or alter the price of merchandise or a commodity; (3) to prevent competition in the manufacture, transportation, sale, or purchase of merchandise or a commodity; (4) to fix or control the price of merchandise or a commodity intended for public sale, use, or consumption; (5) to contract or agree not to sell or transport an article or commodity for a price below a fixed value, or to maintain the price at a fixed or graduated figure so as to preclude free competition, or to pool interests connected with the sale or transport in order to affect its price. Such combinations are declared unlawful conspiracies against trade, and, in a different section of the act, contracts designed to bring about or further them are termed "void."

While they are more explicit, the substance of these Valentine Act provisions is comparable to that of the federal antitrust law. Although "monopoly," specifically treated by the Sherman Act, is mentioned by name but once in the Ohio act, judicial construction has included both "monopoly" and "a tendency to monopolize" within the ambit of its proscriptions. The Valentine Act also is similar to the Sherman Act because both acts specifically proscribe acts which restrain trade and contracts designed to effect a restraint.

Ohio L. Abs. 231 (Ct. App. 1934), however, the Valentine Act was said to be patterned after the Sherman Act and the interpretation placed upon it by the federal judiciary.

21. OHIO REV. CODE § 1331.01.
22. OHIO REV. CODE § 1331.01(B). OHIO REV. CODE § 1331.01(A) defines "person" to include corporations, partnerships, and associations, foreign and domestic.
23. OHIO REV. CODE § 1331.01(B) (1).
24. OHIO REV. CODE § 1331.01(B) (2).
25. OHIO REV. CODE § 1331.01(B) (3).
26. OHIO REV. CODE § 1331.01(B) (4).
27. OHIO REV. CODE § 1331.01(B) (5).
28. OHIO REV. CODE § 1331.04.
33. OHIO REV. CODE § 1331.01(B).
34. OHIO REV. CODE § 1331.06.
The broad mandate of the Valentine Act has been somewhat qualified by exceptions, both legislative and judicial. In the Ohio Fair Trade Law, the legislature expressly exempted certain vertical price-fixing and resale price maintenance agreements from the prohibitions imposed by the antitrust statute. Other arrangements violating the literal terms of the Valentine Act are permitted by the courts if they are "reasonable." Similarly, the "rule of reason" governs the application of federal antitrust laws by federal courts. Also exempt from the Sherman Act, as from the Valentine Act, are certain qualified resale price maintenance agreements. The federal McGuire Act makes such agreements legal under federal antitrust statutes if a resale price maintenance agreement is legal in the state where the product is sold.

There are still other exceptions to the federal antitrust laws, only some of which have companion exceptions in Ohio. Agricultural cooperatives, some expressly regulated industries, and organized labor are exempted from proscription by federal antitrust law. These are not all, at least to the same degree, made exempt from the proscriptions of the Valentine Act. Nor does Ohio have a general price discrimination provision or a general "sales below cost" provision. Ohio legislation in these areas is limited to a special provision in the Valentine Act relating to price discrimination in dairy products and a statute forbidding the sale of cigarettes below cost. Regulations concerning the issuing of trading

35. OHIO REV. CODE §§ 1333.05-.10, .27-.34. To comply with the Ohio Fair Trade Act, the commodity, label, or container must bear the trade-mark, brand, or name of the producer or owner. It also is stipulated that the commodity must be in fair and open competition with commodities of the same general class produced by others.


40. The Agricultural Cooperatives Law, OHIO REV. CODE § 1729.01-.28, provides that an association complying with its provisions is not a combination in restraint of trade. Furthermore, marketing contracts between the association and its members are not unlawful restraints of trade.

41. It was held in Garner v. Teamsters Union, 346 U.S. 485 (1953), that the NLRB was the proper body to decide questions of unfair labor practice, and that in certain cases involving interstate commerce, it has exclusive jurisdiction. Thus, much of the labor field would seem exempt from the operation of state antitrust laws.

42. OHIO REV. CODE § 1331.15.

43. OHIO REV. CODE §§ 1333.11-.211.
stamps complete the list of Ohio's major inroads upon the scope of its monopolies law.

**Penalties**

The Valentine Act differs from federal antitrust laws in its provision for a civil recovery. Moreover, its criminal penalties are almost unique among antitrust laws.

**Civil Damages**

In a civil suit under the Valentine Act, an award of two-fold damages and cost of suit may inure to plaintiff. Were the suit brought under the Sherman Act, the possible extent of recovery would be treble damages and the cost of suit, including a reasonable attorney's fee. Thus, in borderline cases, if a choice between the two acts is possible, the Sherman Act may appear the more desirable vehicle for a civil action.

**Criminal Penalties**

In contrast, the criminal penalty attaching to a violation of the Valentine Act is potentially far more severe than that under the federal act. The Sherman Act provides a single criminal penalty consisting of a fine not to exceed $50,000, or imprisonment not to exceed one year, or both.

Somewhat more complicated, the Valentine Act contains several criminal penalties. The general provision consists of a maximum fine of $5,000, and/or imprisonment from six months to one year for each offense. Each day's violation is made a separate offense. This provision could lead to shockingly large fines and prison terms.

Apart from this blanket provision, those who violate the prohibition against combinations to control the price of food may be awarded a maximum five year prison sentence and/or a fine for each day's violation. The act provides that the minimum fine for this kind of violation shall

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44. *Ohio Rev. Code* § 1333.01-.04.
47. There have been suggestions, however, that the treble damage provision of the Sherman Act is a curse rather than a blessing to one bringing suit under it because it is too strong for a jury to evoke, thus making proof of damages difficult.
49. It is not applied to a violation of the prohibition on combinations which purchase dairy products at higher prices in one locality than in another. *Ohio Rev. Code* § 1331.15. Here, a different penalty attaches.
51. It is possible that each day *Ohio Rev. Code* § 1331.02 (prohibiting monopolies and restraints of trade by the use of a trustee or trust certificates) is violated, may not constitute a separate offense. Although included in the general provision of § 1331.04, it is treated separately in § 1331.99(A).
be $500, but provides no maximum. Still another section of the Valentine Act provides that an additional fifty dollar fine may be assessed for each day a violation of any of its provisions continues after due notice is given by the state.

The section of the Valentine Act which prohibits combinations from restraining trade by purchasing dairy products at higher prices in one locality than in another is exempted from the above penalty provisions. However, those who violate this section are subject to a fine not to exceed $500 or imprisonment not to exceed six months.

As the act interestingly provides that its sections are cumulative of each other and all other laws in any manner affecting them, it embodies a formidable array of penalties. The cutting edge of the Valentine Act would seem to be sharp enough to cow any potential violator of its provisions, if there were any threat of its being used.

**JUDICIAL CONSTRUCTION OF THE VALENTINE ACT**

In construing the Valentine Act, Ohio courts often have demonstrated a tendency to follow the federal judiciary's construction of the federal antitrust statutes. A reason for this may be found in a similarity of background and legislative intent, if not of provisions. Both the Valentine Act and the Sherman Act were erected upon a foundation provided by the common law, and, to an extent, both are declaratory of it. On several occasions this has encouraged Ohio courts, frustrated in their search for authority by the paucity of reported decisions under the Valentine Act, to seek guidance in the application of the act from decisions under the Sherman Act. Thus, not long after the thrust of the federal law had been judicially modified by grafting onto it a proviso that its provisions applied only to "unreasonable" combinations, much the same qualification was appended to the Ohio act.

52. Ohio Rev. Code §§ 1331.05, .99(B).
54. Ohio Rev. Code § 1331.03.
56. A federal court once indicated: "Speaking generally, the policies of the state of Ohio, and of the United States, regarding restrictions of competition, are the same . . . . The rule is that of the common law, declared by Ohio by the Valentine Act, and for the United States by the Sherman Act." United States Tel. Co. v. Central Union Tel. Co., 202 Fed. 66, 70 (6th Cir. 1913), cert. denied, 229 U.S. 620 (1913). See Standard Oil Co. v. United States, 221 U.S. 1 (1911); State ex rel. Monnet v. Buckeye Pipe Line Co., 61 Ohio St. 570, 65 N.E. 464 (1900); Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666 (1880).
This modification causes the antitrust law, despite its literal terms, to operate against only those transactions and combinations which in their effect upon trade or competition and in the light of all the surrounding circumstances are unreasonable because inimical to the public welfare.\textsuperscript{60} Combinations which unite in a few the power to affect prices and thereby suppress competition, or to deprive persons unfairly of the right to engage in an occupation or business are deemed harmful to the public.\textsuperscript{61}

Federal courts more recently adopted a doctrine of per se illegality whereby certain activities by reason of their nature are conclusively presumed unreasonable restraints of trade.\textsuperscript{62} Some states have rejected this doctrine as applied to their own antitrust laws,\textsuperscript{63} and its status still is uncertain in Ohio.\textsuperscript{64} However, the doctrine finds support in some Ohio decisions,\textsuperscript{66} notably in the area of price fixing.

Although sometimes similarly construed, federal and Ohio antitrust laws differ markedly in the frequency of their construction. There have been sufficient cases brought under the federal statutes to lend them a fairly substantial judicial gloss.\textsuperscript{68} Conversely, the Ohio experience has been one of few cases in the period closely following the Valentine Act's enactment and, more recently, the evaporation of even this meager supply. This experience, or lack thereof, has had an unfortunate effect upon the quality of construction of the Ohio act and doubtless a corresponding effect upon its utilization.

\textsuperscript{60} Ibid.; H. Lipman & Sons v. Brotherhood of Painters, 63 Ohio App. 157, 25 N.E.2d 22 (1939). A concise statement of the "rule of reason" as applied by federal courts is found in Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

\textsuperscript{61} Stark County Milk Producers' Ass'n v. Tabeling, 139 Ohio St. 159, 194 N.E. 16 (1934); Clover Meadow Creamery v. National Dairy Prods. Co., 20 Ohio N.P. (n.s.) 243 (1932), rev'd on other grounds, 17 Ohio L. Abs. 231 (Ct. App. 1934). In Stark County Milk Producers' Ass'n v. Tabeling, supra at 173, 194 N.E. at 22, the court said: "The test for determining whether a covenant in restraint of trade is reasonable or not is to consider whether the restraint is no greater than is sufficient to afford a fair protection to the interests of the party for whose benefit it is made and at the same time not so large as to interfere with the interests of the public."


\textsuperscript{64} See State ex rel. Cullitan v. Greater Cleveland Livery Owners Ass'n, 74 N.E.2d 104 (Ohio C.P. 1947), for an example of a case which utilizes this doctrine.

\textsuperscript{65} See Rayess v. Lane Drug Co., 138 Ohio St. 401, 35 N.E.2d 447 (1941); State ex rel. Monnet v. Buckeye Pipe Line Co., 61 Ohio St. 570, 56 N.E. 464 (1900); Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666 (1880). The latter two cases were decided under the common law, yet they strongly indicate that certain restraints are conclusively presumed contrary to the public welfare. It is also worthy of note that at least one researcher has found in the wording of the Valentine Act itself support for the position that certain restraints on trade are illegal per se. See Note, A Survey of Ohio Trade Regulation — A Comparison With Federal Trade Regulation — A Recommendation, 25 U. Cinc. L. Rev. 476, 480-81 (1956).

\textsuperscript{66} For a summary of guides for interpreting the federal antitrust laws, see ATT'Y GEN. NAT'L COMM. ANTITRUST REP. (1955).
APPLICATION OF THE VALENTINE ACT TO SPECIFIC PRACTICES

The purpose of this section is to illuminate the Valentine Act against a background of specific restraints of trade. It is hoped that by so doing, the Valentine Act will be made to seem more realistic and less an obscure subject suitable merely for academic speculation.

At the outset, it should be remembered that under the provisions of the Valentine Act a contract or combination, if illegal, will be so due to its ultimate purpose or to the method by which it seeks to accomplish that purpose. In the case of some offenses, price fixing is one, it seems there need be no demonstration of specific injury to individuals or the public when an illegal purpose is evident. These are offenses considered unreasonable per se. In the other cases, as remarked earlier, the restraint must be shown to be unreasonable before the condemnation of the act can be evoked.

Restraint of Trade by Corporate Manipulation

Trusts

As generally applied to an unfair trade practice, a "trust" is an arrangement whereby competing concerns combine to destroy competition by placing their businesses under the control of a trust or trustee and receive certificates as evidence of their interest. As defined in the Valentine Act, however, the term "trust" embraces many other proscribed combinations in restraint of trade. Yet the traditional trust is not overlooked, as the act expressly provides that it is unlawful to place the management or control of a combination or its manufactured product in the hands of a trustee with the intent to fix the price or limit the production of an article or commodity. This section of the Valentine Act appears to declare what had earlier been held the common law of Ohio. In State ex rel. Watson v. Standard Oil Co., the Ohio Supreme Court held that an attempt by officers of an Ohio corporation to exchange the corporation's stock for certificates of the Standard Oil Trust was unlawful and would be enjoined as an ultra vires act by the corporation.

Mergers

Although the Ohio General Corporation Law gives corporations broad authority to form or acquire shares of other corporations, the

67. See Rayess v. Lane Drug Co., 138 Ohio St. 401, 35 N.E.2d 447 (1941); State ex rel. Cullitan v. Greater Cleveland Livery Owners Ass'n, 74 N.E.2d 104 (Ohio C.P. 1947).
68. See cases cited at note 60 supra.
69. OHIO REV. CODE § 1331.02.
70. 44 Ohio St. 137, 30 N.E. 279 (1892). There seem to be no reported decisions enforcing the statutory proscription of the "trust" as a trade restraint.
71. OHIO REV. CODE § 1701.13(F) (3).
right does not extend to the creation of unlawful restrictions of trade or commerce. Nor is it lawful to form subsidiaries for the purpose of creating a monopoly or trade restriction. In applying these concepts, however, Ohio courts have recognized that any merger or combination of business interests will have the effect of decreasing competition to some extent in the field involved. The courts have indicated, therefore, that a deleterious effect upon competition brought about by the purchase of one corporation's stock by another may not render the purchase void if the effect is merely incidental to a transaction with a lawful purpose.

Monopolizing

The Valentine Act contains no provision equivalent to section 2 of the Sherman Act which under some circumstances prohibits monopolizing by a single firm. The offense of monopolizing proscribed by the Sherman Act is considered to consist of the possession of an economic monopoly (monopoly power) within the relevant market coupled with intent to secure or maintain it. Monopoly power itself can be defined as the power to control market prices or to exclude competition to a substantial degree.

As noted earlier, the Valentine Act has been interpreted as proscribing both monopolies and a tendency to monopolize. The cases containing this interpretation, however, involved combinations by several enterprises for the purpose of an illegal restraint of trade. Thus, no Ohio authority exists on the question of whether its antitrust law forbids a single enterprise to gain for itself power to control a market.

Price-Fixing

Agreements Between Competitors

Price-fixing by competitors has long been considered illegal in Ohio. When engaged in by a substantial portion of the industry concerned,
price-fixing was held illegal under the common law of Ohio.\textsuperscript{79} In declaring the common law, the Valentine Act explicitly proscribed combinations and contracts which have as their purpose price-fixing.\textsuperscript{80}

Thus, in Ohio, contracts between producers, wholesalers, or retailers, establishing agreed sale or resale prices on merchandise, are unlawful and void.\textsuperscript{81} It seems, however, that under the Valentine Act a price-fixing agreement is illegal regardless of the proportion of the industry involved or the reasonableness of the price fixed.\textsuperscript{82} In taking this position, one Ohio court adhered to the federal doctrine of per se illegality of price-fixing agreements.\textsuperscript{83} The doctrine seems to be supported by the language of the Ohio act, although enacted prior to development of the doctrine by federal courts.\textsuperscript{84}

A price-fixing association cannot escape the force of the Valentine Act by adopting a unique or seemingly innocent form of organization. The act forbids associations of any description of manufacturers, dealers, or employers which have as their purpose price-fixing and the prevention of competition among members.\textsuperscript{85} Should such an association come into being, any resolution or by-law designed to further its illegal purpose would be void and unenforceable in Ohio.\textsuperscript{86}

\textit{Agreements Between Manufacturers and Wholesalers or Retailers}

Unless exempted by statute,\textsuperscript{87} contracts stipulating that articles of commerce provided to a retailer or wholesaler are to be resold only at specified prices are illegal under the Valentine Act. While the case of \textit{McCall v. O'Neil},\textsuperscript{88} which supports this proposition, was decided prior to the enactment of the Ohio Fair Trade Law, it indicates the status of agreements between manufacturers and wholesalers or retailers.

\textsuperscript{80} Ohio Rev. Code § 1331.01(B)(5).
\textsuperscript{83} State \textit{ex rel. Cullitan v. Greater Cleveland Livery Owners Ass'n}, supra note 82.
\textsuperscript{86} Graf v. Master Horse-Shoers' Protective Ass'n, 1 Ohio N.P. (n.s.) 423 (Super. Ct 1904).
\textsuperscript{87} Certain vertical price-fixing agreements are exempt from antitrust law under the Ohio Fair Trade Act, Ohio Rev. Code §§ 1333.05-10, .27-.34.
\textsuperscript{88} 17 Ohio N.P. (n.s.) 17 (C.P. 1914); \textit{accord}, Freeman v. Miller, 9 Ohio N.P. (n.s.) 26 (C.P. 1909).
resale price maintenance agreements which fall outside the protection of that act.

A Common Selling Agency Used by Competitors

There is nothing in the Valentine Act which indicates that a number of competitors of a product may not designate a single agency to handle sales. Where a seller uses a number of methods of distributing his product, the fact that he also uses a selling agent which a competitor uses will not ordinarily raise antitrust problems. If, however, the competitors agree that all their sales will be made through a common selling agent, a problem may arise. This is particularly true when the agent has authority to determine sales prices of the products. As price competition could thereby be eliminated, such an arrangement might be considered equivalent to price-fixing.

There are no Ohio decisions on this question, but some decisions in other states hold such arrangements illegal under their antitrust laws.89 On the other hand, a federal decision held that a proposed plan for a common selling agent was legal in the absence of proof of an intent or power to fix prices.90 It seems probable that were the arrangement to result in price-fixing, it would be illegal under the Valentine Act.

Limitation of Production by Competitors

The Valentine Act provides that a combination of two or more persons to pool, combine, or unite any interests connected with the sale or transportation of an article or commodity to affect its price is unlawful and void.91 Even prior to enactment of this statute, Ohio courts refused to enforce contracts between normally competing producers or dealers by which the parties agreed to refrain from competition and divide their respective profits in fixed proportions among themselves.92 Similarly, contracts whereby manufacturers of a product agreed to a production limit for each member and on the price to be charged for the product were unenforceable under the common law.93 Such contracts are proscribed by the Valentine Act. It has been decided

89. See California Raisin Growers’ Ass’n v. Abbott, 160 Cal. 601, 117 Pac. 767 (1911) (dictum).
90. Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933).
91. OHIO REV. CODE § 1331.01 (B) (5).
that these agreements are in no sense reasonable and thus clearly are unlawful.\textsuperscript{94}

\textbf{Exclusive Dealing and Tying Contracts}

An exclusive dealing contract commonly is one by which a purchaser is required to purchase all his needs from the seller, thus preventing the purchaser from dealing with competitors of the seller. In cases where the federal antitrust statutes apply to such contracts, they are governed by section 3 of the Clayton Act. This section prohibits contracts where their effect may be to "substantially lessen competition or tend to create a monopoly."\textsuperscript{95}

As the Clayton Act is an addition to common-law antitrust principles,\textsuperscript{96} it appears to provide no authority for interpretation of the Valentine Act. However, since the Valentine Act has been held to proscribe "a tendency to monopolize,"\textsuperscript{97} under certain circumstances it would seem to make exclusive dealing contracts unlawful. Yet in \textit{Federal Sanitation Co. v. Frankel},\textsuperscript{98} an Ohio court of appeals indicated that a contract of exclusive selling rights which provided that the salesman could not engage in the business for one year after termination of his employment was not in restraint of trade when its terms were not oppressive and the restraint was only partial.

Tying contracts, whereby the seller of one product requires the buyer as a condition to the sale to purchase another product, are governed both by section 3 of the Clayton Act and by the Sherman Act.\textsuperscript{99} Federal courts hold such agreements illegal if the seller has "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product . . . ."\textsuperscript{100} There are no Ohio decisions on the legality of such agreements under the Valentine Act.

\textbf{Territorial Restraints on the Seller}

Federal courts have held that arrangements whereby a seller agrees to sell only to the buyer in a specified territory are illegal under the Sherman Act when the arrangement is part of a plan to give a person a


\textsuperscript{97} State \textit{ex rel. Cullitan v. Greater Cleveland Livery Owners Ass'n}, 74 N.E.2d 104 (Ohio C.P. 1947); Needle v. Bishop & Babcock Co. 20 Ohio N.P. (n.s.) 77 (C.P. 1904).

\textsuperscript{98} 34 Ohio App. 331 (1929).


\textsuperscript{100} Northern Pac. Ry. \textit{v. United States}, 356 U.S. 1, 6 (1958).
monopoly in the area involved and the parties have substantial market control of the product. There appear to be no Ohio decisions on the legality of such agreements. It would seem, however, that as the Ohio antitrust law proscribes all agreements directed to monopolizing or restraining trade, exclusive territorial arrangements would be illegal under the Valentine Act if unreasonable.

Group Boycotts and the Picketing of Competitors

A combination by two or more persons for the purpose of boycotting the business or trade of a third party would seem to be a combination to carry out a restriction of trade or commerce and therefore a violation of the Valentine Act. Certainly, under the Sherman Act federal courts have held agreements by groups of competitors not to deal with a third person unreasonable restraints of trade. In Ohio, however, whether a boycott is lawful or unlawful seems to depend upon its nature — whether it is a primary or secondary boycott. Absent the employment of unlawful means, a primary boycott for a purpose considered legitimate is not actionable, while secondary boycotts are unlawful and may be enjoined.

Although it might seem to be a course which falls under the proscriptions of the Valentine Act, it appears that in special circumstances businessmen may picket their competitors. It has been held by an Ohio court that where a genuine economic dispute exists, and there is no resort to force or intimidation, an association of businessmen has the right to picket the premises of a competitor who cuts prices established under the National Industrial Recovery Act. It seems best to limit this decision to its special facts, as it appears that the Valentine Act may not have been brought to the court’s attention in this case.

The Failure of the Valentine Act

Despite its apparent wide applicability and extensive remedial and punitive provisions, the Valentine Act is ignored — a sword left to rust. Attempts to discover a single cause of the act’s disuse prove fruitless. It is not clear whether the failure is due to particular provisions, factors external to the act, or its very nature.

103. W. E. Anderson & Sons Co. v. Local Union No. 311, 156 Ohio St. 541, 104 N.E.2d 22 (1952). This holding, however, may not apply to agreements not to sell.
104. Ibid.
105. Bernstein v. Retail Cleaners’ & Dyers’ Ass’n, 31 Ohio N.P. (n.s.) 433 (C.P. 1934). In this case, an NRA code of fair competition, ratified by the state General Assembly in the adoption of the Ohio Recovery Act, was said to be an expression of public policy as to the fair price to be charged.
Factors Contributing to the Failure to Utilize the Valentine Act

Federal enactments loom large in the antitrust field, and it is difficult, if ever wise, to escape their shadow. The power of Congress to regulate interstate commerce reaches deeply into areas once considered exclusively intrastate in nature. Moreover, as the nation's economy has developed, businesses have tended to become more national and less local in scope. Thus, they enter interstate commerce and its accompanying federal regulation. Companion to these developments has been an increase in litigation under federal antitrust laws.

That the increased importance of federal law has had a deleterious effect upon utilization of state antitrust laws is hardly open to question. However, since the area of commercial activity within the legitimate scope of state control is still considerable, there is no demand that states desert the field.

Yet it would seem that in Ohio the field has been abandoned to the federal government. The Valentine Act provides that either the state's Attorney General or the County Prosecutor of any county may initiate enforcement proceedings under it. Never very great, activity by these officials in prosecuting suits under the act now seems to have ceased entirely. Only a few years ago, the state's Attorney General's office seemed blissfully unaware that it had any responsibility to enforce the provisions of the Valentine Act. Yet in the same period, officials responsible for enforcement of antitrust laws in the federal government and in other states have actively continued in the field. Although in


107. In 1959, the New York Attorney General indicated that under its recently amended antitrust laws, the state had commenced or recently concluded actions involving the following industries: milk production; dry-cleaning; hard surface floor covering; food distribution; apparel; hardware distribution; and phases of building maintenance. Leffkowitz, New York State Antitrust Activity — Another Year of Progress, 31 N.Y.S.B.A. BULL. 110 (1959).

108. During the course of its reply to the Special Committee to Study the New York Antitrust Laws, the office of the Attorney General of Ohio stated: "The Prosecuting Attorneys of the eighty-eight counties in Ohio constitute the enforcement agencies for this chapter on monopolies just as they constitute the enforcement agencies for all criminal laws of Ohio." N.Y.S.B.A., REPORT OF THE SPECIAL COMMITTEE TO STUDY THE NEW YORK ANTITRUST LAWS 107a (1957). Yet in addition to his responsibility under OHIO REV. CODE § 1331.11, a responsibility shared with the several county prosecuting attorneys, it appears that the Attorney General is the only official who can bring a proceeding in quo warranto to oust a foreign corporation violating the Valentine Act from the state. OHIO REV. CODE § 1331.07.

the past the Attorney General's office has taken a rosier view, it seems most unlikely that there have been no offenses whatsoever under the Valentine Act in the last several years.

It must be noted that a significant number of suits brought under the Sherman Act result from efforts of the Antitrust Division of the Justice Department. The diligence of this staff adds much to the force of the federal statutes. A like result has been apparent where a state maintains a staff whose only duty is to enforce its antitrust laws. There never has been provision for a similar body in Ohio.

The absence of a substantial amount of litigation under the Valentine Act in the past may have had a self-perpetuating effect. For the law has been left unsettled to an extent, with a resulting discouraging effect on those contemplating a suit or defense based on the act's provisions. Even a cursory look at the footnotes of this note will disclose that the few decisions existing under the Valentine Act are for the most part products of lower courts.

It also appears that if indeed there is an area where both federal and Ohio antitrust statutes apply, the federal law commonly has been the vehicle chosen. Reasons for this may be found in the unsettled state of Ohio authority under its antitrust law, in what might be considered procedural advantages of federal courts, and in the Sherman Act's provision for treble damages.

THE FUTURE

While its past is distinguished only by its disuse, the Valentine Act could have a brighter future. It was, in 1889, an expression of a then popular fear of the power of monopolies and other combinations in restraint of trade to injure the public. As we have become more accustomed to massive and many-tentacled commercial enterprises, this fear has lessened; but the danger remains.

110. Again quoting the reply to the New York Special Committee by the office of the Attorney General of Ohio: "[T]rust monopolies have not been a problem in this State . . . ." N.Y.S.B.A. REPORT OF THE SPECIAL COMMITTEE TO STUDY THE NEW YORK ANTITRUST LAWS 107a (1957).

111. California, New York, and Wisconsin all have special antitrust staffs, and, unsurprisingly, these states lead in antitrust enforcement.

112. The federal statutes contain provisions for bringing in additional parties and for discovery which are more liberal than those of Ohio. Fed. R. Civ. P. 22-24, 26-37. It may be noted, however, that the Valentine Act is like the Sherman Act in providing immunity from prosecution to witnesses required to testify in either criminal or civil suits under the act. Ohio Rev. Code § 1331.13. The corresponding section of the federal law is 32 Stat. 904 (1903), 15 U.S.C. § 32 (1958).