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Chapter 2

Antitrust

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2-1 INTRODUCTION

Since 1890, the federal government has employed a variety of statutes to protect competition, starting with the Sherman Act, which "was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[2] Together with other provisions of antitrust law such as the Clayton Act and the Federal Trade Commission Act, the law "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."[3] There can be no doubt that the virtue espoused by antitrust law is competition.[4]

Designed like its federal counterparts to promote competition for the benefit of consumers, the Texas Free Enterprise and Antitrust Act of 1983 targets conduct that improperly impedes competition within Texas. The focus of the law is not injury to competitors, but rather injury to competition. Indeed, robust competition

1. The author gives special thanks to his colleagues Kimberly McMullan, Autry Ross, and Christian Ward, whose expertise and hard work were invaluable in writing this chapter.

2. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

3. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

4. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

necessarily benefits some competitors and harms others, which is why the focus in any antitrust lawsuit must be on the injury to the competitive system as a whole.

Antitrust law provides an arsenal of relief from anticompetitive conduct for the private litigant and the government lawyer alike. From attempted monopolies to concerted acts to squeeze out competitors, state and federal statutes, with the guide of court opinion, set out that conduct legislators found especially dangerous to healthy competition in the marketplace. But private and public plaintiffs must beware, as elements of antitrust claims, such as properly defined relevant markets, market power, or anticompetitive intent, are just a few of the perilous aspects of this area of the law. Market participants must also be cautious, as their anticompetitive conduct could subject them not only to civil monetary damages, but also to criminal penalties.

2-2 STATUTORY OVERVIEW

2-2:1 Texas Free Enterprise and Antitrust Act of 1983

2-2:1.1 History

Prior to 1983, the Texas antitrust statute prohibited monopoly, trust, and conspiracy in restraint of trade, containing a "laundry list" of prohibited conduct.[5] In 1983, reforms were enacted in an effort to make the antitrust laws more workable and accomplish their goals. The 1983 reforms, known as the Texas Free Enterprise and Antitrust Act of 1983 (Texas Antitrust Act), were modeled on both the Sherman Act and the Clayton Act and were "specifically designed to update Texas antitrust law and afford courts broader powers of protection than that provided by the 'laundry list' of particular violations set out in the 1889 Texas antitrust act."[6] Because the old Texas antitrust law was inconsistent with developments in federal law, the 1983 Act was designed to bring uniformity to state and federal interpretations of antitrust

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[5] *Red Wing Shoe Co., Inc. v. Shearer's, Inc.*, 769 S.W.2d 339, 342 (Tex. App.—Houston [1st Dist.] 1989).

[6] *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 580 (Tex. 1992) (internal citation omitted).

laws.[7] The protections provided by the Texas Antitrust Act were considered broader than prior protections because they gave the courts "the flexibility to adapt legislative intent to evolving economic and business conditions."[8]

2-2:1.2 Purpose

The Texas Antitrust Act's statutorily defined purpose is to "maintain and promote economic competition in trade and commerce occurring wholly or partly within the State of Texas and to provide the benefits of that competition to consumers in the state."[9] However, there is no statutory preference or mandate for who wins the competition. Rather, that Act "protects competition and not individual competitors."[10]

2-2:1.3 Defined Terms

The Texas Antitrust Act contains few, though important, defined terms that shape what conduct is governed by the Act. Except as otherwise provided in Section 15.10(a), the following definitions apply:

"Goods" are "any property, tangible or intangible, real, personal, or mixed, and any article, commodity, or other thing of value, including insurance."[11]

"Person" is "a natural person, proprietorship, partnership, corporation, municipal corporation, association, or any other public or private group, however organized...."[12] It specifically excludes, however, "the State of Texas, its departments, and its administrative agencies or a community center operating under Subchapter A, Chapter 534, Health and Safety Code."[13]

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7. *Red Wing Shoe Co., Inc. v. Shearer's, Inc.*, 769 S.W.2d 339, 342-43 (Tex. App.—Houston [1st Dist.] 1989).

8. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 580 (Tex. 1992) (internal citations omitted).

9. Tex. Bus. & Com. Code § 15.04; *Caller-Times Pub. Co., Inc. v. Triad Comm., Inc.*, 826 S.W.2d 576, 581 (Tex. 1992) (Act's purpose is to "maintain and promote economic competition and to provide the benefits of that competition to consumers in the state").

10. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 581 (Tex. 1992) (internal citations omitted).

11. Tex. Bus. & Com. Code § 15.03(2).

12. Tex. Bus. & Com. Code § 15.03(3).

13. Tex. Bus. & Com. Code § 15.03(3).

"Services" are "any work or labor, including without limitation work or labor furnished in connection with the sale, lease, or repair of goods."[14]

The terms "trade" and "commerce" mean "the sale, purchase, lease, exchange, or distribution of any goods or services; the offering for sale, purchase, lease, or exchange of any goods or services; the advertising of any goods or services; the business of insurance; and all other economic activity undertaken in whole or in part for the purpose of financial gain involving or relating to any goods or services."[15]

Section 15.10(a) of the Texas Antitrust Act deals with civil investigative demands and contains its own set of definitions.

2-2:2 Overlap With Federal Law

Because it is modeled on the Sherman and Clayton Acts, the Texas Antitrust Act provides that it is to be interpreted in harmony with federal judicial interpretations of comparable federal laws. Specifically, the Act demands that "[t]he provisions of this Act shall be construed to accomplish [its] purpose and shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with [its] purpose."[16] "The express words of the 1983 Act, as well as its legislative history, support the conclusion that the Texas legislature was taking a deliberate step toward uniformity with federal antitrust law."[17]

2-2:2.1 Sherman Act

The Sherman Act prohibits contracts, combinations, or conspiracies in restraint of commerce or trade, as well as monopolization, attempted monopolization, or conspiracies to monopolize.[18] Section 15.05 of the Texas Antitrust Act

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14. Tex. Bus. & Com. Code § 15.03(4).

15. Tex. Bus. & Com. Code § 15.03(5).

16. Tex. Bus. & Com. Code § 15.04; *see also The Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 688 (Tex. 2006) ("[W]e must, as we have noted, construe the [Texas Antitrust Act] in harmony with federal antitrust caselaw to promote competition for consumers' benefit. Because our own caselaw is limited, we rely heavily on the jurisprudence of the federal courts.") (footnote omitted).

17. *Red Wing Shoe Co., Inc. v. Shearer's, Inc.*, 769 S.W.2d 339, 343 (Tex. App.—Houston [1st Dist.] 1989).

18. 15 U.S.C. §§ 1-2.

likewise prohibits the same.[19] Because the sections are comparable, Texas courts look to federal law interpreting the Sherman Act for guidance in interpreting these provisions of the Texas Antitrust Act.[20]

2-2:2.2 Clayton Act

The Clayton Act prohibits anticompetitive practices, including price discrimination, tying arrangements, exclusive dealings, certain mergers and acquisitions, and interlocking directorates.[21] The Texas Antitrust Act likewise prohibits such conduct.[22]

The Clayton Act brings within the reach of antitrust law certain practices that were beyond the Sherman Act, such as unilateral price discrimination, and allows greater regulation of mergers. It allows the Federal Trade Commission and Department of Justice to regulate all mergers, and gives the government discretion whether or not to give approval to a merger.

A key difference between the Clayton Act and the Sherman Act is that the Clayton Act contains safe harbors for union activities, exempting labor unions and agricultural organizations, on the ground that "[t]he labor of a human being is not a commodity or article of commerce," thus permitting labor organizations to carry out their "legitimate objectives."[23]

2-2:2.3 Robinson-Patman Act

The Robinson-Patman Act of 1936 prohibits anticompetitive practices by producers, specifically price discrimination.[24] An amendment to the Clayton Act, it prevented unfair price discrimination for the first time, by requiring that the seller offer the same price terms to customers at a given level of trade.

Sales that discriminate in price to equally-situated distributors are prohibited by the Robinson-Patman Act when the effect of such sales is to reduce competition. A violation occurs when (1) there were sales made in interstate commerce; (2) the commodities sold

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19. Tex. Bus. & Com. Code § 15.05(a), 15.05(b).
20. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 580 (Tex. 1992).
21. 15 U.S.C. § 12 et seq.
22. Tex. Bus. & Com. Code §§ 15.05(c), 15.05(d).
23. 15 U.S.C. § 17.
24. 15 U.S.C. § 13.

were of the same grade and quality; (3) the seller discriminated in price between purchasers; and (4) the discrimination had a prohibited effect on competition.[25]

The Robinson-Patman Act is not considered to be in the core area of the antitrust laws. The FTC is active in its enforcement, but the Department of Justice is not. In the late 1960s, in response to industry pressure, federal enforcement of the Robinson-Patman Act ceased. Since then, enforcement of the law has been driven largely by private action of individual plaintiffs. In the mid-1970s, there was an unsuccessful attempt to repeal the Act.

2-2:2.4 Federal Trade Commission Act

The Federal Trade Commission Act bans "[u]nfair methods of competition" and "unfair or deceptive acts or practices."[26] The FTC Act was designed "to supplement and bolster the Sherman Act and the Clayton Act to stop in their incipiency acts and practices which, when full blown, would violate those Acts, as well as to condemn as 'unfair method of competition' existing violations of them."[27] Although the FTC does not technically enforce the Sherman or Clayton Acts, it can bring cases under the FTC Act against the same kinds of activities that violate those laws. The FTC Act also reaches other practices that harm competition, but that may not fit neatly into categories of conduct formally prohibited by the Sherman Act. Only the FTC brings cases under the FTC Act.

2-2:3 Exemptions

Exemptions from antitrust laws are to be narrowly construed.[28] This narrow construction applies equally to express and implied exemptions.[29] Because there is a presumption against exemptions to the antitrust laws, defendants have the burden of proving that their actions are exempt or immune from the laws.[30] With regard

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25. *Lycon, Inc. v. Juenke*, 250 F.3d 285, 288 (5th Cir. 2001) (citing *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 556 (1990)).

26. 15 U.S.C. § 45.

27. *Federal Trade Comm'n v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 394-95 (1953) (internal citations and quotations omitted).

28. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979).

29. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979).

30. *Henderson Broad. Corp. v. Houston Sports Ass'n, Inc.*, 541 F. Supp. 263, 265 (S.D. Tex. 1982).

to judicially created exemptions, courts "do not start with a clean slate, neatly balancing whether there should or should not be antitrust jurisdiction."[31] Rather, "the burden is on defendants to demonstrate that they or their practices were intended to be exempt or immune from the broad mandate of the Act."[32]

Section 15.05(g) of the Texas Antitrust Act provides that nothing in the Act is to be construed to prohibit activities that are exempt from federal antitrust laws.[33] Accordingly, activity exempt from federal antitrust laws by virtue of a statutory or judicial exemption also is exempt from the Texas Antitrust Act. However, in 1991, the Texas legislature made an exception to the blanket protection for exempt activity by deciding that the McCarran-Ferguson Act does not exempt insurance activities under Texas law.[34]

Examples of state-level statutory exemptions include exemptions for agricultural marketing associations,[35] unitized development of oil and gas resources,[36] and hospital cooperative agreements.[37] At the federal level, examples of exemptions include provisions of the Clayton Act and the Norris-LaGuardia Act that immunize labor unions and labor disputes from challenge under the Sherman Act;[38]

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31. *United States v. Am. Tel. & Tel. Co.*, 461 F. Supp. 1314, 1324 (D.D.C.1978) (exemption for regulated industries). *See also Allegheny Uniforms v. Howard Uniform Co.*, 384 F. Supp. 460, 463 (W.D.Pa.1974) (exemption defense for government action).

32. *United States v. Am. Tel. & Tel. Co.*, 461 F. Supp. 1314, 1324 (D.D.C.1978) (exemption for regulated industries). *See also Allegheny Uniforms v. Howard Uniform Co.*, 384 F. Supp. 460, 463 (W.D.Pa.1974) (exemption defense for government action).

33. Tex. Bus. & Com. Code § 15.05(g).

34. Tex. Bus. & Com. Code § 15.05(g).

35. Tex. Agric. Code § 52.005 ("A marketing association is not a combination in restraint of trade or an illegal monopoly;" "Organizing under this chapter is not an attempt to lessen competition or to fix prices arbitrarily;" "Marketing contracts or agreements authorized by this chapter are not illegal or in restraint of trade").

36. Tex. Natural Res. Code § 103.003 ("Agreements and operations under agreements that are in accordance with the provisions in this chapter, being necessary to prevent waste and conserve the natural resources of this state, shall not be construed to be in violation of" the Texas Antitrust Act).

37. Tex. Health & Safety Code § 314.002 ("A hospital may negotiate and enter into cooperative agreements with other hospitals in the state if the likely benefits resulting from the agreement outweigh any disadvantages attributable to a reduction in competition that may result from the agreements.").

38. *H. A. Artists & Assocs., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 713 (1981) ("While the Norris-LaGuardia Act's bar of federal-court labor injunctions not explicitly phrased as an exemption from the antitrust laws, it has been interpreted broadly as a statement of congressional policy that the courts must not use the antitrust laws as a vehicle to interfere in labor disputes.").

the Soft Drink Interbrand Competition Act, which allows soft drink manufacturers to engage in vertical exclusive dealing arrangements provided that there is substantial and effective competition with other similar products;[39] and the McCarran-Ferguson Act, which exempts the business of insurance from federal antitrust laws to the extent the industry is regulated by the states, except in cases of boycott, coercion, or intimidation.[40]

2-3 UNLAWFUL PRACTICES

2-3:1 Monopolies

Monopoly power is "the power to raise prices to supra-competitive levels or … the power to exclude competition in the relevant market either by restricting entry of new competitors or by driving existing competitors out of the market."[41] It is unlawful to monopolize, attempt to monopolize, or conspire to monopolize any part of "trade" or "commerce" as those terms are defined in the Texas Antitrust Act.[42]

Congress authorized scrutiny under the monopoly provisions of the Sherman Act "only when [single firms] pose a danger of monopolization" in order to reduce "the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur."[43] Accordingly, a single firm's conduct under Section 2 of the Sherman Act, and by extension the Texas Antitrust Act, is unlawful "only when it threatens actual monopolization."[44]

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39. 15 U.S.C. § 3501 ("Nothing contained in any antitrust law shall render unlawful the inclusion and enforcement in any trademark licensing contract or agreement, pursuant to which the licensee engages in the manufacture …, distribution, and sale of a trademarked soft drink product, of provisions granting the licensee the sole and exclusive right to manufacture, distribute, and sell such product in a defined geographic area….").

40. 15 U.S.C. § 1102 (the Sherman Act, the Clayton Act, and the Federal Trade Commission Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law").

41. *American Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569, 1581 (11th Cir. 1985) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966)).

42. Tex. Bus. & Com. Code § 15.03(5).

43. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984).

44. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984).

2-3:1.1 Monopolization

Prohibited both by the Sherman Act and Section 15.05(b) of the Texas Antitrust Act, a monopoly exists where there is: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power.[45] Acquisition of such power from growth or development resulting from a superior product, business acumen, or historical accident is not actionable.[46] Moreover, the possession of monopoly power is not unlawful unless it is coupled with anticompetitive conduct.[47]

2-3:1.1a Monopoly Power in Relevant Market

Monopoly power is the power to control prices or exclude competition.[48] In determining whether there is an actual monopoly, courts first must consider the relevant product and geographic market, as well as the defendant's economic power in that market.[49]

2-3:1.1a(i) Relevant Market

Courts require evidence clearly defining the relevant market for a plaintiff to prevail on this element of a monopolization claim.[50] Without a definition of a relevant market, there is no way to measure a defendant's ability to lessen or destroy competition.[51] A relevant antitrust market has two components: a product market and a geographic market.[52]

The scope of a relevant product market is defined by "the reasonable interchangeability of use or the cross-elasticity of

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45. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 580 (Tex. 1992) (citing *United States v. I.T.T. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)).

46. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 580 (Tex. 1992) (citing *United States v. I.T.T. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)).

47. *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004).

48. *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

49. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993).

50. *Texas Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 592 (Tex. App.—Austin 2007).

51. *Walker Process Equip. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965); *Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 737 (7th Cir. 2004) (rejecting "direct evidence of anticompetitive effects" as substitute for market definition; plaintiff must provide "at least a rough definition of a product and geographic market").

52. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993).

demand between the product itself and substitutes for it."[53] In other words, courts ask whether, in response to a price increase for one product, enough customers would switch to other products to make the price increase unprofitable.[54] The relevant product market must include all products, the use of which is reasonably interchangeable.[55] Products that consumers view as substitutes for other products can be said to be in competition with each other.[56] Whether one product is reasonably interchangeable for another depends on the ease and speed with which customers can substitute it, the desirability of doing so, and the cross-elasticity of suppliers' production facilities.[57] The boundaries of a product market are determined by eliminating from the market all products that are not reasonably interchangeable substitutes for the product manufactured or sold by the defendant.[58]

The relevant geographic market is determined by the area where the vast bulk of business occurs and not by the area containing fringe or possible customers.[59] In other words, the relevant geographic market is the "area of effective competition … in which the seller operates, and to which the purchaser can practicably turn for supplies."[60] As with the relevant product market, courts analyze the relevant geographic market with reference to the cross-elasticity of demand. For example, if an increase in price in one region leads suppliers in another region to increase supply, the two regions are likely in the same relevant geographic market. Because

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53. *C.E. Servs., Inc. v. Control Data Corp.*, 759 F.2d 1241, 1245 (5th Cir. 1985) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)).

54. *United States v. Microsoft Corp.*, 253 F.3d 34, 51-52 (D.C. Cir. 2001) (en banc) (per curiam) (relevant market includes all reasonable interchangeable products or services, because "the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level") (internal citation and quotations omitted).

55. *See R.D. Imports Ryno Indus. v. Mazda Distribs. (Gulf), Inc.*, 807 F.2d 1222, 1225 (5th Cir.1987), *cert. denied*, 484 U.S. 818 (1987) ("The antitrust plaintiff is required to define the relevant product market in terms of goods that are 'reasonably interchangeable' with the goods at issue.").

56. *See R.D. Imports Ryno Indus. v. Mazda Distribs. (Gulf), Inc.*, 807 F.2d 1222, 1225 (5th Cir. 1987), *cert. denied*, 484 U.S. 818 (1987).

57. *See Federal Trade Comm'n v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1037 (D.C.Cir. 2008); *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 n.42 (1962).

58. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394-404 (1956).

59. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359-361 (1963).

60. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963) (quoting *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)).

it is difficult to measure elasticity directly, courts look at several related indicators in determining whether a particular geographic area can be characterized as a relevant geographic market. As the Supreme Court explained in *Brown Shoe Co. v. United States*, the geographic market must correspond both "to the commercial realities of the industry and be economically significant."[61] Accordingly, in some instances the relevant geographic market may encompass the entire country, and in other instances it may be a single metropolitan area.[62]

The definition of the relevant market is a fact question that depends heavily on the special characteristics of the industry.[63] Courts generally will not usurp the fact-finder's role by holding relevant market allegations insufficient as a matter of law.[64] However, the Fifth Circuit has made clear that a plaintiff's failure to allege a relevant market properly is grounds for dismissal of an antitrust claim for which market definition is required.[65] "Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient, and a motion to dismiss may be granted."[66] Cases where dismissal on the pleadings is appropriate often involve failed attempts to limit a product market to a single brand, or failure to attempt an explanation as to why a market

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61. *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962) (internal quotations omitted).

62. *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962).

63. *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 849 (5th Cir. 1975). *See also In re Waste Mgmt. of Texas, Inc.*, 392 S.W.3d 861, 871 (Tex. App.—Texarkana 2013) (citing *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 212 (3d Cir. 2005) ("The geographic scope of a relevant product market is a question of fact to be determined in the context of each case in acknowledgement of the commercial realities of the industry being considered."); *Seidenstein v. Nat'l Med. Enters., Inc.*, 769 F.2d 1100, 1106 (5th Cir. 1985) (although "usually [a question] of fact for the jury," relevant market can be determined as a matter of law "in some instances")).

64. *See, e.g., C.E. Servs., Inc. v. Control Data Corp.*, 759 F.2d 1241, 1245 (5th Cir. 1985) (denying summary judgment in light of "the ad hoc, fact-specific core embedded in any determination of relevant market"); *accord Bell v. Dow Chem. Co.*, 847 F.2d 1179, 1184 (5th Cir. 1988).

65. *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 418 (5th Cir. 2010).

66. *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 417-18 (5th Cir. 2010) (quoting *Apani Sw., Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620, 628 (5th Cir. 2002)).

should be limited in a particular way.[67] Nevertheless, dismissal of an antitrust claim at the motion to dismiss stage for failure to plead the relevant market adequately should not be done lightly.[68]

PRACTICE POINTER:
Properly defining the relevant product and geographic markets is critical for a plaintiff in any antitrust case, and failure to give sufficient thought to this element of an antitrust claim early on can have adverse consequences down the road. Depending upon the complexity of the product or geographic market involved, retaining a qualified industry expert early—even to assist in drafting the complaint—can mean the difference between a successful and an unsuccessful claim. Likewise, relying on certain relevant markets, like a single product market or narrowly circumscribed geographic market, while sometimes justified, can be difficult to establish and are carefully scrutinized by the courts, counseling extra consideration at the outset.

2-3:1.1a(ii) Market Power

Evidence of a defendant's market share—the "structural analysis" method of proof—is an important consideration for a court when determining the existence of market power. The Second Circuit observed that while a 90 percent market share was enough to constitute monopolization, "it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not."[69] Fifth Circuit decisions have concluded that market shares in the range of 16 or 25 percent are insufficient as a matter of law to support monopolization absent other compelling structural evidence.[70]

The structural analysis was developed as a shortcut formula to demonstrate power to control prices or exclude competition.[71] Early monopolization cases were not as concerned with high

67. *Todd v. Exxon Corp.*, 275 F.3d 191, 200 (2d Cir. 2001).
68. *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 443 (4th Cir. 2011).
69. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945).
70. *Dimmitt Agri Indus., Inc. v. CPC Int'l Inc.*, 679 F.2d 516, 529 (5th Cir. 1982).
71. *Dimmitt Agri Indus., Inc. v. CPC Int'l Inc.*, 679 F.2d 516, 526 (5th Cir. 1982).

market share, but rather dealt with monopolization claims on the basis of predatory exercise of market power.[72] In those cases, the government attempted to demonstrate the actual exercise of market power to control prices or exclude competitors.[73] The completed monopolization offenses were largely based on what today would be called "conduct analysis."[74] For example, these cases viewed tortious attacks or threats on property, discriminatory price cutting, and sales by a vertically integrated firm at excessively high prices as predatory prices evidencing both elements of the completed monopolization offense.[75] The modern cases do not explicitly overrule this approach.[76] However, because structural analysis arguably is more objective and easier to demonstrate, it has supplanted conduct analysis in proving the first element of a monopolization offense.[77]

2-3:1.1b Willful Acquisition, Maintenance, Or Use of Power

Possession of monopoly power is not itself a violation of Section 2 of the Sherman Act or the Texas Antitrust Act. Rather, monopolization necessarily requires "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident."[78] As the Supreme Court has made clear, "the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*."[79]

Willful acquisition or maintenance of monopoly power can be demonstrated by obvious antitrust violations such as price fixing or allocation of markets,[80] or by more subtle conduct "designed to

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72. *Dimmitt Agri Indus., Inc. v. CPC Int'l Inc.*, 679 F.2d 516, 526 (5th Cir. 1982).

73. *See Dimmitt Agri Indus., Inc. v. CPC Int'l Inc.*, 679 F.2d 516, 526 (5th Cir. 1982) (citing *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911); *United States v. Am. Can Co.*, 230 F. 859 (D. Md. 1916)).

74. *Dimmitt Agri Indus., Inc. v. CPC Int'l Inc.*, 679 F.2d 516, 526 (5th Cir. 1982).

75. *Dimmitt Agri Indus., Inc. v. CPC Int'l Inc.*, 679 F.2d 516, 526 (5th Cir. 1982).

76. *Dimmitt Agri Indus., Inc. v. CPC Int'l Inc.*, 679 F.2d 516, 526 (5th Cir. 1982).

77. *Dimmitt Agri Indus., Inc. v. CPC Int'l Inc.*, 679 F.2d 516, 526 (5th Cir. 1982).

78. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

79. *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004) (emphasis in original).

80. *Woods Exploration & Producing Co., Inc. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1307 (5th Cir. 1971).

barricade access to markets or inhibit production."[81] Some types of conduct held violative of the prohibition against monopolization include competing appliance retailers, manufacturers, and distributors agreeing not to sell appliances to plaintiff;[82] exclusion by a board of trade having monopolistic power of an owner of a warehouse from a tobacco market;[83] and exclusion of a competitor from a building and an appropriate market for business opportunities without justifiable business reasons.[84]

2-3:1.2 Attempts to Monopolize

To establish attempted monopolization, a plaintiff must show (1) that a defendant engaged in predatory or anticompetitive conduct, (2) with a specific intent to monopolize, and (3) a dangerous probability of achieving monopoly power.[85] The first element of an attempted monopolization claim addresses the conduct, the second looks to the motivation behind the conduct, and the third looks to the defendant's market power and commensurate ability to lessen or destroy competition in that market.[86] Therefore, "[t]he difference between actual monopoly and attempted monopoly rests in the requisite intent and the necessary level of monopoly power."[87] An attempt to monopolize may be shown by proof of anticompetitive conduct coupled with a market share as low as 20 percent.[88]

In order to demonstrate an attempted monopolization claim, a plaintiff first must lay the predicate with a showing that the defendant has significant market power, or an "ability to control prices or exclude competition."[89] If the defendant's market power

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81. *Woods Exploration & Producing Co., Inc. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1307 (5th Cir. 1971).

82. *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213-14 (1959).

83. *American Fed'n of Tobacco Growers, Inc. v. Neal*, 183 F.2d 869, 872-73 (4th Cir. 1950).

84. *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484, 488-89 (1st Cir. 1952).

85. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

86. *Marlin v. Robertson*, 307 S.W.3d 418, 431 (Tex. App.—San Antonio 2009) (citing *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993)).

87. *Chromalloy Gas Turbine Corp. v. United Techs. Corp.*, 9 S.W.3d 324, 327 (Tex. App.—San Antonio 1999).

88. *Dimmitt Agri Indus., Inc. v. CPC Int'l Inc.*, 679 F.2d 516, 533 (5th Cir. 1982) (internal citations omitted).

89. *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1386 (5th Cir. 1994).

is insignificant, it is unlikely that the plaintiff will be able to demonstrate a dangerous probability that the defendant will gain market power in the relevant market.[90] Such an analysis necessarily begins with a definition of the relevant market.[91]

2-3:1.2a Predatory or Anticompetitive Conduct

Exclusionary conduct, as required to establish an attempt to monopolize, is conduct "other than competition on the merits … that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power."[92]

Predatory pricing can serve as a basis for either actual monopolization or an attempt to monopolize.[93] In 1992, for the first time, the Texas Supreme Court addressed the question of what constitutes proof of predatory pricing under the Texas Antitrust Act.[94] Drawing from federal law, but noting a lack of uniformity among federal circuit courts, the court determined which federal approach best guided its interpretation of the Texas Antitrust Act.[95] Declining to rely on any one circuit, the court drew "on the interpretations of several circuits as an aid in developing an appropriate test."[96]

Predatory pricing under the Texas Antitrust Act has two elements: (1) whether the predatory pricing is economically feasible[97]; and (2) proof that the seller set its prices below (i) the seller's average variable cost for the product, or (ii) if there are substantial barriers to entry, below its short-run profit maximizing price and its average total cost, and (iii) the benefits

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90. *Surgical Care Ctr. of Hammond v. Hosp. Serv. Dist. No. 1 of Tangipahoa Parish*, 309 F.3d 836, 840 (5th Cir. 2002).

91. *See* § 2-3:1.1a(i).

92. *Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 475 (5th Cir. 2000) (internal quotations and citations omitted).

93. *See, e.g., Stearns Airport Equip. Co., Inc. v. FMC Corp.*, 170 F.3d 518, 528 (5th Cir. 1999) (discussing actual monopolization claim based on predatory pricing); *Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 474-79 (5th Cir. 2000) (analyzing predatory pricing under first of three elements of claim for attempted monopolization).

94. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 580 (Tex. 1992).

95. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 581 (Tex. 1992).

96. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 581 (Tex. 1992).

97. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 581 (Tex. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 598 (1986)).

of the seller's price depend on its tendency to discipline or eliminate competition and thereby enhance the seller's long-term ability to reap the benefits of monopoly power.[98] The subjective intent of the seller is not a factor in determining whether its prices are predatory.[99]

PRACTICE POINTER:
Demonstrating predatory pricing is fact intensive, requiring a command of defendant's pricing structure and costs, and challenging even in the most justified of circumstances. Requesting the relevant information, and then understanding the significance of the information obtained, requires careful thought, and likely the assistance of an expert antitrust economist. Again, as with the pleading of relevant market, bringing a predatory pricing case counsels involving the appropriate expert consultants from the outset. While this sort of claim has received ongoing interest by academics and practitioners, it remains one of the more difficult claims to pursue successfully.

2-3:1.2a(i) Economic Feasibility

Without economic plausibility, a business has no motive to engage in predatory pricing.[100] The practice derives economic feasibility from the objectively reasonable expectation of recouping losses from predatory pricing by later charging higher prices.[101] Thus, to meet its burden under this element of predatory pricing, a plaintiff must prove "that the alleged predator has an objectively reasonable expectation of recouping its losses from predatory pricing by charging higher prices later."[102] There is no reasonable expectation of recouping losses unless the structure of the relevant market permits the seller to later recoup predatory pricing losses.[103]

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98. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 588 (Tex. 1992).
99. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 587 (Tex. 1992).
100. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 581 (Tex. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 595 (1986)).
101. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 581 (Tex. 1992) (citing *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117-19 (1986)).
102. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 582 (Tex. 1992).
103. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 582 (Tex. 1992).

If a company charges prices that are above a competitive price in a market without meaningful barriers to entry, new competition enters the market and prices must be lowered to maintain market position, making recoupment impossible.[104]

Requiring economic feasibility of predatory pricing is "consistent with the goal of providing the benefits of competition to the consumers of the state."[105] Low prices for consumers are an "ultimate goal" of the Texas Antitrust Act.[106] If the market does not allow for later recoupment, then consumers benefit from a period of low prices because the monopolist cannot charge higher prices in the future.[107] If the market does not allow for future recoupment, consumers cannot lose.[108] A court need only inquire into the relationship between price and cost if market structure makes recoupment feasible.[109]

2-3:1.2a(ii) Price Below Cost

The second test for establishing predatory pricing is whether the seller set its prices below "some appropriate measure of cost."[110] In the seminal predatory pricing case interpreting predatory pricing under the Texas Antitrust Act, the Texas Supreme Court considered a variety of approaches taken by the federal circuits, and settled on the approach that "provides greater certainty for business and consequently increased competition and lower prices for consumers."[111] Ultimately, the Court settled on a test that took

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104. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 582 (Tex. 1992).

105. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 582 (Tex. 1992).

106. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 582 (Tex. 1992).

107. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 582 (Tex. 1992).

108. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 582 (Tex. 1992) (citing *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989)).

109. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 582 (Tex. 1992) (citing *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989)).

110. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 583 (Tex. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584 n.8 (1986)).

111. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 586 (Tex. 1992).

into account a seller's "average variable cost," "short-run profit-maximizing price," and "average total cost."[112]

"Average variable cost" is defined as the costs that vary with changes in output divided by the output.[113] A price above average variable cost will not support a charge of predatory pricing unless there are substantial barriers to entry into the relevant market.[114] Conversely, evidence of pricing below average variable cost will support a finding of predatory pricing.[115]

Where there are substantial barriers to market entry, predatory pricing will be found where the seller charges a price below its short-run profit-maximizing price and its average total cost, and the benefits of this price depend on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of its monopoly power.[116]

2-3:1.2b Specific Intent to Monopolize

The intent element of an attempted monopolization claim requires more than a showing that the defendant intended to compete vigorously, for "vigorous competition is precisely what the antitrust laws are designed to foster."[117] All lawful competition aims to defeat and drive out competitors. Therefore, the mere intention to exclude competition and to expand one's own business is not sufficient to show a specific intent to monopolize.[118] Rather, a plaintiff alleging attempted monopolization must show the defendant's specific intent to acquire and exercise the power to

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112. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 588 (Tex. 1992).

113. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 583 (Tex. 1992) (citing *International Air Indus., Inc. v. Am. Excelsior Co.*, 517 F.2d 714, 724 n.27 (5th Cir. 1975)). When considering claims of predatory pricing, the trier of fact must have sufficiently precise cost information to allow it to determine average variable cost. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 588 (Tex. 1992) (internal citation omitted).

114. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 586 (Tex. 1992).

115. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 586 (Tex. 1992).

116. *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 586-87 (Tex. 1992).

117. *Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 887 (5th Cir. 1984).

118. *See Pacific Eng'g & Prod. Co. of Nevada v. Kerr-McGee Corp.*, 551 F.2d 790, 795 (10th Cir.) ("In a two firm industry, the exclusion of one firm necessarily results in a monopoly. That does not mean the survivor necessarily violates the antitrust laws.").

fix or exclude competition.[119] The acts from which one can infer specific intent must essentially be predatory in nature.[120]

2-3:1.2c Dangerous Probability of Achieving Monopoly Power

To establish a dangerous probability of monopoly, a plaintiff must present evidence that the defendant's conduct "threatens actual monopolization."[121] In analyzing whether there is an actual danger of monopoly, courts must "consider the relevant product and geographic market and the defendant's economic power in that market."[122] Courts require evidence clearly defining the relevant market in order for a plaintiff to prevail on this element.[123] The time to analyze whether there is a dangerous probability of monopolization is when the act occurs, not in hindsight.[124] Therefore, the fact that a defendant does not ultimately achieve a monopoly does not mean there was not a dangerous probability of success. Indeed, it is the failure that makes the claim one of attempted monopolization rather than actual monopolization.[125]

2-3:1.3 Conspiracy to Monopolize

The elements of a conspiracy to monopolize offense differ from an attempt to monopolize claim. To establish a conspiracy to monopolize, a plaintiff must prove: (1) the existence of a combination or conspiracy; (2) overt acts done in furtherance of the combination or conspiracy; (3) an effect upon a substantial amount of interstate commerce; and (4) the existence of specific

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119. *Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 887 (5th Cir. 1984).

120. *The Great Escape, Inc. v. Union City Body Co., Inc.*, 791 F.2d 532, 541-42 (7th Cir. 1986).

121. *Texas Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 592 (Tex. App.—Austin 2007) (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993)).

122. *Texas Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 592 (Tex. App.—Austin 2007) (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993)).

123. *Texas Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 592 (Tex. App.—Austin 2007).

124. *United States v. Am. Airlines, Inc.*, 743 F.2d 1114, 1118 (5th Cir. 1984).

125. *El Aguila Food Prods., Inc. v. Gruma Corp.*, 301 F. Supp. 2d 612, 631 (S.D. Tex. 2003) ("Attempted monopolization is described as an unsuccessful attempt to achieve monopolization that is beyond simple risk.").

intent to monopolize.[126] A conspiracy to monopolize may be proven whether or not the conspirators actually succeed in acquiring or exerting the power to exclude competitors.[127]

2-3:1.3a Specific Intent to Monopolize

The intent element of a claim for conspiracy to monopolize is the same specific intent required for an attempted monopolization claim. The showing requires more than that the defendant intended to compete vigorously, for "vigorous competition is precisely what the antitrust laws are designed to foster."[128] All lawful competition aims to defeat and drive out competitors. Therefore, the mere intention to exclude competition and to expand one's own business is not sufficient to show a specific intent to monopolize.[129] Rather, a plaintiff must show defendant's specific intent to acquire and exercise the power to fix or exclude competition.[130] The acts from which one can infer specific intent must essentially be predatory in nature.[131]

2-3:1.3b Combination or Conspiracy to Achieve Monopoly

A conspiracy to monopolize requires joint, not independent, action. Accordingly, this essential element requires an agreement between two independent entities to commit the conduct leading to a monopoly. "No formal agreement is necessary to constitute an unlawful conspiracy…. The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words."[132]

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126. *J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 704 F.2d 787, 796 (5th Cir. 1983) (recognizing uncertainty within the circuit as to whether a plaintiff must prove the relevant product and geographic market in a conspiracy claim).

127. *American Tobacco Co. v. United States*, 328 U.S. 781, 789 (1946).

128. *Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 887 (5th Cir. 1984).

129. *See Pacific Eng'g & Prod. Co. of Nevada v. Kerr-McGee Corp.*, 551 F.2d 790, 795 (10th Cir.) (specific intent cannot be inferred from conduct, even where effect was to drive only competitor out of business).

130. *Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 887 (5th Cir. 1984).

131. *The Great Escape, Inc. v. Union City Body Co., Inc.*, 791 F.2d 532, 541-42 (7th Cir. 1986).

132. *American Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946) (internal citation omitted).

2-3:1.3c Overt Acts in Furtherance of Combination Or Conspiracy

Proof that defendants engaged in an overt act in furtherance of the conspiracy is required to prevail on a conspiracy to monopolize claim. The overt acts themselves need not be illegal to support this element of the claim, though illegal acts such as violations of other provisions of the antitrust law may suffice to constitute an overt act. The Supreme Court has held that it is of little import whether the means used to accomplish the "unlawful objective" are lawful themselves.[133] "Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition."[134]

2-3:2 Combinations in Restraint of Trade

Like Section 1 of the Sherman Act, the Texas Antitrust Act provides that "[e]very contract, combination, or conspiracy in restraint of trade or commerce is unlawful."[135] Again, Texas courts look to federal law concerning Sherman Act claims when addressing this provision of the Texas Antitrust Act.

To establish a violation of Section 1 of the Sherman Act and Section 15.05(a) of the Texas Antitrust Act, there must be concerted action by two or more people or entities. These provisions do not reach conduct that is "wholly unilateral."[136] Antitrust law makes an important distinction between concerted and independent action.[137] The conduct of a single firm is governed by monopoly prohibitions alone and is unlawful only when it threatens actual monopolization.[138] A single firm appearing to "restrain trade"—even unreasonably so—is not a violation of Section 1 of the Sherman Act or Section 15.05(a) of the Texas Antitrust Act.[139] Because it may be difficult to

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133. *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946).

134. *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946).

135. Tex. Bus. & Com. Code § 15.05(a).

136. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (internal citation omitted).

137. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984).

138. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984).

139. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984).

distinguish robust competition from conduct with long-run anti-competitive effects, Congress and the Texas legislature authorized scrutiny of single firms only when they pose a danger of monopolization.[140] Judging unilateral conduct in this manner reduces the risk that the antitrust laws will discourage competition by a single aggressive entrepreneur.[141]

Concerted activity is judged more strictly than unilateral activity for an obvious reason: concerted activity "inherently is fraught with anticompetitive risk" because it "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands."[142] When two or more entities that previously pursued their own interests separately combine to act as one for their common benefit, it not only "reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction."[143] While such integration of resources may lead to efficiencies that benefit consumers, their anticompetitive potential warrants extra scrutiny.[144]

Key to any analysis is whether the alleged contract, combination, or conspiracy is concerted action—that is, whether it joins together separate decision makers. The relevant inquiry, therefore, is whether there is a contract, combination, or conspiracy amongst "separate economic actors pursuing separate economic interests,"[145] in such a manner that the agreement "deprives the marketplace of independent centers of decisionmaking,"[146] and therefore of "diversity of entrepreneurial interests,"[147] and ultimately actual or potential competition.

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140. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984).
141. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984).
142. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-69 (1984).
143. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984).
144. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984).
145. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984).
146. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984).
147. *Fraser v. Major League Soccer*, 284 F.3d 47, 57 (1st Cir. 2002).

PRACTICE POINTER:
It is important to consider carefully whether the economic actors involved in your case are pursuing common or separate economic interests. While a parent corporation cannot conspire with its subsidiary in violation of Section 1 of the Sherman Act, other superficially "unified" organizations (e.g., trade organizations), while admittedly a collection of members to form a single unit, still may be found to have conspired in violation of antitrust laws. Litigants should look at such relationships not from a structural point of view, but rather from a functional one. Members of a single organization still may have separate economic interests, and agreement among them could deprive the market of independent centers of decision making.

2-3:2.1 Horizontal and Vertical Combinations

Contracts, combinations, and conspiracies in restraint of trade come in two forms: horizontal and vertical. Horizontal restraints are "cartels or agreements among competitors that restrain competition among enterprises at the same level of distribution."[148] Vertical restraints are those imposed by persons or firms further up the chain of distribution of a specific product than the enterprise restrained.[149]

Conduct may be permissible among entities at different levels of the commercial chain, while the same conduct among competitors at the same level would be illegal. For example, a horizontal agreement to divide territories is per se illegal, while a vertical agreement to do so is not.[150]

Most horizontal contracts, combinations, and conspiracies in restraint of trade are illegal per se.[151] On the other hand, most

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148. *Red Wing Shoe Co., Inc. v. Shearer's, Inc.*, 769 S.W.2d 339, 341 (Tex. App.—Houston [1st Dist.] 1989).

149. *Red Wing Shoe Co., Inc. v. Shearer's, Inc.*, 769 S.W.2d 339, 341 (Tex. App.—Houston [1st Dist.] 1989).

150. *Business Elecs. Corp. v. Sharp. Elecs. Corp.*, 485 U.S. 717, 734 (1988) (citing *United States v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 390-91 (1967); *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963)).

151. *Red Wing Shoe Co., Inc. v. Shearer's, Inc.*, 769 S.W.2d 339, 341 (Tex. App.—Houston [1st Dist.] 1989).

vertical restraints are assessed using the rule of reason analysis.[152] The Supreme Court has warned that "departure from the rule-of-reason standard must be based on demonstrable economic effect rather than … upon formalistic line drawing."[153] Accordingly, where vertical nonprice restraints had not been shown to have a "pernicious effect on competition" or "so lacking in redeeming value" as to justify per se treatment, a rule of reason analysis is required.[154] The Supreme Court has recognized that some vertical nonprice restraints "had real potential to stimulate interbrand competition, the primary concern of antitrust law."[155]

2-3:2.2 Illegality Per Se Versus the Rule of Reason

An agreement not to compete is a restraint on trade.[156] However, not every contract in restraint of trade is prohibited by antitrust law. Rather, only those contracts that are unreasonable restraints of trade are forbidden.[157] Because of their inherently pernicious effect upon competition, some restraints are "per se" unreasonable, while others are not and must be analyzed under the "rule of reason."

2-3:2.2a Per Se Violations

"[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[158] Where a practice is categorized as illegal per se, a plaintiff need not prove the precise harm to competition caused by the practice because a restraint only

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152. *Red Wing Shoe Co., Inc. v. Shearer's, Inc.*, 769 S.W.2d 339, 341 (Tex. App.—Houston [1st Dist.] 1989).

153. *Business Elecs. Corp. v. Sharp. Elecs. Corp.*, 485 U.S. 717, 724 (1988) (internal quotations and citations omitted).

154. *Business Elecs. Corp. v. Sharp. Elecs. Corp.*, 485 U.S. 717, 724 (1988) (internal quotations and citations omitted).

155. *Business Elecs. Corp. v. Sharp. Elecs. Corp.*, 485 U.S. 717, 724 (1988) (internal citations and quotations omitted).

156. *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 687 (Tex. 1990).

157. *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 687 (Tex. 1990) (internal citations omitted).

158. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958); *see also Marlin v. Robertson*, 307 S.W.3d 418, 427 (Tex. App.—San Antonio 2009) (describing as illegal per se restrictive practices whose "nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality").

receives per se treatment if the courts have considerable experience with the type of restraint and it has a manifestly anticompetitive effect.[159] Instead, the plaintiff need only show that the agreement was formed and that it is a practice that historically has been considered per se illegal under antitrust law.[160] Texas courts appear to follow the federal practice of designating certain restraints as unlawful "per se."[161]

While the per se rule can provide guidance and predictability of result for certain conduct, the use of the rule is "confined to restraints … that would always or almost always tend to restrict competition and decrease output."[162] To warrant a per se prohibition, a challenged restraint must have "manifestly anticompetitive" effects and "lack any redeeming virtue."[163] Courts should only use a per se analysis when there has been extensive experience with the complained-of restraint, and then only if courts can confidently predict that the restraint would be invalidated in most or all instances under the rule of reason.[164] Not surprisingly, courts have "expressed reluctance to adopt *per se* rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious."[165] Any departure from the rule of reason analysis "must be based upon demonstrable economic effect rather than … upon formalistic line drawing."[166]

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159. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886-87 (2007).

160. *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 343-45 (1982).

161. *See, e.g., Times Herald Printing Co. v. A.H. Belo Corp.*, 820 S.W.2d 206, 211 (Tex. App.—Houston [14th Dist.] 1991) ("Because contracts, combinations, and conspiracies in restraint of trade come in different forms, courts require different standards of proof and different safeguards to promote and protect competitive conditions. For example, certain *price fixing, group boycotts* and *tying agreements* are illegal *per se.*" (emphasis in original) (citing *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958)).

162. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (internal citations and quotations omitted).

163. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (internal citations and quotations omitted).

164. *See Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886-87 (2007); *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 344 (1982).

165. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (internal citations and quotations omitted).

166. *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977). Practices typically categorized as illegal per se are discussed in § 2-3:2.3.

2-3:2.2b Rule of Reason Analysis

Most challenged contracts, combinations, or conspiracies are analyzed under the "rule of reason" standard. The focus of the "rule of reason" test is whether the restraint promotes competition or suppresses or destroys competition.[167] The factors considered in a rule of reason analysis vary from case to case.[168]

When engaging in a rule of reason analysis, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[169] Factors typically considered include "specific information about the relevant business,"[170] "the restraint's history, nature, and effect,"[171] and whether the businesses involved have market power.[172] The rule is designed to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.[173]

To establish a violation under the rule of reason, a plaintiff must prove the restrictive practice has an adverse effect on competition in the relevant market.[174] The focus is on the effect an alleged restraint has on competition; a mere showing that the plaintiff suffered economic injury will not suffice.[175] "To keep the antitrust laws from becoming so trivialized, the reasonableness of a restraint is evaluated based on its impact on competition as a whole within the relevant market."[176] Thus, a plaintiff must prove what market it contends was restrained and that the defendants played a significant role in the relevant market.[177] In the absence of market power, any restraint on trade created by the defendants' actions is unlikely to

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167. *See, e.g., Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918); *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978).

168. *See Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

169. *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

170. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

171. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

172. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (equating the rule of reason with "an inquiry into market power and market structure designed to assess [a restraint's] actual effect").

173. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007).

174. *Marlin v. Robertson*, 307 S.W.3d 418, 429 (Tex. App.—San Antonio 2009).

175. *Marlin v. Robertson*, 307 S.W.3d 418, 429 (Tex. App.—San Antonio 2009).

176. *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 708 (4th Cir. 1991).

177. *Marlin v. Robertson*, 307 S.W.3d 418, 429 (Tex. App.—San Antonio 2009).

implicate Texas Antitrust Act section 15.05(a).[178] "There must be evidence of 'demonstrable economic effect,' not just an inference of *possible* effect."[179]

2-3:2.3 Practices Found To Be Illegal

2-3:2.3a Price-Fixing

Horizontal price fixing—an agreement among competitors to set prices—is illegal per se. "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se."[180]

As the Supreme Court explained, "[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices."[181] Even a reasonable fixed price may, over time or through economic and business changes, become unreasonable.[182] Once established, it may be maintained unchanged because of the absence of competition secured by the agreement.[183] "Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions."[184]

2-3:2.3b Market Allocation Agreements

Agreements by competitors to allocate territories to minimize competition are treated as per se violations of the antitrust laws.

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178. *Marlin v. Robertson*, 307 S.W.3d 418, 429 (Tex. App.—San Antonio 2009).

179. *The Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 689 (Tex. 2006) (emphasis in original) (internal citation omitted).

180. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

181. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927).

182. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927).

183. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927).

184. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927).

Indeed, these so-called horizontal market allocation agreements are a classic example of an illegal restraint because they are "inherently anticompetitive."[185] Such agreements are illegal per se regardless of whether the parties split a market within which they both do business, or they never competed in the same market but simply reserve one market for one and one market for the other.[186]

2-3:2.3c Resale Price Maintenance Agreements

Vertical price fixing is known as "resale price maintenance." The Supreme Court has recognized that the scope of per se illegality should be narrow in the context of vertical restraints because of their "real potential to stimulate interbrand competition, the primary concern of antitrust law."[187]

In 1997, the Supreme Court overruled 30-year-old precedent and concluded that vertical maximum price fixing should be analyzed under a rule of reason analysis rather than be considered a per se violation.[188] Ten years later, the Court overruled nearly 100-year-old precedent and ruled that vertical minimum price fixing should likewise be analyzed under the rule of reason.[189] In this latter ruling, the Court explained that "it cannot be stated with any degree of confidence that resale price maintenance always or almost always tend[s] to restrict competition and decrease output."[190] Because resale price maintenance can have either precompetitive or anticompetitive effects, "these agreements appear ill suited for *per se* condemnation."[191]

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185. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984).

186. *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990).

187. *Business Elecs. Corp. v. Sharp. Elecs. Corp.*, 485 U.S. 717, 724 (1988) (internal quotations and citations omitted); *see also The Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 689 (Tex. 2006).

188. *State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997).

189. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 894-95 (2007), overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

190. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 894 (2007) (internal citations and quotations omitted).

191. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 894 (2007).

2-3:2.3d Tying Arrangements

Tying arrangements are prohibited by Section 15.05(c) of the Texas Antitrust Act and Section 1 of the Sherman Act.[192] A tying arrangement is the sale or lease of one product (the tying product) on the condition that the other party buy or lease a second product (the tied product).[193] Tying arrangements are considered illegal per se because they curb competition on the merits in the tied product.[194] "They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market."[195] Not every tying arrangement is an illegal tying arrangement, however. Per se treatment requires "proof that the tying arrangement involved the use of market power to force [consumers] to buy [goods] they would not otherwise purchase."[196]

An illegal tying arrangement has five elements: (1) a tying and a tied product; (2) actual coercion by the seller that in fact forced the buyer to purchase the tied product; (3) the seller has sufficient market power in the tying-product market to force the buyer to accept the tied product[197]; (4) there are anticompetitive effects in the tied market; and (5) the seller's activity in the tied product involves a not insubstantial amount of interstate commerce.[198] If only a single purchaser is forced to purchase a tied item, the impact on competition would not be sufficient to warrant the concern of antitrust law.[199] Tying arrangements are not condemned unless

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192. Tex. Bus. & Com. Code § 15.05(c); *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 462 (1992).

193. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958).

194. *Standard Oil Co. of California v. United States*, 337 U.S. 293, 305-06 (1949); *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 844 (5th Cir. 1975).

195. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 6 (1953).

196. *Breaux Bros. Farms, Inc. v. Teche Sugar Co., Inc.*, 21 F.3d 83, 86 (5th Cir. 1994) (internal citations omitted).

197. Relying on a Supreme Court ruling that 30 percent of a tying market did not establish dominant market position, some courts use a 30 percent share of the tying product market as a benchmark for the minimum amount of market power necessary to give rise to a per se illegal tying arrangement. *See, e.g., Breaux Bros. Farms v. Teche Sugar Co.*, 21 F.3d 83, 87 (5th Cir. 1994).

198. *MJR Corp. v. B & B Vending Co.*, 760 S.W.2d 4, 22 (Tex. App.—Dallas 1988) (citing *Amey Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1502-03 (11th Cir. 1985)).

199. *MJR Corp. v. B & B Vending Co.*, 760 S.W.2d 4, 22-23 (Tex. App.—Dallas 1988).

a substantial volume of commerce is foreclosed.[200] An actual, substantial and material restraint of trade must be shown. Without a showing of actual adverse effect on competition, defendants cannot make out a case under the antitrust laws.[201] Moreover, when a party has no control over a tied market, the dangers typically associated with a tying arrangement do not exist.[202]

Actual coercion must be established to support a tie-in claim, because an antitrust violation only occurs if the seller goes beyond persuasion and actually coerces or forces the buyer to purchase the tied product in order to obtain the tying product.[203] The seller's exploitation of its control over the tying product to force the buyer into the purchase of the tied product is the essential characteristic of an illegal tying arrangement.[204] Refusal to sell, on its own, is not coercion.[205]

Not every refusal to sell two products separately restrains competition.[206] If each of the products may be sold separately in a competitive market, one seller's decision to sell the two in a single package imposes no unreasonable restraint on either market.[207]

2-3:2.3e Price Discrimination

The Texas Antitrust Act does not have a provision specifically prohibiting price discrimination, and there is no Texas equivalent to the Robinson-Patman Act.[208]

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200. *MJR Corp. v. B & B Vending Co.*, 760 S.W.2d 4, 22-23 (Tex. App.—Dallas 1988) (citing *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984)).

201. *MJR Corp. v. B & B Vending Co.*, 760 S.W.2d 4, 22-23 (Tex. App.—Dallas 1988) (citing *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984)).

202. *Breaux Bros. Farms, Inc. v. Teche Sugar Co., Inc.*, 21 F.3d 83, 89 (5th Cir. 1994).

203. *RTLC AG Prods., Inc. v. Treatment Equip. Co.*, 195 S.W.3d 824, 831 (Tex. App.—Dallas 2006).

204. *RTLC AG Prods., Inc. v. Treatment Equip. Co.*, 195 S.W.3d 824, 831 (Tex. App.—Dallas 2006).

205. *RTLC AG Prods., Inc. v. Treatment Equip. Co.*, 195 S.W.3d 824, 831 (Tex. App.—Dallas 2006) (citing *Logic Process Corp. v. Bell & Howell Publ'ns Sys. Co.*, 162 F. Supp. 2d 533, 540 (N.D. Tex. 2001)).

206. *RTLC AG Prods., Inc. v. Treatment Equip. Co.*, 195 S.W.3d 824, 831 (Tex. App.—Dallas 2006) (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 11 (1984)).

207. *RTLC AG Prods., Inc. v. Treatment Equip. Co.*, 195 S.W.3d 824, 831 (Tex. App.—Dallas 2006) (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 11 (1984)).

208. For a discussion of price discrimination claims under federal law, refer to § 2-2:2.3.

2-3:2.3f Exclusive Dealerships

Exclusive dealing arrangements are challenged under Section 15.05(c) of the Texas Antitrust Act and both the Sherman Act and the Clayton Act. Exclusive dealing occurs when a sales contract prevents a purchaser from using or dealing in the goods of a competitor or competitors of the seller.[209] A contract by which a distributor obtains an exclusive territory for the resale of articles purchased from the supplier, and by which the distributor is given a contractual right to prevent sales by the supplier to others in that territory, is a violation of the Texas Antitrust Act and thus is unenforceable.[210]

The primary antitrust concern with exclusive dealing arrangements is that they may be used by a monopolist to strengthen its position, which may ultimately harm competition.[211] A prerequisite to any exclusive dealing claim is an agreement to deal exclusively, though an express exclusivity requirement is not necessary because courts look past the terms of the contract to ascertain the relationship between the parties and the effect of the agreement "in the real world."[212]

Exclusive dealing agreements can be entered into for procompetitive reasons, and generally pose little threat to competition.[213] However, "[e]xclusive dealing can have adverse economic consequences by allowing one supplier of goods or services unreasonably to deprive other suppliers of a market for their goods…."[214] Exclusive dealing arrangements are especially concerning when imposed by a monopolist.[215] In some cases,

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209. *Star Tobacco, Inc. v. Darilek*, 298 F. Supp. 2d 436, 442 (E.D. Tex. 2003).

210. *Sherrard v. After Hours, Inc.*, 464 S.W.2d 87, 89 (Tex. 1971).

211. *ZF Meritor v. Eaton Corp.*, 696 F.3d 254, 270 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 2025 (U.S. 2013) (internal citation omitted).

212. *ZF Meritor v. Eaton Corp.*, 696 F.3d 254, 270 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 2025 (U.S. 2013) (internal citation omitted).

213. *ZF Meritor v. Eaton Corp.*, 696 F.3d 254, 270 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 2025 (U.S. 2013) (citing *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 76 (3d Cir.2010) ("[I]t is widely recognized that in many circumstances, [exclusive dealing arrangements] may be highly efficient—to assure supply, price stability, outlets, investment, best efforts or the like—and pose no competitive threat at all.")).

214. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring), *abrogated on other grounds* by *Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

215. *ZF Meritor v. Eaton Corp.*, 696 F.3d 254, 271 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 2025 (U.S. 2013) (internal citation omitted).

a dominant firm may be able to foreclose rival suppliers from a large enough portion of the market to deprive such rivals of the opportunity to achieve the minimum economies of scale necessary to compete.[216]

Because of the potentially procompetitive benefits of exclusive dealing agreements, their legality is judged under the rule of reason.[217] The legality of an exclusive dealing arrangement depends on whether it will foreclose competition in such a substantial share of the relevant market so as to adversely affect competition.[218] Courts consider not only the percentage of the market foreclosed, but also take into account "the restrictiveness and the economic usefulness of the challenged practice in relation to the business factors extant in the market;" this is known as the "qualitative substantiality test."[219] An exclusive dealing arrangement is unlawful only if the "probable effect" of the arrangement is to substantially lessen competition, rather than merely disadvantage rivals.[220]

There is no set formula for evaluating the legality of an exclusive dealing agreement, but modern antitrust law generally requires a showing of significant market power by the defendant, contracts of sufficient duration to prevent meaningful competition by rivals, and an analysis of likely or actual anticompetitive effects considered in light of any procompetitive effects.[221] Courts will also consider whether there is evidence that the dominant firm engaged in coercive behavior, and the ability of customers to terminate the agreements.[222] The use of exclusive dealing by competitors of the defendant may also be considered.[223]

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216. *ZF Meritor v. Eaton Corp.*, 696 F.3d 254, 271 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 2025 (U.S. 2013) (internal citation omitted).

217. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961).

218. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 328 (1961).

219. *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1251-52 n.75 (3d Cir.1975).

220. *ZF Meritor v. Eaton Corp.*, 696 F.3d 254, 271 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 2025 (U.S. 2013) (internal citation omitted).

221. *ZF Meritor v. Eaton Corp.*, 696 F.3d 254, 271 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 2025 (U.S. 2013) (internal citation omitted).

222. *ZF Meritor v. Eaton Corp.*, 696 F.3d 254, 271-72 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 2025 (U.S. 2013) (internal citation omitted).

223. *ZF Meritor v. Eaton Corp.*, 696 F.3d 254, 272 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 2025 (U.S. 2013) (internal citation omitted).

2-3:2.3g Group Boycotts

Group boycotts, which are concerted refusals to deal, are a type of economic activity that merits per se invalidation.[224] However, group boycotts are not always per se illegal, and a plaintiff must do more than merely allege a group boycott because not all group boycotts are predominantly anticompetitive.[225] Precisely which group boycotts are subject to the per se rule is, however, not always clear.

The Supreme Court has clarified that a necessary precondition for a per se unlawful group boycott is that it must be horizontal—that is, it must involve an agreement among firms that ordinarily compete with each other at the same level of the market.[226] Other attributes typical of a group boycott subject to per se treatment are that "the boycott often cuts off access to a supply, facility, or market necessary to enable the boycotted firm to compete;" that "frequently the boycotting firms possessed a dominant position in the relevant market;" and that "the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive."[227] However, a concerted refusal to deal need not necessarily possess all of these traits to merit per se treatment.[228]

2-3:3 Covenants Not to Compete

A covenant not to compete[229] is "[a]n agreement, generally part of a contract of employment or a contract to sell a business, in which the covenantor agrees for a specific period of time and within a particular area to refrain from competition with the covenantee."[230] Two varieties of covenants not to compete are

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224. *Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 293 (1985).

225. *Marlin v. Robertson*, 307 S.W.3d 418, 428 (Tex. App.—San Antonio 2009).

226. *See NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998); *see also Tunica Web Adver. v. Tunica Casino Operators Ass'n, Inc.*, 496 F.3d 403, 412 (5th Cir. 2007).

227. *Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 294 (1985); *Tunica Web Adver. v. Tunica Casino Operators Ass'n, Inc.*, 496 F.3d 403, 413-14 (5th Cir. 2007).

228. *Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 295 (1985); *Tunica Web Adver. v. Tunica Casino Operators Ass'n, Inc.*, 496 F.3d 403, 413-14 (5th Cir. 2007).

229. Synonymous terms include "noncompete agreement," "noncompete clause," and "restrictive covenant."

230. Black's Law Dictionary 364 (6th ed. 1990).

most common: covenants prohibiting the seller of a business from competing with the buyer, and covenants prohibiting an employee, upon discharge, from competing with the former employer.[231]

The Texas Constitution protects freedom of contract, but the legislature may impose reasonable restrictions on that freedom for public policy reasons.[232] It has done so by prohibiting naked restraints of trade in order to promote economic competition.[233] As the legislature recognized, however, valid covenants not to compete have benefits for trade and commerce, such as increasing efficiency by encouraging employers to entrust to key employees confidential information and important client relationships and incentivizing employers to invest resources in human capital and develop accompanying goodwill.[234] The Texas Covenants Not to Compete Act was thus intended to balance the interest in avoiding naked restraints that impede competition with that in allowing parties to agree to reasonable limitations that may further promote economic competition.[235]

The Texas Covenants Not to Compete Act, codified as Sections 15.50-52 of the Texas Antitrust Act, governs the enforceability of non-compete agreements that restrict a former employee's professional mobility or an employee's solicitation of employees or customers of the former employer.[236] The Act does not expressly govern non-disclosure agreements.[237] Texas courts have stated that the latter are not restraints on trade because, rather than necessarily and directly restricting the former employee's ability to compete with the former employer, they instead merely

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231. *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168, 170 (Tex. 1987), *superseded on other grounds by statute as stated in Marsh USA Inc. v. Cook*, 354 S.W.3d 764 (Tex. 2011), (citing *Daniel v. Goesl*, 161 Tex. 490, 341 S.W.2d 892 (1960), and *Justin Belt Co. v. Yost*, 502 S.W.2d 681 (Tex.1974)).

232. *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 768 (Tex. 2011).

233. *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 768-69 (Tex. 2011).

234. *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 769 (Tex. 2011).

235. *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 770 (Tex. 2011).

236. *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 768 (Tex. 2011); *see also Guy Carpenter & Co., Inc. v. Provenzale*, 334 F.3d 459, 464-65 (5th Cir. 2003); *Rimkus Consulting Grp., Inc. v. Cammarata*, 255 F.R.D. 417, 438-39 (S.D. Tex. 2008); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 681-82 (Tex. 1990); *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593, 599-600 (Tex. App.—Amarillo 1995).

237. *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 768 (Tex. 2011); *CRC-Evans Pipeline Int'l, Inc. v. Myers*, 927 S.W.2d 259, 265 (Tex. App.—Houston [1st Dist.] 1996); *Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 663 (Tex. App.—Dallas 1992).

prevent the former employee from disclosing trade secrets and confidential information that was acquired.[238] Accordingly, "[a] non-disclosure agreement may be enforceable even if a covenant not to compete is not.[239]

PRACTICE POINTER:
The current trend in Texas jurisprudence is toward increasing enforceability of covenants not to compete and away from non-enforcement based on technical issues of contract formation. In the most typical context of covenants ancillary to employment agreements, employer litigants seeking to enforce must still carry their burden, however, of showing that limitations are reasonable. In other contexts, the burden of proving unreasonableness is on the party resisting enforcement. On either side of the litigation, counsel should be mindful at the outset of the need to develop evidence, argument, and strategy targeted at the reasonableness inquiry that is likely to be at the core of the case.

2-3:3.1 Ancillary to Or Part of Otherwise Enforceable Agreement

The Act's requirement that, to be enforceable, a covenant not to compete be ancillary to or part of an otherwise enforceable agreement derives from the common law prohibition of naked restraints on trade and the policy considerations underlying that prohibition.[240] Texas law requires that the covenant not to compete be "ancillary or part of an otherwise enforceable agreement *at the time the agreement is made.*"[241] The Texas Supreme Court has rejected the view that a unilateral contract could never serve as the required otherwise enforceable agreement because unilateral contracts are not immediately enforceable at the time they are made. "[A]t the

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238. *CRC-Evans Pipeline Int'l, Inc. v. Myers*, 927 S.W.2d 259, 265 (Tex. App.—Houston [1st Dist.] 1996); *Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 663 (Tex. App.—Dallas 1992).

239. *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d 877, 888 (Tex. App.—Dallas 2003).

240. *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 770-71 (Tex. 2011) (citing *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 849 (Tex. 2009); *Justin Belt Co. v. Yost*, 502 S.W.2d 681, 685 (Tex. 1973); *Weatherford Oil Tool Co. v. Campbell*, 340 S.W.2d 950, 952 (Tex. 1960)).

241. *Alex Sheshunoff Mgmt. Services, L.P. v. Johnson*, 209 S.W.3d 644, 649 (Tex. 2006) (quoting Tex. Bus. & Com. Code § 15.50) (emphasis in original).

time the agreement is made" was intended to modify "ancillary or part of," not "otherwise enforceable agreement."[242] Thus, a unilateral contract can indeed satisfy the Act's requirements.[243] As long as the covenant not to compete is ancillary to or part of the unilateral contract when the covenant not to compete is made, the covenant not to compete becomes enforceable the moment the employer performs its promise under the agreement, as long as the Act's other requirements are met.[244] The focus of the "core inquiry," then, is whether a covenant "contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promise."[245]

Recently, the Texas Supreme Court reemphasized that the Covenant Not to Compete Act was intended to render more covenants not to compete enforceable, not fewer.[246] Prior case law had set out a two-part test for determining whether a covenant not to compete was "ancillary to an otherwise enforceable agreement": "(1) the consideration given by the employer in the otherwise enforceable agreement must give rise to the employer's interests in restraining the employee from competing; and (2) the covenant must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement."[247]

The Texas Supreme Court repudiated the "give rise" requirement, as it does not appear in the Act itself, nor does the Act define "ancillary."[248] The court declared "the Legislature did not include a requirement in the Act that the *consideration* for the non-compete

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242. *Alex Sheshunoff Mgmt. Services, L.P. v. Johnson*, 209 S.W.3d 644, 651-56 (Tex. 2006).

243. *Alex Sheshunoff Mgmt. Services, L.P. v. Johnson*, 209 S.W.3d 644, 655-56 (Tex. 2006).

244. *Alex Sheshunoff Mgmt. Services, L.P. v. Johnson*, 209 S.W.3d 644, 655 (Tex. 2006). *See also Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 845-46 (Tex. 2009) ("We hold that if the nature of the employment for which the employee is hired will reasonably require the employer to provide confidential information to the employee for the employee to accomplish the contemplated job duties, then the employer impliedly promises to provide confidential information and the covenant is enforceable so long as the other requirements of the Covenant Not to Compete Act are satisfied.").

245. *Alex Sheshunoff Mgmt. Services, L.P. v. Johnson*, 209 S.W.3d 644, 655-56 (Tex. 2006) (quoting Tex. Bus. & Com. Code § 15.50).

246. *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 772-73 (Tex. 2011).

247. *Light v. Centel Cellular Co. of Texas*, 883 S.W.2d 642, 647 (Tex. 1994), *holding modified by Alex Sheshunoff Mgmt. Services, L.P. v. Johnson*, 209 S.W.3d 644 (Tex. 2006) and *abrogated by Marsh USA Inc. v. Cook*, 354 S.W.3d 764 (Tex. 2011).

248. *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 775-76 (Tex. 2011).

must give rise to the interest *in restraining competition with the employer.* Instead, the Legislature required a nexus—that the non-compete be 'ancillary to' or 'part of' the otherwise enforceable agreement between the parties."[249] The court further found that "ancillary" and "part" should be given their common meanings.[250]

PRACTICE POINTER:
The Texas Supreme Court has removed the highly technical barriers to enforcement erected by prior case law and shifted the focus back toward the substance and reasonableness of the covenant not to compete at issue. It is no longer the case that only covenants not to disclose confidential information made at the same time that the information was provided meet the requirement of being ancillary to or part of an otherwise enforceable agreement. However, some otherwise enforceable agreement still must exist, and the covenant not to compete must still be ancillary to or part of such an agreement to be enforceable. So, do not neglect that requirement when preparing the case.

2-3:3.1a Non-Solicitation Covenants

Covenants not to solicit customers or prospective customers of the former employer or seller of a business are subject to the provisions of the Covenant Not to Compete Act as restraints on trade.[251] They are enforceable as ancillary to the employer's implied promise to provide access to sensitive information about clientele.[252] Early case law held that such a covenant was not enforceable

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[249] *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 775 (Tex. 2011) (stock options provided to employee as consideration for the covenant not to compete was reasonably related to the employer's interest in protecting its goodwill, and thus the non-compete agreement was "ancillary to or part of" the agreement to provide stock options and "not unenforceable on that basis").

[250] *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 775 (Tex. 2011).

[251] *See Alex Sheshunoff Mgmt. Services, L.P. v. Johnson*, 209 S.W.3d 644, 646-47 (Tex. 2006); *Travel Masters, Inc. v. Star Tours, Inc.*, 827 S.W.2d 830, 831-34 (Tex. 1991), *abrogated by statute on other grounds as stated in Alex Sheshunoff Mgmt. Services, L.P. v. Johnson*, 209 S.W.3d 644 (Tex. 2006); *York v. Hair Club for Men*, No. 01-09-00024-CV, 2009 Tex. App. LEXIS 4866, *11 (Tex. App.—Houston [1st Dist.] June 25, 2009, no pet.); *SafeWorks, L.L.C. v. Max Access, Inc.*, No. H-08-2860, 2009 U.S. Dist. LEXIS 29268, *11-15 (S.D. Tex. Apr. 8, 2008).

[252] *York v. Hair Club for Men*, No. 01-09-00024-CV, 2009 Tex. App. LEXIS 4866 (Tex. App.—Houston [1st Dist.] June 25, 2009) (applying *Mann Frankfort* and concluding that a covenant not to solicit hair-replacement clients was enforceable as ancillary to the

when it was made at the inception of an employment-at-will relationship and the employment agreement consisted entirely of the non-solicitation covenant.[253] Because either the employee or the employer could terminate the at-will employment relationship at any time, the non-solicitation covenant was, in the Texas Supreme Court's view, not ancillary to an otherwise enforceable agreement.[254] In a 1993 amendment to the Act, the legislature abrogated that holding, specifically and expressly providing that an at-will employment agreement can serve as the "otherwise enforceable agreement" to which a covenant not to compete must be ancillary to or part of.[255]

The status of covenants not to solicit employees of the covenantee under Texas law is currently less clear. Historically, Texas courts routinely treated such agreements as not covered by the Act, usually not regarding them as restraints on trade.[256] In a recent Texas Supreme Court opinion, however, the court grouped covenants that restrict solicitation of the former employer's employees together with those that restrict solicitation of customers, declaring both to be "restraints on trade . . . governed

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employer's implied promise to provide its stylists access to the highly guarded and sensitive information about its clientele).

253. *Travel Masters, Inc. v. Star Tours, Inc.*, 827 S.W.2d 830, 833 (Tex. 1991), *abrogated by statute as stated in Alex Sheshunoff Mgmt. Services, L.P. v. Johnson*, 209 S.W.3d 644 (Tex. 2006).

254. *Travel Masters, Inc. v. Star Tours, Inc.*, 827 S.W.2d 830, 833 (Tex. 1991), *abrogated by statute as stated in Alex Sheshunoff Mgmt. Services, L.P. v. Johnson*, 209 S.W.3d 644 (Tex. 2006).

255. *Alex Sheshunoff Mgmt. Services, L.P. v. Johnson*, 209 S.W.3d 644, 653 & nn.5-6 (Tex. 2006) (examining the legislative history and noting that the legislature intended to abrogate *Travel Masters, Inc. v. Star Tours, Inc.*, 827 S.W.2d 830 (Tex. 1991)); *see* Tex. Bus. & Com. Code Ann. § 15.51(b) ("If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, for a term or *at will*, the promisee has the burden of establishing that the covenant meets the criteria specified by Section 15.50 of this code." (emphasis added)).

256. *See, e.g., Beasley v. Hub City Tex., L.P.*, No. 01-03-00287-CV, 2003 WL 22254692, at *2 n.3 (Tex. App.—Houston [1st Dist.] Sept. 23, 2003) (distinguishing between the section of a non-competition covenant pertaining to nonrecruitment of employees and the remainder of the covenant noting that "[o]f course, the standard for enforcing a noncompetition covenant differs from that for enforcing a covenant not to solicit employees"); *Totino v. Alexander & Assocs., Inc.*, No. 01-97-01204-CV, 1998 WL 552818, at *9 (Tex. App.—Houston [1st Dist.] Aug. 20, 1998) (holding that the nonrecruitment covenants at issue did not significantly restrain the individual appellants' trade or commerce and thus were not covered by the Act and stating "We consider nonrecruitment covenants to be, by analogy, more like nondisclosure covenants than noncompetition covenants.").

by the Act."[257] As of this writing, there are no Texas cases citing this statement for the principle of applying the Act to covenants not to solicit employees.

PRACTICE POINTER:
In seeking to enforce a covenant not to solicit a former employer's customers, a party can rely on the Act to establish an at-will employment agreement as the requisite otherwise enforceable contract. If a covenant not to solicit employees is at issue, counsel should consult the most current Texas case law to determine whether or not the covenant is subject to the Act. If the status of such covenants remains unclear at the time of such litigation, counsel should consider making good-faith arguments for development of the law in the direction most favorable to the client's interest.

2-3:3.1b Non-Disclosure Covenants

Texas courts distinguish covenants not to disclose from covenants not to compete, reasoning that non-disclosure covenants are not in fact restraints on trade.[258] They are thus generally not themselves subject to the Act; so, "reasonable time, geographical, and scope-of-activity limitations are not prerequisites to enforceability."[259] As such, non-disclosure covenants may, and frequently do, serve as the otherwise enforceable agreements that a covenant not to compete is ancillary to or part of.[260]

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257. *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 768 (Tex. 2011) ("Covenants that place limits on former employees' professional mobility or restrict their solicitation of the former employers' customers and employees are restraints on trade and are governed by the Act.").

258. *Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 663 (Tex. App. —Dallas 1992); *see also Guy Carpenter & Co. v. Provenzale*, 334 F.3d 459, 465 (5th Cir. 2003); *Alliantgroup, L.P. v. Feingold*, 803 F. Supp. 2d 610, 622 (S.D. Tex. 2011); *Shoreline Gas, Inc. v. McGaughey*, No. 13-07-364-CV, 2008 WL 1747624, at *10 (Tex. App.—Corpus Christi Apr. 17, 2008); *Oxford Global Res., Inc. v. Weekley-Cessnun*, No. 3:04-CV-0330-N, 2005 WL 350580, at *2 (N.D. Tex. Feb. 8, 2005); *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d 877, 888 (Tex. App.—Dallas 2003); *CRC-Evans Pipeline Int'l, Inc. v. Myers*, 927 S.W.2d 259, 265 (Tex. App.—Houston [1st Dist.] 1996).

259. *Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 663 (Tex. App.—Dallas 1992) (non-disclosure covenant may, be treated as a restraint on trade if, as a practical matter, it "prohibits the former employee from using, in competition with the former employer, the general knowledge, skill and experience acquired in former employment").

260. *See Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 773 (Tex. 2011); *Alex Sheshunoff Mgmt. Services, L.P. v. Johnson*, 209 S.W.3d 644, 648 (Tex. 2006); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 850 (Tex. 2009).

PRACTICE POINTER:
If, as is often the case, a non-disclosure covenant was unilateral at the time it was made, counsel should determine by investigation whether the covenant in fact became enforceable through performance. For example, to enforce such a covenant against a former employee, the employer will need to show that it did in fact provide confidential information to the employee.

2-3:3.2 Shifting Burden of Establishing Compliance With the Act

The Covenant Not to Compete Act allocates the burden of proof as to whether a covenant not to compete meets the requirements for enforceability based on the type of agreement to which the covenant is ancillary.[261] Thus, in the context of employment agreements, the employer has the burden of proving compliance with the Act's criteria.[262] In other contexts, such as when the covenant not to compete is ancillary to the sale of a business, the presumption is that the covenant not to compete does meet the criteria and it is the covenantor's burden to prove otherwise. If either party seeks to collect statutory treble damages for the allegedly anticompetitive conduct, it remains that party's burden to make the required showing that the conduct was willful and flagrant.[263] That standard is difficult to meet.[264] Litigants should also be mindful of any changing burden based on the procedural posture of the case.[265]

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261. Tex. Bus. & Com. Code § 15.51(b).

262. *See, e.g., John R. Ray & Sons, Inc. v. Stroman*, 923 S.W.2d 80, 84-85 (Tex. App.—Houston [14th Dist.] 1996). (insurance agency as former employer could not sustain burden of proving that the non-compete agreement executed by its former employee was ancillary to his employment agreement and met the statutory reasonableness requirements for enforceable covenants where covenant imposed an industry-wide exclusion on the agent's working in the insurance business in and around the county, was unlimited in time, and extended to customers with whom the agent had no involvement).

263. *Daytona Group of Texas, Inc. v. Smith*, 800 S.W.2d 285, 291 (Tex. App.—Corpus Christi 1990); *see* Tex. Bus. & Com. Code § 15.21(a)(1).

264. *Daytona Group of Texas, Inc. v. Smith*, 800 S.W.2d 285, 291 (Tex. App.—Corpus Christi 1990).

265. *See Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 656-61 (Tex. App.—Dallas 1992) (where employee and new employer moved for summary judgment on claim that covenant not to compete in employee's employment agreement was unenforceable, burden shifted to movants of proving unenforceability as a matter of law, which was met by showing that the covenant contained no geographical limitations).

Texas case law has not yet established clear standards for how either party may prove reasonableness, and the courts largely appear to approach the inquiry on an ad hoc basis. Because Texas courts tend to adhere strictly to the parol evidence rule, attempts to show reasonableness through evidence from outside the four corners of a contract may not succeed.[266]

PRACTICE POINTER:
If the client has a potential claim for statutory treble damages for the alleged anticompetitive conduct, counsel should pay attention to developing the evidence needed to establish that the conduct was willful and flagrant. The burden of making that showing is a stiff one, and it falls on whichever party seeks the statutory damages, regardless of the type of contract.

2-3:3.3 Reasonableness

The Texas Supreme Court has expressly signaled its intent that courts focus on the Act's "core inquiry," which "is whether the covenant contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promise."[267] It is thus now clear in Texas that "[t]he hallmark of enforcement is whether or not the covenant is reasonable."[268] What is less clear is whether Texas courts will find particular covenants not to compete to be so. "The reasonableness of the covenant is generally recognized to be a question of law for the court's determination."[269] But, the cases

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266. *See Bandera Drilling Co., Inc. v. Sledge Drilling Corp.*, 293 S.W.3d 867, 871-72 (Tex. App.—Eastland 2009) (seller attempted to meet his burden of proving that covenant was unenforceable through parol evidence regarding the parties' negotiations and mutual understandings, which was not accepted because contract contained merger clause and was not ambiguous).

267. *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 777-78 (Tex. 2011) ("We hold that if the relationship between the otherwise enforceable agreement and the legitimate interest being protected is reasonable, the covenant is not void on that ground."); *Alex Sheshunoff Mgmt. Services, L.P. v. Johnson*, 209 S.W.3d 644, 655 (Tex. 2006).

268. *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 777 (Tex. 2011).

269. *Electronic Data Sys. Corp. v. Powell*, 508 S.W.2d 137, 139 (Tex. Civ. App.—Dallas 1974); *see also Orkin Exterminating Co., Inc., Co. v. Wilson*, 501 S.W.2d 408, 411 (Tex. Civ. App.—Tyler 1973); *Toch v. Eric Schuster Corp.*, 490 S.W.2d 618, 621 (Tex. Civ. App.—Dallas 1972).

provide few meaningful guidelines, and the inquiry is typically an ad hoc one with few bright-line rules.

A few helpful principles may be discerned from the case law. Covenants not to compete that contain industry-wide exclusions are unreasonable,[270] as are covenants that are unlimited as to time.[271] Similarly, a covenant not to compete that contains no geographical restrictions at all cannot be enforced as written.[272] The geographical scope may make a court more or less likely to find a given time limitation reasonable; that is, the more limited the geographical scope, the longer the duration of the time limit that will be permitted.[273] Finally, although the Act abrogated the short-lived Texas tenure of the "common calling" doctrine,[274] under which an employee with a common calling such as sales could not be restricted from practicing it, the degree to which a covenanting employee's occupation is common may nevertheless be a factor in determining whether restrictions are reasonable.[275]

PRACTICE POINTER:

In developing the client's case on reasonableness, realize that the inquiry is likely to be ad hoc with equitable overtones. If particular aspects of the covenant at issue stand out, for example, an extremely broad geographic scope or very long duration of time, case law that is more or less dispositive may be found. But in most cases, developing the client's story and appealing to the court's common sense and view of equity may be more persuasive.

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270. *John R. Ray & Sons, Inc. v. Stroman*, 923 S.W.2d 80, 85 (Tex. App.—Houston [14th Dist.] 1996) (citing *Peat Markwick Main & Co. v. Haas*, 818 S.W.2d 381, 388 (Tex. 1991)).

271. *John R. Ray & Sons, Inc. v. Stroman*, 923 S.W.2d 80, 85 (Tex. App.—Houston [14th Dist.] 1996) (citing *Juliette Fowler Homes, Inc. v. Welch Assocs., Inc.*, 793 S.W.2d 660, 662-633 (Tex. 1990)).

272. *Sheline v. Dun & Bradstreet Corp.*, 948 F.2d 174, 176 (5th Cir. 1991); *see also DeSantis v. Wackenhut Corp*., 793 S.W.2d 670, 682 (Tex. 1990); *Juliette Fowler Homes v. Welch Assocs.*, 793 S.W.2d 660, 662 (Tex.1990); Alexandra Sowell, Comment, *Covenants Not to Compete: A Review of the Governing Standards of Enforceability after* DeSantis v. Wackenhut Corp. *and the Legislative Amendments to the Texas Business and Commerce Code*, 45 Sw.L.J. 1009 (1991).

273. *Greenstein v. Simpson*, 660 S.W.2d 155, 159 (Tex. App.—Waco 1983); *York v. Dotson*, 271 S.W.2d 347, 348 (Tex. Civ. App.—Fort Worth 1954).

274. *See Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 772 (Tex. 2011).

275. *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 683 (Tex. 1990).

2-3:3.3a Time

Texas trial courts have "considerable discretion" in determining whether the time limitations in a covenant not to compete are reasonable.[276] Courts may "consider whether the interests which the covenant was designed to protect are still outstanding" and "balance those interests against the hardships which would be imposed upon the employee by enforcement of the restrictions."[277]

Courts rarely will find a time limitation of three years or less to be unreasonable and unenforceable. "Two to five years has repeatedly been held a reasonable time in a noncompetition agreement."[278] The permissible duration of the time limitation may be longer as the area of the geographical restriction becomes smaller.[279] As the covered geographic area gets larger, acceptable time limitations tend to become smaller.[280]

2-3:3.3b Territory

The geographic scope must be specific and ascertainable to be enforceable, and "[i]ndefinite descriptions of the area covered by a non-competition covenant render them unenforceable as

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276. *Bob Pagan Ford, Inc. v. Smith*, 638 S.W.2d 176, 178 (Tex. App.—Houston [1st Dist.] 1982); *see also LaRocca v. Howard-Reed Oil Co.*, 277 S.W.2d 769 (Tex. Civ. App.—Beaumont 1955).

277. *Bob Pagan Ford, Inc. v. Smith*, 638 S.W.2d 176, 178 (Tex. App.—Houston [1st Dist.] 1982) (upholding trial court's determination that three-year time restriction in car dealership's employment agreement with a former salesman was unreasonably long and unenforceable as written); *see also Smith Protective Servs., Inc. v. Robertson*, 560 S.W.2d 174 (Tex. Civ. App.—Houston [1st Dist.] 1977).

278. *AMF Tuboscope v. McBryde*, 618 S.W.2d 105, 108 (Tex. Civ. App.—Corpus Christi 1981); *see also Weber v. Hesse Envelope Co.*, 342 S.W.2d 652, 655 (Tex. Civ. App.—Dallas 1960) (two-year restriction in envelope salesman's non-compete agreement was "well within the period generally upheld as enforceable"); *Arevalo v. Velvet Door, Inc.*, 508 S.W.2d 184, 185 (Tex. Civ. App.—El Paso 1974) (three-year time limitation in beautician's covenant not to compete was not challenged as unreasonable); *Electronic Data Sys. Corp. v. Powell*, 508 S.W.2d 137, 138 (Tex. Civ. App.—Dallas 1974) (three-year limitation in computer systems engineer's restrictive covenant was not questioned).

279. *Greenstein v. Simpson*, 660 S.W.2d 155, 159 (Tex.App.—Waco 1983); *York v. Dotson*, 271 S.W.2d 347, 348 (Tex. Civ. App.—Fort Worth 1954); *Moore v. Duggan Abstract Co.*, 154 S.W.2d 519, 520-21 (Tex. Civ. App.—Fort Worth 1941) (seller of an abstract business could be lawfully enjoined to abide by his covenant to no longer engage in the abstract business in Denton County for the remainder of his life).

280. *See, e.g., French v. Cmty. Broad. of Coastal Bend, Inc.*, 766 S.W.2d 330, 333-34 (Tex. App.—Corpus Christi 1989) (three-year limitation in television station manager's restrictive covenant that geographically covered counties within the station's area of dominant influence); *AMF Tuboscope v. McBryde*, 618 S.W.2d 105, 108 (Tex. Civ. App.—Corpus Christi 1981) (two-year limitation held reasonable for covenant including a geographic scope of a 100-mile radius).

written."[281] "What constitutes a reasonable area is generally considered to be the territory in which the employee worked while in the employment of his employer."[282] Texas courts may be more willing to find broad geographical restrictions reasonable in agreements concerning sales of businesses than in the context of employment agreements, a recognition that contracting businesses having more coequal bargaining power.[283] The population density of the area covered by the geographical restrictions is relevant to their reasonableness. "A covenant that would be unreasonable in a dense, industrialized urban area may be reasonable when applied to less settled areas."[284]

2-3:3.3c Scope of Activity

To be reasonable, the scope of activity covered by the covenant not to compete must have some reasonable relationship to the scope of activities encompassed by the relevant ancillary agreement.[285]

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[281] *Gomez v. Zamora*, 814 S.W.2d 114, 118 (Tex. App.—Corpus Christi 1991) (former employer, whose business was assisting hospitals to recover government money for providing medical services to indigent patients, was unable to meet its burden of showing reasonableness where covenant as written did not specify geographic scope and record did not reflect what geographic area it was intended to cover); *see also Weatherford Oil Tool Co. v. Campbell*, 340 S.W.2d 950, 951-52 (Tex. 1960); *Hice v. Cole*, 295 S.W.2d 661, 664-65 (Tex. Civ. App.—Beaumont 1956); *Butts Retail, Inc. v. Diversifoods, Inc.*, 840 S.W.2d 770, 774 (Tex. App.—Beaumont 1992) (geographical limitation in a franchise agreement permitting franchisee to operate retail fruit and nut store was not enforceable as written because the term "metropolitan area" was too vague and not defined; covenant prohibiting another fruit and nut retail business "within the metropolitan area" of a mall was thus unreasonable and unenforceable as applied to the mall in which the franchisee's store was located).

[282] *Diversified Human Res. Group, Inc. v. Levinson-Polakoff*, 752 S.W.2d 8, 12 (Tex. App.—Dallas 1988) (covenant purporting to prohibit former employee of employment agency from working anywhere within 50 miles of any city in which agency operated a profit center was overbroad and unreasonable; it would effectively preclude employee from working anywhere in Texas although she had worked for the agency only in Dallas); *see also Justin Belt Co. v. Yost*, 502 S.W.2d 681, 685 (Tex. 1973); *Martin v. Linen Systems for Hosps., Inc.*, 671 S.W.2d 706, 709 (Tex. App.—Houston [1st Dist.] 1984).

[283] *Williams v. Powell Elec. Mfg. Co.*, 508 S.W.2d 665, 667-68 (Tex. Civ. App.—Houston [14th Dist.] 1974) (court upheld as reasonable a restriction encompassing the entire continental United States when the buyer manufacturer did business on a nationwide basis); *Caraway v. Flagg*, 277 S.W.2d 803, 806 (Tex. Civ. App.—Dallas 1955) (restriction preventing the seller of a Dallas taxidermy business from competing anywhere within Texas was upheld when the business drew customers from across the state).

[284] *Wilson v. Chemco Chem. Co.*, 711 S.W.2d 265, 267-68 (Tex. App.—Dallas 1986) (upheld as reasonable a restriction against an independent contractor covering "some twenty-one counties in four states" when the region, though "vast" was "sparsely populated"); compare *NCH Corp. v. Share Corp.*, 757 F.2d 1540 (5th Cir. 1985) (covenants covering fewer counties in one state were invalidated).

[285] *See Juliette Fowler Homes, Inc. v. Welch Assocs., Inc.*, 793 S.W.2d 660, 662 (Tex. 1990) (where covenant between two companies providing fundraising services was essentially

In the employment context, it must relate to the employee's activities during the course of employment.[286] In the context of an agreement to sell a business, it must relate to the scope of the business sold.[287]

2-3:3.3d Protection of Goodwill Or Business Interest

Limitations in a covenant not to compete must "not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee."[288] In the employment context, that requirement has been found not to be met when a covenant fails to limit non-solicitation restrictions to customers whom the employee actually dealt with during the period of employment. Where no effort is made to limit the prohibition only to customers with whom the employee dealt during his or her employment, the restriction is in excess of what is required to protect an employer's business and goodwill.[289]

2-3:3.4 Enforcement

Covenants not to compete may be enforced by damage awards, injunctive relief, or both, against a breaching promisor.[290]

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unlimited in scope, prohibiting the promisor's employees from entering into "any form of contract for services, directly or indirectly" with any client of the promisee, covenant was held unenforceable against the former president of the promisor when he later went to work for an association that provided services to a client charitable organization).

286. *Allan J. Richardson & Assocs., Inc. v. Andrews*, 718 S.W.2d 833, 835 (Tex. App.—Houston [14th Dist.] 1986).

287. *Barrett v. Curtis*, 407 S.W.2d 359, 361-62 (Tex. Civ. App.—Dallas 1966); *Pitts v. Ashcraft*, 586 S.W.2d 685, 689-90 (Tex. Civ. App.—Corpus Christi 1979) (divorced woman's covenant not to compete against funeral business she and her ex-husband once jointly owned was enforceable against her, but language stating that she was "not to encourage or advise anyone else" to so compete could not preclude her from giving financial gift to her son although she knew he intended to use it to start competing funeral business).

288. Tex. Bus. & Com. Code § 15.50(a); *see also Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 386 (Tex. 1991); *John R. Ray & Sons, Inc. v. Stroman*, 923 S.W.2d 80, 85 (Tex. App.—Houston [14th Dist.] 1996).

289. *NCH Corp. v. Share Corp.*, 757 F.2d 1540, 1543 (5th Cir. 1985) (covenants by sales representatives for companies selling chemical specialty products were unenforceable when "no effort was made to limit this prohibition only to customers with whom the sales representative had dealt during his employment with NCH" and the covenants thus "were clearly in excess of what was required to protect NCH's business and good will"); *see also Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 388 (Tex. 1991) (covenant by accounting partner that applied to clients of former accounting firm who became clients after he departed and those with whom he had no involvement while with the prior firm held to be unreasonable and thus unenforceable).

290. Tex. Bus. & Com. Code § 15.51(a); *Alliantgroup, L.P. v. Feingold*, 803 F. Supp. 2d 610, 621 (S.D. Tex. 2011); *Hilb, Rogal & Hamilton Co. of Texas v. Wurzman*, 861 S.W.2d 30, 33 (Tex. App.—Dallas 1993).

A non-compete covenant also may serve as a basis for a tortious interference claim against a third party, even if the covenant not to compete is itself unenforceable.[291]

2-3:3.5 Reformation

The Covenant Not to Compete Act provides that a court must reform time, geographical, and scope of activity limitations found to be unreasonable as written and enforce a covenant as reformed if it has found that the covenant is ancillary to or part of an otherwise enforceable agreement.[292] However, the court may not award the promisee damages for breach of the covenant before its reformation and may grant only injunctive relief.[293] Thus, a party who brings an action only for money damages is not entitled to reformation.[294] Additionally, the party seeking reformation must "show what, if any, reformation of the covenant would be reasonable and necessary to protect the goodwill or other business interest of the company" to be entitled to reformation.[295] Otherwise, the reformation may simply be an exercise in futility. [296]

PRACTICE POINTER:
If there is any likelihood that the covenant may be found enforceable only as reformed, for example, if the covenant contains no or a very broad geographic restriction, counsel for the party seeking enforcement should pay attention at the outset to the need to show what reformation would be reasonable and necessary to protect the client's goodwill or other business interest. And, of course, counsel should discuss with the client early on and consistently what reformation and flexibility the client could live with.

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291. *Juliette Fowler Homes, Inc. v. Welch Assocs., Inc.*, 793 S.W.2d 660, 664 (Tex. 1990).

292. Tex. Bus. & Com. Code § 15.51(c).

293. Tex. Bus. & Com. Code § 15.51(c); *Juliette Fowler Homes, Inc. v. Welch Assocs., Inc.*, 793 S.W.2d 660, 663 (Tex. 1990).

294. *Sheline v. Dun & Bradstreet Corp.*, 948 F.2d 174, 178 (5th Cir. 1991).

295. *John R. Ray & Sons, Inc. v. Stroman*, 923 S.W.2d 80, 85 (Tex. App.—Houston [14th Dist.] 1996); *Daytona Group of Texas, Inc. v. Smith*, 800 S.W.2d 285, 290 (Tex. App.—Corpus Christi 1990).

296. *John R. Ray & Sons, Inc. v. Stroman*, 923 S.W.2d 80, 85 (Tex. App.—Houston [14th Dist.] 1996).

2-3:3.6 Availability of Costs and Attorney's Fees

In the context of an agreement obligating the promisor to render personal services, the promisor may be awarded costs and reasonable attorney's fees if the covenant is found not to contain reasonable limitations as to time, geographical area, and scope of activity.[297] To be entitled to such an award, the promisor must establish that the promisee "knew at the time of the execution of the agreement that the covenant did not contain" the required reasonable limitations and that the limitations contained in the covenant were more restraining than necessary to protect the promisee's goodwill or other business interest.[298] Additionally, the promisee must have "sought to enforce the covenant to a greater extent than was necessary to protect the goodwill or other business interest of the promisee."[299] The costs and fees provision has been held to be "permissive, not mandatory," meaning whether or not to make the award is within the trial court's discretion.[300]

PRACTICE POINTER:
In the employment agreement context, counsel and their clients should be mindful of the possibility of a fees and costs award to the promisor. The promisor's counsel will want to develop evidence that the promisee knew at the time of the covenant's execution that its limitations were not reasonable. Both parties should bear in mind that such an award is ultimately within the court's discretion, not mandatory, and often will reflect the equities of the situation in the eyes of the court.

2-4 ANTITRUST REMEDIES AND DEFENSES

2-4:1 Scope

The Texas Antitrust Act permits suit for damages or injunctive relief by any person or Texas governmental entity whose business or property has been injured by reason of a violation of subsections

297. Tex. Bus. & Com. Code § 15.51(c).

298. Tex. Bus. & Com. Code § 15.51(c); *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 678 (S.D. Tex. 2010); *Franlink, Inc. v. GJMS Unlimited, Inc.*, 401 S.W.3d 705, 711 (Tex. App.—Houston [14th Dist.] 2013).

299. Tex. Bus. & Com. Code § 15.51(c).

300. *Emergicare Sys. Corp. v. Bourdon*, 942 S.W.2d 201, 205 (Tex. App.—Eastland 1997).

(a), (b), or (c) of § 15.05. These sub-sections prohibit contracts, combinations, or conspiracies in restraint of trade (§ 15.05(a)); monopolization, attempted monopolizations, and conspiracies to monopolize (§ 15.05(b)); and improper exclusive dealing that lessen competition (§ 15.05(c)).[301] Temporary or permanent injunctive relief is also available for these same violations.[302] No private right of action for damages or injunctive relief is available for violations of subsection (d) of § 15.05, which bars mergers or acquisitions that substantially lessen competition, or subsection (e), which makes unlawful certain labor practices.[303]

Claims under the Texas Antitrust Act for damages or injunctive relief may be brought by a natural person, proprietorship, partnership, corporation, municipal corporation, association, or any other public or private group, as well as the State of Texas and any of its political subdivisions.[304] Any of these same persons may be named as defendants in an action for damages or injunctive relief, except municipal corporations, the State of Texas, and its departments and administrative agencies who are not proper defendants.[305]

Any person or governmental entity who files suit seeking monetary or injunctive relief under the Texas Antitrust Act must mail a copy of the complaint to the attorney general, who may elect to intervene as a representative of the public. A statutory fine may be imposed on any plaintiff who fails to comply with the notice requirement.[306]

Declaratory relief is also available under the Texas statute to a private litigant in the form of an action against the state seeking a declaration that his or her actions or proposed actions do not violate any of the prohibitions set forth in subsection (a)-(e) of § 15.05. A foreign corporation not authorized to do business in the state is ineligible to bring such an action.[307]

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301. Tex. Bus. & Com. Code §§ 15.05(a), 15.05(b), 15.05(c), 15.21(a)(1).
302. Tex. Bus. & Com. Code § 15.21(b).
303. Tex. Bus. & Com. Code §§ 15.05(d), 15.05(e), 15.21(a)(1).
304. Tex. Bus. & Com. Code §§ 15.03(a)(3), 15.21(a)(1), 15.21(b).
305. Tex. Bus & Com. Code §§ 15.03(a)(3), 15.21(a)(1), 15.21(b).
306. Tex. Bus. & Com. Code § 15.21(c).
307. Tex. Bus & Com. Code § 15.16(a).

2-4:2 Monetary Damages

The Texas Antitrust Act permits a prevailing plaintiff to recover actual damages sustained.[308] Damages are awarded through a two-step process. First, a plaintiff must prove the "fact of damage," sometimes referred to as "impact"; that is, some "element of actual damages caused by the defendant's violation of the antitrust laws."[309] The fact of damage requirement is one of causation; the plaintiff must show that the defendant's unlawful conduct was a material cause of injury to its business.[310] The showing necessary to meet the requirement depends on the nature of the antitrust violation. For example, in a price fixing case, impact "may be shown simply by proof of purchase at a price higher than the competitive rate."[311]

Once impact has been established, then the court considers the computation of damages, where a more relaxed burden applies than would justify an award in other civil cases.[312] Even under this "relaxed" standard, however, a court must still exercise its responsibility "not to allow damages to be determined by 'guesswork' or 'speculation' and must insist on upon a 'just and reasonable estimate of the damage based on relevant data."[313] Thus, the "lenient standard" of calculating damages in antitrust actions does not allow a plaintiff to hide its lack of business success by resorting to unfounded damage measures.[314]

2-4:2.1 "Before and After" and "Yardstick" Measures of Lost Profits

When quantifying antitrust damages, the two most common methods are the "before and after" and "yardstick" measures of lost profits. The "before and after" method compares the plaintiff's

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308. Tex. Bus. & Com. Code § 15.21(a)(1).

309. *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 988-89 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 1594 (1984), *abrogated on other grounds by Deauville v. Federated Dept. Stores, Inc.*, 756 F.2d 1183 (5th Cir. 1985).

310. *El Aguila Food Products, Inc. v. Gruma Corp.*, 131 Fed. App'x 450, 452 (5th Cir. 2005) (internal citation omitted).

311. *Robinson v. Texas Auto. Dealers Ass'n*, 387 F.3d 416, 422 (5th Cir. 2004), *cert denied*, 125 S. Ct. 1710 (2005) (internal citation and quotation omitted).

312. *Eleven Line, Inc. v. North Texas State Soccer Ass'n, Inc.*, 213 F.3d 198, 208-09 (5th Cir. 2000).

313. *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 49 (5th Cir. 1972) (*quoting Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946)), *cert. denied*, 409 U.S. 665 (1972).

314. *Eleven Line, Inc. v. North Texas State Soccer Ass'n, Inc.*, 213 F.3d 198, 209 (5th Cir. 2000) (internal citation omitted).

profit record prior to the antitrust violation with that subsequent to it. In contrast, the yardstick test is more commonly associated with situations where the business is new and goes out of business before it is able to compile an earnings record. Under these circumstances, an antitrust plaintiff may utilize the yardstick test by providing evidence of the profits of business operations that are closely comparable to the plaintiff's.[315] The proponent of the yardstick method of determining lost profit bears the burden to demonstrate the reasonable similarity of the business whose earning capacity he would borrow, including such factors as geographic location, nature of the markets served, and relative costs of operation.[316] In Texas courts, an antitrust plaintiff's claim of lost profits must be shown through competent evidence with "reasonable certainty," a standard that excludes speculative profits, chancy business opportunities, or promotion of untested products.[317] Damage assumptions finding no support in the actual facts cannot support a verdict.[318]

PRACTICE POINTER:
When litigating Texas Antitrust Act claims or other state law claims in federal court, defendants should be mindful that Texas courts have required that lost profits be proved with "reasonable certainty." This standard is arguably more demanding than its federal antitrust counterpart, which more explicitly recognizes the difficulty of proving damages with certainly due to anticompetitive conduct. As such, the "reasonable certainty" standard represents a potential useful line of attack on the state law portion of the plaintiff's federal court case.

2-4:2.2 No Double Recoveries Under Federal and State Laws

Double recoveries for the same damages under both federal and state laws are not permitted. A plaintiff making a recovery under

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315. *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 668 (5th Cir. 1974), *cert. denied*, 95 S. Ct. 1128 (1975) (internal citations and quotations omitted).

316. *Eleven Line, Inc. v. North Texas State Soccer Ass'n, Inc.*, 213 F.3d 198, 208-09 (5th Cir. 2000) (internal citation omitted).

317. *Atlas Copco Tools, Inc. v. Air Power Tool & Hoist, Inc.*, 131 S.W.3d 203, 206-07 (Tex. App.—Fort Worth 2004) (internal citations omitted).

318. *Eleven Line, Inc. v. North Texas State Soccer Ass'n, Inc.*, 213 F.3d 198, 209 (5th Cir. 2000) (internal citation omitted).

either section 15 of the Clayton Act or any other comparable provision of federal law may not recover damages in a suit under the Texas Antitrust Act for substantially the same conduct that was the subject of the federal suit.[319]

PRACTICE POINTER:
Where a plaintiff has obtained a judgment in a prior antitrust action, whether in state or federal court, a defendant should assert the fact of that judgment as an affirmative defense.

The bar on double recoveries from state and federal courts, however, does not prevent simultaneous prosecution of claims in both venues. A litigant alleging claims under the Texas statute does not "give up or alter its particular rights to pursue its state-law remedies in state court by simultaneously asserting rights under federal law."[320] When enacting federal antitrust remedies, Congress did not preempt the field of antitrust law, but instead intended for "federal antitrust laws to supplement, not displace, state antitrust remedies."[321] Thus, even though the Texas statute must be construed in harmony with federal judicial interpretations, that requirement does not mandate that federal law controls state law or create grounds for removal.

2-4:3 Injunctive Relief

Under the Texas Antitrust Act, injunctive relief may be obtained by any person or governmental entity whose business or property is threatened with injury by reason of a violation of any of the prohibitions in subsections (a), (b), or (c) of § 15.05.[322] A plaintiff may seek relief, whether temporarily or permanently, against any person, other than a municipal corporation or the State of Texas and its departments and administrative agencies, in state district court in any Texas county where any of the named defendants

319. Tex. Bus. & Com. Code § 15.21(a)(2).

320. *American Airlines, Inc. v. Sabre, Inc.*, 694 F.3d 539, 544 (5th Cir. 2012) (internal citation and quotation omitted).

321. *California v. ARC Am. Corp.*, 490 U.S. 93, 102 (1989).

322. Tex. Bus. & Com. Code § 15.21(b).

resides, does business, or maintains its principal office.[323] Suit is also proper in any county in which any of the named plaintiffs resided at the time the cause of action or any part of it arose.[324] A copy of the complaint must be mailed to the attorney general who may intervene as a public representative.[325]

General principles of equity apply in antitrust suits seeking injunctive relief.[326] Injunctive relief is available to a plaintiff if a violation of the Texas statute threatens it with injury, although the threat must be real and actual rather than merely threatened and remote.[327] Like other proceedings where injunctive relief is sought, a jury may determine whether an antitrust violation has occurred, but the trial court determines whether the illegal conduct threatens the plaintiff with injury and thus the propriety of injunctive relief.[328] An injunction obtained pursuant § 15.21(b) cannot be used as a means to preserve assets unrelated to the litigation solely to protect a potential judgment for damages, since equity bars the practice.[329]

PRACTICE POINTER:
Among the remedies commonly sought by an antitrust plaintiff is injunctive relief to prohibit ongoing or future anticompetitive conduct. At trial, it is incumbent on the plaintiff to establish that the defendant's conduct is actual and continuing, rather than a one-time event.

2-4:4 Declaratory Judgment

Pursuant to § 15.16, a person who is uncertain as to whether his or her action or proposed action violates or will violate any of the

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323. Tex. Bus. & Com. Code § 15.21(b).

324. Tex. Bus. & Com. Code § 15.21(b).

325. Tex. Bus. & Com. Code § 15.21(c).

326. Tex. Bus. & Com. Code § 15.21(b).

327. *Chromalloy Gas Turbine Corp. v. United Techs. Corp.*, 9 S.W.3d 324, 329 (Tex. App.—San Antonio 1999) (jury finding established that defendant engaged in attempted monopolistic conduct "at some indeterminate time in the past," which did not imply a finding of continuing illegal conduct that threatened plaintiff with injury).

328. *Chromalloy Gas Turbine Corp. v. United Techs. Corp.*, 9 S.W.3d 324, 327 (Tex. App.—San Antonio 1999) (internal citation omitted).

329. *In re Fredeman Litig.*, 843 F.2d 821, 830-31 (5th Cir. 1988) (construing § 15.21(b)).

prohibitions contained in § 15.05 may file suit against the state for a declaratory judgment.[330] Thus, § 15.16 provides a private litigant with a means to seek legal redress through a declaratory judgment action of violations of subsections (d) and (e) of § 15.05, which bar mergers or acquisitions that substantially lessen competition and unfair labor practices, respectively. In contrast, the monetary damage and injunctive relief available under § 15.21 applies only to violations of sub-sections (a), (b), and (c) of § 15.05.[331] A foreign corporation not authorized to do business in Texas is not eligible to seek relief under § 15.16. Suit under § 15.16 must be brought in Travis County district court.[332]

2-4:4.1 Requirements for Declaratory Judgment Complaint

A complaint for declaratory relief must allege an actual, justiciable controversy rather than a mere hypothetical dispute. Construing a predecessor version of § 15.16, the Austin Court of Appeals held that a plaintiff must demonstrate an actual interference in its rights by the state. In the absence of such interference, no justiciable controversy exists, and the court is without jurisdiction to render an advisory opinion.[333]

In addition to alleging a justiciable controversy, the plaintiff bringing a declaratory judgment action must observe certain other requirements. Citation of the suit must be served on the attorney general who then represents the state in the proceeding. The petition filed by the plaintiff also must describe in detail the action or proposed action to be undertaken by the plaintiff, as well as all other relevant facts.[334] The plaintiff must also pay all costs of the suit.[335]

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330. Tex. Bus. & Com. Code § 15.16.
331. Tex. Bus. & Com. Code §§ 15.16, 15.21(a)(1), 15.21(b).
332. Tex. Bus. & Com. Code § 15.16(a).
333. *State v. Margolis*, 439 S.W.2d 695, 699 (Tex. App.—Austin 1969).
334. Tex. Bus. & Com. Code § 15.16(b).
335. Tex. Bus. & Com. Code § 15.16(d).

2-4:4.2 Specifications of Declaratory Judgments

A judgment rendered under § 15.16 must meet certain specifications. It must fully recite the action or proposed action to be undertaken by the plaintiff and any other facts considered by the court.[336] The judgment must be strictly construed and may not be extended by implication to an action or fact not recited in the judgment.[337] Nor does the judgment bind the state with respect to any non-party.[338] Finally, the judgment does not estop the state from establishing a violation of § 15.05 on the basis of a fact or action not recited in the declaratory judgment, which when combined with an action or fact recited in the judgment, constitutes a violation of § 15.05.[339]

2-4:5 Attorney's Fees and Costs

In suits for damages or injunctive relief under § 15.21, a prevailing plaintiff is entitled to recover the cost of suit, including a reasonable attorney's fee.[340] Section 15.16, which provides for declaratory judgment actions under the Texas Antitrust Act, does not provide for an award of fees and costs.[341]

2-4:5.1 Recovery of Plaintiff's Fees

Recovery of attorney's fees under federal antitrust law, with which the Act is to be interpreted in harmony,[342] is considered mandatory in nature.[343] Fee awards deter violations by requiring a losing defendant to pay the plaintiff's attorney's fees "as part of his penalty for having violated the antitrust laws."[344] To promote this policy, so long as a plaintiff has demonstrated an antitrust violation and the fact of damage, "recovery of attorneys' fees must

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336. Tex. Bus. & Com. Code § 15.16(b).

337. Tex. Bus. & Com. Code § 15.16(c)(1).

338. Tex. Bus. & Com. Code § 15.16(c)(2).

339. Tex. Bus. & Com. Code § 15.16(c)(3).

340. Tex. Bus. & Com. Code §§ 15.21(a)(1), 15.21(b).

341. Tex. Bus. & Com. Code § 15.16.

342. Tex. Bus. & Com. Code § 15.04.

343. *Funeral Consumers Alliance, Inc. v. Serv. Corp. Int'l.*, 695 F.3d 330, 338 (5th Cir. 2012) (internal citations omitted).

344. *Sciambra v. Graham News*, 892 F.2d 411, 415 (5th Cir. 1990) (quoting *Farmington Dowel Prods. Co. v. Foster Mfg. Co.*, 421 F.2d 61, 90 (1st Cir. 1970)).

be sustained regardless of the amount of damages awarded."[345] Plaintiffs also have standing to seek recovery of fees from non-settling defendants even where a previous settlement with another defendant means that no additional compensatory damages will be assessed.[346]

2-4:5.2 Recovery of Defendant's Fees

Under certain circumstances, a prevailing defendant in an action for damages under the Texas Antitrust Act may also recover attorney's fees and costs. Upon a finding that an antitrust action for monetary damages was groundless and brought in bad faith or for the purpose of harassment, § 15.21(a)(3) requires that the court award a reasonable attorney fee, court costs, and other reasonable expenses of litigation to the defendant.[347] The scant authority interpreting this provision suggests the standard for an award of fees and costs under this provision is a high one. One court analogized the standards for groundlessness, bad faith, and harassment under the Act to a similar, but not identical, provision found in the Texas Deceptive Trade Practices Act.[348] According to that court, bad faith is "the conscious doing of a wrong for dishonest, discriminatory, or malicious purposes."[349] Further, a showing that the suit was brought "for purposes of harassment" requires that "the sole purpose" of the suit was harassment.[350] Findings of bad faith and harassment must be supported by an evidentiary record sufficient to establish the circumstances surrounding the filing of the pleading and the signer's credibility and motives.[351] As another court has observed, an award of fees

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345. *Sciambra v. Graham News*, 892 F.2d 411, 417 (5th Cir. 1990) (quoting *U.S. Football League v. Nat'l Football League*, 887 F.2d 408, 412 (2nd Cir. 1989)).

346. *Funeral Consumers Alliance, Inc. v. Serv. Corp. Intern.*, 695 F.3d 330, 336-37 (5th Cir. 2012) (internal citations and quotations omitted).

347. Tex. Bus. & Com. Code § 15.21(a)(3).

348. *See* Tex. Bus. & Com. Code § 17.50(c).

349. *Medical Specialist Group, P.A. v. Radiology Associates, L.L.P.*, 171 S.W.3d 727, 733 (Tex. App.—Corpus Christi 2005) (internal citations omitted) (affirming denial of fee award).

350. *Medical Specialist Group, P.A. v. Radiology Associates, L.L.P.*, 171 S.W.3d 727, 733 (Tex. App.—Corpus Christi 2005) (quoting *Donwerth v. Preston II Chrysler-Dodge, Inc.*, 775 S.W.2d 634, 637 (Tex. 1989)).

351. *Medical Specialist Group, P.A. v. Radiology Associates, L.L.P.*, 171 S.W.3d 727, 733-34 (Tex. App.—Corpus Christi 2005) (internal citations omitted).

will not be supported by "*post hoc* reasoning" that "because [plaintiffs] did not ultimately prevail, their claims must have been unreasonable or without foundation."[352]

2-4:6 Prejudgment Interest

Prejudgment interest may be recovered by a plaintiff who prevails on a claim for damages under § 15.21. Prejudgment interest is assessed at the same rate as postjudgment interest under Texas law and runs from the date of service of the plaintiff's pleading alleging an antitrust claim until the date of judgment. The court may adjust the interest award if it finds that the award is unjust under the circumstances of the case. Interest on actual damages may not be recovered when statutory treble damages are also awarded.[353]

2-4:7 Treble Damages

In an action under § 15.21(a) for damages, if the trier of fact finds that a violation of subsections (a), (b), or (c) of § 15.05 was "willful or flagrant," then the recovery must be increased by three times the damages sustained.[354] The Act does not define "willful or flagrant." Traditionally, Texas courts have defined willful conduct in terms of conduct that is undertaken "knowingly, intentionally, deliberately, and designedly."[355] Texas courts rarely have addressed what conduct satisfies this standard in the antitrust context. The Texas Supreme Court has recognized that the requirement of willful and flagrant conduct to obtain treble damages is "above and beyond" what is required to prove the underlying antitrust violation, and a trial court errs by combining the two into a single standard.[356] According to a decision by the supreme court of a sister state construing the treble damage provision of its antitrust

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352. *Marlin v. Robertson*, 307 S.W.3d 418, 436 (Tex. App.—San Antonio 2009).

353. Tex. Bus. & Com. Code § 15.21(a)(1).

354. Tex. Bus. & Com. Code § 15.21(a)(1).

355. *See, e.g., Geders v. Aircraft Engine and Accessory Co.*, 599 S.W.2d 646, 650-51 (Tex. App.—Dallas 1980).

356. *Caller-Times Publ'g Co. v. Triad Commc'ns Inc.*, 826 S.W.2d 576, 587-88 (Tex. 1992).

act, flagrant conduct is conduct that is "shocking," "outrageous", or "outstandingly bad."[357]

PRACTICE POINTER:
Key evidence in antitrust cases showing willful or flagrant conduct sometimes takes the form of internal discussions among the defendant's employees, often in the form of emails. Email authors too often forget that emails can be fodder in litigation and adopt a relaxed, even cavalier attitude in discussing company business. As such, email dialogues can provide a jury with a candid view of the motivation for anticompetitive conduct and help provide a basis for punishing illegal conduct.

2-4:8 Defenses

Not surprisingly, given the complexity of antitrust law, an array of defenses may be asserted in response to an antitrust claim. Some of these defenses, such as affirmative defenses, are generic to all litigation, while others are peculiar to antitrust law.

2-4:8.1 Affirmative Defenses

Under Texas practice, affirmative defenses must be specifically pled.[358] Certain fact patterns usually suggest the applicability of an affirmative defense. For example, where an alleged antitrust violation arises in the context of a business relationship that has existed for several years, a defense of limitations may be viable.[359] Similarly, where parties are engaged in parallel litigation or have litigated in the past, the affirmative defenses of collateral estoppel or res judicata may be applicable.[360] Finally, mirroring the statutory exemptions set forth at § 15.05(g), justification is an affirmative defense under Texas antitrust law, provided the defense is based

357. *Western Waste Service Sys., Inc. v. Superior Court*, 584 P.2d 554, 555-56 (Ariz. 1978).

358. Tex. R. Civ. P. 94.

359. *See* section 2-5:3 below. *See, e.g., Robinson v. Texas Automobile Dealers Ass'n.*, No. 5:97-CV-273, 2003 WL 2176745, at *3 (E.D. Tex., Mar. 27, 2003).

360. *See, e.g., Ford Motor Co v. Metro Ford Truck Sales, Inc.*, No. 05-99-00031-CV, 1999 WL 11262800, at *4 (Tex. App.—Dallas, Dec. 9, 1999).

on the exercise of either (1) the party's own legal rights; or (2) the party's good faith claim to a colorable right.[361]

2-4:8.2 Defenses Under Antitrust Law

In contrast, other defenses arise from the operation of antitrust law. For example, a defendant may contend that a plaintiff lacks standing to assert an antitrust claim, either because the plaintiff has not suffered an antitrust injury or because the plaintiff lacks proper status to bring an antitrust action.[362] Likewise, the conduct alleged by the plaintiff may be subject to an exemption to the antitrust laws within the meaning of § 15.05(g), thus foreclosing the possibility of liability.[363] Finally, a defendant may defend against an antitrust claim by showing that the plaintiff has failed to prove a required element of its cause of action.[364] By way of example, in a suit alleging a violation of the prohibition in § 15.05(a) against restraint of trade, plaintiff failed to show an adverse effect on competition in the relevant market by claiming that the absence of board-certified pediatric neurosurgeons diminished the quality of care in the market, when there was no proof of economic loss or actual injury to the welfare of patients.[365]

2-5 PRIVATE CAUSES OF ACTION

2-5:1 Jurisdiction

A litigant seeking relief under the Texas Antitrust Act must be mindful of its jurisdictional limitations. Texas courts have long held that transactions or agreements that relate wholly to interstate commerce are not subject to its antitrust statutes.[366] But the fact that a transaction or agreement involves some aspect of interstate commerce does not necessarily foreclose the application of Texas antitrust law. As provided by § 15.21(a)(1), no suit shall

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361. *Money Masters, Inc. v. TRW, Inc.*, No. 05-98-02017-CV, 2003 WL 152770, at *5 (Tex. App.—Dallas, Jan. 23, 2003).

362. *See* § 2-5:6.

363. *See* § 2-2:3.

364. *See* § 2-3 (discussing required elements of antitrust violations).

365. *Marlin v. Robertson*, 307 S.W.3d 418, 430-31 (Tex. App.—San Antonio 2009).

366. *Albertype Co. v. Gust Feist Co.*, 102 Tex. 219, 114 S.W. 791, 792 (Tex. 1909).

be barred "on the grounds that the activity or conduct affects or involves interstate or foreign commerce."[367] Thus, antitrust violations where at least some component of the transaction implicates intrastate commerce have been held to be actionable under Texas antitrust law.[368]

The Texas Supreme Court most recently addressed the extraterritorial scope of the Texas Antitrust Act in *Coca-Cola Co. v. Harmar Bottling Co.* There, the Court held that even when anticompetitive conduct occurs in Texas, the Act does not provide a cause of action for "damages and injunctive relief from injury that occurred in other states."[369] Accordingly, antitrust claims made by soda retailers in the neighboring states of Arkansas, Louisiana, and Oklahoma were not cognizable under the Act even though at least part of the alleged anticompetitive conduct by the defendant occurred in Texas. The Court reasoned that the asserted injury did not occur in Texas, and competition and consumers would not be promoted and benefited by granting relief with respect to markets outside of Texas.[370]

Other parts of *Harmar*, however, suggest that the Act might provide an action to remedy extraterritorial injuries provided such remedies promote competition in Texas or protect Texas consumers. According to the Court, extraterritorial relief requires "a showing that such relief promotes competition in Texas or benefits Texas consumers."[371] The Court further observed that one of the purposes of the Act is "to promote competition in Texas, even if the trade or commerce involved extends outside of Texas."[372] Thus, under *Harmar*, a claim possibly will be cognizable under the Act if it alleges that remedying an extraterritorial injury will promote competition in Texas or benefit Texas consumers. Texas lower courts have not yet had to clarify these contours of the *Harmar* holding.

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367. Tex. Bus. & Com. Code § 15.21(a)(1).

368. *Pounds Photographic Labs, Inc. v. Noritsu Am. Corp.*, 818 F.2d 1219, 1224 (5th Cir. 1987).

369. *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 682 (Tex. 2006).

370. *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 683 (Tex. 2006).

371. *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 674 (Tex. 2006).

372. *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 682 (Tex. 2006).

PRACTICE POINTER:
The prudent antitrust plaintiff should conduct a comprehensive analysis at the onset of the case to determine whether the Texas Antitrust Act applies to a claim involving interstate conduct or harm. There is no definitive list of factors to be examined, although some are obvious. For example, the plaintiff should consider the ties between the conduct and the state, including whether the parties are located in Texas and whether the anticompetitive conduct occurred in Texas. Out-of-state conduct or harm should be carefully reviewed with an eye towards its impact on Texas consumers. The impact on Texas consumers could take many forms. Revenue losses suffered by a Texas plaintiff due to anti-competitive conduct could force it to raise prices or restrict product offerings that are directed exclusively to Texas consumers. The availability of competing products could be restricted or disappear altogether. As with most successful commercial litigants, it pays for an antitrust counsel to understand its client's industry and business trends.

2-5:2 Venues

An action by a private litigant for a violation of conduct prohibited by sub-sections (a), (b), or (c) of § 15.05, whether for monetary damages or injunctive relief, may be brought in district court in the following counties: (1) where any of the named defendants reside, do business, or maintain their principal office; or (2) where any of the named plaintiffs resided at the time the cause of action or any part thereof arose.[373] On a showing of good cause, a properly filed suit may be transferred to another county upon order of the court.[374] A suit for a declaratory judgment seeking a determination whether specified actions or proposed actions violate or will violate § 15.05 must be brought in Travis County district courts.[375]

2-5:3 Statute of Limitations

An action by a private litigant for damages or injunctive relief under the Texas Antitrust Act is barred unless filed within four

373. Tex. Bus. & Com. Code § 15.21(a)(1).
374. Tex. Bus. & Com. Code § 15.26.
375. Tex. Bus. & Com. Code § 15.16(a).

years after the cause of action accrued or within one year after the conclusion of any action brought by the state in a civil fine or criminal action based on the same conduct, whichever is longer. A cause of action for a continuing violation is considered to accrue at any and all times during the period of the violation.[376] But a newly accruing claim for damages must be based on an injury occurring during the limitations period, "not merely the unabated inertial consequences of some pre-limitations action."[377] Thus, where a plaintiff failed to offer evidence that during the limitations period defendants reiterated their refusal to admit the plaintiff, an internet pharmacy, into defendants' healthcare networks, then plaintiff could not establish a continuing violation.[378]

2-5:4 Discovery

Discovery is critical to the outcome of an antitrust suit. It is only through discovery that facts concerning key aspects of a claim can be established or defeated, including for example, the existence of a relevant market, conspiratorial conduct, and damages. Permissible forms of discovery under Texas civil practice include requests for production, interrogatories, requests for admission, and oral or written depositions.[379] In general, a party may obtain discovery regarding any matter that is not privileged and is "relevant to the subject matter" of the pending action.[380] The standard of relevance is liberally construed by Texas courts so as to allow litigants to obtain the fullest knowledge of the facts and issues prior to trial.[381]

For purposes of conducting discovery, every case filed in Texas state court is assigned to one of three levels, depending on the amount in controversy and the issues involved in the case.[382] Typically, antitrust litigants can expect that discovery in their case will be governed by Level 3, which is intended to apply to more complex cases. Discovery in a Level 3 case is conducted pursuant to a discovery control plan that is tailored to the circumstances of the

376. Tex. Bus. & Com. Code § 15.25(a).
377. *Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 517 F.2d 117, 128 (5th Cir. 1975).
378. *Rx.Com v. Medco Health Solutions, Inc.*, 322 Fed. App'x 394, 397 (5th Cir. 2009).
379. Tex. R. Civ. P. 192.1.
380. Tex. R. Civ. P. 192.3(a).
381. *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 664 (Tex. 2009).
382. Tex. R. Civ. P. 190.1.

case and approved by the court. The entry of a Level 3 discovery control plan may be made on motion by a party, by the court on its own initiative, or by an agreed order by the parties.[383] The court may modify the plan when the interests of justice require.[384]

PRACTICE POINTER:
If possible, an antitrust plaintiff should develop a focused plan of discovery, including the identity of key witnesses and the locale of important documentary evidence, prior to the filing of suit. That plan then assists the plaintiff in formulating case themes, preparing expert testimony, and uncovering case strengths and weaknesses. The plan also ensures that the case will move forward expeditiously to trial, thus reducing client costs and conserving judicial resources.

2-5:5 Standing

Antitrust law imposes a threshold standing requirement upon persons seeking liability for antitrust violations. As such, it is "the initial inquiry in antitrust cases."[385] To establish standing, an antitrust plaintiff must show: (1) injury-in-fact; (2) antitrust injury; and (3) proper plaintiff status, which assures that other parties are not better situated to bring the suit.[386] Standing is a question of law and may be raised at any time, including on appeal.[387]

2-5:5.1 Injury in Fact

Almost certainly the most easily satisfied and therefore the least litigated of the standing requirements is that of injury-in-fact. It is most commonly defined as "an injury to the plaintiff caused by the defendant's conduct."[388] Only a person injured "in his business or property" may seek damages for violation of the antitrust laws,

383. Tex. R. Civ. P. 190.4(a).

384. Tex. R. Civ. P. 190.5.

385. *Maranatha Temple, Inc. v. Enterprise Prods. Co.*, 893 S.W.2d 92, 105 (Tex. App.—Houston [1st Dis.] 1994) (internal citations omitted).

386. *Doctor's Hosp. of Jefferson, Inc. v. Southeast Med. Alliance, Inc.*, 123 F.3d 301, 305 (5th Cir. 1997) (internal citations omitted); *Marlin v. Robertson*, 307 S.W.3d 418, 424 (Tex. App.—San Antonio 2009) (internal citations omitted).

387. *Roberts v. Whitfill*, 191 S.W.3d 348, 354-56 (Tex. App.—Waco 2006).

388. *Doctor's Hosp. of Jefferson, Inc. v. Southeast Med. Alliance, Inc.*, 123 F.3d 301, 305 (5th Cir. 1997).

and only a person who can show a significant threat of such injury from impending violations can obtain injunctive relief.[389] By way of example, an antitrust plaintiff suffers an injury-in-fact when paying defendants inflated prices for goods and services.[390]

2-5:5.2 Antitrust Injury

An antitrust injury is an injury of the type that "the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful."[391] Texas antitrust laws are "designed to protect competition rather than individual competitors."[392] Accordingly, "the injury should reflect the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation."[393] No antitrust injury exists if a plaintiff merely alleges damages from increased rather than decreased competition or from a defendant's pro-competitive behavior. "Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws."[394]

Both Texas courts and courts in the Fifth Circuit draw an important distinction between antitrust injury and injury to competition, in the context of establishing standing. Antitrust injury for standing purposes should be viewed "from the perspective of the plaintiff's position in the marketplace, not from the merits-related perspective of the impact of a defendant's conduct on overall competition."[395] Thus, a plaintiff need not establish a market-wide injury to competition as an element of standing. To establish standing, a plaintiff must show that its losses are of the type that the antitrust laws were designed to prevent, regardless

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389. *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1341 (5th Cir. 1988) (internal citations omitted).

390. *Den Norske Stats Oljeselskap AS v. Heeremac Vof*, 241 F.3d 420, 438 (5th Cir. 2001) (Higginbotham, J., dissenting).

391. *Roberts v. Whitfill*, 191 S.W.3d 348, 354-56 (Tex. App.—Waco 2006) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc.*, 429 U.S. 477, 489 (1977)).

392. *Scott v. Galusha*, 890 S.W.2d 945, 950 (Tex. App.—Fort Worth 1994) (internal citations omitted).

393. *Marlin v. Robertson*, 307 S.W.3d 418, 425 (Tex. App.—San Antonio 2009) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc.*, 429 U.S. 477, 489 (1977)).

394. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993).

395. *Doctor's Hosp. of Jefferson, Inc. v. Southeast Med. Alliance, Inc.*, 123 F.3d 301, 305 (5th Cir. 1997) (internal citations omitted).

of the ultimate merits of the claim.[396] Both the Fifth Circuit and Texas courts have cautioned against granting summary judgment on the basis of standing when they mean to say that no antitrust violation has occurred.[397]

2-5:5.3 Proper Plaintiff Status

Antitrust injury is necessary but not sufficient to establish standing.[398] In addition, the court must consider whether a plaintiff is a proper plaintiff to sue for damages, examining such factors as (1) the causal connection between the alleged antitrust violation and harm to the plaintiff; (2) an improper motive; (3) the nature of the plaintiff's alleged injury and whether the injury was of a type that Congress sought to redress with the antitrust laws; (4) the directness with which the alleged market restraint caused the asserted injury; (5) the speculative nature of the damages; and (6) the risk of duplicative recovery or complex apportionment of damages.[399] These factors are weighed on a case-by-case basis.[400]

Proper plaintiff status has been found to be lacking in a number of factual circumstances. For example, where the damages sought by the plaintiff are potentially duplicative or cannot be apportioned without undue complexity, dismissal for lack of standing has been found to be appropriate.[401] A detailed analysis of the factual basis of the plaintiff's claim often shows the absence of any causal

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396. *Doctor's Hosp. of Jefferson, Inc. v. Southeast Med. Alliance, Inc.*, 123 F.3d 301, 306 (5th Cir. 1997).

397. *Doctor's Hosp. of Jefferson, Inc. v. Southeast Med. Alliance, Inc.*, 123 F.3d 301, 306 (5th Cir. 1997) (internal citations and quotations omitted); *Marlin v. Robertson*, 307 S.W.3d 418, 426 (Tex. App.—San Antonio 2009) (internal citations and quotations omitted) (defendants not entitled to summary judgment on issue of standing because analysis focused "too narrowly" on injury as a "component of substantive liability" rather than as an element of standing).

398. *Rio Grande Royalty Co. v. Energy Transfer Partners*, 786 F.Supp.2d 1190 (S.D. Tex.) (quoting *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110 n.5 (1986)).

399. *Hughes v. Tobacco Inst., Inc.*, 278 F.3d 417, 422 (5th Cir. 2001) (internal citations omitted) (summarizing anti-trust standing factors).

400. *Paycom Billing Servs., Inc. v. Mastercard Int'l, Inc.*, 467 F.3d 283, 290 (2d Cir. 2006).

401. *See, e.g., Bell v. Dow Chem. Co.*, 847 F.2d 1179, 1183-84 (5th Cir. 1988) (damages were speculative where other causal explanations for plaintiff's damages existed); *Hughes v. Tobacco Inst., Inc.*, 278 F.3d 417, 422-23 (5th Cir. 2001) (upholding a dismissal of cigarette smokers' claims for alleged antitrust violations against cigarette manufacturers because distributors could properly sue for similar violations, thus creating risk of double liability).

connection to its alleged damages, thus requiring dismissal.[402] Several courts have held that plaintiffs who are neither a consumer of the alleged violator's goods or services or a competitor of the alleged violator do not have standing to sue.[403] Likewise, indirect purchasers lack antitrust standing to seek damages, both as a matter of federal law and Texas law.[404]

2-5:6 Summary Judgment Practice

Two types of motions for summary judgment are proper in Texas courts: a "traditional" summary judgment motion, where the movant must prove its claim or defense or disprove an element of non-movant's claim or defense as a matter of law;[405] or a "no-evidence motion," where the movant must show that there is no evidence of one or more essential elements of a claim or defense on which the non-movant must prevail.[406]

In reviewing both a traditional and no-evidence summary judgment, Texas courts consider the evidence presented in the light most favorable to the non-movant and credit evidence favorable to the non-movant if reasonable jurors would and disregard evidence contrary to the non-movant unless reasonable jurors could not.[407] With respect to a traditional motion for summary judgment, the movant has the burden to demonstrate that no genuine issue of material fact exists and it is entitled to judgment as a matter of law.[408] In contrast, a no-evidence summary judgment motion is essentially "a motion for a pretrial directed verdict"; once such a motion is filed, "the burden shifts to the nonmoving party to

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402. *See, e.g., McCormack v. Nat'l Collegiate Athletic Ass'n.*, 845 F.2d 1338, 1341-42 (5th Cir. 1988) (causal chain between loss of opportunity to attend collegiate athletic events and value of degree asserted by student was too speculative and abstract).

403. *See, e.g., State v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 969-70 (E.D. Tex. 1997) (state was neither consumer of or competitor of defendant tobacco companies); *Maranatha Temple, Inc. v. Enterprise Prods. Co.*, 893 S.W.2d 92, 105 (Tex. App. —Houston [1st Dis.] 1994) (as potential seller of real estate, plaintiff was neither consumer of nor competitor of defendant, who was in business of buying real estate).

404. *Abbot Labs. Inc. v. Segura*, 907 S.W.2d 503, 505-06 (Tex. 1995); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

405. Tex. R. Civ. P. 166a(a), (b).

406. Tex. R. Civ. P. 166a(i).

407. *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009).

408. Tex. R. Civ. P. 166a(c).

present evidence raising an issue as to the elements specified in the motion."[409]

One Texas court has concluded that when considering summary judgments in the antitrust context, federal practice "varies significantly from the Texas summary judgment practice."[410] Under federal practice, policy considerations underlying substantive antitrust law may limit the reasonableness of inferences which may be drawn from circumstantial evidence offered in opposition to a motion for summary judgment. As a result, if the factual context renders an antitrust claim implausible, then non-movants "must come forward with more persuasive evidence to support their claim than would otherwise be necessary."[411] In contrast, when deciding antitrust summary judgments, Texas courts "indulge every reasonable inference in favor of the non-movant," and look to federal authority to the extent it provides standards for determining the "reasonableness of the inferences" to which the non-movant is entitled.[412]

PRACTICE POINTER:
To challenge plaintiff's standing to assert an antitrust claim, a Texas state court defendant should raise the defense of subject matter jurisdiction through the filing of a plea to the jurisdiction. That defense can be raised with other grounds ripe for summary adjudication, whether by a traditional or a no-evidence summary judgment.

2-5:7 Class Actions and Multi-District Proceedings

2-5:7.1 State Court Class Actions

Class actions are a procedural device designed to promote judicial economy by allowing claims that lend themselves to collective treatment to be tried together in a single proceeding.[413] Like other state court class action litigants, antitrust plaintiffs must

409. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 581-82 (Tex. 2006).
410. *Ash v. Hack Branch Distrib'g Co.*, 54 S.W.3d 401, 418 (Tex. App.—Waco 2001).
411. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).
412. *Ash v. Hack Branch Distrib'g Co.*, 54 S.W.3d 401, 418 (Tex. App.—Waco 2001) (internal citations and quotations omitted).
413. *Riemer v. State*, 392 S.W.3d 635, 639 (Tex. 2013).

comply with the requirements of Texas Rule of Civil Procedure 42, which governs class action practice in Texas state court.[414] State court class actions involving claims under the Texas Antitrust Act are rare in the reported case law. One court has held that an antitrust plaintiff's burden for class certification includes providing a "trial plan" for dealing with individual issues.[415] Other issues related to the propriety of such actions will undoubtedly arise. In addressing these issues, Texas courts are likely to look to federal decisions and authorities, given that that Rule 42 is patterned after Federal Rule of Civil Procedure 23.[416]

One obstacle putative Texas state court antitrust class actions confront is the extraterritorial limitation of the Texas statute, which does not allow a remedy for antitrust damages occurring in other states absent a showing that the remedy promotes competition in Texas or protects Texas consumers.[417] Thus, any nationwide class action asserting claims under the Texas statute may be inherently suspect. Given these jurisdictional restrictions under the Texas statute, an obvious alternative to a nationwide class action asserting state law claims is one brought on behalf of a class composed exclusively of Texas consumers.[418]

2-5:7.2 Federal Court Class Actions

Claims asserted under the Texas Antitrust Act, including those involving class actions, can be litigated in federal court.[419] When a suit involves opposing parties of diverse citizenship, or when a federal claim is asserted along with a state law claim, the suit may be removed to federal court.[420] In addition, pursuant to the Class Action Fairness Act ("CAFA"), federal district courts have original jurisdiction to hear certain state class actions where

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414. Tex. R. Civ. P. 42.

415. *Reynolds Metals Co. v. Mumphord*, 47 S.W.3d 141, 146 (Tex. App.—Corpus Christi 2001).

416. *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425, 433 (Tex. 2000).

417. *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 682 (Tex. 2006).

418. *See, e.g., Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 83 F. Supp. 2d 781, 785 (E.D. Tex. 2000) (noting Texas state court case where certification granted of class composed of purchasers of Mrs. Baird's bread products within the State of Texas who alleged price-fixing claims in violation of Tex. Bus. & Com. Code § 15.05(a) and Texas common law).

419. *See, e.g., McPeters v. LexisNexis*, 910 F. Supp. 2d 981, 986 (S.D. Tex. 2012).

420. 28 U.S.C. §§ 1331, 1332, 1441(a).

the following conditions are met: (1) the proposed class action contains more than 100 members; (2) minimal diversity exists between the parties; (3) the amount in controversy exceeds $5,000,000; and (4) the primary defendants are not states, state officials, or governmental entities.[421] This rule is subject to certain exceptions where federal district courts may decline to exercise jurisdiction "in the interests of justice and looking at the totality of the circumstances," including the so-called "local controversy" and "home state controversy" exceptions.[422] These exceptions apply to class actions that are localized controversies where both the majority of the proposed class and the primary defendants are citizens of the state in which the action was filed. As such, these exceptions may represent vehicles to maintain state court jurisdiction over an antitrust class action brought on behalf of Texas consumers.

2-5:7.3 Multi-District Proceedings

Where a state court class action is properly removable to federal court, it may be consolidated with other similar pending actions for certain purposes. Thus, when civil antitrust claims involving one or more common questions of fact are pending in different federal court districts, the Judicial Panel on Multidistrict Litigation ("MDL Panel") may transfer all such actions to any district for coordinated or consolidated proceedings.[423] In deciding whether to centralize multiple antitrust proceedings, the panel may consider a number of factors, including coordination with any ongoing governmental action, elimination of duplicative discovery, prevention of inconsistent pretrial rulings, and the conservation of the resources of the parties, their counsel, and the judiciary.[424] At the conclusion of pretrial proceedings, each transferred action must be remanded to the district from which it was transferred.[425]

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421. 28 U.S.C. § 1332(d); *See also, Hollinger v. Home State Mut. Ins. Co*, 654 F.3d 564, 569 (5th Cir. 2011) (summarizing requirements of CAFA).

422. 28 U.S.C. §§ 1332(d)(3), 1332(d)(4).

423. 28 U.S.C. § 1407(a).

424. *See, e.g., In re Am. Express Anti-Steering Rules Antitrust Litig.*, 764 F. Supp. 2d 1343, 1344 (J.P.M.L. 2011).

425. 28 U.S.C. § 1407(a).

PRACTICE POINTER:
Until the MDL Panel rules on a request for transfer, district courts with pending cases arising from the antitrust conspiracy retain jurisdiction to decide pending motions, including motions to remand, motion to dismiss, or motions relating to discovery. To increase efficiency and consistency, the parties favoring transfer should move the district court under such circumstances to stay the proceeding, pending a ruling from the MDL Panel. A motion for stay should be brought promptly, as the further along the case is in discovery or motions practice, the less compelling are arguments in favor of judicial economy.

2-5:8 Final Judgments Rendered in Actions Brought by State of Texas

A final judgment obtained by the state in a civil penalty action pursuant to § 15.20 or a criminal proceeding pursuant to § 15.22 to the effect that a defendant violated any of the prohibitions in § 15.05 is prima facie evidence against the same defendant in any subsequent action brought pursuant to § 15.21. The presumption applies to all matters which the judgment would be an estoppel between the parties to the new suit. Where a consent judgment or decree is entered before the taking of any testimony in the underlying action brought by the state, the presumption is not available in the subsequent action.[426]

2-5:9 Practical Considerations

Texas plaintiffs injured by anticompetitive face several practical considerations when deciding litigation strategy for the pursuit of their claims. Perhaps the most important is whether to opt for a federal or a state forum, and relatedly, whether to assert claims under state or federal law, or both.

Several factors sometimes point to a federal forum, depending on the facts of a case. Where a plaintiff asserts an injury that occurred in whole or in part outside of Texas, an antitrust plaintiff must be cognizant of the limits to the extraterritorial reach of the Texas Antitrust Act. Unless a persuasive showing can be made that

426. Tex. Bus. & Com. Code § 15.24.

the sought remedies will promote competition in Texas or protect Texas consumers, then no jurisdiction exists in Texas state court, and the case must be dismissed, presumably in favor of a federal court action.[427] Another disadvantage of the Texas statute is the lack of a cause of action for damages or injunctive relief for a merger or acquisition that substantially lessens competition,[428] in contrast to § 4 of the Clayton Act.[429] The Texas statute also lacks a remedy for illegal price discrimination, which is available under federal law in the form of the Robinson-Patman Act.

There are potential risks to a litigant under the Texas statute which are worth noting as well. First, the attorney general is authorized to intervene as a representative of the public in any action for monetary damages or injunctive relief, potentially complicating the prosecution of plaintiff's case.[430] Second, a plaintiff whose suit for damages is found to be groundless and brought in bad faith or for the purpose of harassment can be required to pay the defendant's legal fees, court costs, and other litigation expenses.[431]

On the other hand, a Texas state court antitrust action can have advantages. This is particularly true with respect to a state court forum. In that regard, certain aspects of Texas civil procedure and discovery may be viewed by plaintiffs as more favorable than their federal counterparts. In Texas summary judgment practice, courts are required to consider evidence in the light most favorable to the non-movant and to shift the burden of proof only when the movant has conclusively proved the essential elements of his causes of action as a matter of law.[432] In contrast, under federal summary judgment practice, a non-movant may be required in an antitrust action to present additional evidence if the court deems its claim implausible.[433] In terms of discovery, Texas state courts offer the parties the flexibility of tailoring their own discovery plan, subject to court approval.[434] As a substantive matter, the Texas

427. *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 682 (Tex. 2006).
428. Tex. Bus. & Com. Code § 15.21(a), 15.21(b).
429. 15 U.S.C. § 15.
430. Tex. Bus. & Com. Code § 15.21(c).
431. Tex. Bus. & Com. Code § 15.21(a)(3).
432. *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989).
433. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).
434. Tex. R. Civ. P. 190.4(a).

statute may provide litigants with a degree of flexibility missing from federal courts. The Texas Supreme Court has instructed that Texas courts may draw from the law of any circuit in guiding their interpretation, affording state court practitioners latitude to make arguments not available in a federal court action.[435] Finally, it is worth remembering that a plaintiff is not required to choose between a state or federal forum and may elect instead to bring separate actions in both.[436]

2-6 ENFORCEMENT ACTIONS

2-6:1 Civil Investigative Demands

2-6:1.1 Purpose

In addition to providing for public and private lawsuits for alleged antitrust wrongs, the Texas Antitrust Act also empowers the Texas attorney general to conduct investigations to ascertain whether any person is or has been engaged in, or is actively preparing to engage in, activities which may constitute an antitrust violation.[437] Specifically, the attorney general may, prior to the commencement of a civil proceeding, issue a written demand, referred to as a "civil investigative demand" or "CID" under the Act, requiring a person to provide certain types of information. These include documents for inspection and copying, written answers to interrogatories, oral testimony, or any combination of the foregoing.[438]

A "person," for purposes of the attorney general's authority to conduct civil investigations, is broadly defined to mean a natural person, proprietorship, partnership, corporation, municipal corporation, association, or any other public or private group.[439] However, the attorney general may not demand documentary material from a proprietorship or partnership whose annual gross income does not exceed $5 million.[440]

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435. *Caller-Times Publ'g Co. v. Triad Commc'ns Inc.*, 826 S.W.2d 580-81 (Tex. 1992).
436. *See, e.g., American Airlines, Inc. v. Sabre, Inc.*, 694 F.3d 539 (5th Cir. 2012).
437. Tex. Bus. & Com. Code § 15.10(b).
438. Tex. Bus. & Com. Code § 15.10(b).
439. Tex. Bus. & Com. Code § 15.10(a)(5).
440. Tex. Bus. & Com. Code § 15.10(b).

The purview of the attorney general to conduct civil investigations extends to all violations of conduct prohibited by § 15.05, including not just the prohibitions set forth in subsections (a), (b), and (c) against restraints of trade, monopolization, and exclusive dealing and tying arrangements, but also the prohibitions in subsections (d) and (e) against mergers or acquisitions that substantially lessen competition, and unlawful labor practices.[441] The decision by the legislature to extend the investigative authority of the attorney general to the latter two categories of prohibited conduct gives that office unique oversight responsibility under the Texas Antitrust Act. Antitrust plaintiffs bringing suit for damages or injunctive relief under § 15.21 are not afforded a cause of action for injuries caused by conduct violating the prohibitions in subsections (d) and (e).[442] Nor may the State prosecute a civil suit or bring a criminal action for violations of those subsections.[443] Thus, the authority of the attorney general to conduct civil investigations of ongoing or attempted antitrust violations, coupled with that office's power under § 15.20(b) to seek injunctive relief for any violation or threatened violation of § 15.05, fills an important role in the statutory framework.

2-6:1.2 Format and Requirements of Demand

By requiring that any demand conform to certain requirements, the Texas Antitrust Act provides important protections for persons from whom the attorney general seeks information or other materials in a civil investigation.

2-6:1.2a Protections to Person Receiving Demand

The demand must advise that the person has the right to object to the demand pursuant to the terms of the Act.[444] A demand also must describe the nature of the activities that are under investigation and provide the section of the Act that may have been or may be

441. Tex. Bus. & Com. Code § 15.10(a)(2).
442. Tex. Bus. & Com. Code §§ 15.21(a), 15.21(b).
443. Tex. Bus. & Com. Code §§ 15.20(a), 15.22.
444. Tex. Bus. & Com. Code § 15.10(c)(1).

violated by the activity.[445] Descriptions of the investigation are deemed sufficient if they inform the person of the "intent and scope of the demand" and allow the person to determine "the relevancy of the documents demanded for inspection."[446] Perhaps most significantly, a person responding to a demand is afforded the protections of the Texas Rules of Civil Procedure and other state law relating to discovery.

PRACTICE POINTER:
A demand may not require the production of documentary material, the submission of answers to interrogatories, or the giving of oral testimony unless the material or information would be discoverable under state law.[447]

2-6:1.2b Required Content of Demand

The content of each type of demand is also regulated by the terms of the Act. A demand for documentary material must describe the materials to be produced with reasonable specificity, state a return date or dates which will allow a reasonable time for the production of the materials, and identify the individual acting on behalf of the attorney general to whom the material is to be made available for inspection and copying.[448] Similarly, a demand for written interrogatories must propound the interrogatories with definiteness and certainty, state a date on which answers to the interrogatories will be provided, and identify the individual acting on behalf of the attorney general to whom the answers should be submitted.[449] A demand for oral testimony must state a reasonable date, time, and place at which the testimony will begin and identify

445. Tex. Bus. & Com. Code § 15.10(c)(1).

446. *Attorney General of Texas v. Allstate Ins. Co.*, 687 S.W.2d 803, 807 (Tex. App.—Dallas 1985) (description in demand sufficient, stating that Attorney General "is investigating the possibility of a group boycott of certain providers of health care services to workers' compensation claimants in the State of Texas").

447. Tex. Bus. & Com. Code § 15.10(d)(1).

448. Tex. Bus. & Com. Code § 15.10(c)(2).

449. Tex. Bus. & Com. Code § 15.10(c)(3).

the individual acting on behalf of the attorney general who will conduct the examination.[450]

2-6:1.2c Product of Discovery

The documentary material the attorney general may obtain by means of a demand includes "product of discovery" from other proceedings.[451] "Product of discovery" is broadly defined to include the original or duplicate of any deposition or interrogatory, document, examination, or admission obtained by any method of discovery in any judicial or administrative proceeding.[452] No demand for any product of discovery may be returned until 20 days after the attorney general serves a copy of the demand upon the person from whom the discovery was obtained.[453] A demand for product of discovery by the attorney general supersedes any inconsistent order, rule, or provision of law preventing or restraining its disclosure. A person making voluntary disclosure of product of discovery does not in so doing waive any right or privilege otherwise available to that person.[454]

2-6:1.3 Responses Available

2-6:1.3a Petition for Relief

A person served with a demand, or in the case of a demand for product of discovery, the person from whom the discovery was obtained, may seek relief from the demand by filing a petition for an order modifying or setting aside the demand. The petition is properly brought in the district court of the person's residence or principal office or place of business or in Travis County district court. The petition must be filed within 20 days after the demand has been served or at any before the return date specified in the demand, whichever is shorter.[455] The time for compliance with the demand does not run during the pendency of the petition, but

450. Tex. Bus. & Com. Code § 15.10(c)(4).
451. Tex. Bus. & Com. Code §§ 15.10(a)(4), 15.10(b).
452. Tex. Bus. & Com. Code § 15.10(a)(6).
453. Tex. Bus. & Com. Code § 15.10(c)(5).
454. Tex. Bus. & Com. Code § 15.10(d)(2).
455. Tex. Bus. & Com. Code § 15.10(f).

the petitioner must comply in the interim with any uncontested portions of the demand.[456]

As grounds for relief, the petitioner may allege the failure of the demand to comply with the requirements in the Act or the violation of any constitutional or other legal right or privilege. The petition must specify each ground upon which relief is sought. The petitioner must serve a copy of the petition on the attorney general who may submit an answer. When considering the petition, the court must presume that the demand was issued in good faith and within the scope of the attorney general's authority, absent evidence to the contrary.[457] Otherwise, absent a court order providing that compliance is not required, a person on whom a demand is served must comply with the terms of the demand.[458]

2-6:1.3b Means of Compliance With Demand

For each of three types of demands issuable by the attorney general—documentary material, interrogatories, and oral examination—the Act prescribes appropriate means of compliance.[459] Two special requirements apply with respect to responding to a demand for documentary material or interrogatories. First, a responding person must indicate in writing which, if any, of the documents or interrogatory answers contain trade secrets or confidential information.[460] Second, both the production of documentary material and responses to interrogatories must be made under a sworn certificate by a knowledgeable person stating that all of the requested material or information in the possession or control of the person to whom the demand is directed have been produced.[461] Other requirements for the production of documentary material and interrogatory responses are similar to those associated with customary litigation practice.[462]

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456. Tex. Bus. & Com. Code § 15.10(g)(2).

457. Tex. Bus. & Com. Code § 15.10(f).

458. Tex. Bus. & Com. Code § 15.10(g)(1).

459. Tex. Bus. & Com. Code §§ 15.10(g)(3), 15.10(g)(4), 15.10(g)(5).

460. Tex. Bus. & Com. Code §§ 15.10(g)(3)(A), 15.10(g)(4)(A).

461. Tex. Bus. & Com. Code §§ 15.10(g)(3)(B), 15.10(g)(4)(B).

462. *See* Tex. Bus. & Com. Code §§ 15.10(g)(3)(A), 15.10(g)(4)(A) (documentary material must be made available on the return date at the person's principal office or place of business,

The examination of any person pursuant to a demand for oral testimony may be taken by any person authorized to administer oaths and affirmations by the laws of the State of Texas or the United States.[463] Unless otherwise agreed, the testimony of the person must be taken in the county where the person resides, is found, or transacts business.[464] A person required to provide testimony pursuant to a demand has the right to be accompanied, represented, and advised by counsel, who may provide advice with respect to any question, either on his initiative or at the request of the person giving testimony.[465] The Act places limitations on who can attend an examination. The individual conducting the examination on behalf of the attorney general must exclude from the place of examination all persons except the person being examined, the person's counsel, the counsel of the person to whom the demand has been issued, the person before whom the testimony is to be taken, any stenographer taking the testimony, and any persons assisting the individual conducting the examination.[466]

At the time of the examination, the person being examined or his or her counsel may properly object to any question in whole or in part and refuse to answer on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Otherwise, neither the person being examined nor his or her counsel may object to or refuse to answer any question or interrupt the oral examination. In the event the person refuses to answer any question, the attorney general may petition the district court where the examination is being conducted for an order to compel.[467] The witness has 15 days after receipt of the transcript to examine, make any changes in form or substance accompanied by a statement of the reasons

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or such other place agreed upon place, and the expense of any copying must be borne by the attorney general; each interrogatory must be answered separately and fully in writing, unless objected to).

463. Tex. Bus. & Com. Code § 15.10(g)(5)(A).

464. Tex. Bus. & Com. Code § 15.10(g)(5)(B).

465. Tex. Bus. & Com. Code § 15.10(g)(5)(C).

466. Tex. Bus. & Com. Code § 15.10(g)(5)(D).

467. Tex. Bus. & Com. Code § 15.10(g)(5)(E).

for such changes, and then sign and return the transcript, unless signing is waived in writing.[468]

2-6:1.3c Petition to Compel Compliance by Attorney General

In the event that a recipient of a demand fails to comply with its terms, the attorney general may seek to compel compliance by filing a petition for enforcement. The petition may be filed in the district court in the county in which the person resides, is found, or transacts business. If the person transacts business in more than one county, then the petition must be filed in the county of the person's principal office or place of business or in any other county mutually agreed upon by the person and the attorney general.[469] In addition, any person who conceals, withholds, destroys, or alters any documentary material or otherwise provides inaccurate information is guilty of a misdemeanor and may be punished by a fine of not more than $5,000 or by a sentence of not more than one year in the county jail, or by both.[470]

2-6:1.4 Disclosure of Information Obtained by Demand Process

Section 15.10(i) prohibits the attorney general from disclosing any material received in response to a demand without the consent of the person who produced the material, or in the case of any product of discovery, of the person from whom the discovery was obtained, unless disclosure is permitted under one of the exceptions found in that subsection or unless ordered by a court for good cause shown.[471] This privilege against disclosure applies only to demand materials in the possession of the attorney general; it does not apply to materials or information in the possession of a private antitrust litigant which were previously produced to the attorney general in the course of a civil investigation.[472]

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468. Tex. Bus. & Com. Code § 15.10(g)(5)(F).
469. Tex. Bus. & Com. Code § 15.10(h)(1).
470. Tex. Bus. & Com. Code § 15.10(h)(2).
471. Tex. Bus. & Com. Code § 15.10(i)(1).
472. *In re Memorial Hermann Healthcare*, 274 S.W.3d 195, 197 (Tex. App.—Houston [14th Dist.] 2008).

2-6:1.4a Statutory Exceptions to Rule Against Non-Disclosure

Under the statutory exceptions to the general rule of non-disclosure contained in § 15.10(i), the attorney general may make available demand materials as he or she determines may be required by the state in two circumstances: (1) in the course of any investigation or judicial proceeding in which the state is a party; and (2) for official use by any law enforcement officer of the State of Texas or of the United States, other than for criminal law enforcement purposes.[473] Upon request, the attorney general must also make demand materials available for inspection by the party who produced the materials.[474] The language found in § 15.10(i) that is the basis of these exceptions—"except as provided in this section"—applies only to § 15.10(i) and does not extend to other provisions of the Act. Thus, disclosure of demand materials by the attorney general is not required by § 15.12, which provides that the Texas Rules of Civil Procedure apply in any suit brought by the attorney general to enforce the prohibitions in § 15.05.[475]

PRACTICE POINTER:
The privilege against disclosure applies only to demand materials in the possession of the attorney general; it does not apply to materials or information in the possession of a private antitrust litigant which were previously produced to the attorney general in the course of a civil investigation.

2-6:1.4b Disclosure for Good Cause

The second basis for disclosure of demand materials—a showing of good cause—is determined by the facts of a particular case. Ordinarily though, good cause may be shown by meeting the same standard that is applicable to the disclosure of non-core work product: that a party has substantial need of the materials and that the party is unable without undue hardship to obtain

473. Tex. Bus. & Com. Code §§ 15.10(i)(2), 15.10(i)(3).
474. Tex. Bus. & Com. Code § 15.10(i)(4).
475. *State v. Lowry*, 802 S.W.2d 669, 672 (Tex. 1991).

the substantial equivalent of the materials by other means.[476] One court has found that "substantial need" was established upon a showing that the requested information led to the filing of the enforcement action and could provide evidence for a defense.[477] To satisfy the "undue hardship" prong, the difficulty and burden of replicating the investigative materials is an appropriate factor to consider.[478] Demand materials gathered by the attorney general from third parties are not exempt from discovery on the basis of the work product privilege.[479]

PRACTICE POINTER:
For purposes of showing good cause under § 15.10(i), parties should also consult federal decisions construing the work product privilege under Fed. R. Civ. P. 26(b)(3), which like its Texas counterpart, allows discovery upon a showing of substantial need and undue hardship. Among other exceptions to the general rule of non-disclosure of work product, federal courts recognize that a witness' unavailability or lack of recall can constitute undue hardship to a party seeking discovery.

2-6:1.4c Other Obligations Owed by Attorney General

The attorney general owes other obligations to persons who produce demand materials. In the event that the attorney general intends to disclose demand materials which a producing party has designated as containing trade secrets or confidential information, the attorney must notify the producing party not later than 15 days prior to the disclosure. The producing party may then petition a district court in any Texas county where the person resides, does business, or maintains its principal office for a protective order.[480] In addition, upon a written request, the attorney general must return all documentary materials to the producing party whenever the investigation has been completed, whether as a result of the

476. *State v. Lowry*, 802 S.W.2d 669, 673 (Tex. 1991).
477. *State v. Lowry*, 802 S.W.2d 669, 673 (Tex. 1991).
478. *State v. Lowry*, 802 S.W.2d 669, 673 (Tex. 1991).
479. *State v. Lowry*, 802 S.W.2d 669, 672 n.6 (Tex. 1991).
480. Tex. Bus. & Com. Code § 15.10(i)(5).

termination of any proceeding arising out the investigation or a decision not to institute any such proceeding.[481]

2-6:2 Governmental Civil Suits

2-6:2.1 Suit to Collect Civil Fine

The Texas Antitrust Act authorizes the attorney general to collect a civil fine from any person, other than a municipal corporation, whom the attorney general believes has violated the prohibitions set forth in sub-sections (a), (b), or (c) of § 15.05.[482] Suit may be filed in district court in Travis County or in any Texas county in which any named defendant resides, does business, or maintains its principal office.[483] Any corporation found to have violated the prohibitions in § 15.05(a)-(c) must pay a fine to the State of Texas in an amount not to exceed $1 million; any other person is potentially liable for a fine in an amount not to exceed $100,000.[484]

2-6:2.2 Suit for Injunctive Relief

The attorney general may bring suit seeking injunctive relief against any person, except a municipal corporation, for any activity or contemplated activity that violates or threatens to violate any of the acts prohibited in § 15.05.[485] Thus, the authority of the attorney general to seek injunctive relief extends not only to sub-sections (a), (b), and (c) of § 15.05, which apply to restraints of trade, monopolization, and exclusive dealing and tying arrangements, but also to sub-sections (d) and (e), which prohibit anticompetitive mergers and unlawful labor practices.

Venue for an action brought by the attorney general for injunctive relief is proper either in Travis County district court or in a district court in any Texas county in which any of the named defendants resides, does business, or maintains its principal place of business.[486] In deciding a case for injunctive relief brought by the attorney general, the court is required to apply the same principles as

481. Tex. Bus. & Com. Code § 15.10(i)(6).
482. Tex. Bus. & Com. Code § 15.20(a).
483. Tex. Bus. & Com. Code § 15.20(a).
484. Tex. Bus. & Com. Code § 15.20(a).
485. Tex. Bus. & Com. Code § 15.20(b).
486. Tex. Bus. & Com. Code § 15.20(b).

generally applied by courts of equity in suits for injunctive relief.[487] If the state substantially prevails on the merits, it is entitled to recover the cost of suit, including a reasonable attorney's fee.[488]

The authority of the attorney general to seek injunctive relief under § 15.20 includes orders of divestiture of stock, share capital, or assets of a person acquired in violation of subsection (d), where no other remedy will eliminate the lessening of competition. An order of divestiture must prescribe a reasonable time, manner, and degree for the disposition.[489]

In antitrust actions brought by a governmental entity, injunctive relief is available upon a finding that a defendant committed an antitrust violation, without any showing of actual or potential loss or injury.[490] As one Texas court has recognized, "The inherent threat to the public interest is sufficient to entitle the government to injunctive relief."[491]

2-6:2.3 Federal and State Actions by Attorney General

The constitutional or common law authority of the attorney general to bring other actions under state and federal law is not limited by the enforcement powers granted to the attorney general under § 15.21 for the initiation of civil suits or suits for injunctive relief.[492]

2-6:3 Criminal Actions

The Texas Antitrust Act provides for criminal sanctions. Pursuant to § 15.22(a), any person, other than a municipal corporation, who violates § 15.05(a) by engaging in a contract, combination or conspiracy in restraint of trade, or who violates § 15.05(b) by monopolizing, attempting to monopolize, or conspiring to monopolize trade or commerce, is guilty of a felony punishable by a term of confinement in the Texas Department of Criminal Justice

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487. Tex. Bus. & Com. Code § 15.20(b).

488. Tex. Bus. & Com. Code § 15.20(b).

489. Tex. Bus. & Com. Code § 15.20(b).

490. *Credit Bureau Reports, Inc. v. Retail Credit Corp.*, 476 989, 992 (5th Cir. 1973) (for injunctive relief in a government action for antitrust violations, "there need be established only an antitrust violation").

491. *Chromalloy Gas Turbine Corp. v. United Techs. Corp.*, 9 S.W.3d 324, 328-29 (Tex. App.—San Antonio 1999).

492. Tex. Bus. & Com. Code § 15.20(d).

of not more than three years or by a fine not to exceed $5,000, or both.[493] Criminal suit against an offender may be brought either in district court in Travis County or in any county in which any of the acts contributing to the violation either occurred or are ongoing.[494]

2-6:4 Immunity from Criminal Prosecution

When a person upon whom an investigative demand has been served pursuant to § 15.10 refuses or is likely to refuse to comply with the demand on the basis of the privilege against self-incrimination, the attorney general may apply to the district court in which the person is located for an order granting the person immunity from prosecution and compelling the person's compliance with the demand.[495] The attorney general may seek similar relief with respect to a subpoena for testimony or other civil discovery, sought pursuant to §§ 15.11 and 15.12, where a person refuses or is likely to refuse to comply with a request for discovery on the basis of the privilege against self-incrimination.[496]

Upon receipt of the application, the court may issue an order granting the person immunity and requiring the person to comply with the demand or request notwithstanding his or her claim of privilege.[497] The order is not effective until the person to whom it is directed asserts the privilege and is informed of the order, although the order may be issued prior to the actual assertion of the privilege.[498] When informed of the order, a person whose testimony or production of materials is sought may not refuse to comply with the order on the basis of the privilege against self-incrimination. Criminal prosecution of the person for any act, transaction, matter, or thing about which he or she is ordered to testify or produce is prohibited, unless the alleged offense is perjury or failure to comply with the order.[499]

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493. Tex. Bus. & Com. Code § 15.22(a).
494. Tex. Bus. & Com. Code § 15.22(b).
495. Tex. Bus. & Com. Code § 15.13(a).
496. Tex. Bus. & Com. Code § 15.13(a).
497. Tex. Bus. & Com. Code § 15.13(b).
498. Tex. Bus. & Com. Code § 15.13(c).
499. Tex. Bus. & Com. Code § 15.13(d).

2-7 CONCLUSION

Antitrust litigation perhaps stands at the pinnacle of the legal field in terms of both its legal complexity and its factually intensive nature. Many suits involve business relationships that are long-standing and intricate, thus requiring extensive factual discovery from both the parties and third-parties as well. This exhaustive factual record often must be marshaled and synthesized by expert testimony, so as to provide the fact-finder an understanding of an industry and the relationships at issue. Antitrust law itself often involves difficult concepts, requiring considerable investment of attorney time. Considered together, these factors sometimes point to considerable burden and expense for the antitrust litigant. The uncertainty and risk of antitrust litigation in turn has led courts to impose more demanding standards on litigants, particularly in the form of standing, antitrust injury, and in the case of state antitrust laws like the Texas Antitrust Act, the extraterritorial reach of those laws. Nevertheless, a survey of relevant case law authorities shows that antitrust law remains viable and provides meaningful remedies for those whose businesses have been injured, ranging from small family-owned enterprises to large sophisticated Fortune 500 companies. Likewise, in terms of antitrust litigation initiated by the government, changes in the political environment sometimes have brought a renewed emphasis on antitrust enforcement, a phenomenon with potential significance at both the state and federal levels.