



# **The Public Purchaser's Guide to Antitrust**

Antitrust Section  
Consumer Protection Division



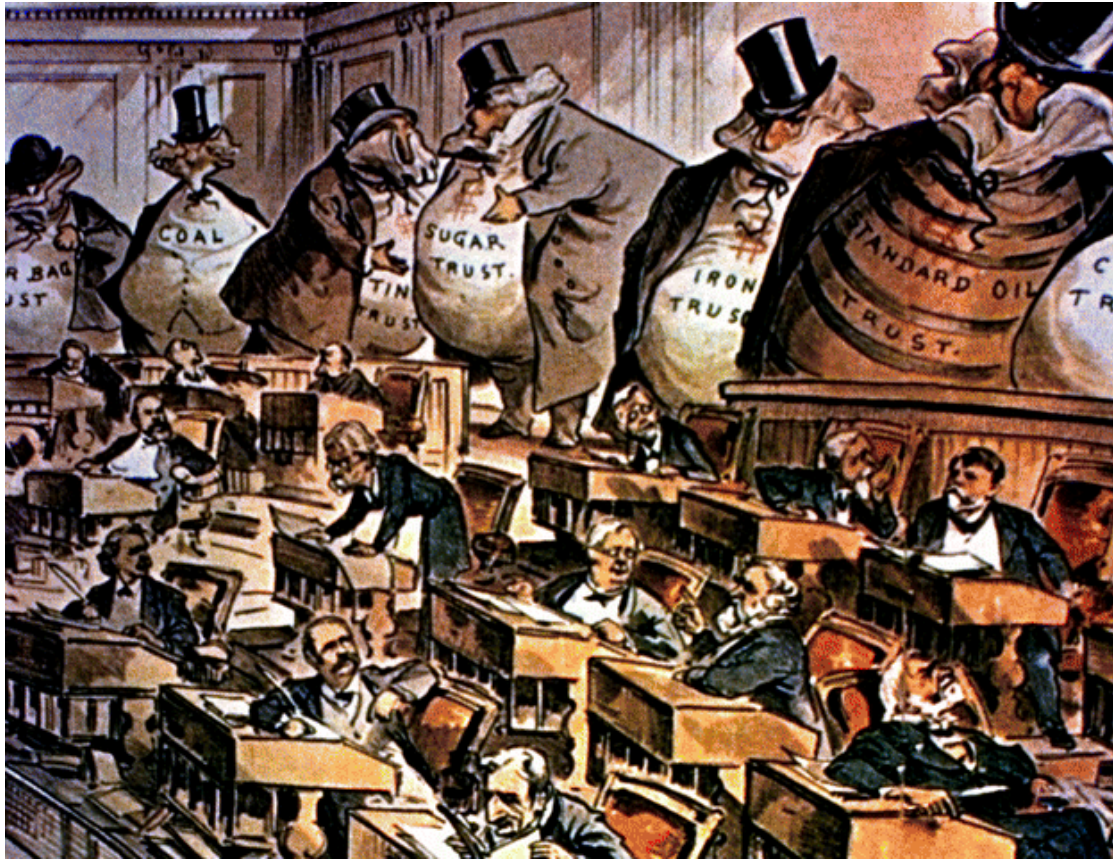
# Topics Covered

- ▶ What is antitrust? (Basic Concepts)
- ▶ How do antitrust violations affect buyers?
- ▶ How can you spot potential antitrust violations and guard against them?



# History of Antitrust

## Origins



**Special interest “trusts” dominated the national economy and wielded enormous political power in the late 1800s**



# History of Antitrust



**Trust certificates were used to mask owner's identity while trustees secretly controlled the market**



**Teddy Roosevelt (President, 1901-1909), the original trustbuster.**



# Overview of Antitrust Section

## What we do:

- ▶ Enforce state and federal antitrust law
  - Sherman Act
  - Clayton Act
  - Texas Free Enterprise & Antitrust Act
- ▶ Outreach

## Who we represent:

- ▶ State and State Agencies
- ▶ Political Subdivisions & Tax-Supported Entities (with consent)
- ▶ Consumers (limited)



# Overview of Antitrust Section

## ▶ **What we don't do:**

- Direct officials to choose one procurement method over another
- Investigate procurement or bidding violations that don't raise antitrust concerns
- Make sure public entities get the best price or value for goods and services



# Basic Concepts

## Three Types of Antitrust Violations

### ▶ **Monopolization**

- Unlawfully acquiring or maintaining the power to fix prices and exclude competitors

### ▶ **Illegal Mergers**

- Where the effect of the merger may substantially lessen competition

### ▶ **Collusion and Conspiracy**

- Competitors making agreements to remove or reduce competition in the marketplace



# Effects in the Marketplace

## ▶ Without Competition:

- **Higher Prices**
- **Poorer Quality**
- **Less Choice**
- **Less Innovation**

Antitrust statutes are premised on a congressional determination that “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....” *N. Pac. Ry. Co. v. U.S.*, 356 U.S. 1, 4 (1958)



# Monopolization & Mergers

## What Can You Do About Monopolies/Mergers?

- ▶ Let us know if you suspect a dominant vendor is trying to drive its competitors out of business.
- ▶ Let us know if you hear of a potentially problematic merger.
- ▶ Assist us when contacted for interviews.



# Anticompetitive Agreements

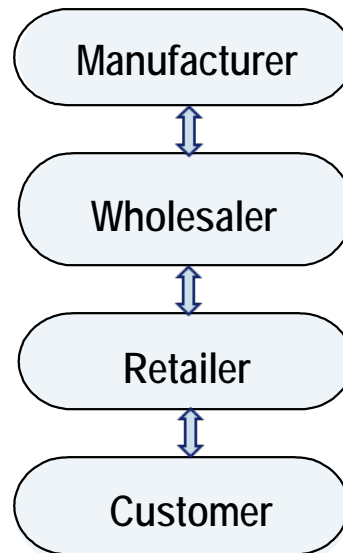
## Collusion: What's Prohibited

- ▶ “Contracts, combinations or conspiracies in restraint of trade”
  - There **MUST** be an agreement, **BUT** agreements may be hard to prove.
    - “Conscious parallelism” alone is not violation
    - Conspirators try to hide agreement



# Types of Anticompetitive Agreements

## Vertical Agreements Typically less suspect



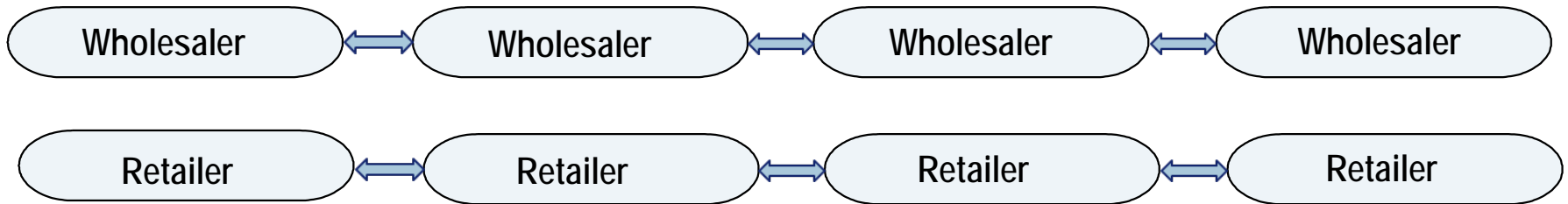
- Resale Price Maintenance
- Exclusive Distributorships



# Types of Anticompetitive Agreements

## Horizontal Agreements Inherently suspect

For example:



Between competitors at the same level of the market



# Types of Anticompetitive Agreements

- ▶ Horizontal Agreements
  - Price Fixing
  - Market Allocation/ Customer Allocation
  - Bid Rigging
    - Complementary Bidding
    - Bid rotations
    - Bid suppression

Conspirators often mix and match





# Indicators of Collusion

## What Can You Do About Collusion?

- ▶ Recognize Conditions Favorable to Collusion
  - Few vendors in the market
  - No easy substitutions
  - Frequent interactions or information sharing between competitors



# Indicators of Collusion

## What Can You Do About Collusion?

- ▶ Recognize Suspicious Statements or Behavior
  - Irregularities in appearance or submission of bids, e.g., suspicious joint bid
  - The absence of bids or responses when more are expected (could also be caused by market conditions or RFP)
  - Refusals to bid alluding to agreement or understanding with competitor
  - Refusal to bid or offer quote due to “ethical concerns” about poaching customers



# Indicators of Collusion

## What Can You Do About Collusion?

- ▶ **Recognize Suspicious Bidding or Pricing Patterns**
  - Some bids are much higher than previous bids or estimated costs
  - Consistent % margins between winning and losing bids
  - A vendor always wins a bid in a certain area for a particular service, or in a fixed rotation with other bidders



# Guarding Against Collusion

## What Can You Do About Collusion?

- ▶ Draft RFPs to encourage maximum participation
  - Minimize use of tight specs:
    - Don't tailor bids to one particular product or supplier.
    - Don't use specs written by or copied from a manufacturer.
    - Don't use brand names in specs.



# Guarding Against Collusion

## What Can You Do About Collusion?

- ▶ Advertise in a variety of ways.
- ▶ Insist on compliance with procedures.
- ▶ Maintain and review procurement records.
- ▶ Don't disclose cost estimates before awarding a contract (unless absolutely required)
- ▶ Don't disclose the identity of proposal holders or other bidders



# Guarding Against Collusion

## What Can You Do About Collusion?

- ▶ Assignment Clause- Part B.5.6, Comptroller's RFP Template
- ▶ AT Certification Statement--Gov. Code § 2155.005



# Consequences of Collusion

## Potential Consequences for Antitrust Violators:

- ▶ State/Federal Civil Antitrust Prosecution:
  - Treble Damages, Penalties, Attorneys' Fees and Investigative Costs





# Consequences of Collusion

## Potential Consequences for Antitrust Violators

- ▶ Private litigation and class action suits by purchasers
- ▶ Debarment
- ▶ State/Federal Criminal Prosecution:
  - Jail & Fine



# Contact Information

## To Sum Up:

- Use us as a resource.
- Contact us with concerns/suspicious.
- Assist us with our investigations.

Office of Attorney General  
Antitrust Section, Consumer Protection Division  
Main number: (512) 936-2334

[www.texasattorneygeneral.gov/cpd/antitrust-section](http://www.texasattorneygeneral.gov/cpd/antitrust-section)