IN THE SUPREME COURT OF TEXAS

NO. 03-0737

THE COCA-COLA COMPANY ET AL., PETITIONERS,

v.

HARMAR BOTTLING COMPANY ET AL.,
RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SIXTH DISTRICT OF TEXAS

Argued November 9, 2004

JUSTICE BRISTER, joined by CHIEF JUSTICE JEFFERSON, JUSTICE O'NEILL, AND JUSTICE MEDINA, dissenting.

After buying up distributors of the leading soft drink brands in the Ark-La-Tex area, Coke began demanding that retailers stop advertising competing brands, stop selling some of them, and artificially raise the prices of the rest. Retailers who refused to play along were punished with higher wholesale prices; only Wal-Mart (a behemoth in its own right) successfully refused.

There is a line between competing and bullying, and the jury found that Coke crossed it. As evidence in the record would allow reasonable jurors to reach that conclusion, I would not render judgment to the contrary; because the Court does, I respectfully dissent.

I. Choice of Law is not Jurisdictional

This suit concerns competition in 40 counties, 11 of which are in Texas. The Court vacates most of the jury's verdict because it concerns counties outside Texas, holding that Texas courts have no jurisdiction of such claims. This jurisdictional ruling is unprecedented.

I agree Texas law cannot extend beyond the limits of our sovereignty,[1] cannot punish foreign conduct that was legal where it occurred,[2] cannot govern foreign conduct that has no effect here,[3] and cannot regulate prices in foreign stores merely because Texans might shop there.[4] But this verdict was not limited to Texas law.

The bottlers asserted Texas law applied, but pleaded alternatively that the laws of Arkansas, Louisiana, and Oklahoma outlawed the same conduct. They asserted that our neighbors' antitrust laws were the same as our own, and Coke never denied it. The jury simply found that Coke unreasonably restrained trade and monopolized the relevant markets. Unless our sister states define monopolies or restraints of trade differently than we do, it makes no difference whether the jury's findings were based on Texas law or some other.[5]

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[1] *See Hilton v. Guyot*, 159 U.S. 113, 163 (1895); *Gannon v. Payne*, 706 S.W.2d 304, 306 (Tex. 1986).

[2] *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572-73 (1996).

[3] *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985) (holding states "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them") (citation omitted).

[4] *See Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State.").

[5] *See Shutts*, 472 U.S. at 816 ("There can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit."); *In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 606 (Tex. 2005) (per curiam) (holding that in the absence of conflicting laws, "there can be no harm in applying Texas law"); *Compaq*

The trial court's punitive damages question did ask jurors if Coke wilfully and flagrantly violated Texas antitrust laws, and part of its prolix instructions defined "trade" and "commerce" as "economic activity undertaken in whole or in part for the purpose of financial gain involving or relating to any goods or services within the State of Texas." But in conducting a proper choice-of-law analysis, "we must *first* decide whether Texas law conflicts with the laws of other interested states, as there can be no harm in applying Texas law if there is no conflict."[6] Unless there is some conflict between the antitrust laws of Arkansas, Louisiana, Oklahoma, and Texas, we cannot reverse the jury's verdict, as these two brief references to Texas made no difference.[7]

Instead of resolving this choice-of-law issue with choice-of-law rules, the Court treats it as a jurisdictional defect. Until today, no one has ever suggested the trial court had no subject-matter jurisdiction of this case. Certainly not Coke — its 75 pages of briefing never mention "subject matter" and never once challenge the trial court's jurisdiction. Coke instead argued below and argues here that Texas law does not *apply* to competition in markets outside Texas.[8] That is a choice-of-law issue, not one of subject-matter jurisdiction.

Computer Corp. v. Lapray, 135 S.W.3d 657, 672 (Tex. 2004) (same); *In re J.D. Edwards World Solutions Co.*, 87 S.W.3d 546, 550 (Tex. 2002) (per curiam) (same).

[6] *Compaq*, 135 S.W.3d at 672 (emphasis added).

[7] *See* TEX. R. APP. P. 44.1.

[8] In its brief, Coke stated that the issue presented was "does the TFEAA apply to agreements that are implemented outside the State of Texas and do not affect Texas consumers?" Similarly, the court of appeals said that "Coke contends the trial court erred in its extraterritorial application of the Texas Free Enterprise and Antitrust Act . . . [to] retail establishments outside the State of Texas." 111 S.W.3d 287, 294 (Tex. App.–Texarkana 2003).

The distinction is important because choice-of-law issues (unlike jurisdictional issues) can be waived, as Coke has done here. Coke maintains that it objected to the application of Texas law, but concedes that it never requested the application of any other state's laws or offered proof of any of them. While the trial court could have judicially noticed those laws, it was not required to do so under Rule 202 of the Texas Rules of Evidence.[9] When a party fails to request judicial notice of the law of another state as permitted under Rule 202, "Texas courts will simply presume that the law of the other state is identical to Texas law."[10]

This presumption is much older than Rule 202 itself. We stated in 1895 that "[i]n the absence of proof the court will presume the law of another State to be the same as the law of this State . . ."[11] There could hardly be a clearer rule in the history of Texas jurisprudence; this Court has decided literally dozens of cases on precisely this presumption.[12] So has our sister court in criminal

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[9] TEX. R. EVID. 202 ("A court upon its own motion may, or upon the motion of a party shall, take judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every other state, territory, or jurisdiction of the United States.").

[10] Olin Guy Wellborn III, *Judicial Notice Under Article II of the Texas Rules of Evidence*, 19 ST. MARY'S L.J. 1, 27 (1987).

[11] *Tempel v. Dodge*, 33 S.W. 222, 222 (Tex. 1895).

[12] *See Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 920 (Tex. 1993); *Gevinson v. Manhattan Constr. Co.*, 449 S.W.2d 458, 465 n. 2 (Tex. 1969); *Ogletree v. Crates*, 363 S.W.2d 431, 435 (Tex. 1963); *S. Pac. Co. v. Porter*, 331 S.W.2d 42, 45 (Tex. 1960); *State v. Thomasson*, 275 S.W.2d 463, 464 (Tex. 1955); *Massachusetts v. Davis*, 168 S.W.2d 216, 220 (Tex. 1943); *Abeel v. Weil*, 283 S.W. 769, 776 (Tex. 1926); *Ferguson-McKinney Dry Goods Co. v. Garrett*, 252 S.W. 738, 742 (Tex. Comm'n App. 1923, holding approved); *Nevill v. Gulf, C. & S. F. Ry. Co.*, 244 S.W. 980, 984 (Tex. Comm'n App. 1922, holding approved); *Am. Nat. Bank of Oklahoma v. Garland*, 235 S.W. 562, 564 (Tex. Comm'n App. 1921, judgment adopted); *Lamb v. Hardy*, 211 S.W. 445, 446 (Tex. 1919); *W. Union Tel. Co. v. Bailey*, 196 S.W. 516, 518 (Tex. 1917); *Nat'l Bank of Commerce v. Kenney*, 83 S.W. 368, 369 (Tex. 1904); *Rivera v. White*, 63 S.W. 125, 126 (Tex. 1901); *Gill v. Everman*, 59 S.W. 531, 532 (Tex. 1900); *Blethen v. Bonner*, 53 S.W. 1016, 1016 (Tex. 1899); *Burgess v. W. Union Tel. Co.*, 46 S.W. 794, 795 (Tex. 1898); *S. Ins. Co. of New Orleans v. Wolverton Hardware Co.*, 19 S.W. 615, 615 (Tex. 1892); *James v. James*, 16 S.W. 1087, 1089 (Tex. 1891); *Abercrombie v. Stillman*, 14 S.W. 196, 197 (Tex. 1890); *Houston & T.C. Ry. Co. v. Baker*, 57 Tex. 419, 422 (Tex. 1882); *Porcheler v. Bronson*, 50 Tex. 555, 561 (Tex. 1879); *Armendiaz v. De La Serna*, 40 Tex. 291, 297 (Tex. 1874); *Green v. Rugely*, 23

cases.[13] By failing to prove that Texas law conflicts with the laws of Arkansas, Louisiana, or Oklahoma, Coke has waived any claim that their laws and our laws are not the same.

That is, until today. Although Rule 202 says a court *shall* take judicial notice upon request and *may* do so on its own motion, the Court now says that choice-of-law is jurisdictional (at least sometimes) so trial courts *must* analyze it in *every* case. If they do not, appellate courts may not bother looking for conflicts either (though Rule 202 appears to allow it)[14] and simply presume they are different. Not only does this reverse dozens of our own cases and our own rules of evidence, it allows appellate judges to dismiss jury verdicts on appeal — without notice or argument — whenever they think verdicts "dictate to other states what can and cannot be tolerated."[15]

In this case, the Court's new presumption turns out to be wrong. There is a very good reason why Coke never offered the laws of any other state at trial or on appeal: they all look alike. This

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Tex. 539, 544-45 (Tex. 1859); *Moseby v. Burrow*, 52 Tex. 396, 405 (Tex. 1880); *Bradshaw v. Mayfield*, 18 Tex. 21, 30 (Tex. 1856).

[13] *See, e.g., Crane v. State*, 786 S.W.2d 338, 347 (Tex. Crim. App. 1990); *Langston v. State*, 776 S.W.2d 586, 587 (Tex. Crim. App. 1989); *Smith v. State*, 683 S.W.2d 393, 406 (Tex. Crim. App. 1984); *Acosta v. State*, 650 S.W.2d 827, 828 (Tex. Crim. App. 1983); *Hall v. State*, 619 S.W.2d 156, 158 (Tex. Crim. App. 1980); *Ex parte Nichols*, 604 S.W.2d 81, 82 (Tex. Crim. App. 1980); *Almand v. State*, 536 S.W.2d 377, 379 (Tex. Crim. App. 1976); *McKinney v. State*, 505 S.W.2d 536, 541 (Tex. Crim. App. 1974); *Jackson v. State*, 494 S.W.2d 550 (Tex. Crim. App. 1973); *Ford v. State*, 488 S.W.2d 793, 795 (Tex. Crim. App. 1972); *Doby v. State*, 454 S.W.2d 411, 413-14 (Tex. Crim. App. 1970); *Watts v. State*, 430 S.W.2d 200, 202 (Tex. Crim. App. 1968); *Holcombe v. State*, 424 S.W.2d 635, 637 (Tex. Crim. App. 1968); *Melancon v. State*, 367 S.W.2d 690, 692 (Tex. Crim. App. 1963); *Dillard v. State*, 218 S.W.2d 476, 478 (Tex. Crim. App. 1949); *McDonald v. State*, 136 S.W.2d 816, 818 (Tex. Crim. App. 1940).

[14] *See* TEX. R. EVID. 202 (noting that judicial notice of the laws of other states "may be taken at any stage of the proceeding").

[15] ___ S.W.3d at ___.

is not surprising because most state antitrust laws are patterned on federal antitrust laws,[16] as the laws applicable here show:

> **Federal law**:
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . . Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .[17]

> **Texas law**:
> Every contract, combination, or conspiracy in restraint of trade or commerce is unlawful. It is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce.[18]

> **Louisiana law**:
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in this state is illegal. No person shall monopolize, or attempt to monopolize, or combine, or conspire with any other person to monopolize any part of the trade or commerce within this state.[19]

> **Oklahoma law**:
> Every act, agreement, contract, or combination in the form of a trust, or otherwise, or conspiracy in restraint of trade or commerce within this state is hereby declared to be against public policy and illegal. It is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce in a relevant market within this state.[20]

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[16] *See* Dorothy M. Allison, *Physician Retaliation: Can the Physician-Patient Reltionship Be Protected?*, 94 DICK. L. REV. 965, 979 n.122 (1990) (noting that "[s]tate antitrust laws are usually patterned after the federal statute," and citing the Texas statute as an example).

[17] 15 U.S.C. §§ 1, 2.

[18] TEX. BUS. & COM. CODE § 15.05(a)–(b).

[19] LA. REV. STAT. §§ 51:122(A), 51:123.

[20] 79 OKLA. STAT. tit. 79 § 203(A)–(B).

Despite these manifest similarities, the Court says we cannot presume that our neighbors' laws are the same as our own because then we would have to presume that their laws were intended to protect competition *in Texas*, as our laws are. This is both unprecedented and unfair. Texas law — from abandonment to zoning — is generally intended to govern affairs in Texas; if the historic presumption required a showing that our sister states also intended to govern such affairs in Texas, it would *never* have been used. It is one thing to presume Texas laws are limited to Texas, but quite another to presume foreign laws are limited to Texas too.

The Court justifies all this on the basis that interstate comity requires abstention. "When there is parallel state and federal litigation . . . [c]omity or abstention doctrines may, in various circumstances, permit or require the federal court to stay or dismiss the federal action in favor of the state-court litigation."[21] But we have never adopted an "abstention doctrine" for disputes that cross state lines, and for several reasons should not start now.

First, we are not federal courts, and there is no parallel state litigation. Texas courts have generally considered comity only when there is a conflict between litigation in our courts and litigation elsewhere.[22] There is no such conflict here.

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[21] *Exxon Mobil Corp. v. Saudi Basic Indus. Corp*., 544 U.S. 280, 292 (2005).

[22] *See, e.g., Bryant v. United Shortline Inc. Assurance Services, N.A.*, 972 S.W.2d 26, 30-31 (Tex. 1998) (holding comity did not require Texas courts to defer to Tennessee litigation); *Christensen v. Integrity Ins. Co.*, 719 S.W.2d 161, 163 (Tex. 1986) (holding comity prevented Texas court from enjoining similar California litigation); *Gannon v. Payne*, 706 S.W.2d 304, 307 (Tex. 1986) (holding comity prevented Texas court from enjoining related Canadian litigation).

Second, federal abstention applies only to "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case . . ."[23] Until today, we have not hesitated to decide cases concerning robbery,[24] income taxes,[25] alimony,[26] and child custody[27] on the presumption that a sister state's laws were the same as our own. And at least two Texas courts have done so in antitrust cases,[28] even if the parties did not cite to them. But now, unaccountably, soft drink sales present a policy problem of such "substantial public import" that no Texas court is competent to consider them. As the common law and common cases often "reflect fundamental policy choices,"[29] it is unclear after today's decision what other claims against Texas residents cannot be brought in Texas courts.

Third, today's decision is inconsistent with federal law. The Sherman Act does not apply to conduct affecting only foreign markets because Congress passed a specific amendment saying so,[30] something the Texas Legislature has not done. The federal amendment was required so American

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[23] *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 814 (1976).

[24] *See State v. Thomasson*, 275 S.W.2d 463, 464 (Tex. 1955).

[25] *See Massachusetts v. Davis*, 168 S.W.2d 216, 220 (Tex. 1942).

[26] *See Rivera v. White*, 63 S.W. 125, 126 (Tex. 1901).

[27] *See Ogletree v. Crates*, 363 S.W.2d 431, 435 (Tex. 1963).

[28] *See Byrd v. Crazy Water Co.*, 140 S.W.2d 334, 336 (Tex. Civ. App.-Dallas 1940, no writ) (presuming antitrust laws of California the same as those of Texas); *J.R. Watkins Co. v. McMullan*, 6 S.W.2d 823, 824 (Tex. Civ. App.-Austin 1928, no writ) (presuming antitrust laws of Oklahoma the same as those of Texas).

[29] *See* ___ S.W.3d at ___.

[30] *See* 15 U.S.C. § 6a (providing that Sherman Act shall not apply to foreign trade except for claims arising from conduct with a direct, substantial, and reasonably foreseeable effect on American imports or internal commerce).

businesses could compete in foreign markets, many of which allow price-fixing, monopolizing, and so on,[31] which interstate commerce does not. And the Supreme Court has specifically held that applying American antitrust law extraterritorially is not a jurisdictional problem,[32] and that American courts should defer to foreign antitrust laws only in cases of an unavoidable conflict.[33] We are supposed to construe Texas antitrust laws "in harmony with federal judicial interpretations,"[34] but today the Court calls its own tune.

Finally, and perhaps most important, the Texas antitrust statute specifically precludes judicial abstention. The statute plainly applies to "trade and commerce occurring wholly or partly within the State of Texas,"[35] and the Legislature stated in no uncertain terms that it intended Texas antitrust laws to govern commerce crossing state lines to the absolute limit of constitutional law:

> No suit under this Act shall be barred on the grounds that the activity or conduct complained of in any way affects or involves interstate or foreign commerce. It is the intent of the legislature to exercise its powers to the full extent consistent with the constitutions of the State of Texas and the United States.[36]

Because neither Coke nor the Court suggests that the judgment here is unconstitutional, we cannot prudentially abstain from deciding this case without ignoring the Legislature's express intent.

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[31] *See* Kevin O'Malley, Notes & Comments, *Does U.S. Antitrust Jurisdiction Extend to Claims of Independent/Dependent Foreign Injury?*, 20 TEMP. INT'L & COMP. L.J. 219, 239 (2006) (noting § 6a was intended to encourage American businesses to compete in foreign markets by means that, although illegal here, were lawful there).

[32] *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 795-96 (1993).

[33] *See id.* at 798-99 (holding that foreign insurers actions, although legal under British law, could be sued under Sherman Act in American courts because insurers could have complied with the laws of both countries).

[34] TEX. BUS. & COM. CODE § 15.04; *see Abbott Lab., Inc. v. Segura*, 907 S.W.2d 503, 505 (Tex. 1995).

[35] TEX. BUS. & COM. CODE § 15.04.

[36] *Id.* § 15.25(b).

On occasion, comity and choice of law may suggest that a Texas court should dismiss a claim in favor of a foreign forum under principles of forum non conveniens.[37] But that is a matter of venue rather than jurisdiction,[38] and thus is waived if never requested. Moreover, other public and private interest factors must be balanced in that decision, factors that Coke never addresses. We should not reduce a doctrine this old to two factors favoring one party.

Nor should we make antitrust law inefficient, as its goal is the opposite. If state antitrust laws are a jurisdictional matter, separate suits will have to be brought in each state, even if (as here) they involve the same contracts, the same conduct, and the same parties. And no state court will have jurisdiction if a market straddles a state line, as many do.

The Court suggests that the bottlers should have filed in federal court. But Texas federal courts use the same jurors, identical statutes, and the same federal caselaw as do Texas state courts; it is hard to see why one imposes on our sister states any more than the other. Of course, federal courts can impose federal law across state lines, but the question here is who can impose Arkansas or Louisiana law on a Texas business; it is hard to see why federal courts are more qualified to do that. Moreover, federal courts already have exclusive jurisdiction of federal antitrust claims;[39] if they

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[37] *See Gulf Oil v. Gilbert*, 330 U.S. 501, 508-09 (1947); *Flaiz v. Moore*, 359 S.W.2d 872, 875 (Tex. 1962); *see also* TEX. CIV. PRAC. & REM. CODE § 71.051.

[38] *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 722 (1996) ("The dispute in *Gulf Oil* was over venue, not jurisdiction . . ."); *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994) ("At bottom, the doctrine of forum non conveniens is nothing more or less than a supervening venue provision . . .").

[39] *See Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985) (noting that "federal antitrust claims are within the exclusive jurisdiction of the federal courts . . .").

also have exclusive jurisdiction of most state antitrust claims, it is hard to see why so many state legislatures went to the trouble.

The Ark-La-Tex region is not a legal no-man's-land; *some* law must apply even if Texas law does not. Coke may not escape liability by merely objecting to the application of Texas law; it had the burden of proving a conflict of laws that prevented the application of Texas law. By failing to do so, it waived any choice-of-law complaint.

II. Coke's Conduct is not Legal

The Court renders judgment against the bottlers despite the jury's verdict to the contrary, holding they did not prove Coke harmed competition rather than its competitors. But several of Coke's activities in the Ark-La-Tex market were so anticompetitive that federal courts would not require such proof, and we should not either.

On its face, Texas law (like the Sherman Act) prohibits all monopolies and agreements in restraint of trade. But consistent with federal law, the Texas Act was intended to outlaw only unreasonable restraints or illegal monopolization.[40] As a result, most claims under the Act should be analyzed under a "rule of reason" that takes into account the relevant market and industry conditions before and after the restraint, and the history, nature, and effect of the defendant's conduct.[41]

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[40] *See State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 680 (Tex. 1990).

[41] *See State Oil*, 522 U.S. at 10.

But some restraints are so anticompetitive and unjustifiable that they are deemed unlawful per se, and require no proof that competition has been harmed in a particular case.[42] "[W]hen a particular concerted activity entails an obvious risk of anticompetitive impact with no apparent potentially redeeming value, the fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful per se."[43] In such cases, "no elaborate study of the industry is needed to establish their illegality."[44] "Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements."[45]

I agree with the Court that Coke did not violate antitrust laws by paying for prime locations in retail stores, or shelf space equal to its market share. Such deals are commonplace, and antitrust law does not require Coke to assist its competitors.[46] There was no evidence here that the bottlers ever tried to purchase prime locations, or that they would have failed had they done so. These claims were subject to a rule-of-reason analysis, and fail for lack of proof that they affected prices or competition in the market as a whole.[47]

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[42] *See id.*; *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 133 (1998); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

[43] *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649 (1980).

[44] *Texaco Inc. v. Dagher*, 126 S.Ct. 1276, 1279 (2006) (citations omitted).

[45] *N. Pac.*, 356 U.S. at 5 (citations omitted).

[46] *See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004).

[47] *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 688 (Tex. 1990) ("To establish a violation under the rule of reason, one must prove that the agreement has an adverse effect on competition in the relevant market.").

But the jury could have concluded from the evidence that Coke did far more than this. The Court declines to address any per se violations because the bottlers assert only violations under the rule of reason. But these are not separate causes of action; they are analytical categories used to decide whether conduct may be presumed to be anticompetitive, or must be shown to be so.[48] Deciding which applies is a question of law for the court,[49] so if the lower courts applied (or the parties argued) the wrong one, we may reverse only if it resulted in an erroneous judgment.[50] Here, the bottlers alleged and the jury found that Coke unreasonably restrained trade and monopolized markets; if there is evidence to support that verdict under either per-se or rule-of-reason analysis, we could not ignore it even if the bottlers had filed no briefs at all.

A. Price Fixing

In some markets in the Ark-La-Tex region, Coke required that retailers price all other soft drinks higher than its own. Indeed, Coke sometimes specified that competing products had to be priced at least 30¢ higher than Coke's. Coke could lower its prices to beat the competition, but paying retailers to raise its competitors' prices is price-fixing, pure and simple, and it has been illegal for a long time.

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[48] *See F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 433 (1990); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 344 (1982); *Nat'l Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679, 692 (1978).

[49] *See F.T.C.*, 493 U.S. at 433.

[50] *See BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002) ("If the reviewing court determines a conclusion of law is erroneous, but the trial court rendered the proper judgment, the erroneous conclusion of law does not require reversal.").

For many years, all price-fixing agreements were deemed unlawful per se.[51] Indeed, they were the "archetypal example" of a practice without redeeming competitive value.[52]

In 1997 the Supreme Court made an exception for vertical[53] agreements fixing maximum prices, subjecting them to a rule-of-reason analysis.[54] As the Court noted, a price ceiling keeps consumer prices low, and thus does not generally threaten competition.[55] But a price floor keeps prices artificially high, and so remains illegal per se.[56] Because Coke's contracts fixed minimum prices, there is no question they fall in the latter category.

Coke argues there was no evidence that all soft drink prices in the Ark-La-Tex region increased. But while the bottlers presented contrary evidence (which we must presume the jury credited), the main problem is that Coke's agreements were illegal even if they lowered prices, as it is no defense to price-fixing that the prices fixed were reasonable.[57]

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[51] *Catalano, Inc. v. Target Sales, Inc*., 446 U.S. 643, 647 (1980) ("It has long been settled that an agreement to fix prices is unlawful per se.").

[52] *Id.*

[53] "Horizontal" agreements are generally those among competitors, while "vertical" agreements are those between firms at different levels of distribution, such as a supplier and customer. *See NYNEX Corp. v. Discon, Inc*., 525 U.S. 128, 136 (1998); *Bus. Electronics Corp. v. Sharp Electronics Corp*., 485 U.S. 717, 730 (1988).

[54] *State Oil Co. v. Khan*, 522 U.S. 3, 17-18 (1997).

[55] *Id*. at 15.

[56] *Id.* (noting that "arrangements to fix minimum prices . . . remain illegal *per se*"); *see also Texaco Inc. v. Dagher*, 126 S. Ct. 1276, 1279 (2006) ("[H]orizontal price-fixing agreements fall into the category of arrangements that are *per se* unlawful.").

[57] *Id.*; *Catalano*, 466 U.S. at 647.

Coke also argues that price-fixing is not illegal without a specified resale price. But agreement on a specific price is not required; an agreement that sets a floor on prices is illegal per se even if that floor sometimes varies.[58]

It can be argued that fixing minimum prices is sometimes procompetitive, as when a supplier wants dealers to furnish services they could not afford without a guaranteed margin.[59] But there is no evidence this is the case with soft drinks; moreover, Coke's agreements sought to control not its own prices but those of its competitors. As the sole purpose of these agreements was to keep the price of all competing soft drinks higher than they otherwise would have been, they were illegal per se.

B. Boycott

In a number of its agreements with convenience stores, Coke gave retailers a discount on best-selling drinks if retailers promised not to carry competitors to its new root beer, orange, and grape drinks. This is a boycott.[60] There was evidence a jury could credit (and we must presume they did) that once Coke obtained an exclusive-flavor agreement, it typically raised its prices. This is anticompetitive.

Some boycotts are illegal per se, while others are subject to a rule-of-reason analysis. Generally, when boycotts (1) cut off access to "a market necessary to enable the boycotted firm to

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[58] *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (holding agreement among competitors to buy gasoline on the spot market to prevent prices from falling sharply was per se unlawful, even though there was no direct agreement on the actual prices to be maintained).

[59] *See*, *e.g.*, *Khan v. State Oil Co.*, 93 F.3d 1358, 1361-62 (8th Cir. 1996), *vacated*, 522 U.S. 3 (1997).

[60] *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 802-03 (1993) (defining boycott as refusing to deal in one transaction as means of leverage in unrelated transaction).

compete," (2) are orchestrated by a firm with "[a] dominant position in the relevant market," and (3) "are not justified by plausible arguments" of efficiency or competition, then a per se rule applies.[61] On the evidence introduced at trial, reasonable jurors could have concluded that Coke met all three requirements.

Generally, only horizontal boycotts are illegal per se, as a single customer may always choose to change suppliers (or vice versa).[62] But horizontal agreements need not be instigated by competitors; they can be imposed by dominant firms above or below them. Thus, for example, when a retailer persuaded its 10 manufacturers not to sell to the retailer's small competitor, the Supreme Court used a per se analysis, rejecting as a matter of law a defense that the boycott did not hurt competition but only one competitor.[63] Similarly, when a group of stores persuaded dress designers and manufacturers not to deal with stores carrying competing designs, the Supreme Court used a per se analysis, refusing to consider evidence that the boycott was reasonable and procompetitive.[64]

Even if Coke's conduct were considered a vertical boycott and the rule of reason applied, no elaborate industry analysis would be required to demonstrate the anticompetitive nature of these agreements. "Absent some countervailing procompetitive virtue . . . an agreement limiting consumer choice by impeding the 'ordinary give and take of the market place,' cannot be sustained under the

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[61] *See Nw. Wholesale Stationers Inc. v. Pac. Stationery*, 472 U.S. 284, 294 (1985); *see also F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986) ("[T]he *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor.").

[62] *See NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136-37 (1998).

[63] *See Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209-10 (1959).

[64] *See Fashion Originators' Guild of Am., Inc. v. F.T.C.*, 312 U.S. 457, 467-68 (1941).

Rule of Reason."[65] There may be good business reasons to limit soft drink brands in airplane cabins or fast-food franchises, but there is no evidence that is true of the supermarkets and convenience stores here. While businesses may generally make vertical agreements about whose products to carry without proferring a business reason, a monopolist like Coke cannot impose such a regime when it makes "an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years."[66] Coke advances no credible argument for the proposition that giving consumers fewer choices enhanced competition.[67]

C. Advertising Ban

In many of Coke's agreements, retailers had to agree not to advertise any other soft drinks — inside and or outside the store, in circulars, banners, or signs of any kind, or even signs that merely stated the price.

This ban too is illegal per se: "[a] concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices."[68] There is an exception for bans on price-advertising for professional services, which are

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[65] *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (citations omitted).

[66] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 603 (1985).

[67] *See Indiana Fed'n of Dentists*, 476 U.S. at 459 (finding dentists' agreement to refuse x-rays to patients' insurers had no procompetitive justification and failed rule of reason test).

[68] *Id.* at 461-62.

subject to rule-of-reason analysis because consumers do not have the expertise to compare the quality of services offered.[69] But that, of course, is not the case with soft drinks.

Coke's only proffered justification for the ban on advertising is that it did not want a competitor's ads covering up its own. In the first place, some of the ads banned (such as newspaper ads and in-store circulars) were paid for by the retailers, not Coke. Moreover, Coke's agreements did not demand that its ads be merely the first or the largest or the most visible ads, but the *only* ads. It is hard to imagine any procompetitive reason for banning competing ads, and Coke does not offer any.

D. Monopoly

Finally, Coke argues that with the exception of the advertising ban, the above activities were isolated practices in a few markets involving a few brands for short periods of time. But a monopolist cannot corner the market illegally by doing so a little bit at a time.

Under the Texas Act, like the Sherman Act, a monopoly claim has two elements: (1) monopoly power in the relevant market and (2) willful acquisition, maintenance, or use of that power by predatory means or for predatory purposes.[70] As Coke did not contest the first, we review the record only for the second.

The Coke distributor here is an international corporation accounting for 77 percent of Coke's worldwide sales. It does not contest that its 75-80 percent market share gave it monopoly power in

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[69] *See California Dental Ass'n v. F.T.C.*, 526 U.S. 756, 771-72 (1999).

[70] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004); *Aspen Skiing Co.*, 472 U.S. at 602; *Caller-Times Publ'g Co. v. Triad Communications, Inc.*, 826 S.W.2d 576, 580 (Tex. 1992).

the Ark-La-Tex region.[71] It required agreements from every retailer in the region except Wal-Mart, and the jury could have credited evidence that it punished retailers who refused with prohibitive wholesale prices. Unlike similar agreements in other parts of the country, Coke's agreements in the Ark-La-Tex region were perennial, covering 80 to 100 percent of every year, and extended annually. As Coke concedes, these "special" marketing agreements were unlike those that it used in the rest of the nation, or those that have been approved by other courts.[72] These facts, plus the nature of the agreements noted above, are sufficient to support a jury verdict of monopolization.[73]

It was neither necessary nor sufficient for the bottlers to show that Coke charged monopoly prices. Monopoly pricing is not illegal; indeed, it plays an important role in competition, initially by inducing innovation, and later by attracting new competitors.[74] Illegal monopolization may exist

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[71] *See, e.g., Eastman Kodak Co. v. Image Technical Services, Inc*., 504 U.S. 451, 481 (1992) (holding evidence that defendant controlled 80 to 95 percent of relevant market created fact issue for jury as to monopoly power).

[72] *See RJR Tobacco Co. v. Phillip Morris USA Inc.*, 67 F. App'x 810, 811-12 (4th Cir. 2003), *aff'g* 199 F. Supp. 2d 362, 397 (M.D.N.C. 2002) (upholding agreement that granted supplier best display areas, but did not forbid other products, displays, or competitive pricing); *Bayou Bottling Inc. v. Dr Pepper Co.*, 725 F.2d 300, 304 (5th Cir. 1984) (upholding agreement offering free maintenance on retailer's machines if stocked only with defendants' products); *El Aguila Food Products Inc. v. Gruma Corp*., 301 F. Supp. 2d 612, 631-32 (S.D.Tex. 2003) (upholding marketing agreement by supplier without market power); *Louisa Coca-Cola Bottling Co. v. Pepsi-Cola Metro. Bottling Co.*, 94 F. Supp. 2d 804, 815-16 (E.D. Ky. 1999) (upholding non-exclusive marketing agreement); *Frito-Lay, Inc. v. Bachman Co.*, 659 F. Supp. 1129, 1134 (S.D.N.Y. 1986) (upholding 17-week agreement that guaranteed supplier shelf space equal to its market share); *Beverage Mgmt., Inc. v. Coca-Cola Bottling Corp.*, 653 F. Supp. 1144, 1157-58 (S.D. Ohio 1986) (upholding agreement that granted supplier without market power exclusive ads for half of year).

[73] *Eastman Kodak Co.*, 504 U.S. at 482-83; *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585, 610-11 (1985); *see also Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946) ("Neither proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential competitors is essential to sustain a charge of monopolization under the Sherman Act.").

[74] *See Verizon Communications,* 540 U.S. at 407.

"even though a combination may temporarily or even permanently reduce the price of the articles manufactured or sold."[75]

Nor did the bottlers have to declare bankruptcy to prove their monopolization claim.[76] Instead, they only had to prove that Coke's practices adversely affected competition without a legitimate business justification.[77] That they did.

Even under a rule-of-reason analysis, it would not be up to us to decide whether Coke's agreements were predatory. As we are reviewing a jury verdict, we must interpret the entire record in the light most favorable to the bottlers and give them the benefit of all inferences the evidence fairly supports.[78] "[T]he primary purpose of the antitrust laws is to protect interbrand competition."[79] Even if soft drink sales grew overall, agreements expressly intended to raise prices and reduce consumer choices harm competition.[80] Jurors were entitled to conclude that Coke's agreements were, in several respects, intended to accomplish just that.

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[75] *Fashion Originators' Guild of Am., Inc. v. F.T.C.*, 312 U.S. 457, 467 (1941).

[76] *See Lorain Journal Co. v. United States*, 342 U.S. 143, 153 (1951).

[77] *See Aspen Skiing Co.*, 472 U.S. at 607-610 (affirming jury verdict based on evidence that consumers complained about discontinuation of multi-mountain lift tickets, and absence of legitimate business justification for the decision).

[78] *Id*. at 604.

[79] *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997); *see also Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 126 S. Ct. 860, 872 (2006).

[80] *See Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 789 (6th Cir. 2002) ("Thus, although [sales] in the moist snuff market grew, there was evidence showing that [the defendant's] actions caused higher prices and reduced consumer choice, both of which are harmful to competition.").

Evidence of perfectly legitimate conduct is no evidence of an antitrust violation.[81] Like federal law, Texas law does not give jurors "*carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition."[82] But if a dominant competitor can use its market power to control its competitors' prices, advertising, and access to consumers — as the Court holds they can — it is hard to see what is left of Texas antitrust law.

E. Damages

The jury found that the bottlers' damages totaled $5,153,898.80. Coke argues this figure is inflated because the bottlers did not segregate damages attributable to Coke rather than Pepsi (with whom they settled). Further, Coke argues that by simply assuming the bottlers' sales would have grown at the national average for all soft drinks, it was required to compensate the bottlers not only for illegal conduct, but also for legal conduct or anything else that caused their sales to grow less than the national average.

The United States Supreme Court has said little about calculating damages in antitrust cases, except that verdicts should not be based on speculation or guesswork,[83] that defendants should not profit because their own wrongs prevent a more precise computation,[84] and that plaintiffs may use

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[81] *See Bus. Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 726 (1988) (holding antitrust evidentiary standard should not "deter or penalize perfectly legitimate conduct").

[82] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415-16 (2004).

[83] *See Bigelow v. RKO Radio Pictures Inc.*, 327 U.S. 251, 264 (1946).

[84] *See id.*

estimates and analyses to calculate a reasonable approximation of damages.[85] As it may be impossible to prove what markets would have done absent illegal conduct, several federal circuit cases do not require a showing of the harm caused by individual acts.[86] And in at least one case, lost profits were awarded on the assumption that national sales trends would have applied locally.[87]

But the problem here is that much of the conduct the bottlers emphasized at trial — Coke's discounts for favorable shelf and display locations — was not illegal at all. By mixing valid and invalid elements of damages in a single award over Coke's objection, we cannot tell whether the jury based its award on legal or illegal conduct.[88] When the damages evidence included both proper and improper items, remand is required to allow segregation of the two.[89]

III. Conclusion

Unlike most other statutes, the antitrust laws are like the common law in that "varying times and circumstances" may give them "changing content."[90] Although Texas has had its own antitrust statutes since 1889, the Legislature adopted the current law in 1983 to give Texas courts broader

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[85] *See Eastman Kodak Co. of New York v. S. Photo Materials Co.*, 273 U.S. 359, 379 (1927).

[86] *See, e.g., New York v. Julius Nasso Concrete Corp.*, 202 F.3d 82, 88-89 (2d Cir. 2000); *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 435-38 (5th Cir. 1985); *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 32 (5th Cir. 1972).

[87] *See Bob Willow Motors, Inc. v. Gen. Motors Corp.*, 872 F.2d 788, 798 (7th Cir. 1989).

[88] *See Harris County v. Smith*, 96 S.W.3d 230, 234 (Tex. 2002); *accord*, *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 200-01 (1st Cir. 1996) (holding reversal of monopolization claim required new trial on damages from price-discrimination claim).

[89] *See Smith*, 96 S.W.3d at 236; *Minnesota Mining and Mfg. Co. v. Nishika Ltd.*, 953 S.W.2d 733, 739 (Tex. 1997); *Texarkana Mem'l Hosp., Inc. v. Murdock*, 946 S.W.2d 836, 841 (Tex. 1997); *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10-12 (Tex. 1991).

[90] *Bus. Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 731 (1988).

powers and greater flexibility in addressing new economic and business conditions.[91] We have addressed the amended law only rarely, and never found a violation of it.[92] It is a shame the Court does so again today, allowing a monopolist to fix prices, ban consumer ads, and remove competing products.

Because higher prices and fewer choices injured competition in the Ark-La-Tex region, not just Coke's competitors, I would remand for the bottlers to establish their damages. Because the Court does not, I respectfully dissent.

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Scott Brister
Justice

OPINION DELIVERED: October 20, 2006

[91] *See Caller-Times Publ'g Co. v. Triad Communications, Inc.*, 826 S.W.2d 576, 580 (Tex. 1992).

[92] *See Abbott Laboratories, Inc. v. Segura*, 907 S.W.2d 503, 507 (Tex.1995); *Caller-Times*, 826 S.W.2d at 588; *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 688 (Tex. 1990).