



OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Linton S. Savage
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Corpus Christi, Texas

Dear Sir:

Opinion No. O-4786

Re: Is it in violation of the statutes of the State of Texas, commonly known as the anti-trust act, for all the banks within a city to enter into an understanding to make service charges for the keeping of deposit accounts of depositors which accounts fall below a certain minimum daily average balance, such service charge being upon the number of checks drawn above a fixed number, and all rates or charges made to be the same in the bank?

We have given careful consideration to your question which is substantially as set out above.

The Texas anti-trust, monopoly and restraint of trade statutes are codified and contained in Title 126 of the Revised Civil Statutes, 1925, and in Chapter 3 of Title 19 of the Revised Criminal Statutes, 1925 (Articles 7426-7447, R. C. S., 1632-1644, Penal Code). For all purposes incident to this opinion the two code provisions are substantially the same.

Article 7426 of the Civil Code and Article 1632 of the Penal Code each contain the following language:

"A 'trust' is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for either, any or all of the following purposes:

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"1. To create, or which may tend to create, or carry out restrictions in trade or commerce or aids to commerce or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by laws of this State.

". . . .

"3. To prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or the business of insurance, or to prevent or lessen competition in aids to commerce, or in the preparation of any product for market or transportation.

". . . ." (Emphasis ours)

Article 7429 of the civil statutes reads as follows:

"Any and all trusts, monopolies and conspiracies in restraint of trade, as herein defined, are prohibited and declared to be illegal."

Civil penalties are prescribed by the terms of Articles 7430 and 7436 of the civil code, while Article 1635 of the Penal Code makes a criminal violation a felony.

While we have been unable to find any case law upon the subject, we do find an enlightening discussion which we deem clear and pertinent, in an opinion written during the year 1917 by the Honorable C. M. Cureton. Report and Opinions, Attorney General of Texas, 1916-1918, p. 151.

At the time of writing the opinion, the late lamented Chief Justice of our Texas Supreme Court was First Assistant Attorney General, serving in the administration of Attorney General B. F. Looney. The question was whether banks operating in this State were amenable to the provisions of the anti-trust and monopoly statutes (Articles 7769-7797, R. C. S., 1911, now Articles 7426-7427, R. C. S., 1925, unchanged). The distinguished writer quoted with approval from earlier opinions of this department, and his treatise is of such force we take the liberty of copying at length. After quoting the provisions of the statutes, he wrote as follows:

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"The first question for determination is whether or not the business of banking is limited, affected, or controlled by these articles of the statute defining, prohibiting and punishing trusts and monopolies. In the first anti-trust statute of this State, which was passed in 1889 and which corresponds with those portions of Article 7796 quoted above, we find the following:

"Section 1. Be it enacted by the Legislature of the State of Texas: That a trust is a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or of either two or more of them, for either, any, or all of the following purposes: First. To create or carry out restrictions in trade. Second. To limit or reduce the production, or increase or reduce the price of merchandise or commodities. Third. To prevent competition in manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities. Fourth. To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, use, or consumption in this State.'

"You will note that the Act of 1903, which is the present law, quoted above, materially changed the meaning and application of the original Act of 1889. From reading the two it will be observed that the scope of the Act was broadened and made to apply not only to articles of trade and commerce, but to 'aids to commerce'; also that the Anti-trust Act was made to apply to any act or combination, the purpose of which was 'to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State.' These material and far reaching amendments to the law were made subsequent to the opinion of the Supreme Court of the State in the case of the Queen Insurance Company vs. The State, 86 Texas, page 250, in which case the court held that the business of insurance was not affected by the Anti-trust Act; that insurance was neither trade nor

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commerce, and, therefore, insurance companies could with impunity enter into combinations of any kind and character (86 Texas, 264, 265). In the course of this opinion the Supreme Court declared that insurance was not trade, traffic or commerce, but that 'it is an aid to commerce.' Following this opinion and no doubt as a direct result thereof, the Legislature in 1903 amended the anti-trust and monopoly statutes, and made them apply not only to trade and commerce, but to aids to commerce and to any business authorized or permitted by the laws of Texas. The banking business is, of course, one authorized and permitted by the laws of Texas, and is, we believe, an 'aid to commerce.' The Supreme Court of the United States has held that a dealer in exchange supplies an instrument of commerce. *Nathan v. Louisiana*, 8 Howard, 73.

"The business of a State bank, or rather the powers which it may exercise, is set forth in Revised Statutes, Art. 376, which reads:

"Section 72. Powers of Banking Corporations. - Every such corporation shall be authorized and empowered to conduct the business of receiving money on deposit, and allowing interest thereon, and of buying and selling exchange, gold and silver coins of all kinds; of loaning money upon real estate and personal property and upon collateral and personal securities at a rate of interest not exceeding that allowed by law; provided, that no bank organized under this title shall loan more than fifty per centum of its securities upon real estate; and no such bank shall make a loan on real estate of an amount greater than fifty per centum of the reasonable cash value thereof; also of buying, selling and discounting negotiable and non-negotiable paper of all kinds, as well as all kinds of commercial paper. (R. S., Art. 376; Acts, 1905, S. S., 490, Sec. 3.)' C. & H. Banking Laws, Sec. 72, 83.

"Manifestly, a corporation exercising these powers and functions is aiding commerce and the

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country in a very practical and material way. Argument would seem superfluous. Commerce cannot exist without cash, credit and a system of quick, certain and inexpensive exchange. These things banks supply. They collect into great reservoirs the cash and credit of the country, from which it is distributed into industry and commerce in such amounts and at such times as business may demand. Banks are not unlike lakes and reservoirs in which are collected surplus waters for redistribution for purposes of irrigation, and are as essentially aids to commerce as the latter to successful agricultural production. In fact, the Supreme Court of the United States has declared the safety of the business of banking to be one of the primary conditions of successful commerce. In the case of *Noble State Bank vs. Haskell*, 219 U. S. 111, that court, in referring to the guaranty of bank deposits, declares:

"It may be said in a general way that the police power extends to all the great public needs. *Camfield vs. United States*, 167 U. S., 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of these conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If then the Legislature of the State thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit, as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency

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of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand.'

"We conclude, on the whole, then, that the business of banking is within the protective, inhibitory and penal provisions of the anti-trust laws of this State, and that banks and bankers are as much bound to respect the anti-trust laws as are dealers in commodities. This conclusion is in harmony with the opinions of this office on the subject of banking from the beginning. On January 11, 1912, the Attorney General of the State, in an opinion written by the Honorable John W. Brady, Assistant Attorney General, held that an agreement entered into between the banking institutions of a city prohibiting overdrafts, would be in violation of the anti-trust law; not that any bank on its own motion might not prohibit overdrafts, but that when two or more banks entered into a combination for this purpose, that such combination violated the anti-trust laws. This opinion was predicated upon the propositions that the banking business was an aid to commerce, and was a business authorized and permitted by the laws of this State and in which the statute prohibited any agreement tending to restrict the business. In this opinion Judge Brady in part said:

"The question now recurs: Does the practice of allowing overdrafts, of the character above named, constitute commerce or aids to commerce? There is strong authority for the proposition that bills of exchange, drafts, checks and other like paper are commercial instruments to facilitate commerce, and, if not part of the commerce itself, fairly come within the term, and may be designated as 'aids to commerce' (see 9 Mich., 241; Nathan vs. Louisiana, 17 U. S., 507); and the practice being legal, any agreement or understanding by and between two or more banks of a city prohibiting absolutely the

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granting of such privileges, upon the part of all the parties to the agreement, would in our opinion, create and tend to create and carry out restrictions in commerce and aids to commerce and would therefore be violative of Section 1 of said Act.

"We are further of the opinion that such an agreement would create and carry out restrictions in the free pursuit of a business authorized or permitted by the laws of this State, within the purview of said statute. The banking business is one authorized and permitted by the laws of the State; and the making of loans in the way of overdrafts is a part of such business and a usual and familiar feature of modern banking. Indeed, some of the authorities treat the same as a practical necessity in the conduct of such business, although this view is doubtless too broad. At all events, when pursued with a reasonable degree of prudence and according to the ordinary usage, it is free from illegality, under the present state of the law, and any agreement or understanding whereby banks, parties to the same, bind themselves not to grant this privilege to their customers, creates and carries out restrictions in the free pursuit of their business within the meaning of said statute. In the absence of such an agreement or understanding, the banks would each be free to allow this privilege to their customers; and, since they agree to discontinue the usage and practice, they thereby necessarily restrict their freedom to act in a matter of business, which they would otherwise be free to do. We cannot conceive how it could be held that under such an agreement each party thereto would not be restricting the free pursuit of the business of every other party thereto, as well as his own business. It follows from what has been said that an agreement of the character suggested would be illegal and would subject the parties thereto to the penalties of the Act.' Vol. 25, Opinions of the Attorney General, 171-2.

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"Prior to this time, however, the Attorney General had held that the banking business was subject to the limitations of the anti-trust laws. On February 28, 1907, the Attorney General held that any agreement between banks to fix collection charges constituted restrictions in violation of the anti-trust laws. In that opinion the Attorney General in part said:

"You are respectfully advised that Subdivision 1 of Section 1 of the Anti-trust Act of 1903, defines a trust to be * * * a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for either, any, or all of the following purposes: "To create or which may tend to create or carry out restrictions in trade or commerce or aids to commerce or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by laws of this State."

✓ "Bills of exchange, drafts, and the character of paper to which you refer are commercial instruments to facilitate commerce, and if not a part of the commerce itself, clearly come within the term and may be designated "an aid to commerce" (9 Mich., 241; Nathan vs. Louisiana, 17 U. S., 507); and any combination, agreement, or understanding between banks to fix the charge for collections, would, in my opinion, constitute a restriction in commerce and aids to commerce, in violation of said act.

"Again. The understanding, if adopted, and acted upon by any two or more of the banks, would violate that provision of the same section quoted, which prohibits the creation or carrying out of the restrictions in the free pursuit of any business authorized or permitted by the laws of this State. Collections such as you have mentioned are a part of such business, and any understanding between banks to charge

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not less than a certain rate for collections creates a restriction in the free pursuit of that business within the terms of that act. The purpose of the law is to encourage the widest character of competition between all persons engaged in a similar business, and to prevent any understandings or agreements whereby any such person can not exercise his own free judgment in carrying on his business, and perform the services incident thereto at whatever price he may see fit to charge.' Reports and Opinions of Attorney General, 1906-1908, 393.

"You are, therefore, advised that the business of banking in this State is subject to the anti-trust laws, and those corporations and individuals engaged in this business, violating the anti-trust laws, may be punished the same as other persons violating the same Acts."

There is little that we can add to the foregoing. After considerable research, we have not found any case in conflict with the conclusions announced in the Cureton opinion or those from which it quotes, especially on the controlling point - that the conduct of a bank's business is an "aid to commerce." We are of opinion that an agreement or "understanding" by and between all the banks of a city to make certain charges (such as described in your question) would constitute a "combination of capital, skill or acts" for the purpose of carrying out restrictions in "aids to commerce", in violation of the provisions of Articles 7426, R. C. S., and 1632, Penal Code, supra.

Yours very truly

ATTORNEY GENERAL OF TEXAS

APPROVED SEP 10, 1942

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