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The Detection and Punishment of Tacit Collusion

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INTRODUCTION

The Detection and Punishment of Tacit Collusion

Introduction by Mr. Michael Freed

My name is Michael Freed. I am an attorney in private practice in Chicago. My practice is in the antitrust area, and it is my pleasure to introduce the panel for the first panel discussion this afternoon. For those of you who were here this morning, you know the morning discussion was about the proper goals of antitrust, particularly the intersection of the public and the private interests. The third panel's topic is related to issues involving the U.S. antitrust laws in the global market. These are both somewhat abstract matters.

I think this panel's topic is perhaps more pragmatic in the practical experience. It is the detection and punishment of tacit collusion. The panel is representative of a broad section of attorneys involved in the antitrust area. They include a private practitioner, mostly on the defense side, a prominent professor, and the chief of the Civil Task Force of the Antitrust Division of the Department of Justice.

The first panelist to speak will be William Kovacic. He is a professor of law at the George Mason University School of Law where he teaches antitrust contracts, government contracts, property, quantitative methods for lawyers, and unfair trade practices. He is also an associate faculty member with Rutgers University Center for Research and Regulated Industries, and he is Of Counsel to the Brian Cave law firm in Washing-

ton, D.C. Just yesterday, I received from Professor Kovacic a paper entitled, "Antitrust Policy and Horizontal Collusion of the 21st Century," which I understand will be part of the program of this symposium.

The second panelist to speak will be M. J. Moltenbrey. She is the chief of the Civil Task Force at the Antitrust Division of the U.S. Department of Justice. The Civil Task Force is responsible for major civil antitrust investigations and litigation, with special emphasis on intellectual property, licensing, joint ventures, vertical agreements, and trade association activity.

The final speaker will be Nathan Eimer. He is in private practice doing mostly defense work, a graduate of Northwestern University and the University of Illinois. I asked him today where he went to high school, and he is probably the only person I know from Mather High School. He is an adjunct professor of law and trial advocacy and a partner and senior member of the litigation group at Sidley & Austin here in Chicago. I think that Bill Gotfryd should be commended in putting together a pretty representative panel. He left out plaintiff's counsel, but that's okay, because I see a lot of plaintiff's counsel here in the audience. They will probably learn more by listening to the panel than speaking themselves. Without further ado, I will present our first speaker, Professor Kovacic.

CONFERENCE PRESENTATION

Presentation by Professor Kovacic:

I want to first thank the organizers of the program for the chance to participate. It's a delight to be part of such a wonderful group and to have the chance to talk about a number of especially interesting and current issues. So my thanks to Loyola and its broader community.

I am going to be talking a bit about something that, in a sense, is much more pedestrian than the opening session today. I am going to talk about an area of enforcement policy that commands a fairly broad consensus. If you were to take together, including the contending views from this morning's segment, I think all of the panelists there would have agreed that antitrust prohibition on certain types of agreements among competitors forms an appropriate and central focus for antitrust policy. I say that it is an accepted core with some hesitation because there is some debate in the academic literature about whether the prohibition on horizontal collusion is a good idea.

I remember, with some amusement, a Cato Institute session that took place in the mid-1980s. Two of the featured speakers were the Chairman of the Federal Trade Commission, Jim Miller, and the head of the Antitrust Division, Doug Ginsburg. Both spoke in front of a hard-core Laissez-faire audience. The two speakers were battered for being rampaging interventionists: first, Ginsburg for his hopelessly interventionist idea of putting business people in jail for horizontal price-fixing and, next, Jim Miller for,

what the audience viewed as foolish, his efforts to prosecute subtler forms of horizontal collusion. For two men accustomed to being attacked from the left, it must have come as a shock to be assaulted from the right. We watched both of them backpeddle and say, 'no, there is actually a sensible core here.'

The widely-accepted core can be deceptively simple and often is a very complex area. It starts with an issue that Eleanor Fox referred to this morning. When one goes to a transition economy, one often finds that a prohibition on collusion is a standard element of antitrust practice. Transition economy officials often ask questions such as, "What is an agreement?"; after you lay out the conceptual terms, they say, "Fine. How do you prove an agreement?" You realize, in attempting to answer those very simple straightforward questions, how difficult and complex the resolution of those issues has become in American antitrust jurisprudence.

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The campaign against collusion in the United States is beset by three interesting phenomena or challenges. The first is the proverbial long-standing problem of how to distinguish between unilateral and collective conduct. The definition of agreement is absolutely fundamental to the operation of the Sherman Act; but I am going to assert that it remains one of the most confusing and perplexing areas of antitrust jurisprudence.

The second challenge or phenomenon deals with the apparent persistence of significant episodes of covert illegal collusion among rival producers. I find the Archer Daniels Midland episode to be both fascinating and distressing. At least since the early 1970s, it has been unmistakably clear that those who engage in horizontal price fixing face a real risk of going to prison. Certainly in the past decade, with the promulgation of the Sentencing Guidelines, and the significant bolstering of criminal penalties for horizontal collusion, the sanctions are especially severe. Individual violators will spend a significant amount of time in prison and their companies will be exposed to significant criminal fines, in addition to facing the possibility of private treble damage suits.

It is an article of faith in every compliance antitrust program, well established throughout the corporate community, that if business executives are going to learn anything, the one antitrust precept they absorb is 'you cannot discuss or agree upon prices with your direct rivals.' Notwithstanding a long process of educating the business community on that point, disseminating the message, ratcheting up the penalties, running dozens of grand juries a year, we still find a major firm that took a breathtaking risk, did so at a high level of the company, and carried out the illegal plan over a long period of time. In my mind, this raises two questions: one, how effec-

tive is the basic set of prohibitions on horizontal collusion and, two, how many more serious episodes of such behavior are taking place undetected because an insider steps forward and provides direct evidence of collusion.

The third interesting challenge involves the emergence and refinement of new techniques for subtle forms of coordination—phenomena recognized in the academic literature dealing with oligopolistic coordination and interaction—that permit firms to engage in coordinated activity without relying on behavior that crosses clearly into the red zone. A plain effect of the Sherman Act over a century or more of experience has been to drive cartels underground. The *Trans-Missouri Freight (U.S. v. Trans-Missouri Freight Ass'n.*, 166 U.S. 290 (1897)) collusion case, which is a fixture of early antitrust jurisprudence, involved an agreement that the defendants readily acknowledged. Early horizontal price fixing agreement cases did not involve covert arrangements. The Sherman Act endangered those agreements and pushed them underground. Firms responded by developing subtle, covert techniques for coordinating pricing decisions.

My presentation looks at four separate issues: The first is the agreement issue. The second is to suggest ways of expanding the gathering of direct evidence involving collusion. The third is to emphasize a strategy that involves, apropos of this morning's discussion, dismantling barriers to entry that tend to stabilize collusion. The last is to identify institutional approaches for improving policy guidance and analysis by government agencies in dealing with horizontal collusion.

I want to start with the agreement issue. One can identify four basic coordination scenarios that appear in reported opinions dealing with horizontal collaboration. The first involves an express

exchange of assurances established by direct evidence of agreement—testimony or documentary records that unmistakably identify the terms and format of the cooperation. Ordinarily when direct evidence is discovered, the result is a plea agreement much like the ADM case. The second type of case involves a covert exchange of assurances, but prosecutors or private plaintiffs are unable to generate direct evidence of agreement and instead must rely upon circumstantial proof. A third coordination scenario involves the use of subtle tactics, which take place in various channels through which firms signal their intentions, elicit some form of approval or endorsement from their competitors, and then attempt, through arms-length interaction, to mimic their rival's moves. This behavior may or may not be characterized as an agreement for antitrust purposes. Last is pure structural interdependence in which firms acknowledge their interdependence, recognize the impact of their pricing moves on their rivals, but perhaps do not engage in subtle forms of signaling or other behavior to indicate future moves.

Supreme Court jurisprudence on agreement issues has laid out three basic points of reference. First, the Court has defined an "agreement" as being a conscious commitment to a common scheme. The difficulty with the Court's efforts to define "agreement" is that they could be interpreted to encompass pure oligopolistic interdependence, which has ordinarily been excluded from the reach Section 1 of the Sherman Act. It is possible to imagine the mere interaction of oligopolists being characterized as a conscious commitment to a common scheme, yet, the broad formula does not give us useful guidelines for sorting out the pure interdependent scenario from the actual exchange of assurances. A second basic frame of reference is established by the *The-*

atre Enterprises (Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954)) decision in 1954. In *Theatre Enterprises*, the Supreme Court made clear that if the plaintiff introduces nothing more than evidence of parallel adjustments in behavior over time, it has failed to establish an agreement for Sherman Act purposes. The plaintiff will be required to show parallelism plus something else. "Plus factors" serve as a means for sorting out mere interdependence from concerted action. The last point of reference is that in the case of circumstantial evidence, *Matsushita (Matsushita Electric Industrial Co., v. Zenith Radio Corp., 475 U.S. 574 (1986))* has made clear that where the plaintiff relies exclusively on circumstantial evidence and where the defendant succeeds in demonstrating that an inference of independent action is as likely as an interference of concerted action, summary judgment for the defendant is warranted. Where circumstantial evidence is ambiguous and the hypothesis of unilateral conduct is as plausible as that of concerted action, *Matsushita* indicates that the defendants should prevail unless the plaintiff steps forward with additional evidence that tends to establish the likelihood of concerted action.

What are the weaknesses in these three basic ingredients of Supreme Court jurisprudence? Let me simply mention two. The first is the use of "plus factors." You are familiar with the traditional litany of plus factors: the existence of a rational motive to conspire, the presence of behavior that is contrary to the defendant's self-interest unless pursued as part of the common plan (put another way, a phenomena that cannot be explained rationally, except as the outcome of concerted action), communications among rivals or at least the opportunity to communicate, industry conditions that facilitate or reinforce

collusion, performance data such as high profitability that suggest successful coordination over time, and the lack of a plausible business justification for the behavior.

What is the problem with how the courts have applied these factors in collusion decisions? I am going to describe the typical treatment of agreement issues in court of appeals and district court opinions. The typical opinion observes conscious parallelism and turns to the standard menu of plus factors. The court says that if you find one plus factor, there is an agreement. There is no discussion about the relative weight that individual factors on the list deserve. All we need to look for is one item on the list, and we have an agreement. Or opinions sometimes say, 'I have got several items from this list, A, D, E and F here.' The court realizes it needs something more than just parallelism. The opinion does not explain the relevance of each factor in pushing the behavior outside the zone of unilateral conduct. In effect, the court constructs a black box and does not explain what is going on inside the black box. Such opinions lend a degree of impressionism to district and appellate court decisionmaking in this area.

One way to explain the opinions is that the court develops its own intuition about whether the behavior is concerted or unilateral. If the court tends to give fairly strong weight to the possibility of unilateral behavior or believes the competitive interaction between firms is robust, the court will insist that the plaintiff introduce more plus factors. By contrast, if the court's underlying intuition is that a covert agreement accounts for the observed market outcome, then simply one plus factor will do.

A second basic problem that besets this framework is dealing with behavior that involves subtle interaction between oligopolists where, for ex-

ample, such firms announce price movements in advance, await the reactions of competitors, and respond by either raising prices or making other adjustments. Here, there may be some convergence on a common set of policies, no conventional direct or covert communications among rivals, but behavior that might be termed offer and acceptance.

This situation poses a couple of problems. One is that if you are going to apply the label of concerted conduct to this type of interaction, what kind of order would you write to define the forbidden conduct? What do you tell the firms they cannot do in the future—that they cannot pay attention to each other, cannot respond in certain ways? What is the avoidable conduct that firms must forgo in the future?

Second, in the *Matsushita* framework where the plaintiff relies upon circumstantial evidence, a fundamental problem may arise if defendants make the following argument: *Matsushita* calls for an economically plausible theory of liability and requires that the plaintiff's theory of conspiracy be economically rational. Modern game theory teaches us that we can reach basically the same outcome through arms-length interaction as we can achieve by sitting in a smoke-filled home in the hotel. It is irrational for us to try and do really dangerous things when we simply can rely on arms-length interaction and get the same result. This argument may create ambiguity with respect to the plaintiff's circumstantial evidence. Courts may view summary judgment as appropriate where defendants say, "Yes, we coordinated our behavior, but we did so in a way that is outside the bounds of Section 1, and you have to allow the behavior to go ahead. And, oh, yes, if you are thinking of prohibiting it, what kind of order will you write to tell us what we cannot do?"

A solution that I suggest in the short paper [accompanying this presentation] draws upon the experience with the development of the federal government's merger guidelines. One of the big innovations in the 1982, 1984 and 1992 versions of the merger guidelines has been the use of a more economically-informed theory of how firms collaborate to explain how certain mergers can cause competitive harm. I propose a reformulation of the agreement requirement to track the three basic elements of what economists have concluded firms must do to conspire successfully—namely, reach a consensus, detect cheating, and punish defectors. I propose that those activities be the focus of analysis in collusion cases and that the evaluation of plus factors be related to how, each plus factor suggests the ability of the defendant to do those three things.

The second topic I want to address today is gathering direct proof of conspiracy. One approach to solving some of the dilemmas of the modern agreement doctrine is to redefine the use of circumstantial proof in the determining the existence of an agreement. A second solution is to get more direct evidence of the agreement, in the form of testimony or documentary records which show conduct displaying parallelism that actually *did* collaborate in enabling a common plan of action.

One of the most interesting and most remarkable law enforcement innovations of the modern era has been the amendment in 1986 of the Civil False Claims Act. As altered in 1986, the Civil False Claims Act deputizes all employees of recipients of government funds (e.g., contractors and grant recipients) to monitor compliance with government procurement policy on behalf of the government and to file suits on the government's behalf where such violations are detected. A bounty of 15 to 30 percent of all

amounts that the government recovers is paid to the relator who provided the information that helped generate the recovery by the government. The largest bounty to date has been about \$40 million for an individual who detected double-billing by firms that perform medical tests under a Medicare reimbursement scheme. There are a number of flaws in the mechanism established under the 1986 False Claims Act amendments, but the statute's bounty mechanism suggests some interesting possibilities for detecting covert price-fixing arrangements.

Government prosecutors already rely heavily on insider informants to identify and then prosecute illegal collusion. Informants come forward for a number of reasons. Sometimes, the impetus is moral outrage on the part of a sales representative who notices an arrangement that seems offensive. Sometimes, the cause is the Justice Department's leniency program that gives get-out-of-jail-free cards to the first party in the door. Sometimes, the inducement is a grant of immunity to otherwise culpable individuals. The use of leniency, immunity, and other techniques has been vital to attracting insiders. Without such informants, the Justice Department's anti-collusion program would be considerably less successful.

I propose to bring forward insiders by giving bounties to those who identify collusion by their employers. It is a well-established doctrinal principle that employees lack standing as private litigants to challenge collusion by their employers, the theory being that they do not suffer antitrust injury. If their employers get richer by means of collusion, the employees profit indirectly by sharing of the spoils of the misconduct. My proposal is to create a variant of the 1986 False Claims Act for individuals employed by firms engaged in collusive schemes. My plan, in short, would

have the following elements: (1) the written informer's submission of information about collusion to the Justice Department; (2) a bounty for the informer—perhaps 15 to 25 percent—adjustable downward where the informer has participated in or helped orchestrate the collusive scheme; (3) an anti-retaliation safeguard; (4) the payment of attorneys fees for individuals who counsel the relator or informer in this process; and (5) the allowance of counterclaims by employers against employee informers who breach important duties to the firm—for example, an internal auditor who fails to report episodes of collusion to top management.

I suggest a 10-year experiment with antitrust bountyhunting. Since 1986, the government has recovered about a billion dollars through the amended Civil False Claims Act bountyhunting system. About two hundred million dollars of this amount has been paid out in bounties. I would begin with a 10-year test to see how it works in the case of horizontal collusion.

The third item that I would make an ingredient of a collusion policy for the future is to change public policies that reinforce the ability of firms to collude successfully. This morning's panel pointed out very well the extent to which government policies continue to harm consumers by facilitating or approving collusion on the part of private suppliers. As the panel said this morning, *Parker v. Brown* (*Parker v. Brown*, 317 U.S. 341 (1953)) is one of the worst self-inflicted wounds of American antitrust jurisprudence. It is striking to those of us who have worked with foreign governments attempting to make the transition from communism or socialism to a market system to see how much better their new antitrust statutes are than our own to the extent that they make it especially difficult for the state to avoid liability where it attempts to suppress ri-

valry. Many transition economy antitrust statutes vest power to grant immunity in the national legislature alone and give no such authority to any political subdivision below that.

I am going single out one arena in which current government policy consistently saws the government's own legs off. Consider the case of public procurement. I recently looked through all of the Justice Department's indictments for a five-year period extending from the late 1980s through the early 1990s. Forty percent of the indictments dealt with collusive schemes whose victims were public purchasing authorities.

To put it in the harshest possible light, public bodies are the worst suckers, the worst targets, the worst victims when it comes to horizontal price fixing. Again and again, the government as a purchaser is an inflatable punching bag weighted at the bottom. When struck in the face, the government tilts over, but quickly comes back up for another pounding.

What pathologies in the procurement process facilitate this? A combination of policies put private parties in a superior position to collude effectively. One deals with the observation and opening of bids. A standard ritual of sealed bidding procurement episodes is the opening of each bid in a public forum. The bids are opened and set down on a table in the front of the room, and all bidders are invited to step forward and take a look. If you wanted a foolproof mechanism for detecting cheating on a bid-rigging scheme, you could do no better than this. Each cartel member gets to walk forward and say, "Well, Fred said he was going to bid high this time. Good boy, Fred, you did," to see if the other bid rotation participants abided by their promises and to conceive of a punishment mechanism if they did not.

Why do we do this? It results partly from a compulsion to have absolute integrity in the pro-

curement process. The idea is that if you do not have a public display of bids, government purchasing officials would be corrupted to sell their office to individual bidders. Of course, we could get the same assurance of integrity by having an inspector general or some other internal guardian review bids and contract awards. Yet, we continue to rely upon an open revelation process that I am convinced has a lot to do with the longstanding and successful operation of cartels in the public procurement arena.

A second cartel facilitating policy is the Buy American Act. Buy American and other local content measures staple public procurement policy. These measures restrict competition by excluding various potential offerors—out-of-state producers. Such restrictions have the perverse effect of limiting entry and stabilizing the number of participants who can provide the product. When you look through past bid-rigging episodes that the Justice Department has attacked, it is hard to escape the conclusion that many of them functioned successfully only because domestic content or local content laws stifled new entry. They were only a handful of incumbent producers and having three or four firms to deal with made the organizing and operating of a cartel relatively easy.

The policies described above, and there are a host of others, serve to reinforce and facilitate collusion. The government sticks its chin out repeatedly in these and other respects and asks prospective cartelists to take a swing. It seems to me that an important element of reinventing government is to adjust public policies that promote collusion.

My final suggestion is institutional. Let me briefly mention three possibilities. First, along the lines of developing guidelines, I think it would be extremely helpful to have a document

that does for horizontal restraints and agreement issues what the DOJ and FTC merger guidelines have done in the treatment of horizontal mergers. For collusion, one could begin with a basic economic understanding of what makes a cartel work effectively and structure the analysis of plus factors around that understanding. In its airline pricing case, the Justice Department's competitive impact statement helped it to carefully build a case around the specific phenomena that make collusion possible. It would be useful to use a similar approach to devise guidelines governing the identification and proof of agreement.

The second possibility is to rely on rule making—informal rule making to articulate standards for defining an agreement and to circumscribe the use of facilitating practices. Here, I am echoing Jonathan Baker's proposal of three years ago, that a useful role for the FTC in cases of subtle interaction and subtle forms of signaling is to use administrative rule making to identify coordination tactics and to identify conditions in which the Commission might seek to proscribe specific behavior. I have not always written favorably about the FTC's activities and efforts to extend or refine doctrines in these fields, but I do think that so long as we have two federal competition policy institutions in this area that it is a good use of the Commission's time.

Third, even though the FTC's *Ethyl* case was not a successful venture, I think it was a responsible exercise of prosecutorial discretion to address in facilitation practices in a purely civil process without treble damages exposure. Although the Commission's experience in *Ethyl* was not successful, I think it would be appropriate to come back to that issue in the future as one focal point for the allocation of the agency's horizontal restraint resources. Thank you.

CONFERENCE PRESENTATION

Presentation by Ms. Moltenbrey:

I agree with most of Professor Kovacic's remarks, but I do have a few comments I want to make. First, however, let me preface my remarks by stating that, unlike Richard Epstein, who this morning was willing to speak as the authoritative voice of the Chicago school, I most definitely do not speak as the authoritative voice of the U.S. Department of Justice. The views that I express here are my own and not those of the Antitrust Division.

One of the things that I like about Professor Kovacic's approach to talking about tacit collusion is that he begins by defining his terms. In particular, he focuses on the terms "tacit collusion" and "circumstantial evidence." I think that one source of confusion and disagreement in this area is that courts and commentators tend to use those terms loosely, as if they were interchangeable, when in fact they are very different.

I think that we are confronted with three possible types of agreements when assessing horizontal agreements. The first is the express agreement that we typically think of as the classic criminal cartel. These are usually secret agreements, but their terms are either written down or spoken or articulated in some way. Once we find out what was said or done, it is usually not hard for us to decide whether there is an agreement in such a case. The difficult task is to get evidence of what was said or done.

At the other end, there is the type of coordination we call "conscious

parallelism." It is well-established in the case law that, without more, conscious parallelism is not an agreement within the meaning of the Sherman Act.

Then, there is the wide range of conduct in the middle that we call "tacit collusion." In my mind, tacit collusion occurs when there is no express agreement, but where there is parallel behavior plus something else that causes us to conclude that firms have reached an agreement. So to me, tacit collusion describes a particular type of agreement.

On the other hand, when we talk about circumstantial evidence, we are not really talking about the substantive standards that define what constitutes an agreement under the Sherman Act. Rather, we are talking about how an agreement is proven — what type of evidence shows that there is an agreement. I think it is helpful to keep these distinctions in mind when we talk about tacit agreements. When we are talking about

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whether there is a tacit agreement that violates the Sherman Act, we are asking "What is the conduct?" and "Does that Conduct violate the law?" And when we talk about circumstantial evidence, we are talking about how we are going to prove that a violation occurred.

First though, let me talk a little about express agreements. Professor Kovacic mentioned two problems that I think are likely to be a major focus of the Antitrust Division, and for antitrust enforcement in general, in the coming years. He mentioned the continuing prevalence of classic cartel behavior, as evidenced by the recent Archer Daniels Midland (ADM) case. (*U.S. v. Archer Daniels Midland Company*, 115 S.Ct. 1724 (1995)). Unlike Professor Kovacic, I am not really surprised that this behavior continues. It is true that fines, criminal penalties and jail time have increased recently for these types of crimes, but it is also true that the benefits that drive these types of arrangements are enormous and the likelihood of getting caught is still slim. While the risk in terms of the severity of the consequences of being caught are greater, the risks of getting caught are not necessarily much greater, and certainly the incentive to engage in the conduct is still there.

I think there are two problems that are getting increasing attention in this area. One is the growing use and availability of electronic communications which can contribute to the process of reaching an express agreement among competitors. A lot of the evidence that we tend to use to prove the existence of an express agreement comes from the notes taken, records of phone calls, and other evidence of meetings or communications. When a substantial amount of communication takes place through computers or over the Internet, we are concerned that it may

be easier to destroy evidence of these communications. Records may not be kept long, and it may become more difficult to develop that type of evidence. For that reason, we now place a great deal of emphasis on obtaining access to electronically stored records through our subpoenas and civil investigative demands.

The second factor is the increasing internationalization of competition. The ADM case is a great example. We have to worry about companies not only in the U.S., but also overseas, engaging in cartels. Gathering information and evidence in an international context is much more difficult than obtaining this information domestically, so our job is getting harder in this area. Again, the Division is focusing much more of its attention on developing ways to get access to this information, in part through new agreements with competition enforcement agencies abroad.

I would also like to comment briefly on Professor Kovacic's proposals with respect to these types of cartels. I find his bounty idea intriguing, but I think it is important to recognize that one of the big problems often faced by the Justice Department in a criminal case is the credibility of the immunized witness. An immunized witness' credibility is always subject to attack. I think that any witness who will come forward to claim a bounty will probably also want immunity from prosecution, especially if they participated in the crime. So, in addition to having an immunized witness who may not be very credible to a jury, we are going to get a witness who is going to be paid a lot of money if their testimony results in a conviction. I wonder if this is really something that would be a benefit for enforcement. I think this problem deserves some additional thought, and the idea intrigues me.

With respect to public procurement, I agree

with all of Professor Kovacic's comments. It is an area that the Division has paid attention to in the past. The Division does counsel federal procurement offices on both how to detect collusion when it is happening and how to set up programs in ways that will make it less likely to occur. There are, however, certain constraints in terms of the openness of government — here, I am referring to the fact that whether or not bids are ultimately opened in front of competitors or some secret place subsequent to submission, eventually people are going to find out who won the contract. Concerns about preventing public corruption as well as government accountability dictate that. So I question how much a public opening of bids actually contributes to the problem.

Now, I am going to turn to the topic of tacit agreements, which I think is the thrust of this presentation and in many ways presents the more difficult conceptual problem. Again, I want to mention the distinction between a tacit agreement and circumstantial evidence of an agreement. Oftentimes, when we are talking about tacit collusion, I think we are dealing with direct evidence of the conduct at issue, not circumstantial evidence.

Certainly in the airline case, *U.S. v. Airline Tariff Publishing Co.*, (*U.S. v. Airline Tariff Publishing Co.*, 1994 WL 454730 (D.D.C.)) the Justice Department had a very clear idea of what happened. We knew what the airlines were doing and could prove that conduct through direct evidence. The question was whether that conduct amounted to an agreement under the Sherman Act. That is the more difficult question. I do not know whether it is possible to have circumstantial evidence of tacit agreement. I suppose it is possible. But more likely, and where

the issue of tacit collusion manifests itself, are situations where the course of events is clear — where we know exactly what happened — whether it is the posting of a price in a newspaper, a subsequent response by a competitor, and an alignment of prices at the end — the question is, can we say there has been a “meeting of the minds” or a “conscious commitment to a common scheme?” It is not a question of trying to infer that certain other conduct must have occurred down the road.

I think that the traditional approach to tacit collusion, which has been to look at so-called “plus factors,” can be problematic in part because of this confusion between the notions of “circumstantial evidence” and “tacit agreements.” Many of the usual plus factors that courts and commentators list, including the ones that Professor Kovacic listed, are not necessarily conceptually relevant to whether or not certain conduct constitutes a tacit agreement. Many of the plus factors are instead circumstantial evidence of an express agreement which has been kept secret.

For example, the first factor listed is always the existence of a rational motive to conspire. Perhaps it is just my prosecutorial bias, but I tend to assume that most horizontal competitors have a rational motive to conspire to raise price. I am not sure how much that tells you. Next, take conduct that can only rationally be explained as the result of concerted action, such as submitting uniform sealed bids—that is certainly relevant circumstantial evidence of an agreement. But here again, we are talking about a covert but express, not tacit, agreement.

Another plus factor cited is the defendant's participation in past collusion-related events. I am not sure that I want to rule out the possibility that recidivism is relevant in tacit collusion cases,

but it is more clearly and usually thought of as being relevant to express agreement cases.

That leaves a few plus factors on the table. One of these is the industry's characteristics. The economic approach to deciding whether or not tacit agreements exist leads, as Professor Kovacic suggests, to an interesting result. By the economic approach, I mean looking at what characteristics an industry has and at what it needs to coordinate firms' behavior. In a tight oligopoly with the right market characteristics, firms do not really need to do anything other than engage in pure conscious parallelism to coordinate their behavior and raise prices. The closer an industry gets to a tight oligopoly, the more likely it can achieve coordination and the less likely it will need an agreement, tacit or express, in order to raise prices. On the other hand, the less an industry has oligopolistic characteristics, the more difficult it will be through signaling, through cheap talk, or through other means to monitor what is going on, the more likely an express agreement is needed to enable the firms to raise prices. And I think that is part of the reason that the smoke-filled room type of cartel agreement has not disappeared; for some industries, the smoke filled room is the only way to coordinate. The "action," when we are talking about tacit collusion, is in the middle — in industries that have some of the characteristics that make coordination easier, but not all of them. There are some hurdles that the firms are going to have to overcome to engage in coordinated behavior.

This is what we saw in the airline industry. The industry is characterized by a large number of frequent transactions, and there is a lot of information available to rivals about what firms are doing. There is an almost immediate ability to detect cheating on any price agreement and

an almost immediate ability for other firms to respond. These are factors that most economists would say will make oligopolistic coordination easier because cheating on the coordinated price is not likely to be profitable. The industry also has characteristics that would make it difficult for the oligopoly to coordinate price. The sheer volume of information available and the need to process that information can make it difficult to monitor what is happening in all of the markets in which a firm participates. Also, the sheer volume of information, the number of players, and the number of markets makes it difficult to punish cheating.

Professor Kovacic spoke of the oligopolists' need to reach a consensus, detect cheating, and punish defectors. The oligopolist must also have a way to make it clear to the cheater and to the other competitors that that is what it is doing when it cuts price to punish the cheater. Ignorance about why a firm is cutting price can be very destabilizing to an oligopoly. The Supreme Court referred to this problem in the *Liggett* case— if you cut prices to punish someone for cheating on a coordinated price and none of your other competitors knows why you did it, you are just going to trigger a price war.

That was one of the problems we saw in the airline industry that made coordination without agreement more difficult. In that case, there was evidence that when firms engaged in punishment for what they viewed as one airline's deviation from the agreed upon price, they had developed mechanisms by which they could attach a sort of label to what they were doing so that it was clear to everyone — to the targeted cheater as well as to others who might see the low fare and wonder what was going on — that the fare was intended as punishment for some other airline's fare cut.

They wanted to be able to explain why a certain pricing action was being taken, and let others know that this was not an invitation to start a price war — that, in fact, other airlines should stay out of the skirmish.

One of the most difficult aspects of these types of tacit collusion cases is finding an appropriate remedy. I think one of the most useful approaches to this kind of problem is to look at the process by which the coordinated price was reached to see whether there are things that the firms could have avoided doing. In a pure follow-the-leader pricing situation, it is difficult to figure out how the firms could have acted any differently and still acted the way we expect firms to act — to pursue the profit maximizing course. However, in many cases where the Justice Department is concerned about the exchange of information, punishment, and complaints between competi-

tors about prices, there are activities going on that help the firms overcome various obstacles to coordination and achieve a coordinated outcome. These activities are necessary to help the firms reach consensus, police compliance, punish deviation, and explain their actions. The Department is likely to look at the process by which coordinated outcomes are reached, and if there is conduct clearly directed at the process of reaching an agreement and it is conduct that can be enjoined, then it increases the likelihood that we will conclude there has been a tacit agreement. That may in fact be the key distinction between mere oligopolistic interdependence and tacit agreement.

And I think that I have probably taken a little bit more time than I should have, so I am going to sit down.

CONFERENCE PRESENTATION

Presentation by Mr. Eimer:

Before I got up, Mike Freed was talking to some of the other panel members and said that as defense counsel, I probably would sound like the comedian, Jackie Mason: "I have never seen tacit collusion. If it exists, I do not know where it exists. If it does exist, it is not bad, and we should have more of it."

Tacit collusion does exist, but it exists as collusion. I spend most of my time—in fact, all of my time counseling corporations about the antitrust laws and, to me as an antitrust counselor, conduct is either collusive or it is not collusive. There is no real distinction to me between tacit collusion and collusion. The debate centers around the directness with which the agreement or the understanding was reached. I will get to some of Professor Kovacic's factors in a minute.

I think the ADM situation stunned us all when it occurred last year. I have been involved in some of the ADM grand juries, not representing ADM, thankfully. The interesting thing to me is that all of the corporations that have pled guilty so far are foreign companies; ADM is the only American company. This is an interesting commentary on where we are in antitrust enforcement in this country.

I do not believe the type of conduct ADM engaged in is rampant in this country, but it certainly does exist in the world. I do not believe that you will routinely find smoke-filled rooms occupied with competitors fixing prices—if there are smoke-filled

rooms any more. I still find it shocking to view videotapes of American companies fixing prices.

What ADM did was shocking, and I believe aberrational. Hopefully, it is unique to the culture of ADM. I think, however, that M. J. Moltenbrey is right, that our companies and our economy are now part of the global economy, and as that global economy impacts this country, we are involved. I have seen many circumstances where foreign competitors have not a hint of what an express agreement is or what the constraints of our antitrust laws are, and that is an enormous problem for antitrust enforcement in this country.

Another problem for antitrust enforcement has been the merger policy in this country. There is an increasing concentration of economic wealth in corporations in various industries in this country. The idea that Texaco should call up Shell and decide that they are going to have a joint venture and market gasoline together is stunning.

Nathan Eimer, a partner at Sidley & Austin in Chicago, has a substantial antitrust practice. In addition to his law practice, Mr. Eimer serves as director for several public service organizations including the Infant Welfare Society of Chicago and the Chicago Lawyers' Committee for Civil Rights Under Law, Inc. He is also adjunct professor of law in trial advocacy at Northwestern School of Law. He earned his J.D. cum laude from Northwestern University and his A.B. magna cum laude with Highest Distinction in Economics from the University of Illinois.

Twenty years ago Texaco and Shell would probably not have been able to merge their refining and marketing operations.

The concentration of economic power in this country has led to the increasing concern about tacit collusion. As the number of competitors become fewer and fewer, classic economic theory tells us that we should worry more about interdependent pricing of one kind or another. We are slicing the salami thinner and thinner as to what an agreement is under the Sherman Act and what should be illegal. We are obviously trying to offset the supra-competitive prices that may result from increasing concentration.

Sentencing guidelines have a dramatic impact in the corporate board rooms. In my experience, the efforts by the antitrust authorities and antitrust plaintiffs' lawyers and the judgments and settlements that they have obtained also have had effect on antitrust compliance. An enormous amount of time is spent trying to figure out what employees can and cannot do. An enormous effort is made to develop internal detection systems within corporations because of the sentencing guidelines. Appropriate compliance programs can provide a reduction in sentencing if the corporation is ever found to have engaged in price fixing.

I think that Professor Kovacic's proposals are interesting, but I am not sure that ultimately that is the kind of society we want. What limits those proposals to antitrust laws and antitrust enforcement? I could imagine that you could have whistleblowers in all phases of life, but that is a world that I would not want to be involved in. I do believe that vigorous enforcement from the outside and the pressure on corporations to self-police are important deterrents to price fixing.

I want to address Professor Kovacic's three-

part test for tacit collusion because I think when you get past the first point, the test really implodes on itself. If competition reaches a consensus then, I would say, even as a defense lawyer, we have an illegal agreement. I do not need the other two factors—the only question is, “Has a consensus been reached?” If a consensus has been reached among competitors, I would be quite concerned, if I were their lawyer, as to where they were headed. The real question is, “What does it mean to reach a consensus?” This is another way of asking, “What does it mean to say have you reached an agreement?”

An agreement is unquestionably hard to define. The courts have struggled with it; we, as counsel, have struggled with it, you as counsel and judges have struggled with it. It is not clear and it cannot be clear. It stems back to the premise of our economy—profit maximization through competition. If we are going to allow companies and managers to maximize profits and, therefore, prices, to the extent they independently do so, then at what point can you constrain their conduct? At what point, will we say, “You can't do that?” You know the phrase ‘the wink of an eye is enough to have an agreement established.’ Okay. Fine. A wink of an eye. But how about an E-mail? How about a certain price posting system in a periodical? How about a bulletin board where prices get posted? How about a thousand different things that people can think of over time? If it results in a consensus in which people acknowledge that the pricing level is acceptable, then, through a wink of an eye or an agreement or a consensus, however you define it, it is illegal. This is the end of the analysis.

If, instead, there is independent conduct with the realization that there is going to be a response from a competitor and an expectation based on

game theory what the response will be in terms of a counter measure, then that to me ought not be illegal conduct so long as we are going to allow people to maximize profits—and it seems to me that is very much where we have been.

I think there is—and I think Professor Kovacic’s suggested this indirectly—more room within Section 5 of the Federal Trade Commission Act for increased enforcement. The FTC has experimented with it in the past, and three or four years ago, they tried to bring some cases which resulted in a consent order. They went after people who have solicited a conspiracy without successfully doing so. There is more room in Section 5 to deal with issues of tacit collusion; it would be interesting to see where the FTC could go. I do believe on balance, however, the courts have done an extraordinarily good job in dealing with this. I think the *Matsushita (Matsushita Electric Industrial Co., v. Zenith Radio Corp., 475 U.S.*

574 (1986)) doctrine of requiring the court to eliminate from consideration conduct which is consistent with rational business judgment is a correct view of the law.

Most of what occurs, ultimately goes on in front of a jury, if it ever goes to a jury. What the courts are trying to do is merely decide on the standard for summary judgment. If defense counsel loses summary judgment, that doesn’t mean that the conduct is illegal. It means merely that the conduct is going to a jury for a decision. It is up to the jury to decide whether or not the conduct is an “agreement” under the Sherman Act. The definitions that we have been using here today are really summary judgment standards, for the most part, not ultimate decision standards, and I think it makes a real difference in thinking about antitrust policies to keep that in mind. Thank you.

QUESTION & ANSWER

Mr. Freed: Because there appears to be substantial agreement on many important issues and because we are running a little past the earlier projected time, I would propose that we not get into a rebuttal between and amongst the panelists, but instead open it up to questions from the floor, if anybody has a question concerning any of the remarks which have been made.

Q: Mr. Eimer spoke of extraterritorial application. I know that is the next topic. I would like to get his view and perhaps the former justice's view on the *GE Industrial Diamond* case. Was it not that failure to win their base margin on the fact there must be activity happening overseas?

Ms. Moltenbrey: I expect that there are a number of issues that the judge was looking at, not the least of which was the nature of the evidence, which was complex. I am not sure that the international aspect of it in and of itself was a major factor.

Mr. Eimer: I agree. My understanding of the case, and I was not involved in it, is that there was a failure of proof or failure of evidence—had there been sufficient evidence or had a witness been available; maybe what you are referring to is ability to get sufficient evidence from overseas and competitors, to that extent, then answer is yes. It is clearly an antitrust enforcement problem right now. There is no question about that.

Q: Do you think that the fact that meetings and agreements may have taken place overseas is not itself a variant?

Mr. Eimer: Where the meeting takes place—I do not mean to speak for the Justice Department, but as a defense counsel—I would not counsel my client to be very comfortable committing a conspiracy in England that would impact the United States. I do not think that is that an issue. I think the issue is if there are witnesses in England that are beyond the subpoena power of American courts, can the Justice Department prove the agreement here? That is a real problem for the government, but not one I would seek much comfort in as defense counsel.

Ms. Moltenbrey: I would agree with that.

U. S. ANTITRUST LAWS AND THE GLOBAL MARKET: *NATIONAL AND EXTRATERRITORIAL ENFORCEMENT*

Growing political sentiment combined with legislative proposals favoring the elimination of international trade barriers raise the concern of whether the present state of transnational antitrust enforcement is capable of reaching conduct traditionally condemned in the United States. Do the benefits of free international trade currently outweigh the risks? How do we keep trade “free?”

Introduction:

Professor Christian Johnson

Presenters:

Professor Harry First

Honorable Diane Wood

Mr. Steven Rasher