

Initial Thoughts on the *American Needle* Decision

Gregory J. Werden

That manufacturer American Needle, Inc. brought suit under Section 1 of the Sherman Act, alleging that the NFL and its teams had unlawfully acted in concert in granting a single, exclusive license to all the teams' logos and trademarks for use on apparel. The NFL moved for summary judgment, arguing that the league and its teams had acted as a single economic entity. In the limited context of the NFL's intellectual property licensing, both the district court and court of appeals accepted the single-entity argument.¹

The Supreme Court had invited the single-entity argument in a 1982 opinion by Justice Stevens,² so it came as a bit of a surprise when Justice Stevens' unanimous opinion in *American Needle, Inc. v. NFL*³ not only rejected the NFL's single-entity argument in that case but also seemingly afforded little scope for the argument in future cases involving sports leagues with independently owned and operated teams. The decision, however, did not provide much guidance on when the single-entity argument is valid with joint ventures other than sports leagues.

The Narrow Holding of *American Needle*

The Section 1 analysis in *American Needle* begins by observing that the determination of whether conduct is concerted does not turn on "formalistic distinctions" but rather on a "functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate."⁴ The Court explained that the "key" is whether the alleged agreement "joins together separate decisionmakers . . . 'pursuing separate economic interests.'"⁵ The Court declared that even the actions of a single legal entity constitute concerted conduct if the entity serves as "an instrumentality" of multiple competitors and thus is "a vehicle for ongoing concerted activity."⁶

Applying these principles, the Court found it clear that collective licensing by the NFL teams was concerted conduct. The Court declared that "the teams compete in the market for intellectual property," and that they had acted pursuant to their "separate economic interests," so their collective licensing decisions "depriv[ed] the marketplace of independent centers of decision-making."⁷ The Court then addressed the actions of NFL Properties (NFLP), created in 1963 to

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¹ *Am. Needle, Inc. v. New Orleans La. Saints*, 496 F. Supp. 2d 941 (N.D. Ill. 2007), *aff'd*, *Am. Needle, Inc. v. NFL*, 538 F.3d 736 (7th Cir. 2008).

² *See Ariz. v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982) (observing that a "joint arrangement[] in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit" is "regarded as a single firm competing with the other sellers in the market").

³ 130 S. Ct. 2201 (2010).

⁴ *Id.* at 2209.

⁵ *Id.* at 2212 (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984)).

⁶ *Id.* at 2209–10 (quoting *United States v. Sealy, Inc.*, 388 U.S. 350, 353 (1967)).

⁷ *Id.* at 2213 (quoting *Copperweld*, 467 U.S. at 769).

license the intellectual property of the NFL teams. The Court held that NFLP's "marketing of property owned by the separate teams" is concerted action because the teams have "economic interests that are distinct from NFLP's financial well-being" and so "are not like the components of a single firm that act to maximize the firm's profits."⁸

American Needle did not reject single-entity treatment for all actions by all joint ventures. When participants in a joint venture do not have interests separate from those of the venture, *American Needle* suggests that the venture acts as a single economic entity. For example, concerted action surely does not occur when law partners agree on the firm's fees. But the opinion hints at no general test for determining when a joint venture and its participants act as a single economic entity. The Court's failure to provide more guidance is not surprising but is disappointing both to the antitrust cognoscenti and to participants in all sorts of joint ventures.

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***Copperweld* in Retrospect**

In *American Needle*, the Supreme Court began its analysis of NFLP's actions by observing:

We generally treat agreements within a single firm as independent action on the presumption that the components of the firm will act to maximize the firm's profits. But in rare cases, that presumption does not hold. Agreements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself⁹

This implicit reference to the Court's prior decisions could have been made explicit with a discussion of *Copperweld*.¹⁰ *Copperweld* had held that "an internal 'agreement' to implement a single, unitary firm's policies" is not concerted conduct because it does not "raise the antitrust dangers that § 1 was designed to police."¹¹ *Copperweld* also had held that "the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor," reasoning that each division "pursues the common interests of the whole" so coordination among them entails no "sudden joining of two independent sources of economic power previously pursuing separate interests."¹² Even when sister divisions engage in marketplace rivalry, the Court presumed that they act to maximize company-wide profits.¹³

Multi-divisional corporate structures like those discussed in *Copperweld* typically were created by mergers, as was the structure presented by that case.¹⁴ *Copperweld* teaches that, when two companies merge, they necessarily become a single economic entity for Section 1 purposes. Neither the quoted observation from *American Needle* nor anything else in the decision is to the contrary. A necessary condition for concerted conduct in that observation is that "the parties to the agreement act on interests separate from those of the firm itself." The interests of sister divisions can differ, but they cannot be separate from those of their parent firm for the simple reason that the divisions have no source of profits outside the parent firm. Consequently, *American*

⁸ *Id.* at 2214–15.

⁹ *Id.* at 2215.

¹⁰ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

¹¹ *Id.* at 769.

¹² *Id.* at 770–71.

¹³ *Id.* at 771.

¹⁴ The "agreement" at issue in the case was between *Copperweld Corp.* and *Regal Tube Co.*, which *Copperweld* had purchased from *Lear Singer*. See *id.* at 756, 774.

Needle casts no doubt on the critical legal rule that merging two independent companies necessarily makes them into a single economic entity for Section 1 purposes.

Like NFLP, most joint ventures have participants with interests separate from those of the venture; indeed, few joint ventures are even the principal profit source for their participants. *American Needle* suggests that the typical joint venture engages in concerted conduct when its participants act on those separate profit interests when operating the joint venture or determining its general policies.

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The Solicitor General’s Test

In almost every important way, the Section 1 analysis in *American Needle* closely tracked the brief filed by the Solicitor General, which urged a “functional analysis” and focused on the elimination of actual or potential competition as the key determinant of whether conduct is concerted.¹⁵ The Solicitor General, however, went further than the Court. Consistent with Section 1 principles articulated by the Court, the Solicitor General argued that a sports league acts as a single economic entity if, and only if, two conditions are met:

First, the teams and the league must have effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition among the teams and between the teams and the league in that operational sphere. Second, the challenged restraint must not significantly affect actual or potential competition among the teams or between the teams and the league outside their merged operations.¹⁶

The Supreme Court recited these conditions but found “no need to pass upon the Government’s position that entities are incapable of conspiring under § 1” if, and only if, these conditions are met.¹⁷ The Court explained that this case involved “agreements amongst potential competitors and would constitute concerted action under the Government’s own standard” because, “[a]t any point, the teams could decide to license their own trademarks.”¹⁸ The Court also suggested that the effective merger test was not satisfied because the NFL teams had “potentially competing interests” and ultimately were responsible for the decisions of NFLP.¹⁹ Significantly, these remarks are factual characterizations of the specific situation presented by the case, rather than legal conclusions with potentially broad applicability.

The Supreme Court left the door open to the application of the Solicitor General’s test in future Section 1 challenges to actions taken by joint ventures. A court applying the test, however, also would look to *American Needle*. A court presumably would pay close attention to the Supreme Court’s determination that the NFL teams had not effectively merged their intellectual property licensing operations and to the Court’s conclusion that NFLP was “an instrumentality” of the teams. A court could distinguish ventures in which the participants merely operate the relevant aspect of their operations jointly from ventures in which the participants effectively merged that aspect of their operations. A court also could distinguish ventures that serve the separate inter-

¹⁵ Brief for the United States as Amicus Curiae Supporting Petitioner at 6, 8, 11–13, 16–22, *American Needle, Inc. v. NFL*, 130 S. Ct. 2201 (2010) (No. 08-661).

¹⁶ *Id.* at 17.

¹⁷ *American Needle*, 130 S. Ct. at 2216 n.9.

¹⁸ *Id.*

¹⁹ *Id.*

ests of the participants from ventures that are operated in the interest of the ventures themselves as distinct business entities.²⁰

American Needle's Characterizations of the NFL's Licensing

American Needle came to the Supreme Court with a record remarkably thin even for a summary judgment. Because discovery had been limited to the single-entity issue, much about the intellectual property licensing of the NFL and its teams was undocumented in the record. Notably absent was any analysis of how competition had worked, or might work, in licensing the teams' intellectual property. Yet the Court seemed to treat these matters as both clear and simple.

Initially, the Court asserted: "Prior to 1963, the teams made their own arrangements for licensing their intellectual property and marketing trademarked items such as caps and jerseys."²¹ But this assertion appears to rewrite history.²² I have found no hard evidence of any merchandise licensing by an NFL team before 1959. At that time, Roy Rogers pitched a marketing plan. Roy Rogers Enterprises then licensed merchandise for all NFL teams until the creation of NFLP in 1963.²³

The Court also asserted that "the teams still own their own trademarks and are free to market those trademarks as they see fit," so "[a]t any point the teams could decide to license their own trademarks."²⁴ But this assertion is difficult to square with documents in the record governing the NFL's intellectual property licensing at the time of the events giving rise to the lawsuit. These documents include the Trust Agreement from 1982 through which the NFL teams formally pooled their intellectual property rights.²⁵ Also in the record is the agreement between the Trust and NFLP through which the Trust granted "to NFLP the exclusive right to license the use of the [signatory teams' intellectual property] on all types of articles of merchandise."²⁶ The Court asserted that "the teams are able to . . . withdraw from" their collective licensing arrangement,²⁷ but amending or dissolving the Trust required consent of three-quarters of the participating teams.²⁸

²⁰ A venture in this latter category appears to fit the mold of the *Maricopa County* dictum quoted *supra*, in note 2. *American Needle* repudiated the mistaken notion potentially encouraged by the dictum that merely sharing in profits and losses is sufficient to make a venture a single entity. *Id.* at 2215.

²¹ *Id.* at 2207.

²² At oral argument, Justice Sotomayor asked counsel for the NFL whether the teams' intellectual property ever had been licensed "by the individual teams," and he responded: "It was done, I believe collectively, through Roy Rogers Enterprises." Transcript of Oral Argument at 42, *American Needle, Inc. v. NFL* (No. 08-661), 130 S. Ct. 2201 (2010), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-661.pdf.

²³ See Neil Steinberg, *He Could Always Move Merchandise*, SPORTS ILLUSTRATED, July 27, 1998, available at <http://images.si.com/vault/article/magazine/MAG1013413/index.htm>. The first president of NFLP was Larry Kent, who had been manager of the marketing department at Roy Rogers Enterprises. *Id.*

²⁴ *American Needle*, 130 S. Ct. at 2216 n.9.

²⁵ Trust Agreement, *American Needle*, Joint Appendix at 350–68; see also Partial Answer to Amended Complaint ¶¶ 32–33, *Dallas Cowboys Football Club, Ltd. v. NFL*, No. 95 Civ. 9426 (S.D.N.Y. filed Jan. 11, 1996), Joint Appendix at 464. The Dolphins and Raiders did not sign the Trust Agreement but granted their rights directly to NFLP. See *id.*; NFL Defendants' Response to Plaintiff's Statement of Additional Facts in Support of Its Response to the Motion of the NFL Defendants for Summary Judgment (Single Entity), Joint Appendix at 238, 247–48.

²⁶ License Agreement, Joint Appendix Art. I, *supra* note 25, at 387. Whether NFLP was merely "an instrumentality" of the teams presents a distinct question from whether the teams could decide to license their own trademarks, which must be answered on the basis of additional facts.

²⁷ *American Needle*, 130 S. Ct. at 2207.

²⁸ Trust Agreement §§ 6.01, 6.02, Joint Appendix, *supra* note 25, at 360.

Finally, the Court asserted: “To a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks.”²⁹ That is true, but such competition is most unlikely to be meaningful. American Needle, “a firm making hats,” sought the intellectual property of all NFL teams, as did the other NFL licensees. These companies’ business model is to produce a version of each product (or several) for each NFL team. No licensee with this business model could ever play one team off against another team in licensing negotiations, and thus, meaningful competition could not exist among the teams in licensing to such a company. On remand, American Needle’s claim is apt to be rejected on this basis.

One can imagine companies with very different business models, but it is difficult to imagine a model giving rise to meaningful competition. The most likely alternative involves a licensee selling its merchandise in a single locality (or just a few). A vendor operating only in New Orleans could license from the Colts instead of from the Saints, but that possibility would not provide it with bargaining leverage in negotiating with the Saints. When licensing its intellectual property to local companies in the New Orleans area, the Saints are apt to face less competition from the Colts than from a hundred other owners of trademarks and logos familiar to New Orleans residents and visitors.

Implications for Section 7 Enforcement

A fundamental principle of Section 7 law, first asserted in *Brown Shoe*, holds that “[w]here the arrangement effects a horizontal merger between companies occupying the same product and geographic market, whatever competition previously may have existed in that market between the parties to the merger is eliminated.”³⁰ All subsequent horizontal merger cases have reasoned from the premise that merging parties permanently cease to compete in any meaningful sense because the merged firm maximizes joint profits.

Without this premise, the government would have the burden in every horizontal merger case of proving that the merging firms actually would cease competing after their merger. When post-merger plans call for operating the merging companies as separate divisions, that burden could be difficult to carry. But *American Needle* did not impose that burden even though it held that concerted action is possible within a single firm. As explained above, *American Needle* did not overrule *Copperweld*, which held that separately incorporated companies joined through merger were thereafter a single economic entity because they would maximize joint profits.³¹

Section 7 cases have long determined what constitutes a merger on the basis of functional considerations rather than formalistic distinctions. Beginning with *Penn-Olin*, certain transactions structured as joint ventures were treated as mergers.³² The Supreme Court’s rationale for applying Section 7 in *Penn-Olin* was largely that forming the joint venture eliminated actual or potential competition between its two participants in the venture’s market.³³ The Court treated the formation of the joint venture as a merger because the essential premise of horizontal merger analysis, artic-

²⁹ *American Needle*, 130 S. Ct. at 2213.

³⁰ *Brown Shoe Co. v. United States*, 370 U.S. 294, 335 (1962).

³¹ See *supra* notes 9–14 and accompanying text.

³² See, e.g., *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 167–72 (1964); *FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1159, 1163–65 (9th Cir. 1984); *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 974, 976 (8th Cir. 1981); *United States v. Ivaco, Inc.*, 704 F. Supp. 1409, 1414 (W.D. Mich. 1989).

³³ See *Penn-Olin*, 378 U.S. at 169 (“[I]t may be assumed that neither [parent] will compete with the progeny in its line of commerce.”).

ulated just two years earlier in *Brown Shoe*, applied under the circumstances of the case. The reasoning of *American Needle* is entirely consistent with that of *Penn-Olin* and *Brown Shoe* and does not call into question prior determinations of which transactions are treated as mergers under Section 7.

The Competitor Collaboration Guidelines issued by the federal enforcement agencies in 2000 set out detailed criteria under which joint venture formation is treated as a merger because it has the competition-eliminating effect associated with a horizontal merger and also a similar degree of permanence.³⁴ Applying these criteria, the FTC treated as a merger the formation of joint ventures between Shell and Texaco.³⁵ As described by the Supreme Court in *Texaco Inc. v. Dagher*,³⁶ each venture was like “a single entity,” with Shell and Texaco acting “in their role as investors, not competitors” because the formation of the ventures combined their operations in a manner “ending competition between the two companies in the domestic refining and marketing of gasoline.”³⁷ *American Needle* in no way repudiated the view taken by the Court on the joint venture at issue in *Dagher*.

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The test advocated by the Solicitor General in *American Needle* was an adaptation of the test set out in the Competitor Collaboration Guidelines. If the formation of a joint venture is treated as a merger with respect to certain markets, it should follow that joint venture participants no longer act as separate economic entities within those markets. *American Needle* questioned neither this logic nor the specific policy of the Guidelines. The opinion, however, did spotlight the possibility that a joint venture is not the relevant marketplace actor because it merely serves as “an instrumentality” of its participants. When the facts fit that mold, the formation of the joint venture was not an effective merger.

Implications for Substantive Section 1 Analysis

American Needle explained that the application of the rule of reason is sensitive to the NFL teams’ “need to cooperate” and sometimes does not require “a detailed analysis.”³⁸ The Court specifically identified the NFL teams’ need to “cooperate in the production and scheduling of games” and the league’s “interest in maintaining a competitive balance.”³⁹ The Court thereby signaled the lower courts that they should give substantial weight to special circumstances presented by sports leagues when they apply the rule of reason.

American Needle could be read to signal that non-sports joint ventures should be treated differently. The opinion draws attention to much earlier decisions by the Court applying the per se rule to joint ventures,⁴⁰ so plaintiffs are apt to cite *American Needle* in support of the application of the per rule to various joint venture actions. A judge, however, surely could not be persuaded that, after decades of reining in the per se rule, all nine Justices suddenly would support its revitalization.

³⁴ See Fed. Trade Comm’n & U.S. Dep’t of Justice, Antitrust Guidelines for Collaborations Among Competitors § 1.3 (2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

³⁵ See Brief for the United States as Amicus Curiae Supporting Petitioners at 4, 13 & n.8, *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006) (Nos. 04-805 & 04-814).

³⁶ 547 U.S. 1 (2006).

³⁷ *Id.* at 4, 6–7.

³⁸ *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2216–17 (2010).

³⁹ *Id.*

⁴⁰ *Id.* at 2209–10, 2214–15 (citing *United States v. Topco Assocs.*, 405 U.S. 596 (1972) and *United States v. Sealy, Inc.*, 388 U.S. 350 (1967)).

Conclusion

American Needle held that the NFL's intellectual property licensing was concerted conduct and strongly suggested that most activities of the major professional sports leagues also entail concerted conduct. But the Supreme Court neither broadly rejected the single-entity argument for joint ventures nor endorsed any specific test for determining when that argument should be accepted. The Court indicated, however, that the conduct of joint venture participants is concerted when they act on their own separate interests in operating the joint venture or determining its general policies. ●

Shooting the Messenger: Does the UK Criminal Cartel Offense Have a Future?

Julian Joshua

The architects of the UK's ambitious project to criminalize cartel conduct, resulting in the Criminal Cartel Offense (the Offense) under Section 188 Enterprise Act 2002, wanted the legislation to "send a message." The first contested prosecution of individuals for the Offense certainly sent a message, but not the one the Office of Fair Trading (OFT), Britain's competition watchdog, was expecting. On May 11 of this year, the trial of four British Airways (BA) executives on charges of "dishonestly agreeing" with their counterparts at arch-rival Virgin Atlantic (VA) to fix passenger fuel surcharges on transatlantic routes collapsed even before any witnesses were heard.¹

While the defendants all left court "with their reputations unsullied," (per Owen, J.) an embattled OFT is now struggling to retrieve its credibility and is threatening to cancel the immunity it granted Virgin Atlantic in the separate administrative proceedings under the Competition Act 1998.² BA is hinting it may withhold the GBP 121 million it agreed to pay in civil fines in July 2007 to settle the case.³ Unlikely to have the appetite for any more prosecutions in the near future, the OFT is in any case slated by the new Coalition government to lose its powers in criminal antitrust to a unified economic crime agency.⁴ The ramifications of the failed prosecution may well extend to the repeal of the cartel offense itself.

Up to this year, the OFT's record of enforcement action under the Offense had been uninspiring. The only convictions—of three individuals in *Marine Hose*—were obtained through guilty pleas and by gift of the U.S. Department of Justice via an overseas plea deal, the propriety of which was questioned by the English Court of Appeal.⁵

The First Trial Under the Offense

The prosecution of the BA executives was the first contested trial in the eight years the Offense has been on the statute book. Observers hoped that the trial would provide some answers to the many unresolved questions surrounding the Offense, not least on how juries might tackle the element of dishonesty. With jurors required to judge the defendants according to their own moral compass (see Dishonesty section below), it would have been intriguing to see how they viewed

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¹ Alistair Osborne, *Collapsed BA Price-Fixing Trial Places OFT and Virgin in the Dock*, DAILY TEL., May 11, 2010, available at <http://www.telegraph.co.uk/finance/newsbysector/transport/7707701/Collapsed-BA-price-fixing-trial-places-OFT-and-Virgin-in-the-dock.html>.

² Press Release, Office of Fair Trading, OFT Withdraws Criminal Proceedings Against Current and Former BA Executives (OFT Press Release 47/10) (May 10, 2010). Virgin strongly denies failing to comply with its cooperation obligations.

³ David Robertson & Michael Herman, *BA Threatens to Bite Back After Collapse of Price-Fixing Trial*, THE TIMES, May 11, 2010, available at http://www.business.timesonline.co.uk/tol/business/industry_sectors/transport/article7122341.ece.

⁴ Philip Aldrick, *Coalition Unveils New UK "White Collar" Crime Fighting Agency*, DAILY TEL., May 21, 2010, available at <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/7746790/Coalition-unveils-new-UK-white-collar-crime-fighting-agency.html>.

⁵ R v. Whittle, [2008] EWCA Crim 2560; [2009] UKCLR 247. For the United States plea agreement, see Plea Agreement, United States v. Brammar, No. H-07-487-02 (S.D. Tex. 2007), available at <http://www.usdoj.gov/atr/cases/f228500/228585.pdf>.

the testimony of immunized Crown witnesses who by their own admission were as deeply involved in the alleged cartel but were escaping prosecution by incriminating the defendants.

By coming forward in early 2005 to both the DOJ and the OFT to denounce BA, VA had won full immunity for itself and its associated executives. In the UK, where the Offense may only be committed by individuals, the company was given a full pass from civil penalties under Chapter 1 of the Competition Act 1998, while executives were granted so-called “no action letters” guaranteeing their non-prosecution provided they gave evidence for the prosecution.

After the trial opened, one disquieting revelation after another emerged regarding the conduct of the prosecution. The defense accused the OFT of a wholesale failure to respect the basic rules on pre-trial evidence disclosure⁶ and of farming out its prosecutorial responsibilities to VA’s lawyers—whose acknowledged mission was to safeguard their client’s interests. The same lawyers had also assiduously screened the prosecution’s contacts with its witnesses: in the words of defense counsel, they were “well and truly lawyered up.”⁷

After two weeks of bruising legal skirmishing outside the presence of the jury that brought to light a catalogue of disclosure failures, the judge made it clear that he would allow the prosecution no further adjournments. The last straw was VA’s sudden production to the prosecution, well into the trial, of 70,000 emails previously dismissed as irrelevant or corrupted: one of them seemed to undermine a main plank of the case prosecuting counsel had made in opening to the jury.⁸ The OFT maintained that had the omission been uncovered earlier, the trial would have been able to proceed.⁹ As it is, when the jury was called in, OFT had no option but to offer no evidence, as it was unable to put forward a proper prosecution. A directed verdict of not guilty followed.

It could well be that the dishonesty issue will never be tested before a jury. If the controversy surrounding the OFT’s capability to act as a prosecution agency was rendered moot by the plan to strip it of its criminal law powers, the disquiet extends to the “fitness for purpose” of the Offense itself. The trial exposed a deep fault line running through the whole criminalization project, linking the requirement of dishonesty and the built-in reliance on immunity as the driver of investigations and prosecution.

The Anatomy of the Criminalization Project

For an understanding of the project it is important to appreciate how the Offense was supposed to fit into the existing national and European enforcement landscape. The UK was one of the last major jurisdictions in the developed antitrust world to introduce even administrative fines against companies for cartel violations. Until the Competition Act 1998, it was left largely to the European Commission to sanction cartels involving British companies: while Europe-wide cartels were caught in the net, the Treaty requirement for an effect on interstate trade let off the hook equally damaging cartels with an exclusively national flavor.¹⁰

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⁶ Under section 3 of the Criminal Procedure and Investigations Act 1996, the prosecution is required to disclose any prosecution material which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.

⁷ Trial Transcript, April 29, 2010, at 85.

⁸ The email seemed to show that Virgin had unilaterally decided to increase its surcharge to GBP 6 in August 2004 before a telephone call on which the prosecution heavily relied.

⁹ OFT Press Release 47/10, *supra* note 2.

¹⁰ Under the original draft proposals made by the European Commission for the Modernisation Regulation, the Commission might have maintained its primacy. See Julian M. Joshua, *The UK’s New Cartel Offence and its Implications for EC Competition Law: A Tangled Web*, 28 EUR. L. REV. 620, 628 (2003).

The Competition Act had only been in force for two years when the then administration announced in early 2002 the second stage of its plan to transform Britain into a bracing “Enterprise Economy.”¹¹ Heavily influenced by transatlantic thinking about cartels, and to approving noises off from the DOJ,¹² the OFT’s agenda was driven by the insight that only by targeting individuals could effective deterrence be achieved. Companies would cynically discount the chances of detection against the benefits from operating an illegal cartel. Accepting as realistic U.S. estimates that only one in six cartels was detected, the government concluded that to have any deterrent effect civil fines would have to be set at many times the participants’ annual sales.¹³ This called for the introduction of a criminal offense that would reinforce and supplement the administrative enforcement regime of the Competition Act that was directed at companies. Unlike the Sherman Act, the new system would (a) involve separate but potentially parallel administrative and criminal enforcement schemes; and (b) distinguish corporate and individual liability. From an early stage, it was made clear that the new Offense could only be committed by an individual and not by a corporation.¹⁴

Besides the need to accommodate the existing Competition Act administrative system, an added challenge was provided by the interface at the European level with Article 81 of the EC treaty (now Article 101 of the Lisbon Treaty, or TFEU) then administered by the European Commission, but due to be devolved under “Modernization” to a network of competition authorities in which the Commission was an uneasy first among equals.¹⁵ To be sure, the draft of Regulation 1/2003 foresaw the criminalization at the Member State level of breaches of Article 81, but would have involved subordination of criminal proceedings to complicated rules governing the operation of the European “network.”¹⁶ An additional hurdle in the way of simply criminalizing a breach of the EC (and national) rules was that (while invariably condemned) even hard core cartels are not per se prohibited under either the EC or the UK administrative schemes.¹⁷

Prudently enough, the planners of the UK legislation determined to create a “stand-alone” Offense. The OFT could thus bring a criminal prosecution against individuals not only where it had itself targeted the companies under the Competition Act 1998 or where the firms were being pursued by the EC under Article 81, but also even if no administrative action was taken against the companies at all. By focusing on individual conduct, it was hoped to free the criminal process from the kind of “economic” justifications that would be invited by shadowing the civil regulatory scheme.¹⁸ Nevertheless, as the Court of Appeal made clear during a preliminary appeal in the BA

¹¹ DEP’T OF TRADE AND INDUS., PRODUCTIVITY AND ENTERPRISE: A WORLD CLASS COMPETITION REGIME, CM 5233 (July 2001) [hereinafter WHITE PAPER].

¹² Press Release, U.S. Dep’t of Justice, Assistant Att’y Gen. Charles A. James, Statement Regarding Proposed Amendments to the UK’s Antitrust Laws (Nov. 28, 2001), available at http://www.justice.gov/atr/public/press_releases/2001/9611.htm.

¹³ WHITE PAPER, *supra* note 11, at Box 7.3.

¹⁴ SIR A. HAMMOND & ROY PENROSE, PROPOSED CRIMINALISATION OF CARTELS IN THE UK—A REPORT PREPARED FOR THE OFFICE OF FAIR TRADING (OFT 365), Nov. 2001, ¶ 2.11.

¹⁵ The scheme established by Reg. 1/2003 confers a parallel competence on the Commission and the National Competition Authorities for the application of what are now Articles 101 and 102 TFEU. See Council Regulation (EC) 1/2003, arts. 3 & 5, 2003 O.J. (L 1) 1 (explaining the implementation of the rules on competition in Articles 81 and 82 of the Treaty).

¹⁶ *Id.* art. 12.

¹⁷ Case T-17/93, *Matra Hachette v. Comm’n*, 1994 E.C.R. II-595 (No anticompetitive agreement in principle incapable of benefiting from Article 101(3).)

¹⁸ HAMMOND & PENROSE, *supra* note 14, ¶¶ 2.5–2.6. It was never, however, explained why this required the insertion of the dishonesty component, the only option put forward.

case, the prime purpose of the Enterprise Act criminal legislation was to strengthen the UK's competition regime.¹⁹

Section 188(1) of the Enterprise Act provided: "An individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement . . . arrangements of the [specified] kind relating to at least two undertakings." The arrangements specified in Section 188(2) are price fixing, market and customer allocation, and bid rigging.

Deterrence. Deterrence was the dominant theme of the criminalization project. Introducing custodial sentences would focus the mind of potential cartelists unmoved by the threat of corporate fines on their employers.²⁰ The optimistic prediction of six to ten major cases a year, originally floated in an independent report commissioned by the OFT from two retired public servants,²¹ was soon abandoned. During the parliamentary debates, the Minister argued: "The point is not about how many people we send to prison We would rather that people did not end up operating cartels, but it is important if they do that we send a message, both to the individual and to society, that that is unacceptable and a serious offence."²²

But attitudes towards cartels in Britain were notoriously benign. In a bid to harden UK public and business opinion, the OFT assumed the "competition advocacy" role foreseen for it as part of the administration's bracing new regime. Ministers and senior officials robustly—if inaccurately—condemned cartel participation as "equivalent to theft."²³ "Sending a message" came to dominate the drafting of the legislation itself, manifested in particular by the insistence on including "dishonesty" in the definition of the Offense. Batting away a prescient question from an opposition spokesman who asked, "Is the message more important than whether the provision works?," the Minister riposted: "The message is important as it is part of the working of the provision. Of course the message is useful if it causes few cartels to be created Dishonesty is an important part of the provision. I agree with my hon. Friend that cartels are theft."²⁴

Dishonesty. It is clear that for its advocates, the main purpose of the dishonesty component was to perform a declamatory function: the *Offense itself* was to be designed in such a way as to "demonstrate that it is a serious offence with effects which are harmful to the economy and to society."²⁵ Embedding "dishonesty" in the definition of the Offense was seen as the way to achieve that. If the objective, however, was to "send a seriousness message," framing the offense in a way that made it difficult for hard core offenders to escape conviction would also have served that purpose without legal complications.

Officials seemed to have believed the concept would make it *easier* to obtain jury convictions as well as to persuade judges to impose tough sentences.²⁶ Although the OFT insisted that dis-

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¹⁹ IB v. R, [2009] EWCA Crim 2575.

²⁰ WHITE PAPER, *supra* note 11, ¶ 7.16.

²¹ See HAMMOND & PENROSE, *supra* note 14, ¶ 3.6.

²² MELANIE JOHNSON MP, HANSARD, HC, STANDING COMMITTEE B, ENTERPRISE BILL (Apr. 23, 2002) at col.169.

²³ Rt. Hon. P. Hewitt MP ("Cartels are theft from the customer and they ought to be treated as a serious criminal offence.") (*quoted in* Mary Fagan, *Doing Time or Paying Fines—Crackdown on Cartels*, DAILY TEL., Mar. 24, 2002, available at <http://www.telegraph.co.uk/finance/2757594/Doing-time-or-paying-fines-crackdown-on-cartels.html>); Margaret Bloom, Dir. of Competition Enforcement, Office of Fair Trading, Key Challenges in Public Enforcement, Speech Delivered to the British Institute of International and Comparative Law, (May 17, 2002) available at http://www.offt.gov.uk/shared_offt/speeches/spe0402.pdf.

²⁴ JOHNSON, *supra* note 22, at col.169.

²⁵ HAMMOND & PENROSE, *supra* note 14, ¶ 2.1.

²⁶ *Id.* ¶ 1.10.

honesty is “well understood in English law,” for the leading commentators it is “a deceptively simple name for a complex concept.”²⁷ Officials may have misunderstood the subtle role the notion had come to play in the evolution of the law of theft and fraud: in English law, “dishonesty” is conceptually not a characterization as such of the accused’s conduct but relates to his or her state of mind.²⁸ It had never been intended to perform the condemnatory function the OFT conceived for it in the Offense. Far from going “a long way to preclude a defence argument that the activity being prosecuted is not reprehensible,”²⁹ as the advocates of dishonesty believed, its incorporation not only invites that very defense but also opens up the whole question of motive.³⁰

In its official pronouncements, the OFT declared that the “test” for dishonesty would be the two-stage process set out in a leading Theft Act case, *R v. Ghosh*:³¹ juries would have to ask themselves (a) whether what was done was dishonest by the standards of ordinary and honest people; and (b) if so, whether the defendant *realized* it was dishonest by those standards.

The existence of dishonesty is supposed to be a question of fact from case to case. The OFT may not have fully appreciated that judges are not even allowed by the Court of Appeal (which assiduously polices the application in practice of *Ghosh*) to give the jury any real assistance with understanding what dishonesty means.³² Indeed, in the theft/fraud context, the *Ghosh* jury instruction is discouraged in clear-cut cases as “likely to confuse”: if the defense is simply “not dishonest,” the direction is not supposed to be given.³³ It only comes into play at all in the rare case that a defendant argues that even if most people would think his conduct dishonest, moral obloquy should not attach as he did not realize others might take that view.³⁴

As for dishonesty itself, the concept does call for the jury to make a judgment on where to place the defendant’s conduct on the moral scale, but as the Court of Appeal judgment in *R v. Feely*³⁵ showed, it requires the jury to have a view on acceptable moral standards. It is entirely for the jury to decide what those standards are. Such shared standards may still exist when it comes to stealing or fraud, but as surveys show, there is no community consensus that price fixing equals turpitude.³⁶

Supporters of the Enterprise Act appear to have equated hardcore cartel conduct with dishonesty, and indeed the explanatory notes to the supporting bill went so far as to suggest that bid rigging was automatically dishonest. What the then government may not have appreciated was

[A]s surveys show, there is no community consensus that price fixing equals turpitude.

²⁷ ANTHONY ARLIDGE & JACQUES PARRY, ARLIDGE & PARRY ON FRAUD ¶ 2-002 (3d ed. 2007).

²⁸ *R v. Feely*, [1973] 1 Q.B. 530. A full Court of Appeal stopped in its tracks a tendency that had developed that a technical taking could be theft. The judicial policy informing the judgment was that given the stigma attaching to a conviction for theft or fraud, the criminal law should be slow to extend criminal liability to conduct which would not be condemned as dishonest according to conventional moral standards.

²⁹ HAMMOND & PENROSE, *supra* note 14, ¶ 2.5.

³⁰ Joshua, *supra* note 10, at 625. See also LAW COMM’N, FRAUD: REPORT ON A REFERENCE UNDER SECTION 3(1)(E) OF THE LAW COMMISSIONS ACT 1965 (LAW COM NO. 276, CM 5560, 2002), ¶ 5.18.

³¹ *R v. Ghosh*, [1982] Q.B. 1053. Even where the defendant admits that what he did was unlawful and that he knew it was, *Feely* and *Ghosh* allow him to seek an acquittal on the basis of any circumstances which the jury might be persuaded to view as justifying his conduct. ARLIDGE & PARRY, *supra* note 27, ¶ 2-021.

³² “We do not believe that judges should define what ‘dishonestly’ means. The word is in common use . . . Jurors, when deciding whether an appropriation was dishonest can be reasonably expected to, and should, apply the current standards of ordinary decent people.” *R v. Feely*, [1973] 1 Q.B. 530 at 537–38 (Lawton, L.J.).

³³ *R v. Price*, (1989) 90 Cr. App. R. 409 (CA).

³⁴ See, e.g., *R v. Barrett*, [1999] EWCA Crim 1587.

³⁵ *R v. Feely*, [1973] 1 Q.B. 530.

³⁶ Andreas Stephan, *Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain*, 5 COMP. L. REV. 123 (2008).

that the introduction of this element opened the door to defense arguments that however deliberate and intentional the behavior, on the broader “moral” scale it had noble—or at least unobjectionable—motives. It follows from the whole construct of *Ghosh* dishonesty that it ultimately boils down to letting the jury decide whether the end justifies the means.

Immunity. The enforcement program under the Enterprise Act was also heavily dependent upon the institution of immunity. The corporate leniency system under the Competition Act 1998 already promised a free pass from fines to the first *company* through the OFT’s door to denounce its fellow price fixers.³⁷ In a highly unusual innovation for English criminal jurisprudence, the mechanism was to be extended to co-operating individuals: section 190 (4) Enterprise Act provided for a guarantee of non-prosecution, a device that was later fleshed out by OFT Guidance notices on so-called “no action letters.”³⁸ Individuals are required to make an express written admission of guilt—including the crucial component of dishonesty. The grant of no action letters to individuals in a criminal case is closely linked to their employer’s application for civil immunity from Competition Act fines—a potentially unsettling factor that was to be fully exploited by the defense in the *Virgin* case.

The Enforcement Scheme: Rhetoric and Reality

The passage into law of the Enterprise Act was not supposed to be a “fire and forget” weapon. In the OFT’s grand enforcement vision, a virtuous and self-perpetuating circle of hardening public opinion, immunity applications, carefully selected prosecutions, easy convictions and exemplary prison sentences would turn Britain from a cartel-friendly jurisdiction into the scariest place in the world for them to do business.

While the criminal regime was designed to operate alongside the existing Competition Act system of administrative fines on companies, criminal prosecution was not to be the default mode in the range of enforcement options available to the OFT.³⁹ Officials insisted that criminal powers would, however, be systematically deployed against the worst offenders. According to one senior official, criminal prosecution would be reserved for “the really hardcore cartels with evidence of deep dishonesty,” citing as an example the scenario of bogus trade association meetings with false agendas and fictitious minutes as an elaborate cover for deliberately fixing prices.⁴⁰

In May 2002 another OFT Director issued the following Mission Statement: “[W]e will select carefully the cartels for criminal prosecutions, concentrating on the serious ones. We expect that there will be a relatively small number of prosecutions—but they will have significant deterrent effect. The first prosecutions will reach the courts in a few years.”⁴¹

Whatever the promises of “careful case selection,” the OFT’s enforcement agenda has seemed at best erratic. Since 2005, senior officials were issuing dire warnings to the construction indus-

³⁷ OFT’S GUIDANCE AS TO THE APPROPRIATE AMOUNT OF A PENALTY (OFT 423) (Dec. 2004), available at http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of423.pdf.

³⁸ The latest being LENIENCY AND NO-ACTION: OFT’S FINAL GUIDANCE NOTE ON THE HANDLING OF APPLICATIONS (OFT 803) (Dec. 2008), available at http://www.of.gov.uk/shared_of/reports/comp_policy/of803.pdf.

³⁹ WHITE PAPER, *supra* note 11, ¶ 7.37.

⁴⁰ Adrian Walker-Smith, Dir. of Cartel Enforcement, Office of Fair Trading, *quoted in* Michael O’Kane, Understanding Current Regulator Approaches and Managing Regulator Relationships: International Anti-Cartel Enforcement, Speech Before the C5 European Forum on Conducting, Managing, and Responding to Internal and Regulatory Investigations (June 25, 2008).

⁴¹ Bloom, *supra* note 23.

try to expect criminal prosecutions in the pending investigation of suspected bid rigging, inviting implicated individuals to come forward as the only way to be safe from charges.⁴²

No prosecutions of individuals were brought in the construction investigation, even for explicit examples of unalloyed bid rigging.⁴³ Despite the allegations of “compensation” payments disguised by raising false invoices, officials apparently doubted privately whether dishonesty could be proved. According to an Australian commentator, “[t]he OFT decisions . . . highlight the dangers of loss of credibility and compromise of deterrent impact where an enforcement agency describes a cartel case as serious yet gives no explanation, or an unconvincing explanation, for not bringing criminal proceedings.”⁴⁴

The guilty pleas secured from three executives and heavy prison sentences in *Marine Hose* in 2008⁴⁵ provided the OFT program with a temporary boost but still left unresolved many of the troublesome questions surrounding the cartel offense.

Absent the indicia of “deep dishonesty” to which the OFT had pointed in public pronouncements, the prosecution came close to implying that any deliberate breach of competition rules was dishonest.

The BA Prosecution

The trial was due to last as long as six months. Following a defense challenge to the Court’s jurisdiction, the OFT may have felt vindicated by the preliminary ruling of the Court of Appeal in *IB v. R* that as a stand-alone offense, section 188 did not implicate the complex rules in regulation No 1/2003 regulating the relationship between national authorities and the Commission on the administration of Articles 101 and 102 TFEU.⁴⁶

A defense submission that “mutuality of dishonesty” was required was also rejected. On the express wording of Section 188, it was only necessary for the accused, not both sides, to have “dishonestly agreed.”⁴⁷

Given that the case outlined to the jury by the prosecution did not involve much more than bilateral telephone calls between the alleged conspirators, the issue of dishonesty would clearly have been central to the defense.⁴⁸ Absent the indicia of “deep dishonesty” to which the OFT had pointed in public pronouncements, the prosecution came close to implying that *any* deliberate breach of competition rules was dishonest. Much was made of the accused ignoring BA’s rigorous compliance program. But as the Court of Appeal had held in *IB v. R*, an infringement of Article 81 (or the Competition Act) including via an agreement within section 188(2) “could easily occur without any hint of dishonesty.”⁴⁹ The Court abstained in *IB* from expressing any opinion on the effect of deliberate secrecy.

Although the prosecution tried to dismiss the multiple disclosure failures as a “technical issue,” the problem was more deep-seated and arose from the OFT’s administration of the leniency

⁴² See, e.g., Simon Williams, Competition Enforcement in the UK and the Impact of UK Criminalisation, Paper Presented at the IBC Advanced Competition Law Conference (Apr. 27–28, 2005).

⁴³ Case CE/4327-04, Bid Rigging in the Construction Industry in England, OFT Decision CA98/02/2009 (Sept. 21, 2009), available at http://www.of.gov.uk/shared_of/business_leaflets/general/CE4327-04_Decision_public_1.pdf.

⁴⁴ BRENT FISSE, RECENT OFT CARTEL DECISIONS ILLUSTRATE FUNDAMENTAL FLAWS IN UK CARTEL LAW 5 (Oct. 7, 2009), available at http://www.brentfisse.com/images/Fisse_Recent_OFT_Cartel_Decisions_041009.pdf.

⁴⁵ R v. Whittle, [2008] EWCA Crim 2560.

⁴⁶ IB v. R, [2009] EWCA Crim 2575.

⁴⁷ R v. George, [2010] EWCA Crim 1148.

⁴⁸ It was established by another preliminary ruling (see *id.* ¶ 6.) that the *Ghosh* test would be applicable, which might have raised a whole new set of intriguing questions.

⁴⁹ IB v. R, [2009] EWCA Crim 2575, ¶ 27.

regime itself. Had the trial proceeded to the hearing of witnesses, defense counsel would have moved for dismissal on the ground that “this whole investigation had been skewed by the leniency regime.”⁵⁰

With the collapse of the trial before any evidence was heard, prosecuting counsel never had to address the dilemma of inviting the jury to accept as evidence of the truth against accused of good character, who denied they were dishonest, the testimony of witnesses who had signed admissions of dishonesty.⁵¹ Defense counsel had neatly encapsulated the conundrum thus:

So it is the world turned upside down. If you say you are honest in making an agreement, then you may go to prison. If you say you did nothing wrong, then you're at risk of being charged but if you say you were dishonest, then you and your company will not be punished, you will keep your job.⁵²

The OFT's warning in the wake of the collapsed trial that it might withdraw corporate immunity from VA⁵³ could be mere sabre-rattling: it is not clear how charges could be made to stick based mainly on VA's own confession. After the exposure of the gaps in the evidence during the criminal trial, BA is hardly likely to step forward now to support the OFT's case that there was an infringement by the company under the Competition Act 1998. Intriguingly, on the very eve of the trial, the OFT announced that it had launched civil proceedings against VA under the Competition Act for an alleged agreement to fix the fuel surcharge on Asian routes.⁵⁴ This time it was Cathay Pacific that had won full immunity for blowing the whistle on VA in 2007. Although VA vigorously denies the allegations, and the OFT says it has no grounds for bringing any criminal charges, the revelation would have done nothing to enhance the credibility of the prosecution or its witnesses on cross-examination.

While the four exonerated individuals remain as carve-outs in BA's plea agreement with the DOJ and should no doubt be wary of any U.S. border watch or Interpol Red Notices, their acquittal is an absolute bar to extradition proceedings in Britain.⁵⁵

Lessons

It is no exaggeration to say that the failed prosecution has left an intractable enforcement muddle with implications extending far beyond the case itself. Both immediate and longer term lessons may be drawn from the debacle.

Despite the manifest prosecutorial failures, the outcome was a vindication of the adversary system of trial. As in the United States, the key to a successful defense strategy lies in defense counsel insisting on maximum prosecutorial disclosure and being able to sift through and analyze a

⁵⁰ Trial Transcript, April 29, 2010, at 48. Defense claims that the potential prosecution witnesses were given an easy time in their interviews by the OFT seem to have had some substance. Given that their only admissions of dishonesty were in the signed copies of the “no action letters” returned to the OFT by Virgin's lawyers, the defense wanted to probe whether they had been encouraged to make the admissions because of the advantages it gave them or their employer. Documents that might provide the “context” for the manner in which the investigation had been conducted were, however, met with claims of privilege from Virgin's lawyers and not provided by them to the prosecution.

⁵¹ The retraction in the witness box of their admissions of “dishonesty” despite the risk of losing their immunity (a prospect raised by the prosecution) would have provided a double twist to the conundrum.

⁵² Trial Transcript, April 29, 2010, at 30.

⁵³ OFT Press Release 47/10, *supra* note 2.

⁵⁴ Press Release, Office of Fair Trading, OFT Issues Statement of Objections Against Cathay Pacific Airways and Virgin Atlantic (OFT Press Release 41/10) (Apr. 22, 2010).

⁵⁵ Extradition Act 2003, Sec. 80.

vast number of documents that could allow an effective challenge of immunized witnesses.⁵⁶ If there ever is another prosecution for the Offense, future defendants who maintain their innocence should have no fear of getting a fair trial.

The judge took firm and active control of the proceedings. And even though dishonesty was never put to the test, the prosecution surely faces an uphill task attempting to persuade a jury to convict based on the testimony of witnesses who have admitted their own dishonesty to escape jail. In the United States, where there is no requirement of dishonesty in Section 1, the Department of Justice has suffered a series of losses at trial in the past few years,⁵⁷ an important factor being the jury's negative view on deeply involved cartel members testifying against lower level employees in exchange for a reduced sentence.

With the benefit of hindsight, BA could now be reflecting on its decision to go for early settlement on both sides of the Atlantic.

With the benefit of hindsight, BA could now be reflecting on its decision to go for early settlement on both sides of the Atlantic. No doubt it is difficult to resist the might of the Justice Department in a criminal investigation, but administrative agencies do not have the cards so well stacked in their favor. The OFT insists there is no reason to revisit the civil proceedings, but the newly revealed emails may well cast the facts in a different light.⁵⁸ As for the plea agreement with the DOJ, likely few companies ever find it worthwhile going to trial in the United States, but with no fewer than twelve individuals “carved out” of the plea agreement in the two cases, it is not as if the DOJ had been exactly generous.⁵⁹

VA may now be regretting what might at the time have seemed a smart competitive move. It is finding out that immunity is no panacea. It could now face being fined not once but twice. Did its denunciation of BA trigger the Cathay application? Companies considering the attractions of going for immunity should get a handle on their own total exposure risks before opening Pandora's Box. The OFT might also need to explain why it does not seem to have asked VA the “omnibus question”⁶⁰ that is an essential weapon in the DOJ's arsenal.

The OFT might have paid better heed to its own case selection criteria. The Offense is supposed to be reserved for the “worst cases.” Despite official insistence that the prospects of conviction were carefully weighed, it is difficult to imagine a less suitable case for the new Offense's first outing before a jury. Where was the “deep dishonesty” the OFT says is required? The contrast between the OFT's treatment of the construction industry—relatively modest corporate fines for bid rigging—and prosecuting the BA executives on thin facts could not be sharper. The OFT should have been alerted too by the worrying asymmetry of its prosecution. The apparent injustice of one-

⁵⁶ As in the United States: see Robert H. Bunzel & Howard Miller, *Defending “The Last Man Standing”: Trench Lessons from the 2008 Criminal Antitrust Trial*, United States v. Swanson, ANTITRUST SOURCE, June 2008, at 1, <http://www.abanet.org/antitrust/at-source/08/06/Jun08-Bunzel6=26f.pdf>.

⁵⁷ See, e.g., United States v. Northcutt (Marine Hose) (S.D. Fla. 2008), where following a four week trial in which the cartel protagonists testified for the government the jury acquitted a junior employee after only two hours deliberation. News Release, Carlton Fields Attorneys, Nov. 11, 2008, available at <http://www.carltonfields.com/newseventspubs/news/Detail.aspx?news=759>.

⁵⁸ Alistair Osborne, *OFT to Pursue BA over Civil Fine*, DAILY TEL., May 12, 2010, available at <http://www.telegraph.co.uk/finance/newsbysector/transport/7712896/OFT-to-pursue-BA-over-civil-fine.html>.

⁵⁹ For the U.S. Plea Agreement, see Plea Agreement, United States v. British Airways, No. 07-183 (D.D.C. 2007), available at <http://www.justice.gov/atr/cases/f225500/225523.htm>.

⁶⁰ Scott D. Hammond, Dir. of Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, Cornerstones of an Effective Leniency Policy, Speech Delivered at the ICN Workshop on Leniency Programs (Nov. 22–23, 2004). (“We will ask executives, who are subpoenaed and compelled to provide sworn testimony under penalty of perjury, not just about their knowledge of price fixing in the market under investigation, but whether they have any information of any cartel activity in any other markets as well. This last practice is commonly referred to as the “omnibus question.”).

half of the alleged cartel going unprosecuted in exchange for denouncing its main business rival would not be lost on a jury.

Did the OFT delegate its disclosure responsibilities to lawyers representing VA's interests? While it has acknowledged responsibility for its part in what it called "this oversight," the OFT claims that they occurred at a time when the UK criminal cartel regime was still relatively new and its approach to the handling of leniency applications in parallel criminal and civil investigations still evolving.⁶¹ Yet the prosecution had four years to get its case in order. In what sounds like a classic example of shutting the stable door after the horse has bolted, the OFT announced after the collapse of the trial that it was reviewing its procedures "as regards the way in which the OFT interacts with leniency applicants and their advisers, including how it obtains electronic material and other evidence from them."⁶² Indeed, depending as it does almost entirely on immunity, the whole structure of the criminal enforcement regime needs urgent examination. But there is a deeper structural problem with leniency: the tangle of corporate and individual interests opens the system to charges that immunized witnesses could tailor their recollections to suit their employer.

And will juries ever warm to the inherent fairness deficit? We may never find out. Even if the OFT manages to retain its criminal jurisdiction, after the BA debacle it is unlikely to risk bringing another prosecution any time soon. A strong case can be made for criminalizing hard core cartels.⁶³ However, for many, the Offense looks like a dead man walking. The best place for it may be the new government's promised bonfire of pointless legislation. ●

⁶¹ OFT Press Release 47/10, *supra* note 2.

⁶² *Id.*

⁶³ For an early example, see Gregory J. Werden & Marilyn Simon, *Why Price Fixers Should Go to Prison*, 32 ANTITRUST BULL. 917, 917 (1987).

Participation of Non-Lawyers in Antitrust Matters— Recognizing and Avoiding Privilege Waiver Pitfalls

Kathryn M. Fenton and Kristiana A. Garcia

In antitrust matters, non-lawyers increasingly participate in communications in which attorney-client or work-product information is created or shared. By exposing non-lawyers to legally privileged communications, issues of waiver inevitably arise, and the continuing availability of the privilege may be called into question. This article focuses on some of the potential privilege pitfalls presented by non-lawyer involvement in antitrust investigations, litigation, and merger reviews.¹

While most antitrust lawyers are familiar with the basic requirements for claiming privilege,² they may be less attuned to how claims of privilege can be attacked because of asserted waivers through the sharing of privileged communications with third parties. In recent years, the involvement of non-lawyers in privileged communications has been a particularly fertile source of such attacks, and antitrust attorneys who deal with non-lawyer professionals must be prepared to address these issues.

There are numerous ways such issues can arise in antitrust matters. For example, in high-profile merger reviews or cartel investigations, companies may enlist public relations consultants or government affairs specialists to present the company's rationale for the transaction to the public or to aid in "damage control." Where individuals may face potential criminal exposure for price-fixing activities, they may rely on family members for support and involve them in meetings with their lawyers where legal strategy is discussed. In a range of antitrust matters, disclosure of privileged information to external auditors may be required as part of internal investigations to comply with securities laws. Given the fact-intensive nature of antitrust investigations, lawyers may seek the assistance of industry experts, who simultaneously may be consulting for the business client in the ordinary course. Consultants retained for their industry or economic expertise later may become testifying experts. The emergence of third-party financing of litigation also brings with it a number of questions, including how privileged communications are shared with potential investors. Because technology increases the speed and breadth at which communications are created and disseminated, it is important for lawyers to be aware of the potential pitfalls associated with sharing information with these and other non-lawyer third parties.

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¹ This article does not address the privilege and waiver issues that might arise from sharing information with other lawyers, such as communications pursuant to joint defense agreements. For an analysis of this topic, see Kathryn M. Fenton, *Conflict and Ethics Issues Arising from Joint Defense/Common Interest Relationships*, ANTITRUST SOURCE, Dec. 2009, <http://www.abanet.org/antitrust/at-source/at-source.html>.

² Generally speaking, for a communication to be a privileged attorney-client communication it must (1) be a communication (2) made in confidence (3) to an attorney (or the agent of the attorney) acting as an attorney at the time (4) by a client (5) for the purpose of seeking, obtaining, or providing legal advice. See, e.g., 8 WIGMORE, EVIDENCE § 2292, at 554 (McNaughton rev. 1961) (provided the privilege has not been waived). To qualify for work-product immunity, a document must (1) be prepared in anticipation of litigation or for trial (2) by or for another party or by or for that party's representative. FED. R. CIV. P. 26(b); see also *Hickman v. Taylor*, 329 U.S. 495 (1947).

Marketing, PR, and Government Relations Firms

The question of whether any privilege extends to communications with and/or disclosures to marketing, public relations, and government relations firms can arise in situations where the firm is engaged by a company in the ordinary course of business or where the firm becomes privy to legal communications in situations where it has been engaged specifically to assist the company's lawyers regarding contentious mergers, litigation, or investigations. For example, in a high-profile merger transaction, a public relations firm may be retained to assist in developing the company's message in support of the transaction as it fields media inquiries, seeks shareholder support, responds to Congressional hearings, develops presentations to other governmental bodies, or reacts to customer or supplier concerns. Some of these efforts may require close collaboration with antitrust counsel, who will be focused on ensuring that all public communications are consistent with the legal arguments the parties will be making with respect to the antitrust merits of the transaction. Similarly, in a criminal prosecution, public relations consultants may be retained to assist in "damage control" or to present the company's story to shareholders, customers, or even the pool of potential jurors. In the process, the non-lawyer professionals are likely to become privy to key aspects of legal strategy and to be exposed to a range of privileged communications.

Because PR firms are often simultaneously assisting the company with a host of other, non-antitrust projects, efforts to claim privilege for their activities frequently draw challenges both in private litigation and government investigations.

Because PR firms are often simultaneously assisting the company with a host of other, non-antitrust projects, efforts to claim privilege for their activities frequently draw challenges both in private litigation and government investigations. In evaluating these arguments, courts have taken different, and often fact-specific, approaches to the questions of whether and how attorney-client privilege and work-product questions are resolved when disclosures are made to third parties like PR and marketing firms. Some courts rely on basic agency principles to consider whether the third-party PR firm is the functional equivalent of the company so that communications between the company's lawyers and the company's PR firm are appropriately viewed as attorney-client communications.³ Other courts have looked at the extent to which the communications were necessary and directly related to the purpose of obtaining legal services or, correspondingly, whether access to the privileged information was necessary for the PR firm to do its job.⁴ Still other courts have considered whether the activities of the PR firm were efforts in furtherance of a common legal interest and thus protected under the common interest privilege.⁵

These issues have become a major source of challenges to privilege claims in antitrust and intellectual property cases. In *FTC v. GlaxoSmithKline*,⁶ the FTC attacked a claim of privilege asserted with respect to documents disclosed to GlaxoSmithKline's (GSK's) PR consultants and withheld from the company's response to an FTC subpoena. In rejecting the FTC's assertion of waiver and affirming the privilege, the D.C. Circuit pointed out that the company's legal counsel had worked with the outside consultants in the same manner as it had with the company's full-time

³ See, e.g., *In re Copper Market Antitrust Litig.*, 200 F.R.D. 213 (S.D.N.Y. 2001) (attorney-client privilege extended to crisis management firm hired in connection with high-profile litigation).

⁴ See, e.g., *In re Grand Jury Subpoena*, 265 F. Supp. 2d 321 (S.D.N.Y. 2003) (public relations firm hired by attorney to help client avoid criminal indictment covered by attorney-client and work-product privileges).

⁵ *LG Electronics U.S.A., Inc. v. Whirlpool Corp.*, 661 F. Supp. 2d 958 (N.D. Ill. 2009) (no privilege for communications between a party and its third-party advertising agencies where there was no de facto employee relationship or common interest), *mandamus denied*, 597 F.3d 858 (7th Cir. 2010).

⁶ 294 F.3d 141 (D.C. Cir. 2002).

employees on issues clearly intertwined with legal strategy.⁷ In addition, the court concluded the PR firm had information that GSK's attorney needed to render legal advice.⁸

In contrast, the court in *Calvin Klein Trademark Trust v. Wachner*⁹ held that documents and testimony from a PR firm that had a preexisting relationship with its corporate client were not protected by the attorney-client privilege, even though the PR firm was retained by plaintiff's counsel to assist in the underlying litigation. The court was not convinced that the documents at issue were communications made for the purpose of obtaining legal advice and found that the functions this PR firm performed were no different than those performed by any ordinary PR firm.¹⁰ It thus concluded that disclosure to the PR firm waived any preexisting attorney-client privilege, although it did find that certain work-product documents did not lose that status through disclosure to the PR firm, which needed to understand the litigation strategy in order to advise on public relations.¹¹ The strength of the underlying privilege is a key factor that is weighed by the court as a preliminary matter before assessing other factors such as counsel's and the PR firm's specific need for and use of the information.

One way to preserve the privilege over communications between counsel and PR firms is to focus on the specifics of the relationships. Creating an express agency relationship, so that the PR firm becomes the functional equivalent of the client, supports the argument that resulting communications come within the attorney-client privilege. In the absence of an agency relationship, it will be necessary to scrutinize each interaction with the PR firm to determine whether the context of the particular communication supports a claim of privilege. Thus, to the extent the client discloses otherwise privileged attorney-client communications to its PR firm, it should take care that such a disclosure is limited to those individuals who have a need to know (and that the need to know legal strategy is necessary to the PR firm's ability to provide public relations advice).¹² Alternatively, counsel must be prepared to show that communications with the third-party firm are necessary to counsel's provision of legal advice. The more necessary each entity is to the execution of the other's responsibilities, the more likely the privilege claim will be viewed as legitimate. Another goal should be to avoid situations in which the PR firm is simultaneously assisting with clearly non-legal matters, such as product marketing strategies.¹³ Such "mixed" assignments increase the likelihood that the consulting firm will be found to be engaged in commercial, not legal, pursuits. Of course, any documents prepared or shared in connection with the provision of legal advice should be clearly marked with appropriate legends.

In situations where PR firms are retained specifically to manage communications with regard to a legal matter, the parties should consider whether the company or its outside lawyers should retain the PR firm. The latter approach may be preferred because it also may support an argument for work-product protection for documents created by the consultants at the direction of lawyers and in anticipation or in the course of litigation (and possibly communications between the client

⁷ *Id.* at 148.

⁸ *Id.*

⁹ 198 F.R.D. 53 (S.D.N.Y. 2000).

¹⁰ *Id.* at 55.

¹¹ *Id.*

¹² See, e.g., *FTC v. GlaxoSmithKline*, 294 F.3d 141, 148 (D.C. Cir. 2002).

¹³ When the same firm is involved in multiple roles, it would be helpful to have separate individuals assigned to the legal and commercial projects.

[A]uditors commonly require access to privileged documents and communications in order to undertake risk assessments and to make materiality determinations. Once legally privileged information is disclosed to independent auditors, who may rely on this information in preparing their reports, issues of potential waiver arise.

and the consultants undertaken at the direction of legal counsel that would otherwise not be privileged). However, retention by counsel can undermine arguments that the firm is an agent or the functional equivalent of the client and should be treated as such for privilege purposes. Retention by counsel would more likely make the firm an agent of the lawyers, not the client. Therefore, in circuits that utilize the agency test, the implications of losing this argument should be considered. No matter what test is used, it will be much harder to argue for the privilege if the underlying communication or document is distributed widely to a third party without regard for the third party's need for the information or for the lawyer's need for information from the third party.

Outside Auditors

Auditors and tax professionals are another potential category of third parties that may require access to privileged information. While involvement of such professionals is most common in criminal tax and securities litigation, they also may be employed in potential criminal antitrust investigations—for example, where a company has undertaken an internal investigation and seeks input on its disclosure obligations or its need to book liability reserves.¹⁴ In providing advice on these issues, auditors commonly require access to privileged documents and communications in order to undertake risk assessments and to make materiality determinations. Once legally privileged information is disclosed to independent auditors, who may rely on this information in preparing their reports, issues of potential waiver arise.

Several recent decisions with different outcomes provide perspectives on how waiver claims will be treated. In *United States v. Deloitte & Touche USA LLP*,¹⁵ the court determined that disclosure of attorney work product to outside auditors did not waive legal privilege because the relevant documents (which included one prepared by Deloitte employees incorporating the company attorneys' thoughts) were prepared in anticipation of litigation regarding the company's tax treatment. No waiver occurred by disclosing the documents and information to Deloitte because the disclosure was not "inconsistent with the maintenance of secrecy."¹⁶ This is contrary to the holdings of prior decisions emphasizing that independent auditors serve a public watchdog function so disclosure to them is fundamentally inconsistent with the secrecy required to maintain privilege.¹⁷ Assuming the underlying work-product claim is credible, courts that take the *Deloitte* view are unlikely to agonize over the waiver issue. But the issue of whether the privilege was waived may not even be reached if the work-product claim is called into question.

A recent example, *United States v. Textron, Inc.*,¹⁸ highlights the uncertainty in determining the availability of work-product privilege when a document has both a business and a litigation purpose. In *Textron*, the court found that tax accrual work papers reflecting legal analysis of litigation

¹⁴ See, e.g., *United States v. Textron, Inc.*, 577 F.3d 21 (1st Cir. 2009) (tax accrual work papers prepared by lawyers to support calculation of tax liability reserves were not protected by privilege), cert. denied, 2010 U.S. LEXIS 4373 (May 24, 2010).

¹⁵ 623 F. Supp. 2d 39 (D.D.C. 2009) (company's disclosure of work product to its auditors did not waive the work-product protection), *aff'd in part, vacated in part, remanded by* *United States v. Deloitte, LLP*, 2010 U.S. App. LEXIS 13226 (D.C. Cir. June 29, 2010) (ordering the district court to examine the memorandum in camera).

¹⁶ *Id.* at 41; see also *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441, 445–46 (S.D.N.Y. 2004) (citing *In re Pfizer Inc. Sec. Litig.*, No. 90 Civ. 1260, 1993 U.S. Dist. LEXIS 18215 (S.D.N.Y. Dec. 22, 1993) and holding disclosure of reports of internal investigation to auditor did not waive work-product protection because auditor was not conduit to potential adversary); *Vacco v. Harrah's Operating Co.*, No. 1:07-CV-0663, 2008 U.S. Dist. LEXIS 88158 (N.D.N.Y. Oct. 29, 2008) (documents generated by defendant's general counsel summarizing related litigations for outside auditors were protected by work-product privilege).

¹⁷ See, e.g., *Medinol, Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113 (S.D.N.Y. 2002).

¹⁸ 577 F.3d 21.

tion risks were not work product because they were not prepared “for use in litigation.”¹⁹ Given the Supreme Court’s recent denial of certiorari in *Textron*, the lack of clarity on this issue is likely to persist.

Because information is often disclosed to auditors in the context of criminal matters, the issue of waiver may be additionally complicated by joint representation issues. A case that has attracted the attention of criminal antitrust attorneys is *United States v. Ruehle*.²⁰ The court of appeals held that the statements of a corporate officer to lawyers hired by the company, made during the course of an internal investigation, were not protected by attorney-client privilege because the officer understood that his statements ultimately would be shared with the company’s outside auditors. *Ruehle* highlights both the potential privilege issues associated with communications of an individual employee to corporate counsel during the course of an internal investigation regarding potentially criminal conduct and the waiver issues potentially triggered when there is subsequent disclosure to an auditor or such disclosure is anticipated.²¹

In spite of this conflicting authority, there are some steps that should be considered to preserve privilege during internal investigations or when auditors are involved. A starting point is to maximize the strength of the underlying privilege claim. With regard to work-product claims, this means doing one’s best to ensure that the documents clearly reflect on their face that they were created in anticipation of litigation and incorporate the analysis and opinion of counsel.²² Attorney-client communications made to corporate counsel can best be protected in an internal investigation by appropriately establishing the parameters of the interview at the outset, including proper *Upjohn* warnings.²³ Where documents or information ultimately must be disclosed to outside auditors, any such disclosure should be consistent with the limited purposes of the auditor’s review and the maintenance of secrecy. Although auditors are independent and do not have an agency relationship with the corporation, it is not unreasonable to expect that such disclosure will remain confidential and to remind auditors of this and of the privileged nature of materials prior to sharing privileged information with them.²⁴

Non-Spousal Family Members/Friends

While neither new nor specific to antitrust matters, the disclosure of privileged communications to or in the presence of non-spousal family members can still present a risk of waiver. The marital

¹⁹ *Textron*, 577 F.3d at 31–32.

²⁰ 583 F.3d 600 (9th Cir. 2009).

²¹ For more on this case and the potential ethical pitfalls of joint representation of corporations and their individual employees, see Kathryn M. Fenton & Ryan C. Thomas, “*The Rules of Professional Conduct Are Not Aspirational*”: *Joint Representation of Corporations and Their Employees*, ANTITRUST SOURCE, June 2009, <http://www.abanet.org/antitrust/at-source/09/06/Jun09-Fenton6-29f.pdf>.

²² As *Ruehle* highlights, in cases involving independent auditors who are not construed as agents of the company, creating and/or preserving an attorney-client privilege is more difficult than protecting legitimate work product from waiver when disclosed to such auditors. *See, e.g., Comm’r of Rev. v. Comcast Corp.*, 901 N.E.2d 1185 (Mass. 2009) (communications between in-house corporate counsel and outside tax accountants consulted regarding the structure of a divestiture mandated by an antitrust consent judgment were not protected by attorney-client privilege but were protected by work-product immunity).

²³ The Seventh Circuit recently held that attorney notes created during the course of interviewing school district employees and disclosed to the school board as part of an internal investigation were protected by both work-product and attorney-client privilege. The court advised that proper documentation of the engagement, appropriate *Upjohn* warnings, absence of third parties in interviews, and disclosure of the results in private and in confidence decrease the likelihood of finding any waiver in internal investigations. *Sandra T.E. v. South Berwyn School Dist.* 100, 600 F.3d 612 (7th Cir. 2010).

²⁴ *See, e.g., United States v. Deloitte & Touche USA LLP*, 623 F. Supp. 2d 39, 41 (D.D.C. 2009).

privilege has long provided some protection for disclosure of privileged communications to a spouse,²⁵ but there are no comparable protections for other close family members or friends. In the antitrust context, an individual employee facing possible criminal liability for price fixing may seek support from a spouse, other adult family members, or close friends and even may request their participation in meetings with legal counsel. Yet, there is some question whether this is prudent given potential waiver issues.

The breadth of privilege with respect to non-spousal family members and the definition of family are evolving, and both are raising new issues. For example, notwithstanding the well-established marital privilege, will this privilege apply to same-sex marriages, which may not be recognized in all states? It is unclear whether a comparable privilege would protect discussions with a domestic partner or significant other. There also is no generally recognized privilege for non-spousal family members, such as children, parents, or siblings.²⁶

The breadth of privilege with respect to non-spousal family members and the definition of family are evolving, and both are raising new issues.

As a result, lawyers need to be sensitive to possible claims of waiver arising from participation of children or siblings in privileged communications. At least with regard to work-product protection, where waiver most often turns on whether the disclosure to a third party increased the likelihood that a potential adversary would obtain the information, disclosure to a trusted and close family member, such as a parent or child, is not likely to be viewed as creating this opportunity. Depending on the circuit, however, intentional disclosure of an attorney-client communication to a parent or child may be more risky.²⁷

As a result, clients should be counseled regarding the potential impact of disclosure of privileged communications to any third party, even close family members. In this era of constant connectivity, when people forward e-mails, take work home, and otherwise communicate frequently with family members or significant others, careful consideration of privilege issues may not always occur prior to the disclosure. Therefore, ongoing reminders and control of attendees at meetings in which legal strategies will be discussed probably are the only tools counsel will have in avoiding claims of waiver.

Consultants-Turned-Testifying-Experts

Non-lawyer consultants, including economists, accountants, and industry experts, may be retained in antitrust matters for a variety of reasons—to analyze the feasibility or community benefit of a merger, to estimate the potential efficiencies of a transaction, or to use their industry expertise to analyze the competitive dynamic of a particular market. These same consultants also may be used by the client for ongoing projects in the ordinary course of business. Many of the same principles discussed above in connection with PR firms and government relations consultants apply here as well: Were the consultants agents? Did they have a need to know certain privileged information to perform their jobs? Was their involvement necessary to the provision of legal advice by lawyers? However, additional issues are raised when a consultant with access to privileged information later is tapped to testify as an expert witness on behalf of its client.

Pursuant to Rule 26 of the Federal Rules of Civil Procedure, the consultant-turned-testifying-expert may be required to turn over all information, including privileged communications, to which

²⁵ *E.g.*, *Solomon v. Scientific Am., Inc.*, 125 F.R.D. 34, 36 (S.D.N.Y. 1988) (disclosure of communications protected by the attorney-client privilege within the context of the marital privilege does not constitute waiver of the attorney-client privilege).

²⁶ *But see* *United States v. Stewart*, 287 F. Supp. 2d 461 (S.D.N.Y. 2003) (forwarding an e-mail from lawyer to adult daughter does not waive work-product protection).

²⁷ *Id.* at 464.

he had access prior to designation as an expert and regardless of whether it was provided as the basis for his consulting activities.²⁸ It has been a longstanding rule that legal privileges are lost when documents and information are disclosed to and considered by testifying experts. Some courts have taken the view that all information to which an expert was exposed are discoverable whether or not the expert ultimately relied upon the materials in forming his or her opinion. Even courts which require for discoverability that the information must have been considered by the expert usually require more than a representation by counsel that the information was not considered.²⁹ These requirements make all information to which a testifying expert is exposed discoverable regardless of its privileged nature and the expert's role at the time of disclosure.

Current proposed amendments to Rule 26 recognize some of the practical problems associated with this interpretation and the methods that have developed to protect privileged communications.³⁰ The proposed rule would recognize work-product protection for draft reports and for communications between experts and counsel.³¹ Under the proposal, facts, data, and assumptions provided to and considered by the expert by counsel are still discoverable. While the proposed rule would mitigate the need for some of the excruciating steps counsel currently employ to protect their exchanges with testifying experts, whether previously consultants or not, the rule does not protect the underlying information, so caution would still be warranted.

Practically speaking, until the amendments to Rule 26 become effective, the best way to avoid exposing privileged information received by a testifying expert while serving as a consultant is to avoid allowing the consultant to morph into a testifying expert. Using the common approach of employing different consulting and testifying experts and adopting careful controls over the information to which the testifying expert has access remain the best practices. Even if the Rule 26 amendments take effect and will decrease the need for such practices, caution still should be used for all consultants, whether retained in connection with litigation or not, and disclosure of privileged information to such a consultant should be limited to only what is necessary for both the consultant and the lawyers to do their respective jobs.

Third Parties Paying for Litigation

The current economic environment has spawned new models for funding significant corporate commercial litigation, including antitrust claims. Under the so-called third-party litigation funding model, large financial services firms, hedge funds, or specialized legal claim investment firms provide funding to plaintiffs in exchange for a portion of any recovery.³² When third-party investors finance litigation, ethical issues for which the lawyer-client relationship is central, such as conflicts

²⁸ See, e.g., *Oklahoma v. Tyson Foods, Inc.*, No. 05-CV-329, 2009 U.S. Dist. LEXIS 72022 (N.D. Okla. June 2, 2009) (consultant turned testifying expert was required to disclose all material to which he had access as a litigation consultant); *Kelley v. Microsoft Corp.*, No. C 07-475, 2009 U.S. Dist. LEXIS 8290 (W.D. Wash. Jan. 23, 2009) (accounting consultant identified as Rule 30(b)(6) witness fell outside of both the attorney-client privilege and the work-product protection).

²⁹ *Tyson Foods*, 2009 U.S. Dist. LEXIS 72022, at *34 (citing *In re Air Crash at Dubrovnik*, Civ. No. 3:98cv2464 (AVC), 2001 U.S. Dist. LEXIS 14334 (D. Conn. June 4, 2001)).

³⁰ Summary of the Judicial Conference Committee on Rules of Practice and Procedure 10–14 (Sept. 2009), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/Combined_ST_Report_Sept_2009.pdf.

³¹ The amendments to Rule 26 have been approved by the Supreme Court and are currently before Congress. Barring action by Congress, they will take effect on December 1, 2010.

³² For more information on this trend, see ABA/BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT, *Third-Party Investors Offer New Funding Source for Major Commercial Law Suits*, 26 LMPC 207 (Mar. 31, 2010).

of interest and privilege, can become tricky. Potential claims of waiver of privilege as a result of communications to such third parties is one such issue.

While this phenomenon is relatively new, it is one that antitrust litigators may be more likely to encounter in the future. What happens when a third-party investment firm, looking for litigation in which to “invest,” becomes privy to privileged information? Is the privilege waived, or is there a sufficient common interest between the two parties even though they are not co-litigants? What if the privileged information is shared with the third party as part of its evaluation of whether to invest in the lawsuit, but such investment never occurs?

While the principles of waiver in this context have not yet been tested, both defense and plaintiff lawyers should be aware of this (and other) potential ethical issues and be prepared to address them. A starting point is to structure the relationship thoughtfully to minimize potential waiver claims. For example, at a minimum, confidentiality and common interest agreements should be employed. Another strategy is for separate counsel to act as an intermediary between the investors and the party with the claim.³³

Conclusion

Non-lawyers continue to be involved in antitrust transactions, litigation, investigations, and even ordinary business matters in which legal issues may arise, and non-lawyers will likely be involved in increasingly novel ways which courts have not yet addressed. Therefore, being well-grounded in privilege basics and knowledgeable about the ways courts have analyzed the involvement of non-lawyers in matters like those discussed above will help counsel to be sensitive to the potential privilege pitfalls of such involvement and should ideally aid counsel as he or she seeks to minimize the risk of waiver that non-lawyer involvement may create. Given the varied ways courts have approached these issues within and across jurisdictions (and the increasing opportunities for opposing parties to assert waiver), however, it is unlikely that the risks created by non-lawyer participation can be eliminated. The cautionary tales of another’s unintended waiver challenge, like those above, should be informative but may not be determinative if and when the involvement of a non-lawyer becomes an issue for a client. Therefore, implementing practical and deliberate efforts to limit disclosures to those who need to know and ensuring the client is counseled on the efforts that should be taken to minimize risk are essential to protecting privileged communications in this context. ●

³³ *Id.*

Unilateral Effects with Differentiated Consumer Products: A Response to Werden

David Scheffman and Joseph Simons

In the April 2010 issue of *The Antitrust Source*, we explained that the theoretical economic models underlying the Merger Guidelines' treatment of unilateral effects for differentiated products make a technical mathematical assumption ("differentiability") that leads to a mathematical result that the own-price elasticity of demand can be computed using only the margin (i.e., the "Lerner Equation").¹ This mathematical result, in turn, leads to the general result that *all* horizontal mergers involving "differentiated products" are predicted to increase prices due to anticompetitive unilateral effects, absent offsetting efficiencies. This extreme result is a mathematical theoretical curiosity, not an acceptable basis for a presumption.² As we explained, the technical assumption and its result are contradicted by empirical consumer and economic research and by everyday experience. In his June 2010 response to our article, Gregory Werden challenged some of our analysis with respect to research on consumer demand, asymmetric competitor responses, and the significance of our example of "kinked demand."³ We now reply.

Research on Consumer Demand

In our article, we discussed research that establishes that the demand functions for consumer products are likely to have kinks, which violates the assumption of differentiability. Werden agrees that "formal theory of consumer behavior with asymmetric reactions does predict kinked demand curves for individual consumers."⁴ Werden, however, challenges the empirical support for and/or the significance of kinks. He states: "Empirical research finds small differences between the demand elasticities for price increases and those for price decreases."⁵ Yet Werden's statement is based on only one paper, which studied one product, toilet tissue, based on data from 341 households in Sioux Falls, South Dakota, and which used a model specific to that paper.⁶ In our article we focused on sources from which basic, general conclusions could be drawn.⁷

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¹ David Scheffman & Joseph Simons, *Unilateral Effects for Differentiated Products: Theory, Assumptions, and Research*, ANTITRUST SOURCE, Apr. 2010, <http://www.abanet.org/antitrust/at-source/10/04/Apr10-Scheffman4-14f.pdf>.

² We do not take the position that mergers of competing brands of differentiated consumer products never lead to price increases. Individual mergers may very well do so. Rather, theory and empirical research do not support a presumption that such mergers, generally, are anticompetitive absent offsetting efficiencies.

³ Gregory J. Werden, *Unilateral Effects with Differentiated Consumer Products: A Response to Scheffman and Simons*, ANTITRUST SOURCE, June 2010, <http://www.abanet.org/antitrust/at-source/10/06/Jun10-Werden6-24f.pdf>.

⁴ *Id.* at 2.

⁵ *Id.* at 1 n.5.

⁶ Sangkil Moon et al., *Profiling the Reference Price Consumer*, 82 J. RETAILING 1, 4 (2006).

⁷ For example, one of our main sources was a survey of research on the theory and evidence relevant to asymmetric consumer responses. See Gurusurthy Kalyanaram & Russell S. Winer, *Empirical Generalizations from Reference Price and Asymmetric Price Response Research*, 14 MKTG. SCI. G161 (1995).

With respect to kinks specifically, Werden states: “Empirical evidence, however, indicates that individuals’ demand curves do not actually exhibit sharp kinks at prevailing prices. Rather than a sharp kink, empirical research finds ‘a region of price insensitivity for small increments around a reference price [so] a price change may not be noticed.’”⁸ There are a number of issues with Werden’s interpretation of the articles he cites for this statement. If price changes are “not noticed,” there is little or no demand response and the demand curve is thus highly inelastic in that region. If this is the case, the Lerner Equation cannot be satisfied, since margins will not be consistent with highly inelastic demand. The primary paper cited by Werden estimates demand curves that have at least two kinks.⁹ Around the current equilibrium price the demand curve is highly inelastic, and outside this range, demand is less elastic for price increases than decreases.¹⁰

Werden also argues that “with inevitable consumer heterogeneity, sharp kinks in individual demand curves are consistent with a smooth aggregate demand curve at the brand level.”¹¹ This is a theoretical possibility. What is more likely is that there are a relatively small number of types of consumers (types driven by historical experience with prices that are likely to be common within groups of consumers). This is the typical approach in marketing research. In such a situation, for example, if some of the consumer types have kinks and/or highly inelastic sections (“latitude of price acceptance”), then the aggregate demand curve will have a number of “sharp” kinks.

Finally, Werden states: “Marketing scientists posited, and estimated, brand level demand curves with asymmetric aggregate price response and found a substantial range of prices within which there is no aggregate asymmetry.”¹² This is also taken from a single paper. This paper assumes a model in which demand is “smooth,” i.e., differentiable.¹³ The paper also has the counterintuitive result that demand is more elastic for price cuts than price increases.¹⁴

What should be clear from this discussion is that there is enough evidence of asymmetric price responses by consumers to make the *assumption* of the Lerner Equation untenable.

Asymmetric Competitor Responses

Next Werden addresses our second example of why the Lerner Equation may not hold—asymmetric responses by competitors. Werden states:

Scheffman and Simons mistakenly focus on “residual” demand curves. In fact, standard analysis of unilateral effects analysis with differentiated consumer products uses ordinary “Marshallian” demand curves. Marshallian demand curves are constructed under the assumption that all other prices are held constant, while residual demand curves incorporate responsive price changes by rivals.¹⁵

⁸ Werden, *supra* note 3, at 2.

⁹ Gurumurthy Kalyanaram & John D.C. Little, *An Empirical Analysis of Latitude of Price Acceptance in Consumer Package Goods*, 21 J. CONSUMER RES. 408 (1994).

¹⁰ “Three components of the linear model center on the PR (the reference price): a hypothesized *flat* [vertical] place equal in width to the latitude of acceptance around the reference price and two negatively sloping pieces, one on each side. *See id.* at 412 (emphasis added). Marketing researchers generally put price on the horizontal axis, so that “flat” means vertical for an economist’s depiction of a demand curve.”

¹¹ Werden, *supra* note 3, at 2.

¹² *Id.* at 3 n.14.

¹³ “In this model, we incorporate *smooth* transitions of price elasticity between an ‘inner’ regime close to the benchmark and ‘outer’ regimes of gains and losses.” Koen Pauwels et al., *When Do Price Thresholds Matter in Retail Categories?*, 26 *MARKETING SCI.* 83, 88 (2007) (emphasis added).

¹⁴ *Id.* at 92.

¹⁵ Werden, *supra* note 3, at 3.

In fact, the theoretical economic models of differentiated products do compare the pre-merger equilibrium to the potential effects of the merger. The pre-merger equilibrium necessarily involves residual demands and reaction functions.¹⁶

More on the Assumption of Differentiability—Margins and Demand Elasticities

According to the Lerner Equation, there is an exact equation linking margins and own-price elasticity. However, economic theory, financial economics and accounting, and common sense make clear that the most important determinant of margins is cost structure, specifically the mix of fixed and variable costs. This is yet another reason why assumption of the Lerner Equation is not likely to be valid. There are many business models for consumer products firms (and for firms in other industries also). Some firms produce their products from primary inputs, e.g., primary food products, such as wheat and milk, for branded consumer food products, using highly automated (low variable labor) manufacturing processes. Typically, for such firms, a substantial percentage of their costs would be fixed. Other firms have other producers make their products for them, i.e., use contract manufacturing. For such firms, typically, a significantly smaller percentage of their costs would be fixed. Obviously, this comparison is much broader than the consumer goods industry. In many industries, firms vary significantly in their degree of vertical integration. Thus, margins will differ due to differences in cost structure, having nothing to do with demand conditions.

Firms also differ in the extent to which they are vertically integrated into distribution. Some self-distribute, with much of their costs being fixed, and others use third-party distribution, where most of their costs are variable. Again, margins differ due to cost structure, having nothing to do with demand conditions. For example, we could have two otherwise similarly situated firms—e.g., both selling corn flakes—that would have quite different cost structures and therefore quite different margins. One is vertically integrated in manufacturing and distribution, and one is not. Holding other things constant, the vertically integrated firm is necessarily going to have significantly higher margins than the non-integrated firm. But according to the fundamental prediction of theoretical differentiated products models (including Farrell-Shapiro's Upward Pricing Pressure, or UPP), other things equal, the firm with significantly higher variable costs should have significantly higher prices. Of course this is highly implausible. And it is not consistent with what we observe about actual products.

What is perhaps even more striking is that in the consumer goods products industry (among others), shifting between self-manufacture and contract manufacture occurs with some frequency. The theoretical differentiated products models, however, predict that such movements should lead to substantial changes in price—even though there is only a change in cost structure, with no change in demand. We are not aware of any evidence supporting the general conclusion of the differentiated products models. Finally, many industries, such as packaged software, have high margins. For example, a specific home financial management software product that is not one of the top sellers likely has high margins (since most costs are likely to be fixed), but it is implausible that such a product has relatively inelastic demand. Other examples include the corner hot dog vendor, restaurants, and men's and women's clothing stores.

Examples like these make clear that inferring demand elasticities from margins is not likely to be valid. Since the predictions of the various theoretical differentiated products models, includ-

¹⁶ The use of residual demand is appropriate where competitors react to pricing of their rivals. See Joseph Farrell & Carl Shapiro, *Improving Critical Loss Analysis*, ANTITRUST SOURCE, Feb. 2008, at 7, <http://www.abanet.org/antitrust/at-source/08/02/Feb08-Farrell-Shapiro.pdf>. Of course, most mergers of interest to the antitrust authorities would fall into this category.

ing UPP, depend fundamentally on the Lerner Equation, those models cannot, as a matter of empirical economics or public policy, provide a basis for presumptions about anticompetitive effects. If the plaintiff in an antitrust case puts forward the theoretical differentiated products models and/or attempts to create a presumption of anticompetitive effects based primarily on margins and diversions, in our opinion this will likely stimulate a battle of economic experts, in which the plaintiff's expert will usually lose.¹⁷

Finally, Werden writes: "Because the psychology of retail shoppers is relevant only to consumer goods, I consider only mergers involving such goods, and I understand Scheffman and Simons to have done likewise."¹⁸ We believe the arguments relating to our discussion of margins are also clearly relevant to the use of the Lerner Equation for industrial and commercial products and services.

Concluding Comments

We stand by the fundamental conclusions of our earlier article. To summarize, the theoretical economic models of product differentiation are based on a technical mathematical assumption (i.e., differentiability) leading to the Lerner Equation. The assumption and the Lerner Equation are not likely to be valid as a general matter. Thus, neither the Lerner Equation nor the models upon which it is based can be used to create general presumptions in merger analysis.

Werden raises arguments that at most indicate that in some specific circumstances the assumption of differentiability and the resultant Lerner Equation may hold close enough that the conclusions of the models may be approximately correct. We do not disagree that this may be the case in some specific circumstances. However, the weight of the existing research and relevant analyses indicate that, as a general matter, the assumption of differentiability and the resultant Lerner Equation are not likely to hold. This should not be surprising. What would be very surprising is that as a general matter with differentiated products each competitor necessarily uniquely constrains the prices of every other competitor.

As discussed in our earlier article, we agree that diversions between the merging parties may affect the incentives of the merged firm post-merger. However, this is the case for most horizontal mergers, since there will generally be diversions between the parties in the event of a small but significant nontransitory increase in price (i.e., a SSNIP). But, this does not lead to a presumption that the parties to the merger uniquely constrain each other's prices, since the constraints posed by other competitors may nonetheless make an anticompetitive price increase unprofitable. ●

¹⁷ This is borne out by the litigation of *Swedish Match* discussed in our previous paper. *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 161 (D.D.C. 2000).

¹⁸ Werden, *supra* note 3, at 1 n.6.

Paper Trail: Working Papers and Recent Scholarship

Editor's Note: Editor John Woodbury comments on a paper by Professors Lande and Davis that compares the cartel-related penalties imposed by the DOJ versus the settlements in forty private antitrust suits to conclude that the deterrent effect of these cases is generally larger than that from the DOJ efforts. Thus, the authors reason that the private suits complement DOJ enforcement in terms of establishing deterrence. Send suggestions for papers to review to: page@law.ufl.edu or jwoodbury@crai.com.

—WILLIAM H. PAGE AND JOHN R. WOODBURY

Recent Papers

Robert H. Lande & Joshua P. Davis, Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws (last revised Mar. 17, 2010)

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1565693

In this working paper, the authors—Robert H. Lande (Venable Professor of Law, University of Baltimore School of Law) and Joshua P. Davis (Professor of Law and Director, Center for Law and Ethics, University of San Francisco School of Law) (hereafter LD)—note that “it may come as a surprise—even a shock—that a quantitative analysis of the facts demonstrates that private antitrust enforcement probably deters more anticompetitive conduct than the U.S. Department of Justice’s anti-cartel program.” (p. 2)

At the outset, it should be noted that this paper does not in fact assess the comparative deterrent effect of private antitrust enforcement and Justice Department (DOJ) antitrust enforcement. That would require evaluating the differential effect of DOJ actions vs. private actions on the incidence of antitrust violations. Of course, that would invariably be a complex and substantial undertaking, and it may not even be doable—and LD are well aware of these complexities.

Instead, this paper compares the cartel-related penalties imposed by the DOJ versus the settlements in forty private antitrust suits. That is, the paper is comparing inputs into deterrence, not outputs. To the extent that the deterrent effect is correlated with the penalties (as it surely is), we might infer that the effect of the settlements from private enforcement actions (or the DOJ fines) increases deterrence, although we don’t know by how much. I will return to this topic a bit later.

With those caveats (which the authors would likely acknowledge, given the references to the difficulty of actually measuring deterrence), the paper’s contribution is notable. It takes on the criticism that the forty cases were likely “nuisance” suits—by concluding that these suits had sufficient antitrust merit that they would not be considered nuisance suits—and that effort does help to better bullet-proof their comparisons. And if one attaches weight to the authors’ conclusion that these suits were meritorious, then one could well conclude that because the settlements in these forty private antitrust cases were greater than those in the DOJ cartel cases, the deterrent effect of the former is greater than the larger. How much larger remains an open question. How rapidly does the deterrent effect increase with higher aggregate penalties?

Of course, the private actions would not be relevant—indeed, they would be harmful—if it were true that the current level of federal enforcement activity optimally deters cartel and other anti-competitive behavior. At least with respect to cartels, LD argue this is unlikely to be the case. The paper notes that that between 1992 and 2008, the DOJ filed 699 cases and won 645 cases—a success rate of over 90 percent.¹ As LD point out, the DOJ's success could be interpreted as a preference for avoiding false positives. This means that there are some cartels that are not prosecuted because, while the cases look worthy on the merits, they may be more expensive to litigate and/or be more difficult to “prove up” to a judge or jury. This strategy will lead to underdeterrence. As LD observe, “the high success rate of government litigation suggests that in the absence of private litigation, many bad actors would get away with violating the antitrust laws . . . [I]t holds the potential for the antitrust laws to go largely unenforced.” (p. 31)²

Against that background, LD turn to estimating the penalties levied by the DOJ in price-fixing cases. That one is easy—between 1990 and 2007, the DOJ levied corporate fines totaling \$4.16 billion, individual fines of \$67 million, and restitution of \$118 million.³ In addition, these cases led to total jail time of 330 years and another 97 years of house arrest.

The first question they address is how to value the individual fines, jail time, and house arrest. Do they result in a different level of deterrence than a fine imposed on a corporation? One extreme argument might be that penalties imposed on individuals have no deterrent effect because the penalties imposed on corporations are sufficient to encourage firms to adopt internal controls to prevent criminal antitrust behavior. As LD point out, there will inevitably be instances where the price fixer is in fact not being a good agent of the firm. Or it may be that the price fixer is a good agent of the firm in that the firm will reward the price fixer for her efforts.⁴

After addressing more subtle versions of this issue, LD conclude that penalties imposed on individuals have “more of an impact than a similar penalty against a corporation and that a year of prison time is equivalent to a relatively large financial penalty.” (p. 9) The rationale here is simple: a million-dollar fine (or an equivalent dollar sum that makes the convicted individual just indifferent to jail time) will be a larger proportion of that individual's wealth than will be the case for a million-dollar fine levied on the corporation.

To account for this potentially larger deterrent effect for individual penalties, LD triples the value of those individual penalties. While it's clearly arbitrary, if it is too high, then the comparison between the DOJ penalties and the private settlements will be tilted more towards DOJ. If it's too low, it would be tilted towards the private settlements, but LD subsequently show that for their results to be reversed, the multiplier would have to be implausibly high.

¹ I am assuming that these cases were criminal cartel cases, but the paper is less than clear on this point.

² This key conceptual point should have been made far earlier in the paper than it currently is.

³ I assume that these are all inflation adjusted, but LD are silent on that point. I also would have thought that these would also be based on present discounted values, but apparently that's not the case. If, as LD suggest in an earlier paper, the payout to the DOJ was more rapid than the payout in the private suits, the apples-to-apples comparison of the payouts would show a smaller but unknown differential between the DOJ penalties and the private settlements, depending on the extent to which interest payments by defendants match their rate of time discounting. This does strike me as a potentially significant shortcoming of the study, although the authors claim that the adjustment would have only a small effect on any comparisons. Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879, 893 n.56 (2008).

⁴ LD also address the question of whether the individual fines or jail time are an efficient deterrent to cartel behavior, but that discussion is tangential to their argument in this paper.

LD then turn to estimating the financial equivalent of jail time and house arrest. To develop estimates for this equivalent dollar amount, the authors used a variety of sources. These included value of life estimates (to determine how much a year in a life is worth) developed in the context of regulatory proceedings (such as the EPA's), compensation provided to the victims of 9/11 (or their families), awards in cases of wrongful imprisonment, and estimates made by antitrust experts (though only two such estimates) of the dollar-penalty equivalent of a price fixer serving a year in jail.⁵

LD settle on the high range of the estimates, equating a year in prison to a \$2 million penalty and equating a year of house arrest to a \$1 million penalty. As noted, to account for what LD regard as the higher deterrent effect of penalties levied on individuals than those levied on corporations, LD triples the penalties. After making these adjustments, LD calculate that the penalties levied by the DOJ as part of its anti-cartel effort totaled nearly \$7 billion.

Based on a previous paper,⁶ LD compare this \$7 billion to the settlements or adjudicated damages reached in 40 of the largest antitrust cases (25 of which involved cartels and other per se claims) between 1990 and 2007. The authors restrict their focus to cases that generated \$50 million in such payments. LD estimate that the recoveries in these private suits totaled between \$18–19.6 billion, substantially more than the penalties levied by the DOJ. LD note that if the comparison is restricted to those 25 private cases involving cartel allegations, the damages recovery ranges between \$9.2–10.6 billion, still significantly larger than the \$7 billion in DOJ penalties. Even restricting the private cases to those that involved a DOJ action that resulted in a criminal penalty, the comparison remains favorable. The recovery in these 13 private cases generated \$5.6–7 billion, very close to the DOJ penalties.

Thus, the authors conclude that the deterrent effect of these cases is generally larger than that from the DOJ efforts and so (more importantly) the private suits complement DOJ enforcement in terms of establishing deterrence.

Of course, a key question is whether the private suits are themselves meritorious. LD argue that the \$50 million threshold should act to screen out nuisance suits (since \$50 million is a sufficiently large figure for a firm to simply accede to a settlement rather than litigate.) And more than half of the cases involved settlements in excess of \$100 million.

More generally, LD demonstrate that 85 percent of the 40 private cases had some “outside” validation on the merits. For example, as noted above, 13 of the cases were follow-ons to the criminal cartel cases of the DOJ, and so had some obvious merit. In 12 cases, the DOJ obtained civil relief. In 9 of the cases, the defendants lost at trial or in a closely related case. So it does appear that these were more than private nuisance actions. But LD make the point that about 40 percent of the cases were not related to any enforcement actions by the DOJ—these were otherwise “undiscovered” anticompetitive behavior.

LD's efforts to validate the merit of the private cases seem sensible. But while these cases seem to have merit, it's not the \$50 million dollar screen that's helpful—it is the other validation measures. One can certainly imagine a corporation being willing to settle for a seemingly excessive amount because the reputational degradation of a long, drawn-out suit would not be worth the litigation effort. To take an admittedly extreme example, it seems unlikely that BP would have will-

⁵ Indeed, the paper is worth reading if only to review these sources of the dollar value of life.

⁶ See LANDE & DAVIS, *supra* note 3.

ingly provided a \$20 billion compensation fund to be administered by the federal government but for reputational issues.⁷

What is less obvious is whether the private settlements in fact generate the same deterrent effect as the DOJ penalties. Most obviously, the settlement may be excessive even though the case is meritorious. The currently unknowable variable is how far from optimal deterrence we are. If we are far short of the optimal level of deterrence, then the fact that the settlements are “excessive” considered in isolation (i.e., relative to the merits of the particular case) is irrelevant. Because the probability of detection and conviction of a “true” cartel may be quite low, the expected value of engaging in cartel behavior can only be deterred if the penalties for engaging in such behavior are high enough to offset the low probability of detection and conviction.

Still, the issue of overdeterrence lingers. The authors are clear that they are not addressing the issue of costs and benefits of private antitrust enforcement. Nonetheless, one assumption in the paper seems to be that the large private cases and the nuisance suits are unrelated. It isn’t obvious why that would be true. One can certainly imagine that seemingly excessive settlements on meritorious cases will invite additional private cases of less merit but with a substantial expected value. If that were the case, then the deterrent effect of private suits would be lower and possibly even “negative.” That is, the net effect of private suits may be overdeterrence.

The paper is worth the read. While not covering all of the deterrence bases, and sometimes confusing inputs with outputs, it still provides a counterweight to those who believe that private antitrust suits have no deterrent capabilities. ●

—JRW

⁷ Of course, it’s possible that BP determined that the odds of winning large class actions were low and so this was one way to possibly mitigate that threat. But there appears to be a fair amount of finger pointing on liability, and these are actions that would likely take many years to resolve.