THE INCIDENCE, NATURE, AND IMPLICATIONS OF PRICE-FIXING LITIGATION IN U.S. FOOD INDUSTRIES

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Antitrust laws generally seek to promote competition in U.S. markets. Alternatively, these laws attempt to correct the type of market failure that occurs when the market does not sustain price competition or embodies undesirable features, such as prices fixed and agreed upon by rival sellers. It is well known that the federal policy to curb price-fixing agreements was central to the enactment of the Sherman Act of 1890. Formal cartels of the 19th and early 20th centuries, with their sales quotas, exclusive sales agencies, price-fixing committees, and customer and geographic sales allocations, apparently have been eliminated from the contemporary scene. Despite the disappearance of United States based formal cartels, there has been considerable litigation in recent years over pricing behavior of individual firms. A wide array of agricultural and food industries have been involved in these actions.

The purposes of this article are (1) to describe the current status of federal price-fixing litigation in the United States with particular reference to food firms and industries, (2) to discuss economic issues involved in price-fixing litigation, and (3) to relate legal implications of competition and antitrust actions.

PRICE-FIXING DEFINED

The term "price fixing" is meant to refer primarily to price agreements among rival sellers. Depending on the nature of a particular case, litigation involving rigged prices, exchange of price information, and/or price discrimination also may be closely related to "price fixing."

The aim and result of every price-fixing agreement, if it is effective, is the elimination of one form or another of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to set arbitrary and unreasonable prices.

Through a series of court decisions, agreements among competing sellers to fix prices were deemed illegal *per se* under Section 1 of the Sherman Act. Overt price collusion thus is regarded as a criminal conspiracy. The criminalization of the price-fixing rule in effect means that the law punishes **attempts** to fix prices. The economic impact of the **actual** pricing decisions of rival sellers in price-fixing conspiracies is of no significance in determining guilt, even if the coconspirators maximized losses instead of profits. This potential discrepancy between intent and completed acts places preeminence on the legal conspiracy doctrine rather than the economist's price theory. According to Posner, this situation is unfortunate because many attempts to fix prices may have negligible economic consequences, whereas serious price fixing may escape the detection of overt communication [16, p. 41].

Realities, of course, must dominate the determination of whether or not a certain relationship is objectionable. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it [1]. In grey areas the Supreme Court has applied the "rule of reason" instead of the *per se* rule [3].

INCIDENCE OF PRICE-FIXING LITIGATION

Price-fixing actions are filed under the authority of several federal statutes, but primarily the Sherman Act, the Federal Trade Commission (FTC) Act, and the Clayton Act. Under the Sherman Act, the U.S. Attorney General may bring either civil or criminal suits

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or both simultaneously. Section 5 of the FTC Act gives the Commission adequate power to conduct investigations, issue complaints, hold hearings, and enter cease and desist orders in cases of proved violations. The FTC also administers the provisions of the Robinson-Patman Act, which amended Section 2 of the Clayton Act in 1936 as pertaining to price discrimination.

Price-fixing litigation may arise from actions initiated by the Antitrust Division of the Justice Department, Federal Trade Commission, or from private persons, including state governments and municipalities.[1] The volume of cases filed is related strongly to the level of government enforcement activity. Successful criminal prosecution in price-fixing cases often is followed by private actions involving the same defendants. Enforcement activity ebbs and flows over time in relation to attitudes of the political leadership, agency officials, consumer advocates, and the antitrust bar. The incidence of legal action may not correlate closely to actual occurrence of price fixing.

Estimates of the total number of antitrust suits of various types can be found in the source materials: 8,427 private antitrust cases in federal courts in the period 1935-1974 [6, p. 35], 1,723 U.S. Department of Justice actions for the 1890-1974 period [16, p. 25], and approximately 5,000 class actions pending in federal courts in 1976 [11, p. 11].

Because most price-fixing cases are settled out of court or never reach the appellate court level, the actual number of such cases involving food firms is not readily known for the United States at any particular point in time. Careful review of *CCH Trade Cases* was made for the 1967-1977 period to estimate the number of price-fixing and price discrimination cases adjudicated at the federal appellate court level.[2] This review greatly underestimates the number of cases, but it does suggest the incidence of food cases in relation to nonfood cases, as well as the significance of food price-fixing litigation in relation to total food antitrust cases. For the 1966-1977 period, there were 56 food price-fixing cases and 44 price discrimination cases which involved appellate actions filed by the U.S. Justice Department, private parties, and FTC cease and desist orders. Seven cases dealt with both price fixing and price discrimination.[3] Food price-fixing cases represented roughly 20 percent of all

TABLE 1. *CCH TRADE CASES*, 1967-1977

Year	Total Cases	Food Cases Total	Price Fixing	Price Discrimination	Both Price Fixing and Price Discrimination	Food as % of Total Cases	Price Fixing as % of Total Food Cases	Price Discrimination as % of Total Food Cases
1967	632	23	6	8	0	3.6	26.1	34.8
1968	343	26	7	7	1	7.6	26.9	26.9
1969	315	18	3	5	0	5.7	16.7	27.8
1970	404	23	4	2	1	5.7	17.4	8.7
1971	389	19	3	2	1	4.9	15.8	10.5
1972	477	20	3	2	1	4.2	15.0	10.0
1973	600	38	6	4	1	6.3	15.8	10.5
1974	585	44	12	4	1	7.5	27.2	9.1
1975	577	41	5	5	0	7.1	12.2	12.2
1976	534	42	6	4	0	7.9	14.3	9.5
1977[a]	303	21	1	1	0	6.9	4.8	4.8
Total	5159	315	56	44	6	6.13	17.8	14.0

[a]Only the first six months of 1977

Source: Compiled from *CCH Trade Cases*, Chicago: Commerce Clearing House, various issues, 1967-1977

[1]The U.S. Secretary of Agriculture also has the authority to deal with price fixing by cooperatives under the Capper-Volstead Act and by meat packers under the Packers and Stockyards Act. The regulatory activities of the Secretary of Agriculture under these statutes are not reviewed here.

[2]The *CCH Trade Cases* reporter does not include cease and desist orders made directly through the Federal Trade Commission's own administrative proceedings which were obeyed and not appealed.

[3]In many instances a given "case" represented several similar actions for a particular commodity or type of firm. Thus, the number of cases reported here even underestimates the number of appellate actions.

food antitrust cases. Food cases surprisingly represented only 6 percent of all actions cited in the 1966-1977 period. The average rate of food cases for the 1973-1977 period was twice the rate for the 1967-1972 period (Table 1).

The 56 price-fixing cases were divided equally between private and government actions in the 1967-1977 period. However, since 1975, two-thirds of the actions have been private suits. Private actions are relatively more important in price discrimination cases — approximately three-fourths of the total in the 1967-1977 period. All appellate cases involving both price fixing and price discrimination were legal actions between private parties. Since 1975, all but one price discrimination suit involved private parties.

The relative increase in private rather than government actions in recent years is due to the proliferation of class action suits having the potential reward of treble damages. Private treble damage suits require proof of an antitrust violation by the defendant, proof that the plaintiff has been damaged as a result of the violation, and proof of the extent of the damages.

In terms of the type of food products, one half of the price-fixing cases involved dairy and bakery products. Other major industry groups for price-fixing litigation have been meat products and beer (Table 2).

TABLE 2. NUMBER OF CITED FOOD-PRICE FIXING/DISCRIMINATION CASES BY TYPE OF PRODUCT, 1967-1977

Products	Fixing	Price Discrimination	Both Price Fixing and Price Discrimination	Total
Dairy Products	14	18	0	32
Bread & Bakery Products	14	5	1	20
Beer	4	3	4	11
Fruits and Vegetables	3	3	0	6
Meat Products	5	1	0	6
Soft Drinks	2	2	0	4
Groceries	0	3	0	3
Snack Foods	3	0	0	3
Sugar	2	0	1	3
Peanuts	2	0	0	2
Poultry Products	1	1	0	2
Vending Products	1	1	0	2
Wine	0	2	0	2
Donut Franchise	0	1	0	1
Chicken Franchise	0	0	1	1
Coffee	1	0	0	1
Fish	0	1	0	1
Flour	1	0	0	1
Frozen Pies	0	1	0	1
Fruit Spread	0	1	0	1
Ice Cream Franchise	1	0	0	1
Macaroni	0	1	0	1
Pancake	1	0	0	1
7-11 Franchise	1	0	0	1
	56	44	7	107

Source: Compiled from *CCH Trade Cases*, Chicago: Commerce Clearing House various issues, 1967-1977

In the foregoing discussion of the food industry, the cases cited are readily discernible from published sources. The actual total number of food industry price-fixing actions filed is likely to have been several times the level reported. As an illustration, of the 7,500 private antitrust actions filed in the 1963-1972 period, more than 70 percent were settled even before the pretrial process [5, p. 141].

NATURE OF PRICE-FIXING SUITS IN THE FOOD INDUSTRY

Though there are many variations of the main complaint, plaintiffs in food price-fixing suits commonly charge that the defendants and coconspirators are engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act. This charge usually is followed by somewhat more specific charges that the defendants and coconspirators fixed and/or raised prices, exchanged price information, submitted rigged bids, or conspired to maintain and stabilize list prices. In addition to price-fixing charges, the cases often include allegations that defendants allocated territories, boycotted or refused to sell, restricted resale, participated in trade associations whose practices are in violation of the antitrust law, rotated customers, limited supplies, and/or perpetuated illegal tie-in arrangements. Though the Sherman Act is the dominant statute cited, food price-fixing cases also involve the Clayton Act, and to a lesser degree the Robinson-Patman and the Capper-Volstead Acts.

Government actions tend to concentrate on the food manufacturing sector rather than growers, wholesalers, or food retailers. In private price-fixing litigation, most of the legal action is between two or more vertical components of the food marketing chain. That is, farm producers (or their organizations) take legal action against processors and/or retailers, food processors file action against food retailers, food wholesalers allege price fixing among food processors, food retailers complain (legally) about price fixing by cooperative producer associations, consumer/user groups take action against basic food manufacturers, *ad infinitum*. Thus, the causes of action in food price-fixing cases tend to flow either vertically upward or backward within the marketing system. Occasionally the action takes place on a horizontal plane between two or more firms engaged in the same function, such as among frozen pie makers. Litigation among horizontally competing firms, however, usually emphasized price discrimination rather than

price-fixing issues.

Price-fixing litigation in the food industry is best illustrated by the sugar [8], beef [8, 10, 12], milk [9, 20], bread [19], and broiler cases [2, 21]. The reader is referred to [15] for brief summaries of these cases.

SOME ECONOMIC ISSUES

Economic theory does not provide a totally adequate basis for predicting price fixing and other forms of collusive behavior. By combining it with industrial organization analysis, however, the economist does have a reasonable means of detecting tacit collusion. Such structural characteristics as high seller concentration, the absence of a fringe of small sellers, severe entry barriers, a standardized or homogeneous product, similar vertical marketing arrangements among competing sellers, static or declining demand, and/or a high ratio of fixed to variable costs can be partial signals of misconduct. These factors do not either individually or jointly provide a definite basis for concluding that price-fixing exists, however.

Economists and lawyers representing antitrust enforcement agencies and plaintiffs attempt to demonstrate the existence of price fixing with specific kinds of economic evidence. "Proof" of implicit collusion involves the demonstration of one or more of the following factors: fixed relative market shares, price discrimination, exchanges of price information, identical bids, price-quantity changes unexplained by variations in cost, industrywide resale price maintenance, the level and pattern of profits, and basing point pricing. Though these factors may raise the question of price collusion, they do not provide inviolate "proof."

Because of improved offensive economic tools and the increasing likelihood of antitrust litigation, otherwise competitive agricultural and food industries need expert legal and economic assistance to protect themselves from arbitrary actions and nuisance suits. Agricultural economists can assist the defendants' antitrust bar by describing the competitive nature of the particular market under attack. In one set of the sugar price-fixing cases involving three sugar companies defending themselves against more than 100 industrial sugar users, the defense was built largely around the market forces affecting supply and demand for the historical period. A detailed analysis of the various and competitive factors of the market was provided in the context of institutional restraints and government controls. The Polopolus affidavit concluded that refined sugar prices were determined competitively and that the economic facts did not support the plaintiffs' allegations that price changes were the result of conspiratorial activity among the codefendants [14]. This case was settled on the basis that the codefendants did not violate any antitrust laws and that they did not cause damages to the plaintiffs and their classes. The defendants paid $25 million to the settling plaintiffs, however, as insurance against the unpredictable nature of this massive and complex litigation. For competitive food and agricultural industries with generally low profit rates, the "nuisance" value of antitrust settlements may seem exorbitant.

In the Utah Pie case three national frozen pie makers had engaged in price discrimination in both a legal and an economic sense. For example, one national firm sold pies for $4 per dozen in Alhambra, California, but only $2.74 per dozen in Ogden, Utah, even though the manufacturing plant was closer to Alhambra. The price discounting that occurred was usually off-list. After a series of court battles, the Supreme Court found evidence of predatory intent by each of the three national companies and that the declining price structure for frozen pies in Utah was evidence of price discrimination which had the requisite injury to competition [4]. Elzinga and Hogarty conducted an econometric analysis of the court's decision on pie prices. They concluded that there was very little immediate effect on the price of frozen fruit pies. More importantly, they found the Robinson-Patman Act had the effect of altering the identity of players in the market. Though the national pie companies reduced their presence in the Utah market after their unsuccessful court battles, the local family-operated Utah Pie Company went out of business despite a favorable court decision. The protection from competition under the Robinson-Patman Act is thus marginal and exaggerated by the Act's critics. According to Elzinga and Hogarty, price discrimination can signal a breakdown in market power and a movement toward a competitive equilibrium and not necessarily the exploitation of a monopoly position [6, p. 38].

Of considerable importance to agricultural marketing economists is the recent Supreme Court decision involving the Illinois Brick Company [7]. In this case the State of Illinois and 700 local government entities charged that concrete block manufacturers had engaged in a price-fixing conspiracy in violation of Section 1 of the Sherman Act. Because block manufacturers sell their products directly to masonry contractors, who in turn sell blocks to general

contractors, state governmental agencies are **indirect** purchasers. The Supreme Court held that purchasers cannot sue alleged price-fixers unless they deal directly with them. One immediate effect of the Illinois Brick decision is to limit consumer class action suits to retail price fixing, which traditionally has **not** been the dominant part of price-fixing cases. There is evidence that in the class action broiler cases the plaintiffs' attorneys narrowed their classes of litigants to **direct** purchasers of chickens [2].

If price fixing occurs at one stage of a complicated agricultural marketing system, it is extremely difficult to estimate the impact of the violation on prices in all subsequent stages, particularly if a raw agricultural product is used in several different processed products and sold in disparate markets. Even in fairly simple vertical marketing systems, it would be difficult to estimate how much injury occurred at each stage of the marketing and distribution system. Though Congress has not yet taken action on this issue, there is some speculation that antitrust laws will be amended explicitly to permit recovery by indirect purchasers.

COST AND BENEFITS OF ENFORCEMENT

The number of antitrust class action suits which are settled out of court raises serious questions about the efficiency of antitrust policies and enforcement procedures. The general policy, of course, is to protect the consumer from business conduct which reduces social welfare. Curbing antitrust violations and otherwise promoting perfect competition does involve enforcement and litigation costs which are not insignificant.

The opportunity for treble damages in private antitrust litigation, particularly, creates perverse incentives and may not be in the public interest. The perversity results from the possibility that injured firms may not seek lower prices, but sustain $1 of "wrong" in anticipation of $3 of recovery from legal action. Also, private treble damages encourage certain firms to allege vaguely anticompetitive behavior—which in fact did not occur—in hopes of an out of court settlement. Even in "nuisance" price-fixing suits, defendants will pay off some money rather than risk a jury trial. Obviously, consumer welfare is reduced in these situations as the costs associated with these activities are ultimately tacked onto consumer prices.

Litigation costs and the value of company time expended in defending antitrust cases can be awesome in the food industry. The sugar cases involved millions of dollars for attorneys', and consultants' fees, court costs, computer data services, and the time and resources of company employees and officers, not to mention the millions of dollars in out of court settlements. In one relatively small case, *Utah Pie,* Elzinga and Hogarty estimated the legal defense costs to be about $1 million which represented the value of 3 million frozen fruit pies [6, p. 34]. They estimated the total direct cost of complying with and litigating the Robinson-Patman Act to be $1.4 billion for the 1936-1974 period, with food cases representing more than one half of the total [6, p. 35-36].

This is not to say that antitrust enforcement has not deterred misconduct among competing sellers. In several classic examples of price-fixing conspiracies, judicial action resulted in lower consumer prices. In the 1965 bread case in the state of Washington, several bakers and the largest food chain were found guilty of surpressing price competition and maintaining uniform and noncompetitive prices. During the conspiracy period, bread prices in Washington averaged 20 percent above the U.S. average, whereas **before** the conspiracy prices had been about equal to the U.S. average. **After** the violation was determined, bread prices dropped below the national average. Mueller estimated that the conspiracy "cost" Washington consumers $35 million [13, p. 87]. The costs of litigation and enforcement, however, need to be substracted before a final societal judgment of the bread cases can be made.

In a few instances farmers and fishermen have attempted to redress alleged inequities in the marketing system by class action suits against food handlers and processors. Prochaska, for example, conducted an interesting empirical analysis of the impact on prices and marketing margins of litigation brought by king mackeral fishermen and the subsequent formation of a marketing cooperative [17].

THE ATTORNEY'S ROLE IN ANTITRUST ACTIONS

As the economists' role in antitrust cases has changed over time, so has there been some rethinking by the legal profession in relation to antitrust cases. The lawyer, working within a framework of precedents, adheres to the established legal norms which are not always comprehensible to economists. Although he, too, deals with abstractions rather than certainties, the attorney has been very reluctant to allow models developed by the economist to influence his approach to legal antitrust issues.

By using rigid Socratic dialogue developed through rigorous cross-examination, the anti-

trust lawyer tests the validity of the models constructed by the economist to solve problems. Because any legal issue presupposes a basic adversary action, opposing attorneys using like techniques, mainly cross-examination, attempt to sort out inconsistencies and half-truths according to the basic issue.

The Socratic technique, though working well with individuals or even groups, leaves much to be desired in analyzing the economic truism of antitrust legislation, particularly such vague terminology as contained in Section 1 of the Sherman Act and other subsequent antitrust legislation. The economist may resent the intrusion of the legal adversary technique. Because the economist knows little of the operation of legal instrumentalities or their ultimate objective, he may feel greatly frustrated if his contribution to the solution of the antitrust problem is not given full weight. The lawyer, though he may have less knowledge of the economic ramifications of antitrust policy under the present legal system, does not surrender easily to the economist.

Intercommunication between the disciplines of agricultural economics and law has become increasingly important in antitrust matters. Interchange of information about the relative realities of each discipline allows a basic accommodation to be reached whereby both groups can contribute their expertise to solving the very vexatious and troublesome problems in the field of antitrust legislation and enforcement.

The tools of discovery available to both litigants are interrogatories and depositions. These devices enable the adversary lawyers to establish the issues by identifying unresolved facts as well as other controverted matters. They also ensure the stability and truthfulness of the affiant. Ultimately they have much to do with the determination of both criminal and civil penalties and liabilities imposed by the courts after the issues have been resolved for an individual antitrust case or consolidated group of antitrust cases. Because in some cases treble damages can be exacted, the proofs elicited through interrogatories, depositions, and affidavits are most important.

The economist has an increasingly important role as an "expert witness" in antitrust actions, both public and private. He must be able to translate his findings to the antitrust lawyer who then can use them intelligently in the adversary proceedings for solving antitrust issues. This cooperation can be accomplished best when economists and attorneys understand each other's discipline, including inherent limitations and assumptions.

CONCLUDING REMARKS

Agricultural economists have an important role to play in price-fixing and other antitrust matters involving the food and agribusiness industries. This role is augmented by the professional need to determine the nature and degree of competition in agricultural and food markets and to assess the causes of market imperfections. If price fixing is proved for a particular market, the agricultural economist has adequate tools to estimate what would have been competitive prices under normal market conditions.

The overall atmosphere of antitrust policies and enforcement is confusing. The basis philosophy of promoting competition has obvious benefits to society. Elzinga and Breit argue that efficient antitrust enforcement requires the replacement of the present reparations-induced private action system by public enforcement with optimal fines [5, p. 139]. This conclusion is based on the high degree of risk aversion among corporate managers. That is, large financial penalties will be more likely to deter price fixing than stepped-up enforcement practices. Jail sentences, injunctive relief (dissolution, divorcement, and divestiture), and private treble damages are deemed inadequate.

Kirkham complains that the rules of discovery have been perverted to permit "fumbling about in an effort to discover a cause of action" [11, p. 10]. He further contends that the courts have extended the scope of discovery and the possible scope of the trial to "any period the plaintiff wishes to name—10, 20, 30 years—dredging up transactions so remote that different principles of law might then have been applicable" [11, p. 10]. We have already discussed the possible perverse incentives from treble damage actions and have implied that the proliferation of class action suits has been a chief contributor to court congestion.

In the years ahead, federal antitrust agencies are likely to become increasingly suspicious of the pricing behavior of farmer cooperatives and the pricing effects of marketing orders and agreements. Given the already substantial and diverse nature of antitrust activity in food and agricultural industries, the future demand for expert public and private services of agricultural economists and attorneys is assured.

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