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

H. M. Harris, Jr.

Professors Polopolus and Wershow have prepared an informative and thought-provoking article. A major strength is their illuminating focus on the role of the agricultural economist in antitrust litigation. Particularly revealing is the discussion of the unique attorney-economist partnership involved in most antitrust cases. The agricultural economist can indeed find himself bewildered and frustrated in his role as an expert witness.

The home court is that of the attorney. The rules of the game are his. These rules, as the authors point out, are geared to legal precedence, to Socratic dialogue, to yes-no and black-white answers, and ultimately to a guilty-not guilty verdict. The adversary nature of the proceedings creates an environment of much more perceived hostility than that involved in submitting research results to peer reviewers or in making presentations to farmers, businessmen, or policy makers. A paraphrase of a Kenneth Boulding verse illustrates the situation:

Lawyers must be rather dense.
Their model is rule of precedence.
Economists, it should be said,
Prefer to have a rule of head....¹

I agree with the conclusion of the authors that agricultural economists have an important and growing role to play in price fixing and other antitrust litigation. Before one accepts the role of an expert witness in such a case, he or she would be well advised to read the Polopolus-Wershow paper for a foretaste of what lies ahead. The authors refer to an intercommunication gap between the disciplines of agricultural economics and law, and in the process have narrowed this gap.

A second strength is the excellent review of

some of the criticisms that have been levied against the antitrust litigation process and its impact. Included are costs of enforcement and litigation, the perverse incentive of treble damages, and the problem of unwarranted out-of-court settlements. To reinforce the last criticism of the process, an attorney acquaintance of mine, formerly with the Department of Justice and now a partner in a law firm handling antitrust cases, estimated to me that 90 percent of all antitrust cases initiated are not brought to trial.

With one exception, which will be commented on, the examples of recent litigation in the food industry are well chosen. But with respect to the numbers presented in Table 1, some questions arise. The fact that the food antitrust cases represented only 4 percent of all actions during the 1966-1977 period was "surprising" to the authors. This figure frankly amazes me.

For the period 1956-1965 the National Commission on Food Marketing reported that of 603 suits filed by the Department of Justice, 56 cases or more than 9 percent were in the food industry [4, pp. 166-167]. My calculations indicate that about 70 percent of the reported food cases brought by Justice involved alleged price fixing or similar offenses [4, pp. 156-165]. Of 861 monopoly cease and desist orders issued by the Federal Trade Commission during this period, 241 or 28 percent were in the food industry [4, pp. 190-191].

Note that the Polopolus-Wershow figures are not directly comparable with the earlier Food Commission data, because the former include private suits as well as government cases. Also, the authors have enumerated only cases at the appellate court or FTC order level. Nevertheless, because the number of FTC monopoly orders in the food industry, as re-

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¹In the original Boulding verse, quoted from *The Structure of Economic Science*, Sherman Roy Krupp, ed., Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1966, page 6, the first two lines are:

Business men are rather dumb.
Their model is the rule of thumb.

ported by the Commission on Food Marketing for the earlier 10-year period, exceeds by a considerable margin the total number of food cases cited by the authors, one might draw the conclusion that antimonopoly activity in the industry has declined. Has the industry become more competitive? If this were the case, the authors' Proposition 1, which states that price fixing litigation has not been adequately effective, would be subject to question.

Nor does the apparent recent low level of antitrust litigation in the food industry correspond to current levels of reported activity by Justice and the FTC. Russell Parker reports that between 1972 and 1975 both the FTC and the Department of Justice responded to concern over food prices by "increasing dramatically the amount of their resources spent on investigations involving food processing and retailing companies." He goes on to report that in 1975 FTC spent about a fifth of its total antitrust resources in the food area [5, p. 854]. Parker further notes that within the overall conduct area, there is "an increasing zeal for price fixing cases and a declining zeal for most other *per se* cases" [5, p. 859]. Yet Polopolus and Wershow conclude public enforcement agencies have been relatively inactive in food price fixing cases in 1975 and succeeding years. To summarize, the data so laboriously gathered by Polopolus and Wershow may be telling us something, but it is unclear exactly what.

A POINT OF ISSUE

I have only one major disagreement with Polopolus and Wershow. They have chosen to lump price fixing and price discrimination litigation together. Admittedly, in isolated instances these two conduct offenses are difficult to differentiate, and both charges actually may be alleged in the same suit. In general, however, this is not the case. *Utah Pie*, cited by the authors, provides an excellent example [8]. The authors neglected to point out that the Utah Pie Company initially held 66.5 percent of the relevant market, which under *Aloca* standards could have been considered monopolistically controlled [6]. During the four-year period of geographic price discrimination by national food processors, the firm actually increased its sales and profits. The most tangible evidence of injury to Utah Pie was a decline in market share to 45.3 percent of frozen pie sales. How were the national firms to penetrate the market while avoiding the charge? Only by lowering their price structure in all U.S. markets could they have done so [3, p. 28]. Such suits and interpretations are indicative of the fact that price fixing and price discrimination

are poles apart in terms of preserving competition. Polopolus and Wershow, by citing the Elzinga and Hogarty conclusion that price discrimination can signal a breakdown in market power and a movement toward competitive equilibrium, seem to agree [2, p. 38]. So why do they categorize them together?

The latest example of the divergent impact of price fixing versus price discrimination litigation may be the recent U. S. Gypsum case in Pittsburg [7]. The court ruled that the exchange of price information among competitors did not constitute price fixing. The successful defense maintained that the information exchange was necessary to avoid prosecution on price discrimination charges under the Robinson-Patman Act. In the words of one critic, *Uta Pie* ranks "as the most anticompetitive antitrust decision of the decade" [1]. *U. S. Gypsum* may take that dubious honor for the 1970s. The Supreme Court, on October 3, 1977, did grant a petition of certiorari.

CONCLUDING THOUGHTS

The article by Polopolus and Wershow is understandably oriented to the role of the agricultural economist in the process of actual price fixing litigation. What about the more traditional, everyday roles of the agricultural economist as a researcher or extension worker?

The lack of tools to describe and measure conduct is the weakest link in the basic structure-conduct-performance model. The theory would be enriched considerably with more information on the price discovery process in oligopolistic markets. My experience has been that it is sometimes embarrassingly easy to obtain information on firms' pricing decision processes, potential illegality notwithstanding. The problem is, when pricing behavior skirts violation of the antitrust statutes, one cannot publish the findings. To do so would subject the economist to subpoena and subsequent violation of the "confidential" status given to firms from which information was obtained. Such disclosures could ultimately undermine agribusiness support for the land grant university. This is a dilemma for which there is no easy solution.

Finally, the Polopolus-Wershow article, by enumerating some of the perverse impacts of price fixing litigation in particular and conduct regulation in general, raises the old issue of whether we regulate the conduct of firms that have market power or attack the structure which makes anticompetitive behavior possible. This issue is clearly beyond the assigned scope of the authors, but their conclusions demonstrate that the question should continue to be in the forefront of our interest.

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