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NOTES

Antitrust Law—Reciprocal Price Information Exchanges

In *United States v. Container Corporation of America*, 1 the United States Supreme Court held that the exchange among corrugated container sellers of prices recently charged or quoted to buyers constituted a per se violation of section one of the Sherman Act. 2 The Court reasoned that the effect of the exchanges, in their market setting, had been to keep prices within a relatively narrow ambit, and that this interference with the price mechanism in the market was unlawful.

The method used was simple. When a seller was requested by a buyer to quote a price, he would sometimes ask his competitors who had sold or quoted prices to that buyer what their prices were or had been. There was no agreement that the seller seeking the last price or price quote from his competitor would not undercut it. The exchanges between the defendants were infrequent and the only compulsion to participate was the natural one that a seller would not be able to obtain price information from his competitors if he did not make it available to them. Moreover, industry prices had not increased despite rising labor and material costs. The industry, however, was competitive and, but for the exchanges, prices might have decreased.

Generally the effects of the dissemination of price information are determined by the economic setting 3 and the type of information, and thus the Court closely analyzed the economic conditions of the corrugated container industry. It found that the industry was controlled by a few dominant 4 sellers and that the product was homogeneous. Since each competitor's product was almost identical, price alone determined sales. Moreover, each box was individually made to size and shape to fill a specific order, with no standard unit that competitors could use to make

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4 For a factual breakdown of the concentration in the industry, see P. Areeda, *Antitrust Analysis* 531 (1967).
a price list. The industry was also characterized by ease of market entry and inelastic demand and there were competitive pressures from excess capacity and large buyers. These conditions resulted in uncertainty as to what sellers would charge and made the exchange of price information meaningful.

There were four primary factors then in the market situation of the container industry that served to facilitate interdependent pricing: (1) the general oligopolistic structure; (2) product homogeneity; (3) excess capacity; and (4) inelastic demand. The effect each factor has on the pricing structure must be understood before a critical appraisal of the Court's decision can be attempted.

Exchange of price information among oligopolists obviously can be a potent force for establishing price uniformity. By their nature, oligopolists must anticipate the reactions of their rivals more closely than participants in a more "perfectly competitive market," where power is fragmented and decisions are not based as much on what a seller's rivals are doing as what the seller himself is capable of doing. Uniformity of action in the oligopolistic industry is more easily arranged and enforced without resort to actual agreement. Hence, any agreement is harder to detect because of this natural tendency towards price uniformity. Proof of combination or conspiracy without actual agreement is also difficult, so assuring compliance with the antitrust laws by oligopolists necessarily becomes harder.

Interdependent pricing is further facilitated in industries that produce homogeneous products. Buyers are not persuaded by attempts at differentiation. Competition in quality or special appeal is eliminated, leaving price as the only uncertain factor a competitor must consider in anticipating his rivals' reactions. Homogeneity encourages the tendency not to reduce prices because the seller knows his reductions will be automatically met by his competitors.

Cooperation to defeat the market mechanism is more likely in industries characterized by excess capacity because there is greater incentive to overcome that adverse economic condition. Industries dealing in products for which there is an inelastic demand facilitate interdependent pricing because the buyer has to place his order on an immediate need.

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5 BLAKE & PITOFSKY 28.
6 Adelman, Effective Competition and the Antitrust Laws, 61 Harv. L. Rev. 1289, 1329 (1948) [hereinafter cited as Adelman].
7 89 S. Ct. at 513 n.4. See also Adelman 1328.
basis. Price changes would, therefore, neither increase nor decrease demand. Thus, there is less pressure to cut prices.

There are economic factors in the box industry that might have retarded the otherwise natural tendency towards oligopolistic interdependent pricing: (1) ease of market entry, (2) high fixed costs, and (3) an individualized product. Ease of market entry generally diminishes the effectiveness of oligopolists' efforts to maintain noncompetitive pricing. If entry does not require a large investment and large profits are prevalent, new businessmen are attracted to the industry and the oligopolists' share of the market and their profits are thus reduced. But even this characteristic was turned against the defendants in Container Corporation. New entrants were indeed attracted to the industry, despite its excess capacity. Businessmen, however, would not normally invest in an industry with excess capacity unless there were some special attraction to do so—for example, an unusually high rate of return. The Court could thus infer that the defendants' activities had operated to maintain prices at a normally unexpected level and thus attracted the new entrants. Furthermore, although new entrants usually cause periods of price instability in any market, the Court noted that prices in the container industry had remained relatively stable. These two factors indicated that there was some outside force operating to stabilize prices and contributed to the “irresistible inference” that the exchanges of price information had an anticompetitive effect.

High fixed costs of operation (as opposed to low initial capital investment) can also have a detrimental effect on noncompetitive oligopoly pricing. In industries with high fixed costs, sales gains give an extra boost to profits because the overhead cost can be spread over the expanding sales. Where the commodity is homogeneous, however, sales gains can be achieved only through off-list selling, secret rebates and other devices by which prices are secretly cut. The incentive to use these devices becomes even greater when high fixed costs are coupled with excess capacity as in the corrugated container industry. The individualized nature of the product can make price cuts more difficult to detect and therefore en-

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8 Brief for Appellant at 28, United States v. Container Corp. of America, 89 S. Ct. 510 (1969) [hereinafter cited as Brief for Appellant].
9 BLAKE & PITOFSKY 29-30.
10 89 S. Ct. at 512.
11 BLAKE & PITOFSKY 31.
12 See 89 S. Ct. at 512.
courage departure from noncompetitive pricing. When uncertainty is introduced into the market in this manner, the stability of the oligopolists' control is disturbed.

However, if complete knowledge of current individual prices offered to specific customers is introduced into a noncompetitive oligopoly pricing situation, such as the corrugated container industry, the last doubt as to a competitor's prices will be eliminated. Incentive to lower prices is vastly reduced because the seller knows that lowering his prices will only bring him the same share of the market at a lower return. Price uniformity becomes even more probable. Also eliminated is the buyer's option to withhold price information, thus injecting additional uncertainty into the market that might stimulate price competition based on competitors' individual capabilities. In no instance has the Court sanctioned dissemination of information that specifically identified the customer who received a certain price.

The Supreme Court in the past has not been unaware of the dangers of cooperation among oligopolists to eliminate those uncertainties in their markets that undermine interdependent pricing. *Sugar Institute, Inc. v. United States* involved a somewhat similar economic situation. The sugar industry was dominated by a few sellers, and its product was homogeneous, but not individualized. Excess capacity and high fixed costs had led to the use of off-list pricing and secret rebates. The members of the Institute agreed to abide by published price lists. By eliminating off-list pricing, the members had removed the only possible uncertainty left in their market and the tendency towards price uniformity was greatly enhanced. The Court held the agreement violated the Sherman Act. The second example of the Court's concern about the elimination of market

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13 See text at note 6 *supra*.
14 Brief for Appellant 34.
16 297 U.S. 553 (1936).
17 We have noted that the fifteen refiners, represented in the Institute, refine practically all the imported raw sugar processed in this country. They supply from 70 to 80 per cent, of the sugar consumed. . . . Another outstanding fact is that defendants' product is a thoroughly standardized commodity. In their competition, price, rather than brand, is generally the vital consideration . . . . The fact that, because sugar is a standardized commodity, there is a strong tendency to uniformity of price, makes it the more important that such opportunities as may exist for fair competition should not be impaired. *Sugar Inst., Inc. v. United States*, 297 U.S. 553, 600 (1936).
uncertainties to implement noncompetitive pricing is found in its decisions in the basing point system cases.\textsuperscript{18} Again the industries involved were characterized by excess capacity, high overhead and a standardized product that encouraged the use of secret rebates. There were significant price variations resulting from the varying freight charges. By refusing to sell FOB and by quoting railroad freight charges exclusively, the nonequidistant sellers were able to match their competitors' prices more easily. The purpose of basing point and other similar systems was "to eliminate a kind of uncertainty that is a potent force disrupting stable noncompetitive oligopoly pricing."\textsuperscript{19} Basing point systems agreements have been condemned by the courts as "price fixing."\textsuperscript{20} Both examples indicate that the Court believes agreements designed to eliminate uncertainty and not having any dominant proper purpose should be condemned as per se violations of the antitrust laws.\textsuperscript{21} Other attempts to remove the uncertainties remaining in a market by cooperative dissemination of price information have been considered anticompetitive efforts rather than attempts to make competition more effective.\textsuperscript{22}

The defendants in \textit{Container Corporation} argued that the purpose of the exchanges was to make competition more effective. Relying on

\textsuperscript{18} FTC v. Cement Inst., 333 U.S. 683, 696-700, 709-17 (1948); Sugar Inst., Inc. v. United States, 297 U.S. 553, 589-93 (1936); Fort Howard Paper Co. v. FTC, 156 F.2d 899 (7th Cir. 1946); Milk & Ice Cream Can Inst. v. FTC, 152 F.2d 478 (7th Cir. 1946); United States Maltsters Ass'n v. FTC, 152 F.2d 161 (7th Cir. 1945).

\textsuperscript{19} Turner, \textit{The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal}, 75 HARV. L. REV. 655, 674 (1962). See also Adelman 1327-47.

\textsuperscript{20} See cases cited note 18 supra.

\textsuperscript{21} See generally KAYSEN & TURNER 150.

But in markets where oligopolistic elements are present, some ignorance and uncertainty about the behavior of rivals is an important competitive element in the market, since it prevents "rational" oligopolistic calculation leading to joint maximization of profits.

\textit{Id.}

Cement Manufacturers Protective Association v. United States, they pointed out specifically that the exchanges were an attempt to protect themselves from buyers who misquoted offers from other competitors. But their argument can be dismissed on three grounds. First, as the Court pointed out, the cases are factually distinguishable. In Cement the sellers exchanged information as to what orders had been filled to protect themselves from fraudulent inducements to deliver more cement than a contractor needed for a specific job. The defendants in Container Corporation had no legal right to get the correct price from the buyers. No tort had been committed by the buyers. Second, the defendants already had manuals which enabled them to calculate their competitors' prices, and if they did not want to sell at as low a profit margin as their competitors, they did not have to. Third, it is now clear that the Court does not condone conspiracy to overcome competitive evils, or unethical conduct on the part of competitors or customers who use methods that would otherwise be per se violations of the antitrust laws.

The Supreme Court's finding that the exchanges constituted a violation of the antitrust laws is not surprising. Past precedent supported if not compelled the outcome. The application of the per se rules was, however, an additional step. Generally, the application of a per se rule depends upon a finding that the activity usually has bad effects, that good effects are rarely present and hard to prove, and that there is thus little need to examine effects or invite litigation over them. The per se rule is applied when the Court feels that the defendant should not be allowed to deny that which logic and experience indicate is the principle purpose of the activity. The difference between gains and losses from making conduct per se illegal and the concomitant administrative advantages must justify

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23 268 U.S. 588 (1925).
24 89 S. Ct. at 511.
25 Id. at 512.
27 The per se rule was not applied in Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925); Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925); United States v. American Linseed Oil Co., 262 U.S. 371 (1923); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921).
any arbitrariness involved. In *Container Corporation*, the gain derived from making the price exchanges illegal was the elimination of a method used by already powerful oligopolists to remove one of the last obstacles to noncompetitive pricing in a market ideally receptive to such pricing. The oligopolists are denied a method by which they could interfere with the independent operation of the price mechanism. Against this gain must be balanced any loss of potential benefit. The defendants do lose an easy method of determining which of their customers are misquoting prices to them. But since sellers are supposed to make independent decisions as to price based on their own costs and capabilities, this loss seems insignificant.

In his dissent, Mr. Justice Marshall asserted that the per se rule should not be applied because the ease of market entry in the box industry would preclude the success of any anticompetitive activities. His approach seems unrealistic for several reasons. First, competitors would still be controlling prices within the margins set by both the competitive price and by what they could get noncompetitively without inducing entry. Second, there is a lag between the time prices get high enough to induce entry and the time the entry actually takes place. Competitors, by careful manipulation, may exploit this time lag to make profits, then cut prices back in time to discourage new entry. Third, why should the Court depend on the second line defense of the economic mechanism, when the activity is unlawful? Fourth, the pressures created by ease of market entry are more than counterbalanced by the factors facilitating interdependent pricing. Fifth and last, the finding by the majority that price competition had been held within a narrow ambit despite new entries into the market indicate that Mr. Justice Marshall's hoped for effects had not and would not take place. New entrants would realize that the policy in the industry of buyers splitting orders among the lowest bidders would result in their maintaining their same share of the market at a lower return.

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29 The administrative advantages of per se rules are three: relative clarity, self-enforcement, and less need for litigation to achieve a given level of enforcement. Kayser & Turner 142-43.

30 Irrefutable precedent for the application of the per se rule for that purpose is found in the famous footnote 59 to United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940), the language of which sounds peculiarly applicable to this case.

31 *Container Corporation* represented an excellent opportunity for the Court to set down its policy. This was not a treble damage suit and the defendants did not stand to lose financially.

32 S. Ct. at 515 (dissenting opinion).
Container Corporation indicates that the Supreme Court is acutely aware of the economic setting in which the cooperative activities of businessmen take place. The Court is particularly insistent that oligopolists, because of the tremendous control they already have over the market, the natural tendency to price uniformity in oligopolistic industries, and the advantageous position they are in to defeat the competitive processes, not be allowed to remove any of the uncertainties that prevent them from obtaining even firmer control of the market. The corrugated container industry was ideally conducive to oligopolistic manipulation, except for the uncertainty created by the individualized nature of the product. The exchanges of price information eliminated that uncertainty. The Supreme Court was unwilling to allow the defendants, already rich in power, that additional luxury.

Ben F. Tennille

Arbitration—The Arbitrator’s Duty to Disclose Past Business Relationships With a Party

"[W]here your treasure is, there will your heart be also." 1 This generally recognized element of human nature—that a man will be partial toward his own self-interest—is the reason for the rule that "no man shall be a judge in his own cause." 2 Acceptance of society’s insistence that disputes among its members be resolved through the use of a judicial process, rather than through the use of violence or other forms of "self-help," depends to a great extent on the evident fairness and impartiality of the judicial system. 3 In the leading case of Tumey v. Ohio, 4 the Supreme Court held that it was a violation of due process to subject a defendant’s liberty or property "to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." 5 In Tumey, the defendant was tried and convicted by the village mayor, who received additional compensation from all those tried by him only if they were found guilty. The Supreme

1 Matthew 6:21.
2 Dr. Bonham’s Case, 8 Co. 113b, 77 Eng. Rep. 646 (C.P. 1610).
3 See Hart & McNaughton, Evidence and Inference in the Law, in The Hayden Colloquium on Scientific Concept and Method 51-56 (1958).
5 Id. at 523.