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Terry Hanson, Ph.D.
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Re: Anti-Trust Research on Catfish Cost of Production Model (MASGP 13-008-01)

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Dear Terry:

Below is the summary of research of the Mississippi-Alabama Sea Grant Legal Program regarding your question about the possible legal implications of putting a cost of production model for catfish on your research/extension website. Specifically, whether the model could be seen as an anti-trust price setting procedure among catfish processors or was simply a tool that anyone is free to use without raising anti-trust implications. The following information is intended as advisory research only and does not constitute legal representation of you or Auburn University or its constituents by the Mississippi-Alabama Sea Grant Legal Program. It represents our interpretation of the relevant laws and cases.

Anti-trust law is fact-dependent, and how a court will ultimately rule is based on the individual facts of each case. That said, there are some basic rules under anti-trust law that are relevant to your questions and are discussed in turn below. In addition, anti-trust law depends on whether the activities will take place solely in one state or across state lines, the latter of which will implicate federal law.

The model would take into account the 24-month production period for catfish and how the price and amount of feed used during this time can be used to determine a 24-month weighted feed price. The model's weighted feed price can be inserted into an enterprise budget to determine the cost of producing a single catfish over time. You stated that you could place this estimated cost

of production onto your Auburn University website and update it monthly, and that producers and processors could choose whether to refer to it to see how feed costs are affecting the total cost of producing catfish. The use of the model on your website could raise questions or concerns about price fixing.

In-State Catfish Activities

Under Alabama law, price fixing is prohibited and punishable by a fine. The law states that if "any person or corporation who engages or agrees with other persons or corporations or enters, directly or indirectly, into any combination, pool, trust, or confederation to regulate or fix the price of any article or commodity to be sold or produced within" Alabama, that person or corporation, on conviction, will face a fine of $500 to $2,000.[1]

Alabama has provided several exceptions to this rule, including an exception for certain activities of the catfish industry. Section 2-8-270 of the Alabama Code declares that "in the interest of the public welfare" catfish producers are both encouraged and authorized to work with and cooperate "with handlers, dealers, processors and distributors of catfish feed," as well as with the Commissioner and State Board of Agriculture and Industries. These parties are "authorized and encouraged to act jointly and in cooperation" to promote and stimulate "the increased and efficient production, distribution, use and sale of catfish and catfish products" through "research, education, advertising and other methods."[2] Moreover, Section 2-8-271 states that "[n]o association, meeting or activity undertaken in pursuance of the provision of this article and intended to benefit the Alabama catfish industry shall be deemed illegal or in restraint of trade." Section 2-8-284 states that the provisions do not cover occasional sales between producers.

Mississippi law prohibits price fixing as well. Section 75-21-1 prohibits "a combination, contract, understanding or agreement, expressed or implied, between two or more persons, corporations or firms or associations or persons or between any one or more of either with one or more of the others, when inimical to public welfare and the effect of which would be…(b) to limit, increase or reduce the price of a commodity." If a corporation, partnership, individual, other association or person engages in such activity, he/she/it will be "guilty of a conspiracy to defraud" and upon conviction will be subject to a fine of $100 to $5,000 for a first offense and a fine of $200 to $10,000 for any subsequent offenses.[3] The guilty party can also be enjoined from further engaging in the prohibited acts.[4]

Mississippi also exempts certain seafood activities. Section 75-21-5 states that Chapter 21 of Mississippi law (Trusts and Combines in Restraint or Hindrance of Trade) will not "prevent or penalize agreements entered into between canners or catchers of seafood products or between canners and catchers of such products for the advancement and welfare of the seafood industry in Mississippi." However, to qualify for this exception, the Mississippi Seafood Commission must

[1] ALA. CODE § 8-10-1.
[2] ALA. CODE § 2-8-270.
[3] MISS. CODE § 75-21-1.
[4] *Id.*

approve any agreement made between canners or catchers or canners and catchers of seafood products by an order entered in the minutes of the commission.[5]

Interstate Catfish Activities

Under federal law, price fixing is governed by Section 1 of the Sherman Act, which states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[6] A Section 1 violation is a felony. Upon conviction, a corporation will be subject to a fine up to $100,000,000, while a person faces a fine of up to $1,000,000. The court also has the discretion to subject the violator to up to 10 years in prison.

Section 1 prohibits a concerted action by two or more separate entities that restrains trade. In interpreting Section 1 of the Sherman Act, the U.S. Supreme Court has determined that Section 1 only applies to unreasonable restraints.[7] A restraint is generally seen as an action that has an actual or threatened anticompetitive impact. To bring a successful Section 1 claim under the Sherman Act, a plaintiff generally has to prove that:

(1) the defendants had an agreement, whether through a contract, combination or conspiracy;
(2) the agreement resulted in an unreasonable restraint on trade in the relevant market; and
(3) the plaintiffs were injured as a result.[8]

The courts have developed two separate tests to determine whether an action violates Section 1 of the Sherman Act. The first test is the "rule of reason" analysis, where the court will look at "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[9] The purpose and aim of the rule of reason is to distinguish restraints that have anticompetitive effects that harm consumers and restraints that actually stimulate competition in the best interest of the consumer.[10] The court will look at "appropriate factors" that may include information specific to the business, the market power of the business and the history, nature and effect of the restraint.

However, courts have not applied the rule of reason to all restraints and have found certain restraints to be unlawful per se. "The per se rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work."[11] The courts have limited per se rules to restraints that almost always restrict competition, decrease output, possess anticompetitive effects and have no redeeming virtue.

In determining whether to apply the rule of reason or a per se rule, the courts have also treated certain types of price restraints differently. The U.S. Supreme Court has refused, for example, to

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[5] Miss. Code § 75-21-5.
[6] 15 U.S.C.A. § 1.
[7] *Leegin Creative Leather Products v. PSKS, Inc.*, 551 U.S. 877, 885 (2007).
[8] *Omnicare, Inc. v. Unitedhealth Group Inc.*, 629 F.3d 697, 705 (7th Cir. 2011).
[9] *Id. (quoting Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977)).
[10] *Id.* at 886.
[11] *Id.*

apply a per se rule to vertical price restraints that set a minimum resale price.[12] On the other hand, the Court has determined that horizontal price restraints, which involve agreements between two or more competitors to fix prices, are per se unlawful since these agreements tend to lack any "redeeming competitive rationales."[13]

Establishing a Section 1 Sherman Act Claim

As stated above, to bring a successful Section 1 claim under the Sherman Act, a plaintiff first has to prove that an agreement existed between the defendants. Further, if the plaintiff can establish that the defendants formed an agreement to fix prices, then the case will likely be examined under the per se rule and not the more lenient rule of reason. Unfortunately, the law is not clear on either of these issues.

If multiple processors used the model on your website, there is the potential that someone might claim the processors engaged in price-fixing. Any potential challenger would have to prove that there was an agreement between the processors to fix prices. A plaintiff bringing a Section 1 Sherman Act claim can use direct and circumstantial evidence to show that the defendants had an illegal agreement.[14] Examples of direct evidence include an admission by a conspiracy member or incriminating correspondence between the parties.

In a recent case, a court found that the plaintiffs' evidence did not amount to direct evidence of an illegal agreement. In the case, an independent company would review the defendant insurance companies' (the "Insurers") chiropractic claims to determine what were "reasonable and necessary expenses" using an independently published fee survey that contained national chiropractic fees, including information on "fees at or below which 80% of area chiropractors charge."[15] The company would usually recommend that the Insurers shouldn't pay chiropractic bills that exceeded the eightieth percentile listed in the fee survey, and the Insurers usually followed these recommendations. The plaintiffs tried to argue that these actions were direct evidence of illegal agreements between the company and the Insurers.[16] The court ruled that there was insufficient direct evidence showing that the defendants had an agreement because there was no evidence that the arrangement between the companies had "facilitated a conspiracy among the Insurers to restrain trade" and the arrangement by itself was not enough to establish an illegal agreement.

If a potential challenger did not have direct evidence of an illegal agreement between the processors to fix prices, the claimant could use circumstantial evidence to show the existence of an improper agreement. Although plaintiffs can also use circumstantial evidence to establish an agreement, cases without direct evidence can be hard to prove. To prove an illegal agreement, the circumstantial evidence must tend to exclude the possibility that the defendants were acting independently and not conspiring.[17] In other words, "if it is as reasonable to infer from the

[12] *Leegin Creative Leather Products v. PSKS, Inc.*, 551 U.S. 877 (2007).
[13] *Mitchael v. Intracorp*, 179 F.3d 847, 851 (10th Cir. 1999).
[14] *Mitchael v. Intracorp*, 179 F.3d 847, 851 (10th Cir. 1999).
[15] *Id.* at 851.
[16] *Id.* at 856.
[17] *Id.* at 858.

evidence a price-fixing conspiracy as it is to infer permissible activity," the claim will fail.[18] Therefore, ambiguous conduct that could either be permissible or illegal conduct is insufficient to establish that the defendants were conspiring together.[19] Circumstantial evidence can include the exchange of price information or consciously parallel acts by the defendants, which is known as conscious parallelism.

In the 1990s, food producers brought a price-fixing claim against catfish processors for actions between 1981-1990 that contained both direct and circumstantial evidence. The plaintiffs claimed that the defendants had agreed to set minimum catfish and catfish product prices and to adhere to these minimum prices, and that these agreements led to artificially high and non-competitive prices.[20] In reviewing the merits of the plaintiffs' claims, the court stated that price fixing is a per se Sherman Act violation and ruled that the rule of reason was inapplicable.[21] The court found that meetings of representatives of the defendants were the best direct evidence of an illegal agreement. The plaintiffs provided evidence of about ten meetings, including information on where and when the meeting was held, who attended and what price discussions occurred at the meeting. "[A] voluminous record of telephone calls and facsimile transmissions between the various defendants" also swayed the court. The court reasoned that even though the plaintiffs could not provide details of all the calls, the evidence of the communications was telling and "[a]t the least, the sheer number of contacts between competitors, when with all of the other available evidence, is circumstantial evidence" of an agreement.[22] The defendants decided to settle these claims with the plaintiffs outside of court for around $27 million.

Exchange of Price Information

The possibility also exists that someone might claim the price model on your website is an exchange of price information among the processors. Plaintiffs can use the exchange of price information as circumstantial evidence of an agreement to fix prices. On its own, the exchange of price information may be insufficient evidence to actually establish an agreement to fix prices, but a court will review the facts of each case.[23] The U.S. Supreme Court found that the exchange of price information in the corrugated container industry did amount to an illegal price fixing agreement. In the case, the defendants would exchange information concerning the price they most recently charged or quoted to a customer when a competitor requested the price information, with the expectation that the other parties would give similar information in the future when requested to. Therefore, the agreement between the parties was this reciprocal exchange of prices when one of the other of the parties requested it, resulting in stabilized and decreased prices.[24]

Stating that "interference with the setting of price by free market forces is unlawful per se," the court indicated that exchanging price information in some markets might not affect competitive

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[18] *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 203 F.3d 1028, 1032 (8th Cir. 2000).
[19] *Id. (quoting Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publications*, Inc., 63 F.3d 1540, 1556 (10th Cir. 1995).
[20] *In re Catfish Antitrust Litig.*, 908 F.Supp. 400, 403 (N.D. Miss. 1995).
[21] *Id.* at 405.
[22] *Id.* at 405.
[23] *U.S. v. Container Corp. of Am.*, 393 U.S. 333 (1969).
[24] *Id.* at 336.

prices. However, the court found that the exchange of information did affect prices in the corrugated container industry, where the prices depend on the prices of your competitors and which has a fungible product, inelastic demand and relatively few sellers. The court ruled that "the exchange of price information has had an anticompetitive effect in the industry, chilling the vigor of price competition, and that "[p]rice is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition."[25]

In *Omnicare, Inc. v. Unitedhealth Group, Inc.*, the plaintiff Omnicare claimed that Unitedhealth Group, Inc. and Pacificare violated Section 1 of the Sherman Act by coordinating their negotiations with Omnicare to depress prices.[26] The court ruled that Omnicare was unable to show that there was an agreement between the defendants to act together as horizontal competitors and restrain trade. In its analysis, the court examined evidence that the defendants had exchanged pricing information during the due diligence period of their merger. The information exchanged between the two was often general or sample information that was at times restricted by the companies' attorneys. In addition, a pricing report produced by an actuary for PacifiCare also contained general information and was reviewed by both parties' lawyers to remove any sensitive language. The court found that Omincare's evidence was only average and generalized pricing information that the court believed was "more consistent with independent than collusive action."[27]

Conscious Parallelism

Plaintiffs can also use conscious parallelism to show that an agreement existed between the defendants. Conscious parallelism is the process through which competitors in a concentrated market choose to share monopoly power by setting prices at a "profit-maximizing, supracompetitive level by recognizing their shared economic interests."[28] Thus, if multiple processors used the model on your website in calculating their prices, there is the potential that someone would try to show an illegal agreement with the processors' parallel behavior.

By itself, conscious parallelism does not establish an antitrust violation, especially when a fungible product is involved. A plaintiff must show that additional information exists to establish the illegal agreement, as well as exclude the possibility that the accused acted independently.[29] This additional information, known as plus factors, may include evidence of a motive or need to act in a parallel fashion, a high level of communication between the competitors or that the accused conspirators acted against their business interests.

The plaintiffs in *Mitchael v. Intracorp*, discussed above, tried to show an agreement based on the consistency of the Insurers' behavior and the independent company's review.[30] The court ruled that the plaintiffs did not provide sufficient evidence of the existence of plus factors since the plaintiffs did not sufficiently show the defendants' motive or need to conspire and work

[25] *Id.* at 338.
[26] 639 F.3d 697, 704 (7th Cir. 2011).
[27] *Id.* at 720.
[28] *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.,* 203 F.3d 1028, 1032 (8th Cir. 2000) (*quoting Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993)).
[29] *Id.* at 1032-33.
[30] *Mitchael v. Intracorp*, 179 F.3d 847, 859 (10th Cir. 1999).

interdependently. Further, the court decided that the plaintiffs did not prove their economic theory that defendants conspired to reduce costs, stabilize prices and avoid losing clients since the agreement could actually lead to some chiropractors raising prices to the 80% level. The court concluded that the plaintiffs at most showed "that the Insurers shared a common concern about chiropractic cost containment, and that, at times, some of them shared information about how each one individually handled chiropractic claims." Further the court found that this evidence did not tend "to exclude the possibility that the defendants acted independently out of a legitimate and reasonable concern to control chiropractic costs."[31]

In a case involving the cattle industry, the sellers of cattle brought a Section 1 Sherman Act claim against meat packers and the publisher of a national pricing sheet, claiming that the defendants agreed to use the pricing sheet to depress the price of cattle.[32] The court rejected the plaintiffs' theory of conscious parallelism, ruling that on its own the pricing sheet was not enough to establish a price-fixing claim. The court reasoned that the plaintiffs had not shown that the defendants had acted in a parallel fashion or offered evidence that excluded the possibility that the defendants were acting independently. In particular, the court stated that the claim was flawed because the plaintiffs had not accounted for the additional factors that might have influenced the defendants' pricing decisions, including the meat packers' individual business needs, the temporary conditions of the local market or price competition among the defendants.

In a case involving the North American potash industry, the court had to decide whether potash producers agreed to stabilize and raise prices, or whether the raised prices were simply the result of independent actions by the producers and governmental action by the United States and Canada.[33] The potash industry in North America is an oligopoly, where prices tend to be higher and change independently of supply and demand, which often results in producers charging the same price to keep their market share.[34] The plaintiffs based their Sherman Act case on the theory of conscious parallelism, arguing that the fact that the defendant producers' prices were about equal even though they had different production costs and that the producers quickly met the price change of another producer showed there was an illegal agreement.

First, the plaintiffs tried to establish a plus factor based on inter-firm communications between the producers and argued that "the large and parallel price increases together with nearly simultaneous price verifications" created an inference of a conspiracy. The plaintiffs offered evidence of about three dozen price verifications over more than a seven-year period between employees of the different producers. The court ruled that the evidence was ambiguous and insufficient since the price verifications were on past sales and not future prices, and the plaintiffs had not shown how the communications resulted in price increases. The court also concluded that the plaintiffs' evidence didn't support their claim that an agreement was formed to maintain and stabilize prices, since price verifications are expected in an oligopoly and the verifications were for completed sales, sporadic over a seven-year period and not always given.[35]

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[31] *Id.* at 860.
[32] *In re Beef Industry Antitrust Litig. MDL Docket No. 248*, 907 F.2d 510 (5th Cir. 1990).
[33] *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 203 F.3d 1028 (8th Cir. 2000).
[34] *Id.* at 1031.
[35] *Id.* at 1034-35.

The court was also swayed by what it found as "strong evidence of independent action."[36] This included the fact that producers were losing millions due to historically low prices and that Canadians producers were overproducing potash. These factors led to intervention by both the U.S. government, which required expensive bonds for potash imports and reached a Suspension Agreement with producers that set minimum prices, and the Canadian government, which passed legislation that set and prorated potash production. Under the circumstances, the court concluded, "it would have been ridiculous for the remaining companies to not also raise their prices in parallel fashion."[37]

The plaintiffs also tried to show that the defendants acted against their economic interest. While acting against their economic interest can be a plus factor, "where there is an independent business justification for the defendant's behavior, no inference of conspiracy can be drawn."[38] As evidence as acting against their economic interest, the plaintiffs identified the defendants' uniform participation in a Suspension Agreement, since low tariff producers could have cut prices and gained a larger market share instead of joining the agreement. Since the agreement also allowed these producers to benefit from increased revenues and more certain markets, the court concluded that the Suspension Agreement was not adequate to establish that the producers acted against their economic interests.

In conclusion, if the processors chose to use the model on your website to set their prices, there is the potential that someone might challenge their use of the model as an illegal agreement to fix prices. In order to bring a claim, any potential plaintiff would have to show that the processors agreed to fix prices and did not independently decide to use your model. The claimant could use direct or circumstantial evidence to prove his or her claim, though cases lacking direct evidence of an agreement are harder to prove. The circumstantial evidence would need to exclude the possibility that the processors were acting independently. Further, even if a claimant were able to establish that an illegal agreement existed, the claimant would still have to establish the remaining elements of a Section 1 Sherman Act claim. In order to be successful, the claimant would have to show the agreement resulted in an unreasonable restraint on trade in the relevant market and that the claimant was injured as a result.

I hope you have found this information helpful. If you have follow-up questions or concerns, please let me know.

Sincerely,

Catherine M. Janasie

Catherine M. Janasie
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[36] *Id.* at 1034.
[37] *Id.* at 1034.
[38] *Id.* at 1037.