

Inferring Agreement to Rig Bids from Circumstantial Evidence

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Antitrust and Collusion in the US

- Before 1890
- After 1890
 - Stronger detection and sanctions
 - Stronger concealment
- Issue for Antitrust
 - Basis for inferring agreement

Agenda

- US Doctrine Status Quo
- Circumstantial Proof
- Personal Views Only

Joint Work

- Bob Marshall
- Leslie Marx
- Alison Jones
- Damon Anderson
- Emma Cronenweth
- Rob Anderson

Resources

- Marshall & Marx, **The Economics of Collusion** (MIT Press 2012)
- Kovacic, Marshall, Marx & White, *Super Plus Factors and Agreement in Antitrust Law*, 110 **Michigan Law Review** 393 (2011)

Marshall/Marx Methodology

- Cartel Architecture and Operations
- Examination of Past Cases
 - Agency decisions
 - Published case studies
 - Own consulting

US Doctrine Fundamentals

- Sufficient Proof of Agreement
 - Direct
 - Circumstantial
- Parallel Conduct Alone: Insufficient
- Parallel Conduct Plus other Proof
 - “Plus Factors”

Plus Factors

- Industry Structure
- Firm Conduct
 - Past collusion
 - Communications
 - Complexity
 - Irrationality

Traditional Application

- Checklist
- Tick the Box
- Are There Enough?

Emerging Approach

- Link Factors to Cartel Tasks
- Form Consensus
- Detect Deviations
- Punish Cheaters
- Suppress External Threats
 - Buyers, suppliers, mavericks

Super Plus Factors

- Close Connection to Cartel Behavior
- Linked to Cartel Performance Tasks

Super Plus Factors and Bid Rigging

- Extensive Communications
- Extensive Subcontracting
- Broad Pattern of Refusals to Deal
- Sales Force Incentives