

Einer Elhaug

Foul Smoke

The conventional wisdom is that those who favor free markets should disfavor the current multi-billion dollar tobacco litigation. The conventional wisdom is wrong. For lost in the welter of news articles is the fact that plaintiffs in many of the tobacco cases allege an antitrust conspiracy that, if proven, means the current state of the cigarette market resulted not from a free market, but from a fundamental and devious interference with the free market.

There are two product features sellers can conspire about: price and quality. Most antitrust conspiracies are about price. But conspiracies about quality are also covered by antitrust law. This is because we are entitled to both the product price and quality that would be produced by markets unhampered by anti-competitive seller conspiracies.

The tobacco litigation alleges a conspiracy to fix product quality. Specifically, it alleges that for decades cigarette manufacturers have agreed among themselves not to compete on product safety. This agreement allegedly included both an agreement not to independently market safer tobacco products and an agreement to withhold product safety information. Obviously, these two parts of the alleged conspiracy are linked: If a firm cannot advertise the relative safety of its cigarettes, there is not much point in it investing money to make safer cigarettes.

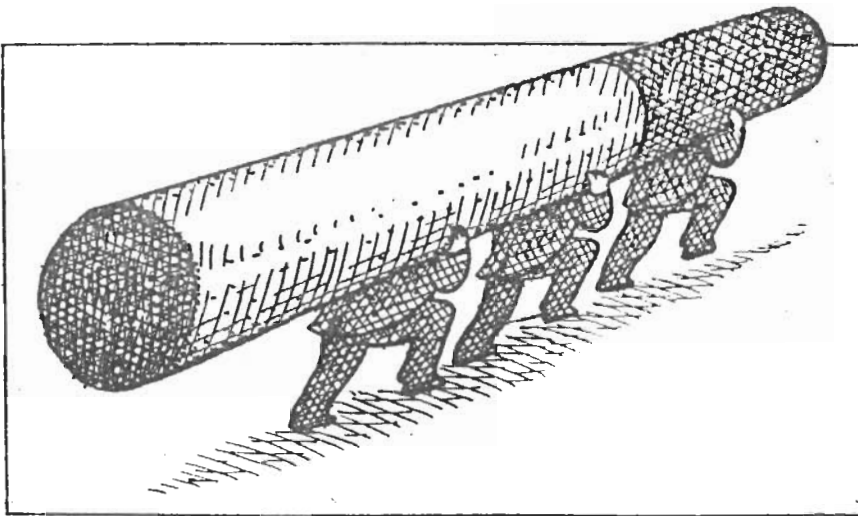
Why might manufacturers ever agree to fix cigarette quality in this way? For the same reason firms sometimes agree to fix prices: to prevent individual firms from pursuing their individual interest in ex-

panding market share by engaging in costly competition. To prevent them, in short, from competing by raising quality, just as price-fixing prevents them from competing by lowering price.

Either price or quality competition can, after all, eat away industry profits. Remember the airline industry before deregulation. The government set prices at high levels. But because airline quality was not completely regulated, airlines tended to engage in costly quality competition. They offered better meals and more frequent flights with more empty seats. In the end, such quality competition ate away all the profits from the excessively high prices.

Obviously, one does not enter into agreements expecting them to have no effect. Thus, if this conspiracy is proven, the cigarette manufacturers themselves must have thought that without their agreement individual cigarette producers would have made safer cigarettes in an effort to expand their individual market share. Further, if individual cigarette makers had sold safer cigarettes, they would have also had an incentive to advertise the true harm of their rivals' cigarettes.

And, indeed, the complaints in the tobacco litigation recount evidence that some individual cigarette makers did in fact develop safer cigarettes, but refrained from selling them because of this antitrust conspiracy. Instead, cigarette makers held these less carcinogenic cigarettes off the market, keeping them in reserve to retaliate in case other manufacturers breached the conspiracy by competing on product safety. Likewise, the complaints recount



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evidence that cigarette makers developed valuable product information on cigarette safety, but withheld it from the market.

The social tragedy is that without this conspiracy the free market might have produced what government regulation has so far been unable to provide: better information, fewer smokers and safer cigarettes. Instead, the cigarette industry has been one of the few industries to show no improvement in product safety for decades.

Compare the cigarette industry to, say, the car industry. Automobile firms vigorously **compete** on safety features, and advertising about safety differences is ubiquitous. **Volvo** talks endlessly about the strength of its doors in side collisions.

Mercedes used to brag about its anti-lock brakes before they became an industry standard.

There is nothing comparable in the cigarette industry. True, cigarette makers have marketed cigarettes that are filtered, low tar and low nicotine. But they have never advertised these cigarettes as less carcinogenic or less addictive, such advertising being allegedly foreclosed by both the conspiracy and the true facts. For the complaints recourt evidence that clever product design in fact made filtered, low-tar and low-nicotine cigarettes more dangerous and addictive than regular cigarettes, meaning their introduction was not genuine competition on product safety at all.

Note that these antitrust claims are not vulnerable to the cigarette makers' favorite defense: that everyone knows cigarettes are carcinogenic and assumed the risk by smoking them. Even if this were true (and much information was distorted or withheld), what antitrust entitles us to is not just the right to make price-quality trade-offs when buying but the right to have the ideal price-quality trade-offs available to us through competition. Just as it would be no defense to a price-fixing conspiracy that buyers know they are paying too much, so too it is no defense to a quality-fixing conspiracy that buyers know the quality is too low.

After all, if automakers conspired to make no car safer than a Yugo, they could not defend themselves by saying that buyers know that cars in general (or Yugos in particular) are unsafe and must regard such risks as outweighed by the benefits of driving. For the conspiracy would be taking away from us the right to choose the safer cars that competition would produce. Likewise, smokers are entitled not to be saddled with a restrained market where all they can buy are Yugo cigarettes.

Such short-circuiting of the competitive process is precisely what antitrust law is meant to redress. And just what adherents of the free market should vigorously oppose.

The writer is a professor at Harvard Law School and counsel for health fund plaintiffs in tobacco cases in several states.