A Knowledge Theory of Tacit Agreement

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Agreement Under the Sherman Act

• Section 1: “Every contract, combination . . . or conspiracy . . . in restraint of trade . . . is declared to be illegal.”

• Section 2: “Every person who shall . . . combine or conspire with any other person or persons, to monopolize any part of the trade . . . shall be deemed guilty of a felony . . . .”
Agreement Under the Sherman Act

• Explicit Agreement
  – Exchange of explicit assurances of common actions

• Inferred Explicit Agreement
  – Agreement inferred from indirect, circumstantial evidence of concerted action
  – But still an explicit agreement

• Tacit Agreement?
  – Agreement formed by conduct?
Agreement Under the Sherman Act

Supreme Court:

“The crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, express or \textit{tacit}.”

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 553 (2007)
Tacit Agreement

• In at least three scenarios, courts have held that certain conduct could constitute a Sherman Act agreement:
  – Parallel conduct preceded by suggestive communications
  – Hub-and-spoke conspiracy
  – Parallel conduct with facilitating practices
Tacit Agreement

- Parallel conduct preceded by suggestive communications
  - US v. Foley, 598 F.2d 1323 (4th Cir. 1979)
    - At a dinner each defendant stated his or her intention to raise real estate commission to 3%, regardless of what others would do.
    - The discussions also referred to an earlier unsuccessful effort by one defendant to raise commission.
    - Defendants raised commissions afterwards.
  Court: sufficient for a jury to find a conspiracy.
Tacit Agreement

- Hub-and-spoke conspiracy
  - In a letter addressed to all defendant motion picture distributors, defendant movie theatre group demanded restrictions upon subsequent-run movie theatres.
  - All defendant distributors independently complied with the demand.

Court: sufficient to establish an unlawful conspiracy among the distributors.
Tacit Agreement

• Parallel conduct with facilitating practices
  – The *Petroleum Products* case, 906 F.2d 432 (9th Cir. 1990)
    • Defendant oil companies publicly posted dealer prices and discounts.
    • Court: Defendants’ price dissemination practices were probative of a conspiracy to fix gasoline prices.
    • “The public dissemination of such information served little purpose other than to facilitate interdependent or collusive price coordination.”
Existing Approaches to Tacit Agreement

- **Minimalist (e.g., Bork)**
  - Rejects the concept of tacit agreement
  - Limits illegal agreement under the Sherman Act to “explicit and detectable agreements”
- **Expansive (e.g., Posner)**
  - Equates interdependent conduct with tacit agreement
- **Middle-Ground (e.g., Bill Page)**
  - Ascertains tacit agreement based on whether the communication serves efficiency purposes.
Existing Approaches to Tacit Agreement

• Problem with existing approaches:
  – Ignores *conspiratory intent* of the alleged co-conspirators
  – So rivals could be held criminally liable for something that’s completely outside of their control (e.g., whether third parties happen to benefit from their communications)
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• Proposed theory of tacit agreement:
  – Define tacit agreement as an agreement formed by non-explicit communications (including actions and non-explicit verbalized communications) that enable co-conspirators to acquire knowledge of one another’s conspiratory intent.
  – Conspiratory intent as the yardstick for distinguishing tacit agreements from uncoordinated actions.
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• Proposed theory of tacit agreement:
  – The circumstances of the non-explicit communication must be such that the only reasonable explanation is that it is made to convey the conspiratory intent of the co-conspirators.
• Tacit offer
• Tacit acceptance
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- Proposed theory of tacit agreement:
  - Example: A German auction of spectrums. By rule, each new bid had to be at least 10% higher than the previous bid. Firm A bid DM 20 million/MHz on Blocks 1-5 and DM 18.18 million/MHz on Blocks 6-10. Firm B bid DM 20 million/MHz on Blocks 6-10 and did not bid on Blocks 1-5.
  - Is this a tacit agreement?
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• Proposed theory of tacit agreement:
  – Tacit offer?
    • Are there alternative explanations for why Firm A bid DM 20 million/MHz on Blocks 1-5 and DM 18.18 million/MHz on Blocks 6-10, other than inviting a conspiracy?
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• Proposed theory of tacit agreement:
  – Tacit offer?
    • Are there alternative explanations for why Firm A bid DM 20 million/MHz on Blocks 1-5 and DM 18.18 million/MHz on Blocks 6-10, other than inviting a conspiracy?
  – Tacit Acceptance?
    • Are there alternative explanations for why Firm B bid DM 20 million/MHz on Blocks 6-10 and did not bid on Blocks 1-5, other than accepting the conspiratory offer?
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• Proposed theory of tacit agreement:
  – The evidentiary standard for determining a tacit agreement will depend on whether it is a criminal prosecution or civil litigation.
    • Criminal: Beyond a reasonable doubt
    • Civil: preponderance of evidence
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• Proposed theory of tacit agreement:
  – Model jury instruction for criminal prosecution:

  “Would the party’s action/communication make a reasonable person believe, beyond a reasonable doubt, that its true intent was to offer/accept a conspiracy?”
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• Proposed theory of tacit agreement:
  – After an agreement is ascertained based on intent, the next inquiry will be whether the agreement is illegal.
  – Efficiency could still be taken into account in that inquiry.
Applications of the Knowledge Theory

• Conscious parallelism
  – The action/communication is in the ordinary course of the rival’s business (e.g., gas stations posting their prices).
  – That would not allow the recipients of the communication to acquire knowledge of the sender’s conspiratory intent.
Applications of the Knowledge Theory

• Parallel conduct preceded by suggestive communications (e.g., *Foley*)
  – One has to determine if the circumstances of the suggestive communications are such that the only reasonable explanation is that they are sent to convey conspiratory intent.
  – One also has to determine if there are reasonable explanations for the subsequent parallel conduct, other than accepting the conspiratory offer.
Applications of the Knowledge Theory

• Facilitating practices
  – One has to determine whether the facilitating practices lack efficiency justifications.
  – If so, it demonstrates that the only reason why the practices are adopted by rivals is to allow rivals to acquire knowledge of one another’s conspiratory intent.
  – So efficiency (or the lack thereof) is still relevant, but it goes towards establishing parties’ conspiratory intent.