

A Knowledge Theory of Tacit Agreement

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ABA/NYU Next Generation of Antitrust Scholars Conference
January 26, 2018

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 *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
 - Interstate Circuit, Inc. v. US, 306 U.S. 208 (1939).
 - 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)

A Knowledge Theory of Tacit Agreement

- 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.

A Knowledge Theory of Tacit Agreement

- 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

A Knowledge Theory of Tacit Agreement

- 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?

A Knowledge Theory of Tacit Agreement

- 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?

A Knowledge Theory of Tacit Agreement

- 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?

A Knowledge Theory of Tacit Agreement

- 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

A Knowledge Theory of Tacit Agreement

- 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?”

A Knowledge Theory of Tacit Agreement

- 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.