The Sedona Conference Journal

Volume 5 2004

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Recommended Citation: Daniel R. Shulman , *Williamson Oil v. Philip Morris: Whatever Happened to Jury Trials?*, 5 SEDONA CONF. J. 81 (2004).

WILLIAMSON OIL V. PHILIP MORRIS: WHATEVER HAPPENED TO JURY TRIALS?

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I. INTRODUCTION

For the 2002 Sedona Antitrust Conference, I provided a paper entitled "Proof of Conspiracy in Antitrust Cases and the Oligopoly Problem," subsequently published in the *Sedona Conference Journal*, Volume 4, Fall 2003. Here, I will address what I believe to be the one significant decision in this area since my last paper, *Williamson Oil Co., Inc. v. Philip Morris USA*, 346 F.3d 1287 (11th Cir. 2003). The *Williamson Oil* case presents, either expressly or implicitly, virtually all of the significant issues connected with proof of conspiracy in an oligopoly setting. Hereafter, this paper will review the decision itself and comment on the issues it raises.

II. THE DECISION: THE UNDERLYING CONTROVERSY

This was an action brought by a class of cigarette wholesalers against Philip Morris, R.J. Reynolds, Brown & Williamson, and Lorillard. The claim was that the cigarette manufacturers conspired between 1993 and 2000 to fix wholesale list prices for cigarettes. The wholesalers relied entirely on circumstantial evidence in support of their claim. The district court granted summary judgment in favor of the manufacturers, and the Eleventh Circuit affirmed on appeal.

As noted by the Eleventh Circuit, "The modern American tobacco industry is a classic oligopoly. Between 1993 and 1999, appellees—the nation's four largest cigarette manufacturers—along with Liggett Group, Inc., manufactured more than 97% of the cigarettes sold in the United States." 346 F.3d at 1291. During the 1990s, a price gap arose in the industry between premium brands, such as Marlboro, and discount or generic cigarettes. Philip Morris, the market leader with a share of 42 to 50 percent, was primarily a manufacturer of premium brands and hostile to the price competition from discount cigarettes. In 1992 and 1993, Philip Morris tried unsuccessfully to increase the price of its discount cigarettes, but on both occasions rescinded its price increase when its competitors did not follow. 346 F.3d at 1291-92.

Following these two unsuccessful efforts to increase prices for discount cigarettes, Philip Morris announced on April 2, 1993, that it was drastically cutting prices for its leading brand, Marlboro, with a 21 percent market share, and "forgoing price increases on other premium brands 'for the foreseeable future.'" 346 F.3d at 1292. This event became known as "Marlboro Friday." *Id.* The effects of the Philip Morris action were to shift market

share from discount cigarettes to Marlboro and other premium brands, and to send a message to the industry that Philip Morris "was willing to take drastic competitive measures (indeed, to sacrifice profits) in order to protect the market share of its flagship brand." *Id.* "Finally, it set off a price war" among the cigarette companies, as competitors matched Philip Morris's price reduction. *Id.*

After roughly six months of competitive carnage, the manufacturers began raising wholesale prices and continued to do so through early 2000. From May of 1995 to January of 2000, there were 11 price increases for cigarettes at wholesale, in which all of the defendants joined. 346 F.3d at 1293-94. The claim of the wholesalers was that these price increases resulted from conspiracy, rather than from the normal operation of competitive forces. In support of their claim, the wholesalers relied on numerous plus factors that accompanied the parallel conduct of the manufacturers. The Court of Appeals reviewed and rejected each of these plus factors, as will be discussed more fully hereafter.

In response to the wholesalers' accusations, in addition to denying conspiracy and claiming their conduct to be mere conscious parallelism typical of an oligopoly, the cigarette companies raised three primary defenses. First, they showed that although wholesale price competition may have diminished, competition increased at the retail level during the period of the alleged conspiracy. "Indeed, during the alleged conspiracy period, the manufacturers spent on retail competition more than twice the amount the wholesalers claim to have been overcharged." 346 F.3d at 1294. Second, the manufacturers showed that not until 1998 did wholesale prices rise to the level that had prevailed before Marlboro Friday. Third, the cigarette companies demonstrated "that significant market share shifts occurred within the tobacco industry during the alleged conspiracy period." 346 F.3d at 1295. The Court summarized the defendants' position as follows:

> Distilled to its essence, the argument espoused by PM, RJR, B&W and Lorillard is that in an oligopoly, reason and economic rationality often dictate parallel pricing behavior, and that the evidence presented by the class is perfectly consistent with such "conscious parallelism." The manufacturers further assert that various acts on which appellants do not focus, or that the class mischaracterizes, established conclusively that appellees' behavior from 1993 through 2000 is dramatically inconsistent with any collusive behavior. Accordingly, they say, even if appellants had established the existence of a plus factor, and thus created an inference of conspiracy, that inference has been fully rebutted. [346 F.3d at 1298.]

III. THE DECISION: THE ELEVENTH CIRCUIT'S ANALYTICAL FRAMEWORK

Much of the Eleventh Circuit's discussion, after stating the controversy, concerned the method of analysis to be used on a motion for summary judgment. Initially, the Court acknowledged the difficulty of distinguishing between illegal price fixing and mere conscious parallelism, which does not violate the Sherman Act according to the Eleventh Circuit. The Court also observed that "'it is only in rare cases that a plaintiff can establish the existence of a conspiracy by showing an explicit agreement; most conspiracies are inferred from the behavior of the alleged conspirators,' and from other circumstantial evidence (economic and otherwise), such as barriers to entry and other market conditions." 346 F.3d at 1299-1300, quoting from *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 569 (11th Cir. 1998), and *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1573 (11th Cir. 1991).[1]

1 The Court also conceded, "In the unusual case where the plaintiff is able to muster direct evidence of price fixing, summary judgment is categorically inappropriate." 346 F.3d at 1300.

Parsing the Supreme Court's decisions in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), the Eleventh Circuit required that "inferences of a price fixing conspiracy drawn from circumstantial evidence [must] be reasonable" to survive summary judgment, and the plaintiff "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." 346 F.3d at 1300. From these well-established, albeit somewhat murky, principles, the Eleventh Circuit then launched into the test it had established to evaluate whether the plaintiffs' proof tended to exclude the possibility of independent conduct.

The Eleventh Circuit announced the test it had developed for avoiding summary judgment, which is that plaintiffs "must demonstrate the existence of 'plus factors' that remove their evidence from the realm of equipoise and render that evidence more probative of conspiracy than of conscious parallelism." 346 F.3d at 1301. The Eleventh Circuit defined a plus factor as "any showing . . . that 'tends to exclude the possibility of independent action.'" *Id.*

The Court then went on to outline a three-step process for resolving a defense motion for summary judgment in a price-fixing case:

> In short, there are three steps to the summary judgment analysis in the price fixing context. First, the court must determine whether the plaintiff has established a pattern of parallel behavior. Second, it must decide whether the plaintiff has demonstrated the existence of one or more plus factors that "tends to exclude the possibility that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 588, 106 S.Ct. at 1356 (internal punctuation and citation omitted). The existence of such a plus factor generates an inference of illegal price fixing. Third, if the first two steps are satisfied, the defendants may rebut the inference of collusion by presenting evidence establishing that no reasonable factfinder could conclude that they entered into a price fixing conspiracy.
>
> In undertaking this analysis, the district court is obligated to give the price fixing plaintiff(s) "'the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean of scrutiny of each.'" [*Id.*]

The Eleventh Circuit also provided a statement of conditions that may disqualify a plus factor from having probative value. Specifically,

> . . . a statement could not constitute a plus factor— *i.e.*, could not be said by a reasonable factfinder to tend to exclude the possibility [of] independent behavior or to establish a price fixing conspiracy—(1) if it required the jury to "engage in speculation and conjecture to such a degree as to render its finding 'a guess or mere possibility,'" . . . or (2) if to infer conspiracy from the evidence the jury necessarily would engage in "fallacious reasoning." [Citation omitted.] Moreover, "if [appellants'] theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted." [346 F.3d at 1302.]

These tests are to be applied with respect to each alleged plus factor.

The Eleventh Circuit rejected as mere semantic bickering the plaintiffs' argument that "the evidence constituting" a plus factor "must merely 'tend to establish' a conspiracy, as opposed to 'tend to exclude' independent action." 346 F.3d at 1303. According to the Eleventh Circuit, this is a distinction without a difference, inasmuch as evidence that tends to establish a conspiracy is no different from evidence that tends to exclude independent action.

In summarizing the analysis to be applied, the Eleventh Circuit concluded that because parallel action was conceded, "the key questions on appeal are (1) whether appellants have shown the existence of a plus factor so as to create an inference of conspiracy; and (2) if so, whether appellees are able to rebut that inference." 346 F.3d at 1305.

IV. THE DECISION: ANALYSIS OF ALLEGED PLUS FACTORS

The next part of the Eleventh Circuit's decision consisted of its analyzing, one by one, each of the eleven plus factors claimed by the wholesalers to constitute proof of conspiracy. The plus factors included:

> (1) signaling of intentions; (2) permanent allocations programs; (3) monitoring of sales; (4) actions taken contrary to economic self-interest, including (a) little analysis of whether to follow price increases, (b) B&W and RJR pulling away from the discount cigarette market, (c) the May 1995 price increase lead by RJR and followed by Philip Morris, (d) Philips Morris' agreement to base the initial [Management Science Associates] . . . payments on market capitalization rather than market share, and (3) "excessive" price increases after the MSA; (5) nature of the market; (6) strong motivation; (7) reduction in the number of price tiers; (8) opportunities to conspire; (9) pricing decisions made at high levels; (10) the smoking and health conspiracy; and (11) foreign conspiracies. [*Id.*]

The Eleventh Circuit's analysis, rejecting each plus factor, was as follows:

A. Signaling

The Court rejected the initial price reduction by Philip Morris on Marlboro Friday as a signal to fix prices, essentially because the price reduction by Philip Morris was procompetitive. The Court supported this reasoning by quoting from *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223-24 (1993) ("Even in an oligopolistic market, when a firm drops its prices to a competitive level to demonstrate to a maverick the unprofitability of straying from the group, it would be illogical to condemn the price cut.") The Court also excused the response of other cigarette companies to Marlboro Friday in complying with Philip Morris' understood desire to reduce the price gap between premium and discount cigarettes.

> It is plain to us that RJR and B&W's actions are readily explained as economically rational, self-interested responses to Marlboro Friday. PM's premium price cuts strongly suggested to its competitors that any attempt to gain market share for discount brands through further price cuts would not be accepted. . . . The only viable way for RJR and B&W to increase their revenues was to raise prices in a manner that would not provoke a competitive response from PM, which is precisely the action that the class labels a signal of conspiracy. Put simply, this action is no more indicative of collusion than it is of lawful, rational pricing behavior. [346 F.3d at 1307.]

Other alleged signaling through public statements was rejected by the Eleventh Circuit as taking statements out of context. The Court also said, in excusing a statement by one executive that his company would not be escalating any price war, "it is clear that further price reductions of either the premium or discount brands would have reduced B&W's revenues without increasing its market share. Broughton's statement simply recognizes this economic fact, nothing more." 346 F.3d at 1308. Finally, the Court rejected Philip Morris' announcement of a permanent allocation program as signaling, because Philip Morris had a "contingency plan" to be implemented if competitors did not follow, and because Philip Morris presented evidence that allocation was "necessary to combat trade loading by wholesalers, which resulted in excess product returns, disruptions in shipping patterns and stale product." 346 F.3d at 1309.

B. Actions Against Manufacturers' Economic Interests

To begin with, the Eleventh Circuit urged caution in any analysis of whether action was contrary to economic self-interest, "lest we be too quick to second-guess well-intentioned business judgments of all kinds." 346 F.3d at 1310. "Thus, if a benign explanation for the action is equally or more plausible than a collusive explanation, the action cannot constitute a plus factor." *Id.* The Court then rejected as a plus factor competitors' following price increases by Philip Morris because the Court found that manufacturers could not expect to achieve increased market share through lower pricing. This was so because of likely retaliation by Philip Morris and because of the unlikelihood of wholesalers' passing on price reductions to retailers. The Court also rejected absence of financial analysis as a plus factor because "[o]nce appellees perceived that raising prices was their wisest economic strategy, no extensive discussion or planning was needed to implement this strategy each time a competitor initiated a price increase." 346 F.3d at 1311. The Court also found that smaller manufacturers were acting consistently with their economic interests when they followed price increases and shifted business from discount to premium brands. The Court concluded that the evidence was "in equipoise . . . equally consistent with collusion as with lawful competition, and accordingly, under *Matsushita* and *Harcros*, it cannot represent a plus factor." 346 F.3d at 1313.

The Court also found that it was not against the self-interest of the cigarette companies to exchange sales information, because "although the sharing of information can be seen as suggesting conspiracy, as appellants allege, it also can be seen equally as a necessary means to the receipt of its competitors' information." *Id.* Putting the matter more colorfully:

> To draw an analogy, each company's willingness to give its own information can be viewed as the ante in a poker game. To ante is irrational only if there is no legitimate reason why one would be playing the game; yet here, the game is oligopolistic competition, which everyone concedes is lawful, and the ante is perfectly consonant with the desire to play. [*Id.*]

The Court ruled the allocation programs not to be against interest because of their tendency to discourage trade loading. According to the Court, "contemporaneous documents demonstrate conclusively that this was the actual motivation for the programs." 346 F.3d at 1314.

C. Monitoring of Sales through MSA

Here, the Court found insufficient evidence of concerted activity, and also found each manufacturer had a legitimate independent interest in obtaining competitive information from its rivals.

D. Smoking and Health Conspiracy

The plaintiffs claimed as a plus factor a cigarette industry conspiracy beginning in 1953 to restrict competition on the basis of health. The Court rejected this as a plus factor because "there is no evidence that these activities continued to transpire during the period in question, *i.e.*, 1993-2000." 346 F.3d at 1316.

E. Foreign Conspiracies

The Eleventh Circuit affirmed the trial court's exclusion of evidence of price-fixing conspiracies in foreign countries, because the plaintiffs "had failed to show that *any* of the actions allegedly undertaken by appellees overseas were illegal under the applicable foreign law." *Id.* (emphasis in original). This failure of proof destroyed any nexus between such foreign price fixing and the alleged United States price-fixing conspiracy.

F. History and Structure of the Tobacco Industry

The Court rejected evidence of market structure as a plus factor because "the majority of the market characteristics on which the class focuses are simply indicia that the tobacco industry is an oligopoly, which is perfectly legal." 346 F.3d at 1317.

> As for the industry's history of antitrust violations, the district court noted that the class had failed to direct it to any precedent for holding such to be indicative of a present antitrust violation. *See Holiday Wholesale Grocery*, 231 F.Supp.2d at 1305 ("The law generally disfavors use of such 'historical' evidence.") (citations omitted). Appellants have failed to do so on appeal as well. [346 F.3d at 1317-18.]

G. Dampening of Market Share Shifts

The Court rejected this as a plus factor because the evidence showed market shares to have shifted more than in the period predating the conspiracy.

H. Credit Memos Making Price Increases Prospective

The Eleventh Circuit found a failure of proof on this claim, "[b]ecause there is no evidence that these credit memos actually delayed the implementation of price increases." 346 F.3d at 1319.

I. Opportunities to Conspire and the Restriction of Decisionmaking Authority to High-Ranking Corporate Officers

The Court basically held that opportunity to conspire, in itself, cannot constitute a plus factor. "Indeed, the opportunity to fix prices without any showing that appellees *actually*

conspired does not tend to exclude the possibility that they did not avail themselves of such opportunity or, conversely, that they actually did conspire." *Id.* (emphasis in original).

V. THE DECISION: REBUTTING THE PRESUMPTION

Although the Eleventh Circuit found that the plaintiffs' had not established even one plus factor, the Court went on to hold that the defendants had "readily rebutted the resulting inference of collusion" through showing that they had "'spent a combined $25.256 billion on promotional allowances, coupons and retail value added' between 1993 and 2000, an amount that is more than double the sum allegedly overcharged." 346 F.3d at 1320-21. Also, defendants rebutted the presumption by showing that prices did not reach pre-conspiracy levels until more than five years after the beginning of the alleged conspiracy, and that market shares shifted significantly during the period of the alleged conspiracy. In short, the cigarette manufacturers presented a coherent and compelling counter-explanation for their conduct, which overwhelmed the plaintiffs' evidence of conspiracy. Even had the plaintiffs established any plus factor, the cigarette companies "would have rebutted any inference that they conspired to fix prices by demonstrating that the class's conspiracy theory is utterly implausible." 346 F.3d at 1323.

VI. COMMENTS ON DECISION

Under the Eleventh's Circuit's view of matters, Judge Posner never had a chance. Neither his views on antitrust economics nor his decision in *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651 (7th Cir. 2002) received even the slightest acknowledgement or consideration in the Eleventh Circuit's decision.

In his extrajudicial writings, Judge Posner has challenged the economic model that conscious parallelism in oligopolies produces supracompetitive pricing without agreement. R. A. Posner, "Oligopoly and the Antitrust Laws: A Suggested Approach," 21 Stanford Law Rev. 1562 (June 1969); *Antitrust*, pp. 51-100, "Price Fixing and the Oligopoly Problem," (2d ed.) (University of Chicago 2001). According to Judge Posner, ". . . the interdependence theory of oligopolistic pricing . . . is inadequate." *Antitrust*, p. 57. This is because time lags in matching price reductions and differences in ability to expand output in response to price reductions render price competition feasible in oligopolies. Similarly, price reductions may not affect rivals and provoke retaliation if they result in sales to new customers, or are only partial. Moreover, the interdependence theory does not adequately explain how prices have risen above competitive levels. Judge Posner argues that matching price increases involves choices to forgo benefits from competing that are against self-interest in the absence of agreement. To Judge Posner, "there is no sound basis in economic theory for thinking that if there are just a few major sellers in a market, competition will disappear automatically." *Antitrust*, p. 69. He says, "The interdependent theorists tend to leap from the sound proposition that concentration is a necessary condition of tacit collusion to the unsound proposition that it is a sufficient condition." *Antitrust*, pp. 68-69. "Each seller must still decide whether to limit output, and this implies at least tacit negotiation with his major competitors." *Antitrust*, p. 69. Thus, "it may be possible to demonstrate through economic evidence the existence of collusive pricing even though no overt acts of collusion are detected." *Antitrust*, p. 79. Judge Posner concludes, "This is where I part company with most other economically minded students of antitrust policy. . . . If the economic evidence in a case warrants an inference of collusive pricing, there is neither legal nor practical justification for requiring evidence that will support the further inference that the collusion was explicit rather than tacit." *Antitrust*, p. 94.

According to Judge Posner, "If seller A restricts his output in the expectation that B will do likewise, and B restricts his output in a like expectation, there is a literal meeting of the minds." *Antitrust*, p. 94. This type of offer and acceptance analysis reappears in Judge Posner's decision in the *Fructose* case, 295 F.3d 651 at 654. It is also consistent with the Supreme Court's analysis in *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).

In both his treatise and his decision in *Fructose*, Judge Posner provides a catalog and discussion of the types of economic evidence that may be sufficient to demonstrate the existence of agreement in an oligopolistic market. Such evidence may include "fixed relative market shares"; "market wide price discrimination"; "exchanges of price information"; "regional price variations"; "identical bids"; "price, output, and capacity changes at the formation of the cartel"; "industry wide resale price maintenance"; "declining market shares of leaders"; "amplitude and fluctuation of price changes"; and "exclusionary practices." *Antitrust*, pp. 79-93. In *Fructose*, Judge Posner discusses such structural factors as oligopoly, fungibility of product, entry barriers, and excess capacity. He discusses conduct plus factors that include identical list prices, information exchanges, price discrimination, and stable market shares in a period of rising demand.

The views of Judge Posner are at odds with the generally accepted so-called Turner view that conscious parallelism can produce supracompetitive pricing in oligopolistic markets without agreement or collusion. Courts often express this position by stating that supracompetitive prices that are the result of conscious parallelism alone do not violate Section 1 of the Sherman Act. As Judge Posner has argued for years, however, this proposition is not self-evident. His decision in *Fructose* may in part be an effort to revive the debate on this point.

What is significant in the *Williamson Oil* decision is its total acceptance and embrace of the Turner position, without any acknowledgement of the contrary views of Judge Posner. For example, the Eleventh Circuit rejects any notion that reducing prices in an oligopoly can result in any benefit to the initiator of the price reduction.

> As explained *supra*, it is clear that further price reductions of either the premium or discount brands would have reduced B&W's revenues without increasing its market share. Broughton's statement simply recognizes this economic fact, nothing more. [346 F.3d at 1308.]

With all due respect, the Eleventh Circuit's conclusion that this is an "economic fact" is not universally shared by economists, particularly those in agreement with Judge Posner.[2] The Eleventh Circuit's wholehearted acceptance of the Turner position guides its entire analysis and determines its result. For example, when viewing the plaintiffs' economic evidence of market structure and behavior for the cigarette industry, which Judge Posner might consider probative of agreement, the Eleventh Circuit concludes, "The problem with this argument, however, is that the majority of the market characteristics on which the class focuses are simply indicia that the tobacco industry is an oligopoly, which is perfectly legal." 346 F.3d at 1317.

Lack of receptivity to the Posner position is only a starting point in explaining the result reached by the Eleventh Circuit. Equally noteworthy is the Eleventh Circuit's absolute

2 Even stronger refutation of the Turner view appears in an excellent recent article by Gregory J. Werden, "Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory," 71 Antitrust Law Journal 719 (2004). The article reviews the impact of game theory and the Prisoner's Dilemma on the development of modern oligopoly theory. Werden explains how economic theory now rejects the Turner view that conscious parallelism alone will invariably produce non-competitive pricing in an oligopoly. The article also sets out how courts deciding antitrust cases have been woefully ignorant of modern oligopoly theory.

rejection of opportunity to conspire as a plus factor. According to the Eleventh Circuit, the opportunity to conspire cannot be a plus factor "without any showing that appellees *actually* conspired." 346 F.3d at 1319 (emphasis in original). This is of course the equivalent of saying opportunity is never a plus factor, and thus flies in the face of the Supreme Court and most other circuits, which continue to list opportunity as a plus factor.

Equally curious is the Eleventh Circuit's treatment of evidence of price-fixing agreements in other countries, and its unwillingness to consider the tobacco industry's history of antitrust violations. The Court held that evidence of price-fixing agreements in other countries could not be considered a plus factor without a showing that the extraterritorial price fixing violated the laws of the foreign countries in which it occurred. The Court cited no authority to support this result, nor does logic support it. Regardless of legality, foreign price-fixing arrangements provided, in the plaintiffs' view, "a mechanism to 'establish and revise, and to monitor and enforce agreements to coordinate.'" 346 F.3d at 1317. Certainly, that the cigarette companies were fixing prices outside the United States tends to exclude the possibility that they were acting independently in setting prices within the United States. Allowing this evidence is consistent with the long line of federal antitrust decisions admitting similar evidence under the Kindred Acts Doctrine, as well as Federal Rule of Evidence 404(b), to show motive, intent, a common scheme or plan, and the absence of mistake. *See Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 710 (1962); *Alexander v. National Farmers Org.*, 687 F.2d 1173, 1196 (8th Cir. 1982); *Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555, 1564-65 (5th Cir. 1984); *In re Coordinated Pretrial Proceedings*, 907 F.2d 432, 452-53 (9th Cir. 1990); *Movie 1 & 2 v. United Artists Communications*, 909 F.2d 1245, 1250 (9th Cir. 1990); *United States v. Southwest Bus Sales, Inc.*, 20 F.3d 1449, 1456 (8th Cir. 1994).

Equally mysterious is the Eleventh Circuit's refusal to consider the history of antitrust violations of the cigarette industry, because the plaintiffs failed to cite "any precedent for holding such to be indicative of a present antitrust violation." 346 F.3d at 1317-18. One is tempted to ask whether the judges in the Eleventh Circuit employ law clerks. Even if no law clerks were available to assist in the *Williamson Oil* opinion, the judges could readily have turned to any antitrust hornbook and seen a truly illustrious compendium of Supreme Court decisions in which the Court considered the history of the industry at issue, including the cigarette industry itself, even going back well before the passage of the Sherman Act. *Standard Oil Co. v. United States*, 221 U.S. 1, 76 (1911); *United States v. Lehigh Valley R.R. Co.*, 254 U.S. 255, 266-70 (1920); *United States v. Reading Co.*, 253 U.S. 26, 43-45 (1920); *United States v. American Tobacco Co.*, 221 U.S. 106, 160, 166, 181-82 (1911); *American Tobacco Co. v. United States*, 328 U.S. 781, 796 (1946). Indeed, had the Eleventh Circuit looked at the cited page in the 1946 *American Tobacco* case, it would have found exactly the authority it was looking for in the Supreme Court's oft-repeated statement, "Size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past." *United States v. Griffith*, 334 U.S. 100, n.10 (1948); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 174 (1948); *United States v. Swift & Co.*, 286 U.S. 106, 116 (1932), all of which contain the same language. Given the plethora of authority to support consideration of a history of past antitrust violations, the Eleventh Circuit's refusal to consider this evidence because the plaintiffs apparently furnished no citations is both baffling and inexcusable.

Moreover, the summary judgment test devised by the Eleventh Circuit, as applied in the *Williamson Oil* case, is highly questionable, and vulnerable to the criticism that it unconstitutionally deprives plaintiffs of their Seventh Amendment right to a jury trial. To avoid summary judgment, according to the Eleventh Circuit, the plaintiff in a price-fixing

case must show, first, parallel behavior, and, second, "the existence of one or more plus factors that 'tends to exclude the possibility that the alleged conspirators acted independently.'" 346 F.3d at 1301. The plus factor must be economically plausible and must not require the jury to engage in speculation and conjecture. 346 F.3d at 1302. (Compare, however, Judge Posner's statement in *Fructose* that "conjecture has its place in building a case out of circumstantial evidence." 295 F.3d at 660.) Even if the plaintiff meets this burden, however, summary judgment will be appropriate if the defendants "rebut the inference of collusion by presenting evidence establishing that no reasonable factfinder could conclude that they entered into a price fixing conspiracy." 346 F.3d at 1301. According to the Eleventh Circuit, the cigarette companies did just that by demonstrating substantial shifts in market shares, price increases that took five years to reach pre-conspiracy levels, and increased spending in retail competition that greatly exceeded the gains from the wholesale price increases implemented by the alleged conspirators.

The Court's analysis, however, raises two substantial questions. First, one must ask why a plaintiff who can show conscious parallelism and one or more plus factors should be deprived of a jury trial because of defense evidence that does not disprove the existence of the plus factors, but merely shows an alternative explanation for the defendants' conduct. Sorting out conflicting explanations would appear to be exactly what juries are for. Second, application of this test in the *Williamson Oil* case appears to fall into the three traps defendants lay for courts in summary judgment motions, as enumerated by Judge Posner in *Fructose*. These three traps are weighing conflicting evidence, failing to consider the plaintiffs' proof as a whole, and confusing the existence of a conspiracy with its efficacy. 295 F.3d at 655-56. That the cigarette companies may not have been as successful as they hoped in raising wholesale prices, because of their propensity to compete at retail, does not establish that there was no wholesale price-fixing conspiracy, but only that it was not particularly effective.

Finally, the Eleventh Circuit seems wholly to have missed the boat in its consideration of the probative value of Marlboro Friday. In its most basic terms, Marlboro Friday involved the dominant firm in an oligopoly making a price reduction as a well understood signal that it would no longer tolerate price competition by other oligopoly members. Thereafter, when the dominant firm raised prices, the competitors all immediately matched, in a series of price increases spanning mid-1993 to early 2000. There is a strong likelihood that Judge Posner would regard this as sufficient evidence of an agreement to engage in supracompetitive pricing. The Eleventh Circuit, however, refuses to consider Marlboro Friday as a plus factor, *i.e.*, signaling, because the initial price reduction by Philip Morris, standing alone, was procompetitive. One cannot imagine, however, a more egregious instance of viewing the plaintiffs' evidence piecemeal, and refusing to view the evidence as a whole. The Eleventh Circuit acknowledged that Philip Morris, through Marlboro Friday, intended to convey a message of no more price competition; it also acknowledged that the message was received and clearly understood by the other cigarette companies. Yet when price increases began, the Eleventh Circuit wholly ignored the transmittal and receipt of the Marlboro Friday message, because the original price reduction, standing alone, was procompetitive, notwithstanding the intent of Philip Morris to use it as the springboard for future collusive price increases. The Court's reasoning is supported neither by logic, nor by precedent. It also transgresses the well-established rule that an unlawful scheme may consist of acts wholly innocent in themselves. *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962).

VII. CONCLUSION

The *Williamson Oil* case is an important, fascinating, and, in this writer's view, wrongheaded decision, which raises and highlights most of the issues that attend summary judgment motions in price-fixing cases in oligopolistic industries. The opinion is well worth study and analysis if one is to understand what the unsettled issues are in this area, and where the law ultimately is headed.