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**AIR CARGO FUEL SURCHARGES AND TACIT
COLLUSION UNDER THE SHERMAN ACT: WHAT
GOOD IS CATCHING A FEW BAD GUYS IF
CONSUMERS STILL GET ROBBED?**

DUSTIN APPEL*

FOR MOST of the last decade, the domino-like effect of the rising cost of oil has created new pressures on industries and markets throughout the global economy. The transportation sector, in particular, has felt the strain of ever-increasing fuel costs driven by oil prices that have now topped \$100 per barrel. In the airline industry, for example, fuel has replaced labor and personnel as the largest single component of operating expenses. Shrinking margins have prompted transportation providers to search for new ways to pass on higher operating costs to their customers without losing market share to competitors.

The widespread adoption of fuel surcharges on transportation services is one result. Airlines began to impose surcharges on passenger and cargo service as early as 2000, and trucking companies and railroads have followed a similar pattern. In response, freight forwarders, essential non-carrier service providers in the transportation supply chain, have also included fuel surcharges in their rates.

From the start, shippers and regulators contested the imposition of fuel surcharges on air cargo with concerns that high surcharges would persist even after fuel prices subsided and that the calculation of the surcharges bears little relationship to the actual fuel consumed during transport. This opposition, however, did little to counter the increasing rates of surcharges lev-

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ied on cargo as fuel prices climbed. A pattern soon emerged as carriers repeatedly adopted uniform rate increases within days of one another, often according to an index of jet fuel prices established by Lufthansa.

In early 2006, the U.S. Department of Justice and European Community antitrust regulatory agencies launched a joint global investigation into alleged price-fixing in connection with fuel surcharges on international airfreight shipments with a series of raids and subpoenas on the major air cargo carriers. The worldwide investigation spawned at least twenty-three private class action lawsuits for antitrust claims, and ultimately led to guilty pleas and criminal fines of over \$700 million in the United States for British Airways, Korean Air Lines, and Qantas Airways, in addition to restitution payments on behalf of Lufthansa and Virgin Atlantic. In October 2007, another series of subpoenas and pre-dawn raids descended upon the offices of leading freight forwarders as the global antitrust probe—already one of the largest in history—widened.

So far, U.S. authorities have announced no new charges or developments in connection with any criminal case against carriers or forwarders, but the probe continues, as do the civil lawsuits against carriers, which were eventually consolidated and transferred to federal court in the Eastern District of New York. Meanwhile, those in the air cargo industry, and those in the legal community concerned with antitrust issues, struggle to discern the implications of the criminal and civil litigation, and to predict how the outcome of the civil suits could affect antitrust regulation in the future.

The air cargo industry is a concentrated market with a relatively limited number of providers for international shipments. In such oligopoly markets, the business decisions of the participants intertwine more closely than in dispersed markets, such that patterns of parallel conduct often emerge seemingly without any overt communication between competitors. Because of this so-called “tacit collusion,” courts have historically struggled to determine what level of conduct constitutes a violation of antitrust law in such markets, a difficulty commentators refer to as “the oligopoly problem.” The ongoing class action civil suits present the courts with a new opportunity to confront this problem and to refine judicial treatment of collusion in oligopolistic markets to better serve the goals of antitrust law.

This comment examines how courts have grappled with the oligopoly problem and proposes the adoption of a new ap-

proach in the context of the air cargo fuel surcharge litigation to deal with the dilemma of tacit collusion to better protect consumers. Part One gives a general background on the tenets of U.S. antitrust law and the oligopoly problem, while Part Two provides an overview of the air cargo industry, the fuel surcharge system, and the current criminal and civil litigation. Part Three examines how the current approach toward tacit collusion in oligopolistic markets, with its overweening focus on the element of conspiracy, fails to address the impact of anticompetitive behavior upon consumers, and how a proposed approach composed of a mixture of theories previously put forward by scholars will remedy this gap in protection.

The current approach toward application of antitrust law toward tacit collusion is somewhat akin to a near-sighted police officer patrolling the sidewalk—only the most blatant wrongdoers are punished, while those on the blurry edge of the field of vision escape. While catching bad actors is a worthy goal, ultimately it means little to consumers if the harmful behavior continues. An understanding of why the current approach toward oligopolistic markets disserves the very consumers it is designed to protect first requires a brief overview of the statutes that comprise U.S. antitrust law.

I. ANTI-TRUST LAW AND THE OLIGOPOLY PROBLEM

A. THE SHERMAN ACT

In the United States, the principal statutes that govern antitrust liability are the Sherman Act,¹ the Clayton Act,² and the Federal Trade Commission Act.³ However, since the Clayton Act narrowly focuses on tying agreements and exclusive-dealing arrangements,⁴ and the Federal Trade Commission Act specifically excludes air carriers from its scope,⁵ it is the Sherman Act that primarily delineates illegal, anticompetitive conduct by airlines. The goal of passage of the Sherman Act was to protect consumers from the abuse of concentrated economic power.⁶ Criminal sanctions are normally limited to price-fixing cases,

¹ Sherman Act, 15 U.S.C. §§ 1–7 (2000).

² Clayton Act, 15 U.S.C. §§ 12–27 (2000).

³ Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2000).

⁴ See 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 1400a (2d ed. 2003).

⁵ 15 U.S.C. § 45(a)(2) (2000).

⁶ E. THOMAS SULLIVAN & JEFFREY L. HARRISON, *UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS* 3 (4th ed. 2003).

since courts more often construe the statute as a civil and regulatory law.⁷ In broad terms, the law prohibits restraints on trade and commerce and bars illegal monopolization, but unlike most criminal statutes, the Sherman Act does not precisely define conduct that constitutes a violation.⁸ Rather, the statute appears to be imbued with a "generality and adaptability" similar to that of a constitutional provision.⁹ While this flexibility is perhaps essential to deal effectively with the complexity of evolving business practices, the Supreme Court has indicated that the Sherman Act's criminal provisions should be reserved for instances "where the law [is] relatively clear and the conduct egregious" to prevent abuse.¹⁰

Turning to the specific language of the statute, Section 1 of the Sherman Act ("Section 1") forbids "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce," and explicitly governs commercial activity both among the states and with foreign nations.¹¹ While this broad language could conceivably encompass *all* private contracts, such a literal approach has consistently drawn rejection.¹² Instead, relying upon earlier common law notions that undergird the statute,¹³ the Supreme Court has ruled that only "unreasonable restraints" on interstate or foreign commerce constitute violations of the Act.¹⁴

Section 2 of the Sherman Act prohibits monopolization, as well as attempts and conspiracies to monopolize, in interstate or foreign commerce.¹⁵ In this context, monopolization signifies conduct—alone or as part of a group—to acquire or maintain the power to exclude competitors from any part of trade or commerce in a given commodity.¹⁶ Although the government (or a private plaintiff) need not show actual exclusion of any potential or existing rival, illegal monopolization requires evidence of specific intent to exercise the power to eliminate com-

⁷ *United States v. Rybicki*, 354 F.3d 124, 164 (2d Cir. 2003) (Jacobs, J., dissenting).

⁸ *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978).

⁹ *Id.* at 439 (quoting *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359–60 (1933)).

¹⁰ *Id.*

¹¹ 15 U.S.C. § 1 (2000).

¹² *Leegin Creative Leather Prods. v. PSKS, Inc.*, 127 S. Ct. 2705, 2712 (2007).

¹³ *Standard Oil Co. v. United States*, 221 U.S. 1, 59–60 (1911).

¹⁴ *See, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

¹⁵ 15 U.S.C. § 2 (2000).

¹⁶ *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946).

petition.¹⁷ Since Section 2 governs extreme concentrations of economic power not seen in the airline industry, the remainder of this comment will focus upon the ramifications of Section 1.

Although the wide-ranging prohibition of Section 1 expressly lists contracts, combinations, and conspiracies,¹⁸ the prevailing view is that these terms are practically indistinguishable, and courts use them interchangeably to describe the same conduct.¹⁹ Regardless of this terminology, conspiracy to violate Section 1 constitutes a completely separate offense.²⁰ Some form of concerted action, however, is required to sustain either a conspiracy or a completed violation under Section 1, as the existence of an "agreement is an essential ingredient of [a] contract, combination, or conspiracy."²¹

Thus, any offense under this section requires first an "agreement, . . . understanding, . . . or a meeting of the minds"²² between "at least two legally distinct economic entities."²³ Secondly, the agreement must have either the purpose or objective of unreasonably restraining trade.²⁴ Once these elements exist, the agreement standing alone is an offense as a conspiracy to violate Section 1.²⁵ Neither successful completion nor any overt act furthering the conspiracy is required to constitute an offense.²⁶ A completed violation of Section 1 requires these additional elements: 1) that the agreement unreasonably restrained interstate trade or commerce; and 2) in criminal prosecutions, intent to restrain trade or commerce.²⁷

To demonstrate an illegal conspiracy in violation of Section 1, plaintiffs or prosecutors may show direct evidence of an express

¹⁷ *Id.*

¹⁸ 15 U.S.C. § 1 (2000).

¹⁹ SULLIVAN & HARRISON, *supra* note 6, at 179. See also, e.g., *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 445 (3d Cir. 1977).

²⁰ See *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 330 (1991).

²¹ SULLIVAN & HARRISON, *supra* note 6, at 179 (quoting Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 655-56 (1962)).

²² *Id.*

²³ *Primetime 24 Joint Venture v. Nat'l Broad. Co.*, 219 F.3d 92, 103 (2d Cir. 2000).

²⁴ *Capital Imaging Assocs., Inc. v. Mohawk Valley Med. Assocs. Inc.*, 996 F.2d 537, 542 (2d Cir. 1993).

²⁵ *Summit Health*, 500 U.S. at 330.

²⁶ *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1270 (6th Cir. 1995).

²⁷ *Meghan Edwards-Ford & Matthew J. McDonald, Antitrust Violations*, 44 AM. CRIM. L. REV. 241, 243 (2007).

agreement between the defendants,²⁸ or may present sufficient indirect or circumstantial evidence to infer the existence of an implied agreement.²⁹ The degree of evidence necessary to sustain an inference of an implied agreement is a vital issue in most cases, particularly to survive motions for acquittal or summary judgment.³⁰ Evidence of the objective to achieve an unreasonable restraint on commerce is generally far more relevant than that of the individual motives of the participants in the conspiracy, unless no other proof of a common purpose is available.³¹

To give effect in practice to the intent of the broad language of the Sherman Act, federal courts have developed two distinct tests to identify conduct that violates Section 1 as an unreasonable restraint: the *per se* rule, which applies to blatantly anticompetitive acts, and an individualized balancing test known as the "rule of reason" for less egregious conduct.³² *Per se* violations are those constraints on trade that have "manifestly anticompetitive" effects³³ and that threaten the proper operation of the free market by restricting competition and decreasing supply.³⁴ Examples of such conduct include territory-splitting arrangements and horizontal price-fixing agreements between competitors.³⁵ Under this analysis, the factfinder must weigh the totality of circumstances in the case to determine whether the restrictive practice at issue should constitute a violation as an unreasonable restraint.³⁶ Factors include the attributes of the particular business or businesses, such as market power held,³⁷ and the "history, nature, and effect" of the practice in question.³⁸ The crux of this analysis is whether the practice generates an economic

²⁸ See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 219 (1940) (finding evidence of an express agreement between defendants to purchase gasoline to curtail supply and increase price).

²⁹ *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 438 (9th Cir. 1990).

³⁰ See, e.g., *id.*; *Lovett v. Gen. Motors Corp.*, 998 F.2d 575, 580-81 (8th Cir. 1993).

³¹ *Fineman v. Armstrong World Indus. Inc.*, 980 F.2d 171, 212-14 (3d Cir. 1992).

³² See, e.g., *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 387 (1956).

³³ *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977).

³⁴ *Broad. Music, Inc. v. Columbia Broad. Sys. Inc.*, 441 U.S. 1, 19-20 (1979).

³⁵ *Leegin Creative Leather Prods. v. PSKS, Inc.*, 127 S. Ct. 2705, 2713 (2007).

³⁶ *Id.* at 2712; *Cont'l T.V.*, 433 U.S. at 49.

³⁷ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984).

³⁸ *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

benefit or harm to the consumer through its impact on competition.³⁹

Application of the rule of reason is favored over per se analysis, especially where the economic impact of questioned business relationships is not immediately obvious.⁴⁰ The Supreme Court has noted that the per se rule is appropriate only in circumstances in which the courts have demonstrable experience with a certain practice and can confidently predict that it would be found invalid in almost all cases under the rule of reason.⁴¹ Further, any “departure from the rule-of-reason standard must be based [on a] demonstrable economic effect” on the consumer.⁴² Consequently, even restraints that closely resemble per se violations—such as horizontal agreements between competitors that border on price-fixing⁴³—still merit a weighing of competitive significance to determine whether the restraint fosters or hinders competition.⁴⁴

Base point pricing is an example of a business practice that the courts have found can produce an anticompetitive effect that rises to the level of an unreasonable restraint on trade.⁴⁵ Under one example of this scheme, sellers of cement could sell product to their customers only on a “delivered price” basis, defined as the cost of the product plus freight charges from a set “base point” to the customer’s destination, regardless of both where the cement originated and the actual freight costs of delivery to destination.⁴⁶ Thus, a seller’s returns on sales rose as destinations grew farther from the base point and diminished as they approached the base.⁴⁷ The system ultimately produced

³⁹ *Leegin*, 127 S. Ct. at 2713.

⁴⁰ *Id.* (citing *State Oil Co.*, 522 U.S. at 10).

⁴¹ *Id.*

⁴² *Id.* (quoting *Cont’l T.V.*, 433 U.S. 36, 58–59 (1977)).

⁴³ *Broad. Music, Inc. v. Columbia Broad. Sys. Inc.*, 441 U.S. 1, 19 (1979).

⁴⁴ *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978). This analysis represents a more focused, narrower scope than the traditional rule of reason. See SULLIVAN & HARRISON, *supra* note 6, at 137–38.

⁴⁵ See, e.g., *Fed. Trade Comm’n v. Cement Inst.*, 333 U.S. 683, 696–700 (1948). Although this case alleged violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (2000) for unfair trade practices, the Court found that, if unregulated, this practice could destroy competition market-wide and result in a monopoly in the cement industry. *Id.* To support this assertion, the Court pointed to two of its prior cases brought under the Sherman Act: *United States v. U.S. Gypsum Co.*, 333 U.S. 364 (1948) and *Sugar Institute, Inc. v. United States*, 297 U.S. 553 (1936). *Id.* at 720–21.

⁴⁶ *Id.* at 698.

⁴⁷ *Id.*

uniform prices and terms of sale throughout the country, since members of the conspiracy could manipulate the aspect of "phantom freight" to impose intolerable losses on recalcitrant sellers, while incurring minimal losses themselves.⁴⁸ The resulting uniformity of prices became so stark that in one case, eleven purportedly independent, sealed bids for sale of cement were identical within fractions of a cent.⁴⁹

The exchange of commercial information between competitors is an example of a practice that defies such easy categorization but can constitute a violation under the rule of reason depending upon its impact on competition.⁵⁰ Important factors in this determination are the nature of the information exchanged, how the businesses involved react, and, perhaps most importantly, the structure of the relevant industry.⁵¹ For example, the courts have generally sanctioned the exchange of market-wide historical information as beneficial to commerce,⁵² but have found disclosure of anticipated market conditions and information about current transactions more problematic due to the danger of collusion between the participants.⁵³ Subsequent moves by competitors to match new prices or refusals to deal with "black-listed" vendors or customers are indications of collusive intent, though not necessarily dispositive standing alone.⁵⁴ Lastly, the requisite impact on competition required under the rule of reason will most likely be present in highly concentrated industries, markets with inelastic demand, and markets for fungible goods where the primary differentiating factor between competitors is price.⁵⁵ However, unique difficulties arise in the

⁴⁸ See *id.* at 713-14. The cartel's method of enforcement was to establish a rogue seller's plant as an involuntary base point, which forced the seller to incur excessive freight charges on every shipment. *Id.*

⁴⁹ *Id.* at 713.

⁵⁰ See, e.g., *Sugar Inst., Inc. v. United States*, 297 U.S. 553, 598-605 (1936) (distinguishing statistical information exchanged between suppliers from notice of contemplated or future price changes).

⁵¹ SULLIVAN & HARRISON, *supra* note 6, at 148.

⁵² See, e.g., *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 586 (1925).

⁵³ *United States v. Container Corp. of Am.*, 393 U.S. 333, 335-37 (1969).

⁵⁴ See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 280 (1968)).

⁵⁵ *Container Corp.*, 393 U.S. at 337 (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-21 (1940)). This impact may not always manifest itself in an increase in prices but rather price stabilization, another form of market manipulation prohibited by the Sherman Act. *Id.*

case of oligopolies—highly concentrated markets dominated by a few large sellers.⁵⁶

B. THE OLIGOPOLY PROBLEM

Courts and antitrust regulators have wrestled with the conundrum of anticompetitive oligopoly conduct for over a century.⁵⁷ The difficulty in identifying illegal activity in these markets stems from the interconnected nature of decision-making in an oligopoly, where the optimal level of price and output for one member depends on the choices made by the other members.⁵⁸ Because of this intersection of interests, oligopolistic markets will often display coordinated pricing and correlated actions by participants.⁵⁹ For example, information about planned or actual price changes by one provider can cause market-wide movements as others act to match the new price level.⁶⁰ Such synchronized behavior in recognition of the interdependence of the market players and their shared economic interests, sometimes called tacit collusion or conscious parallelism, is currently legal,⁶¹ so long as the correlated action is the result of “a rational, independent calculus by each member,” and not the product of affirmative agreement between the actors.⁶² The danger in oligopolistic markets from this behavior lies in the possibility that such concerted action—legal action, with no express agreement—will raise prices to the same level as if the market were a monopoly, dominated by a single supplier.⁶³ The limited number of firms in the market facilitates coordinated

⁵⁶ AREEDA & HOVENKAMP, *supra* note 4, at ¶ 1429a. For a detailed discussion of the economics of oligopolistic markets, see AREEDA & HOVENKAMP, *supra* note 4, at ¶ 404.

⁵⁷ Thomas A. Piraino, Jr., *Regulating Oligopoly Conduct Under the Antitrust Laws*, 89 MINN. L. REV. 9, 9 (2004).

⁵⁸ *Williamson Oil Co., v. Phillip Morris USA*, 346 F.3d 1287, 1299 n.11 (11th Cir. 2003).

⁵⁹ *Id.* at 1299 (citing *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993); *United States v. Von's Grocery Co.*, 384 U.S. 270, 300 (1966) (Stewart, J., dissenting)).

⁶⁰ See, e.g., *United States v. Airline Tariff Publ'g Co.*, 836 F. Supp. 9, 10 (D.D.C. 1993). In this case, federal regulators charged eight airlines with using a central clearinghouse on rate levels to coordinate changes in fares. *Id.*

⁶¹ *Brooke Group Ltd.*, 509 U.S. at 227.

⁶² *Williamson Oil Co.*, 346 F.3d at 1299. There are no cases where conscious parallelism alone has been sufficient to establish a violation of Section 1. Piraino, *supra* note 57, at 70 n.72.

⁶³ Michael K. Vaska, Comment, *Conscious Parallelism and Price Fixing: Defining the Boundary*, 52 U. CHI. L. REV. 508, 512 (1985).

action toward an excessive price by simultaneously reducing both the risk of price increases and the potential rewards of price reductions by any one member.⁶⁴

To a consumer, however, there is no practical difference between a non-competitive price set by an explicit pact among sellers and one arrived at by tacit collusion—the end result on the pocketbook is the same.⁶⁵ Yet, while courts would likely condemn a blatant agreement to fix prices as a *per se* violation,⁶⁶ consciously parallel action—even though it yields an identical economic effect—would escape prosecution. This gap in the protections afforded by the antitrust laws has been called by some “the oligopoly problem.”⁶⁷

Thus far, the courts have been reluctant to fill this gap.⁶⁸ In fact, because some markets are inherently oligopolistic, the federal courts and antitrust commentators have concluded that truly independent parallel conduct must be protected to preserve economic efficiency.⁶⁹ The result is that currently the key factor in determining violations of Section 1 in oligopolistic markets is the existence or absence of an *agreement* between the market participants to engage in anticompetitive behavior, and not the anticompetitive conduct itself nor its effects upon the consumer.⁷⁰ Indeed, when considered, the actual behavior and its market effects are often employed only as circumstantial evi-

⁶⁴ Robert A. Milne & Jack E. Pace, III, *Conspiratologists at the Gate: The Scope of Expert Testimony on the Subject of Conspiracy in a Sherman Act Case*, 17 ANTITRUST 36, 37 n.5 (2003). Of course, this is a gross over-simplification of the economics underlying pricing strategies in oligopolistic markets. For further background, including the effect of game theory on this analysis, see Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U.L. REV. 135 (2002).

⁶⁵ Dennis W. Carlton, Robert H. Gertner & Andrew M. Rosenfield, *Communication Among Competitors: Game Theory and Antitrust*, 5 GEO. MASON L. REV. 423, 437 (1997).

⁶⁶ *Id.*

⁶⁷ Piraino, *supra* note 57, at 13.

⁶⁸ *Id.* at 12.

⁶⁹ *Id.* at 45. The most notable proponent of this view is Professor Donald Turner, whose views reflected the so-called “Harvard” school of thought on antitrust enforcement. See generally Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

⁷⁰ See, e.g., *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 446–47 (9th Cir. 1990) (concluding that pattern of interdependent pricing alone could not constitute antitrust violation, but can be used to support an inference of an agreement to raise or stabilize prices).

dence to establish the existence of an illegal agreement.⁷¹ This undue focus on the conspiracy element of Section 1 has caused the federal courts to struggle in their efforts to discern legitimate parallel-yet-independent action from unlawful collusion in practical terms, especially with regard to the level of evidence required to survive summary judgment.

The Supreme Court attempted to define this standard with the ruling that a plaintiff must present sufficiently unambiguous evidence “that tends to exclude the possibility” of independent action.⁷² This apparent adoption in *Matsushita* of the premise that conscious parallelism alone could not constitute a violation of Section 1 triggered a search for various “plus factors” that would provide evidence of conduct that was more than simply tacit collusion sufficient to allow a Section 1 case to proceed to trial.⁷³ Examples of such “plus factors” include evidence that each defendant acted contrary to its own economic self-interest or in a manner inexplicable in the absence of an illegal agreement, and any evidence that would “exclude the possibility of independent action.”⁷⁴ The business-justification test, another common “plus factor,” can be met if defendants are unable to show independent, legitimate business reasons for engaging in the questioned practice.⁷⁵ Once enough “plus factors” to infer the existence of an agreement are found, courts normally apply the per se rule of illegality, with little or no further examination of the underlying practices employed.⁷⁶ Instead of providing any real guidance, however, this elevation of the conspiracy inquiry over economic effect has caused the courts to render a series of conflicting opinions that has, at best, confused many as to the line between permissible and impermissible oligopoly

⁷¹ See, e.g., *id.* (holding announcements of price increases among competitors and subsequent pattern of parallel pricing are sufficient to support inference of illegal agreement).

⁷² *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)).

⁷³ See, e.g., *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 n.30 (11th Cir. 1991).

⁷⁴ *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1301 (11th Cir. 2003).

⁷⁵ Vaska, *supra* note 63, at 520, 520 n.82 (surveying various federal circuit courts' application of the business-justification test).

⁷⁶ *Id.* at 509.

conduct,⁷⁷ or, at worst, perhaps even encouraged participants in concentrated markets to engage in tacit collusion.⁷⁸

C. POSNER'S PROPOSED APPROACH

Not all scholars agree that tacit collusion should fall outside the ambit of the antitrust law, however. Most notably, Judge Richard Posner argued during formative debates on the subject that since there is no intrinsic difference between formal cartels and tacit arrangements, and since conscious parallelism is still voluntary action, it should be punished in the same way as express collusion.⁷⁹ In fact, he concluded that tacit behavior could be even more detrimental because it is easier to conceal.⁸⁰ This is even more likely with today's technology, when conspirators can enforce their agreements through subtle signals in press releases and on web sites.⁸¹

To overcome this evidentiary hurdle, Posner proposed a two-step approach to evaluate suspected collusive behavior. The first step is to examine the structure of the market at the macroeconomic level to gauge its susceptibility to collusive activity.⁸² Among the factors that indicate a favorable climate for collusion are a concentration of large sellers, a lack of small, fringe sellers, inelastic demand at the competitive price, significant barriers to entry into the market, a standardized product, and emphasis on price over other forms of competition.⁸³ The second prong of the proposed test is to inspect actual data in the market to determine if patterns indicative of collusion exist.⁸⁴ Posner identified evidence of collusion in exchanges of price information, consistent levels and patterns of profits, and base-point pricing.⁸⁵

Although never applied in practice, this approach displays both obvious advantages and drawbacks. In Posner's view, one of the main benefits would be the shift in focus away from wide-ranging searches for smoking-gun documentation of illegal

⁷⁷ Piraino, *supra* note 57, at 24.

⁷⁸ *Id.* at 32.

⁷⁹ Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562, 1575 (1969). Judge Posner's views are said to reflect the "Chicago" school of thought on antitrust enforcement. See generally *id.*

⁸⁰ *Id.*

⁸¹ Piraino, *supra* note 57, at 30.

⁸² RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE, 55 (1976).

⁸³ *Id.* at 55-60.

⁸⁴ *Id.* at 55.

⁸⁵ *Id.* at 62-70.

agreements, which he termed the “cops-and-robbers” method of prosecuting antitrust violations,⁸⁶ to center judicial inquiry on the ultimate impact of the questioned conduct on consumers.⁸⁷ Unfortunately, in place of “hot document” evidence, this approach could require litigants to introduce expensive and “often ambiguous” economic data subject to varying expert interpretation to sustain their cases.⁸⁸ Further, Posner conceded that the reach of the approach could extend too far, for example, to encompass industry reaction to cost increases common to all participants.⁸⁹ He therefore cautioned that tacit collusion should be condemned only when it causes a demonstrable anticompetitive effect on the market.⁹⁰

D. PIRAINO’S PROPOSED APPROACH

Seeking to refine this analysis and synthesize the divergent schools of thought on antitrust treatment, antitrust scholar Thomas Piraino, Jr., has advocated a purpose-based approach to oligopoly pricing cases.⁹¹ Under this proposed test, a court or regulatory agency would infer an illegal conspiracy when participants in oligopolistic markets engage in conduct “contrary to their immediate self-interest and [that] makes no economic sense other than as an invitation to join in a price-fixing or market-allocation arrangement.”⁹² Piraino specifically identifies price-signaling—announcements of planned price increases that risk immediate loss of revenue or profits—as behavior that would sustain such an inference, particularly when followed by competitors.⁹³ The purpose-based test would deem an initiating firm’s announcement an illegal offer to participate in a price-fixing scheme in violation of Section 1, and the subsequent re-

⁸⁶ *Id.* at 47.

⁸⁷ *Id.* at 54–55.

⁸⁸ Vaska, *supra* note 63, at 515. Vaska refers to an admission by Posner that economic evidence “frequently is ambiguous.” *Id.*; Richard A. Posner, *Oligopolistic Pricing Suits, the Sherman Act, and Economic Welfare: A Reply to Professor Markovits*, 28 STAN. L. REV. 903, 910 (1976).

⁸⁹ POSNER, *supra* note 82, at 72.

⁹⁰ *Id.* For a more thorough discussion of Posner’s reasoning, especially in relation to the competing assertion that tacit collusion should be legal, espoused by Professor Donald Turner (the so-called “Chicago” versus “Harvard” schools of thought), see Vaska, *supra* note 63, at 510–17.

⁹¹ Thomas A. Piraino, Jr., *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*, 82 IND. L.J. 345, 382 (2007).

⁹² *Id.*

⁹³ *Id.* at 383.

sponse by competitors as acceptance, thereby completing the elements of conspiracy.⁹⁴ To survive summary judgment under this proposal, the court would require the plaintiff to demonstrate that one or more firms in an oligopoly market signaled its pricing intentions contrary to its individual self-interest and that all other participants followed suit in a manner no less contrary to their own self-interests.⁹⁵ In Piraino's view, this would free the courts from the "fruitless search for plus factors" while still extending the scope of the law to reach the sort of harmful, tacit behavior that currently escapes punishment.⁹⁶ Further, adoption of such an approach would recognize a continuum of treatment of antitrust cases, in which the degree of inquiry should vary appropriately in relation to the competitive effects of the behavior at issue.⁹⁷

While Piraino's approach may not be immune from criticism, the underlying assumption—that the current approach of the courts does not adequately protect consumers in accord with the purpose of the antitrust laws and provides no clear guidance to businesses as to prohibited practices⁹⁸—is valid. In fact, the need for better, more sharply tailored regulation of certain pricing behaviors in oligopolistic markets is on stark display in the current criminal and civil investigations into fuel surcharges levied on international air cargo providers. A brief overview of the air cargo industry itself and the basis of the suits will show why this is so.

II. THE AIR CARGO INDUSTRY AND THE FUEL SURCHARGE LAWSUITS

A. THE AIR CARGO INDUSTRY

Airlines form a vital link in the transportation of cargo worldwide. Some specialized airlines engage exclusively in cargo operations, but even most passenger airlines also move freight on their flights or maintain separate fleets of cargo jets.⁹⁹ Because

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 382–83.

⁹⁷ *Id.* at 347.

⁹⁸ Piraino, *supra* note 57, at 32.

⁹⁹ ORG. FOR ECON. COOPERATION AND DEV., OECD WORKSHOP ON REGULATORY REFORM IN INTERNATIONAL AIR CARGO TRANSPORTATION, BACKGROUND DOCUMENT 17–18 (1999), available at <http://www.oecd.org/dataoecd/1/28/1821288.pdf> [hereinafter OECD]. Lufthansa, Korean Airlines, and British Airways rank among the leading international air cargo carriers worldwide. *Id.*

airfreight normally provides the shortest delivery-time of any mode of transport—but at a significantly higher cost—it is often preferred for shipments of perishable goods or time-sensitive items.¹⁰⁰ The prevalence of high-value, compact goods shipped by air also results from the fact that the physical volume of goods shipped, as opposed to their weight, often drives the cost of airfreight due to the limited availability of cargo space.¹⁰¹ These factors normally help insulate the air cargo industry from competition from other modes of transport.¹⁰²

A small number of major airlines tend to dominate the carriage of airfreight, leading to a concentrated market.¹⁰³ However, the airline industry as a whole is normally competitive, as evidenced by the fact that price increases by a single carrier are not generally sustainable unless most competitors move to match.¹⁰⁴ Price is often the main differentiating factor between competitors, since airfreight is intrinsically fungible, in that cargo space on one plane is no different from that on any other plane bound to a particular destination. The airlines sell a majority of their cargo capacity to freight forwarders, who then serve as a link between carriers and shippers.¹⁰⁵

¹⁰⁰ *Id.* at 24. Examples include electronic components, cut flowers, live plants, seafood, and apparel. *Id.*

¹⁰¹ Airfreight rates are charged per kilogram on the greater of actual weight or dimensional weight of the cargo, and dimensional weight is determined by multiplying height times length times width, then dividing the product by a pre-set factor. American Airlines, Glossary of Cargo Terms, <https://www.aacargo.com/utility/glossary.jhtml#d> (last visited Jan. 22, 2008).

¹⁰² See Ian Putzger, *Pick Your Poison; Fuel, Security Surcharges Are Likely to Offset Rate Reductions for Air-cargo Shippers*, J. COM., Jan. 7, 2008, at 90 (noting that higher airfreight prices due to rising fuel costs could drive “traditional airfreight commodities” toward ocean carriage).

¹⁰³ OECD, *supra* note 99, at 18 (indicating that the top twenty-five carriers control seventy-five percent of the market).

¹⁰⁴ See Baker, *supra* note 64, at 168. Baker describes the role of Northwest Airlines in thwarting a price increase on round-trip fares initiated by Continental Airlines in February 2000. However, the anecdote also reveals that Continental successfully led the implementation of an increased fuel surcharge just three weeks earlier. *Id.* at 166–67.

¹⁰⁵ Andreea Popescu, Air Cargo Revenue and Capacity Management ix (Dec. 2006) (unpublished Ph.D dissertation, Georgia Institute of Technology) (on file with School of Industrial and Systems Engineering, Georgia Institute of Technology), available at http://smartech.gatech.edu/bitstream/1853/14119/1/popescu_andreea_200612_phd.pdf.pdf.

B. THE ROLE OF FREIGHT FORWARDERS

International freight forwarders function as agents on behalf of shippers to arrange a wide array of transportation services, including booking space with carriers, completing export documentation, tracking shipments en route, and assisting with customs clearance.¹⁰⁶ As an industry, freight forwarders fall into three broad categories based on their respective modes of transport: ocean, surface, and air.¹⁰⁷ Freight forwarders who handle international air shipments must be licensed by the International Air Transport Association ("IATA").¹⁰⁸ Freight forwarders do not generally own and operate their own ships, trucks, or airplanes, but instead buy freight positions from carriers.¹⁰⁹ Much the same as the international air carrier market, the international freight forwarding industry is also concentrated, particularly because of the increasing convergence of "traditional" freight forwarders and air express integrators.¹¹⁰

The industry forms a vital link in the air cargo supply chain as an interface between shippers of cargo and the airlines. This occurs because of the high capital investment costs that force the airlines to plan flight schedules and cargo capacity many months in advance, even though the actual demand for space on any given flight becomes certain only a few days before departure.¹¹¹ Freight forwarders facilitate this planning process by entering into long-term contracts to purchase cargo space on scheduled flights six to twelve months in advance, thus assuming the risk of loss for unused space.¹¹² The freight forwarders in turn book cargoes on behalf of their shipper-clients on flights as they occur. Both shippers and carriers benefit from this system:

¹⁰⁶ OECD, *supra* note 99, at 18–19.

¹⁰⁷ James Giermanski & David Neipert, *The Re-regulation of Freight Forwarders in the USA and Its Impact on the USA-Mexico Border*, 9 CURRENTS: INT'L TRADE L.J. 11, 11 (2000).

¹⁰⁸ Export.gov, What is a Freight Forwarder?, http://www.export.gov/logistics/exp_what_is_freight_forwarder.asp (last visited Jan. 22, 2008).

¹⁰⁹ See, e.g., EXPEDITORS INT'L OF WASH., INC., 2006 SUMMARY ANNUAL REPORT 64 (2007).

¹¹⁰ See, e.g., DHL Logistics CEO Rejects Talk of Corporate Break-up, TRANSPORT INTELLIGENCE, Nov. 6, 2007, available at <http://transportintelligence.com/briefs/dhl-logistics-ceo-rejects-talk-of-corporate-break-up/1301>. See also OECD, *supra* note 99, at 20.

¹¹¹ Ek-Peng Chew, Huei-Chuen Huang, Ellis L. Johnson, George L. Nemhauser, Joel S. Sokol & Chun-How Leong, *Short-term Booking of Air Cargo Space*, 174 EUR. J. OF OPERATIONAL RES., 1380 (2006).

¹¹² *Id.*

airlines sell their freight space in large blocks to the forwarders, who can then offer lower per-kilogram freight rates to shippers by consolidating multiple small cargoes.¹¹³ Thus, in addition to being a conduit between shipper and carrier, freight forwarders to some extent influence the prevailing airfreight rate paid by the shipper.

C. AIR CARGO RATES

Air cargo accounts for twelve to fourteen percent of world-wide airline revenues, amounting to roughly \$55 billion in 2006.¹¹⁴ U.S. airlines generated at least forty percent of this global figure in 2006, or \$22 billion.¹¹⁵ Driven by the volume of movement of goods across international borders, air cargo revenues generally track fluctuations in the value of world trade.¹¹⁶ Using this indicator, industry economists predict that airfreight revenues will continue to grow for the next several years at approximately five percent per annum through 2011, a rate of growth not as robust as in the recent past.¹¹⁷ In part, this projected decline is a result of the boost in revenues seen in 2005 and 2006—even in the face of lower traffic volumes—attributed by analysts to the “pricing power” airlines exerted in passing on higher fuel costs to customers through surcharges.¹¹⁸

Projections also show a sharp decline in profitability in the airline industry as a whole. At the time of this writing, profits for 2007, from both passenger and cargo operations, are estimated to be \$5.6 billion worldwide.¹¹⁹ While 2008 profits had once been forecast to be over \$7 billion, the industry now expects to reap only \$5 billion.¹²⁰ While the credit crunch stemming from the meltdown of the U.S. sub-prime mortgage market is noted

¹¹³ Stephen Dolan, *Reform of Air Cargo Transport Regulation Through the WTO and GATS*, 29 TRANSP. L.J. 189, 204 (2002).

¹¹⁴ International Air Transport Association, *Air Freight Market Outlook* (Sept. 2007), http://www.iata.org/NR/rdonlyres/CE373AB8-1093-4192-A892-9C559F57CA29/0/Cargo_Market_Outlook_Sep07.pdf [hereinafter IATA].

¹¹⁵ AIR TRANSP. ASS'N, 2007 ECONOMIC REPORT 21 (2007), *available at* <http://www.airlines.org/NR/rdonlyres/0E9E7072-ECC6-4CED-8B8E-6857256935E7/0/2007AnnualReport.pdf>.

¹¹⁶ IATA, *supra* note 114, at 2.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 6.

¹¹⁹ International Air Transport Association, *Financial Forecast* (Dec. 2007), http://www.iata.org/NR/rdonlyres/DA8ACB38-676F4DB1-A2AC-F5BCEF74CB2C/0/Industry_Outlook_December07.pdf.

¹²⁰ *Id.*

as one cause, the primary driver is the increasing price of oil, which in turn drives up the cost of aviation fuel.¹²¹

D. FUEL COSTS AND FUEL SURCHARGES

Passenger and cargo airlines operate on a specialized petroleum-based, kerosene-type fuel generally referred to as "Jet A" or "Jet A-1."¹²² Current market rates, or "spot-prices," for kerosene-type jet fuel on a delivered basis at various locations are regularly tracked and published by the U.S. Department of Energy.¹²³ As of December 2007, the spot-price for jet fuel in the Los Angeles market was \$2.66 per gallon,¹²⁴ a near-record high, since prices have only exceeded \$2.30 per gallon twice before, including a spike in the aftermath of Hurricane Katrina.¹²⁵ Since 2000, average annual jet fuel prices have climbed over 200 percent.¹²⁶

Fuel costs are now responsible for thirty percent of airline operating costs overall, eclipsing even labor costs, which were once the largest single line item of operating expense in the industry.¹²⁷ Because fuel accounts for a larger percentage of operating costs for freight transport than for passenger service,¹²⁸ airfreight rates should naturally be more sensitive to fluctuations in fuel prices.

As early as 2000, some airlines reacted to increasing fuel costs with the introduction of fuel surcharges into their rates on both passenger and cargo fares in an attempt to recoup falling profits. Eventually, more and more air carriers added similar

¹²¹ *Id.*

¹²² Air Transport Association, Alternative Fuels Q&A, <http://www.airlines.org/economics/energy/altfuelsqanda.htm> (last visited July 4, 2008).

¹²³ Energy Information Administration, Spot Prices for Crude Oil and Petroleum Products, http://tonto.eia.doe.gov/dnav/pet/pet_pri_spt_s1_m.htm (last visited Jan. 23, 2008).

¹²⁴ Energy Information Administration, Monthly Los Angeles Kerosene-Type Jet Fuel Spot Prices, <http://tonto.eia.doe.gov/dnav/pet/hist/rjetlam.htm> (last visited Jan. 23, 2008).

¹²⁵ Michael Fabey, *IATA Slashes Profit Forecast*, SHIPPING DIG., Jan. 14, 2008, at WP.

¹²⁶ Energy Information Administration, Annual Los Angeles CA Kerosene-Type Jet Fuel Spot Prices, <http://tonto.eia.doe.gov/dnav/pet/hist/rjetlaa.htm> (last visited Jan. 23, 2008). The delivered price of kerosene-type jet fuel in the Los Angeles market rose from \$.94 to \$2.20 a gallon. *Id.*

¹²⁷ International Air Transport Association, Economic Briefing: Airline Fuel and Labour Costs Share (June 2007), http://www.iata.org/NR/rdonlyres/4A49F6DA-2B12-48A9-A283-E035AEA5D165/0/Airline_Labour_Cost_Share.pdf.

¹²⁸ IATA, *supra* note 114, at 5.

surcharges to their rates as well. By 2006, the practice had spread throughout the entire industry and remains especially significant among carriers servicing international cargo routes.

Generally, every international cargo carrier calculates the fuel surcharge in the same manner: as an add-on charge to the stated fare on a per-kilogram basis.¹²⁹ For example, a fuel surcharge of \$.10 per kilogram would yield a total charge of \$1 on a shipment of 100 kilograms of chargeable weight. Because the surcharge varies by the shipment's chargeable weight regardless of origin or destination, there is no practical relationship between the weight and size of cargo shipped and the fuel actually consumed by an airliner carrying them. Two cargo freighters transporting identical loads out of Dallas-Fort Worth airport theoretically generate the same fuel surcharge revenue, even if one is bound for Frankfurt and the other for Moscow, a flight of an extra 1,250 miles.¹³⁰

Airlines almost uniformly use some index of various spot prices for fuel to set the rate of the fuel surcharge over time. The methodology employed by American Airlines is a good example. According to its website, the beginning point is an index of the spot price of kerosene-type jet fuel calculated by averaging the weekly spot rates in the New York Harbor, U.S. Gulf Coast, Los Angeles, Rotterdam, and Singapore markets.¹³¹ The index is then compared to a stair-stepped table of "trigger-points" tied to various dollar-per-kilogram levels. If the index rises above or falls below a given trigger-point for two consecutive weeks, the fuel surcharge is increased or diminished accordingly. As oil prices have driven up the cost of jet fuel, the fuel surcharge has risen apace. From November 2006 to January 2008, the fuel surcharge quoted by American Airlines has almost doubled, from \$.50 per kilogram to \$.80 per kilogram.¹³²

Anticompetitive concerns about fuel surcharges appeared almost from the start. Federal regulators in the United States re-

¹²⁹ American Airlines Cargo Fuel Surcharge Instructions, <https://www.aa-cargo.com/shipping/fuelsurcharge.jhtml> (last visited Jan. 23, 2008).

¹³⁰ See Sheremetyevo Airport, Alternate Airports, <http://www.ifly.com/sheremetyevo-international-airport#overview> (last visited Jan. 23, 2008) (at an average fuel-usage rate of 19 liters per mile for a typical freighter, this amounts to a difference of \$16,625 at the current spot-price of jet fuel); Boeing, Commercial Airplanes—747 Fun Facts, http://www.boeing.com/commercial/747family/pf/pf_facts.html (last visited Jan. 23, 2008); Monthly Los Angeles Kerosene-Type Jet Fuel Spot Prices, *supra* note 124.

¹³¹ American Airlines Cargo Fuel Surcharge Instructions, *supra* note 129.

¹³² *Id.*

jected an early proposal in 2000 from IATA to levy a uniform industry-wide fuel surcharge based on an index of spot-fuel prices with the conclusion that the practice was “fundamentally flawed and unfair to shippers.”¹³³ The regulators particularly criticized the use of an index based on spot-prices as improper, since most airlines have long-term fuel contracts and employ hedging to manage their fuel costs, and predicted that high surcharges would persist even after fuel prices fell.¹³⁴ In the wake of the rejection, airlines continued to implement surcharges independently, without any coordination or cover from IATA, which enjoys limited immunity from U.S. antitrust laws.¹³⁵ Most airlines pegged their increases in fuel surcharges to a fuel spot-price index developed by Lufthansa, while a few developed their own indexes.¹³⁶

Over time, the level of fuel surcharges on international shipments mounted. From May 2004 to October 2005, the level rose from \$.20 per kilogram to \$.60 per kilogram—a rate that in some cases equaled the base airfreight fare, effectively doubling the cost of freight.¹³⁷ Carriers applied respective increases in almost perfect lockstep. A complaint filed by shippers in federal court in California documents one instance that illustrates this pattern of uniform increases: in early February 2006, fourteen of the largest international air cargo carriers announced increases in their fuel surcharges from existing levels of \$.45, or .45 euros, to new levels of \$.50, or .50 euros, per kilogram.¹³⁸

E. THE CRIMINAL INVESTIGATION

In early 2006, U.S. and European authorities commenced a joint global investigation into possible antitrust violations cen-

¹³³ John R. Wilke, Daniel Michaels & Mary Jacoby, *Lufthansa to Co-operate in Air-Cargo Investigation; Deal in U.S. Could Be Breakthrough in Price-fixing Probe; Objections to Fuel Surcharges*, GLOBE AND MAIL (Can.), Mar. 8, 2006, at B13.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See John D. Boyd, *Surcharges Filling Up*, TRAFFIC WORLD, May 1, 2006, at 42; David Knibb & Peter Conway, *Cargo Probe Focuses on Surcharges*, AIRLINE BUS., Apr. 1, 2006 (“Many airlines openly admit that they calculate their surcharges based on the fuel price index published on the Lufthansa Cargo website since 2000.”).

¹³⁷ Lara L. Sowinski, *Air Cargo Industry Anxious to Recover in 2006; Shippers Stand to Gain as Industry Tackles High Fuel Costs and Competition From Other Transportation Modes*, 19 WORLD TRADE 38 (2006).

¹³⁸ Complaint at 19, *Printing Techs., Inc. v. Deutsche Lufthansa AG*, No. CV06-1489 (C.D. Cal. Mar. 10, 2006). Among those named in the complaint were Lufthansa, Korean Air, and British Airways. *Id.*

tered on fuel surcharges on passenger and cargo service with coordinated raids and service of warrants in various jurisdictions.¹³⁹ The investigations bore fruit in August 2007, when the U.S. Department of Justice announced that British Airways and Korean Airlines had each agreed to plead guilty to violations of the Sherman Act, and to pay criminal fines of \$300 million each for their roles in a price-fixing conspiracy involving fuel surcharges on both passenger and cargo operations.¹⁴⁰ Soon after, Qantas Airways entered a similar plea agreement that stipulated to criminal fines of \$61 million for its involvement in price fixing on international airfreight shipments.¹⁴¹

In all three cases, the Department of Justice expressly conditioned the plea agreements on the continued cooperation of the airlines in ongoing antitrust investigations involving international air cargo transportation.¹⁴² The respective plea agreements also averred that, had the case gone to trial, the government would have presented evidence that executives of the airlines acted to further the price-fixing conspiracy through attendance at meetings and discussions with executives from other major international air carriers during a period stretching from 2000 to 2006.¹⁴³ Aside from this, however, the plea agreements and publicly available information provide no hint as to the nature and extent of this evidence.¹⁴⁴ There was early speculation that the evidence indicated the collusion began among European carriers, with U.S. airlines then moving to match the

¹³⁹ Knibb & Conway, *supra* note 136; Martin Coleman & Peter Scott, *Antitrust "Victims" Open New Front*, LEGAL WK., Oct. 26, 2006.

¹⁴⁰ Press Release, U.S. Dep't of Justice, British Airways PLC and Korean Air Lines Co. Ltd. Agree to Plead Guilty and Pay Criminal Fines Totaling \$600 Million For Fixing Prices on Passenger and Cargo Flights (Aug. 1, 2007), *available at* http://www.usdoj.gov/atr/public/press_releases/2007/224928.pdf.

¹⁴¹ Press Release, U.S. Dep't of Justice, Qantas Airways Agrees to Plead Guilty and Pay Criminal Fines For Fixing Prices on Cargo Shipments (Nov. 27, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/November/07_at_943.html.

¹⁴² Plea Agreement, United States v. Qantas Airways Ltd., No. 07-00322-JDB (D.D.C. Jan. 14, 2008), *available at* <http://www.usdoj.gov/atr/cases/f229200/229266.htm>; Plea Agreement, United States v. British Airways PLC, No. 07-183 JDB (D.D.C. Aug. 23, 2007), *available at* <http://www.usdoj.gov/atr/cases/f225500/225523.htm>; Plea Agreement, United States v. Korean Air Lines Co., No. 07-184 JDB (D.D.C. Aug. 1, 2007), *available at* <http://www.usdoj.gov/atr/cases/f225500/225524.htm>.

¹⁴³ Plea Agreement, Qantas Airways Ltd., *supra* note 142; Plea Agreement, British Airways PLC, *supra* note 142; Plea Agreement, Korean Air Lines Co., *supra* note 142.

¹⁴⁴ Knibb & Conway, *supra* note 136.

surcharges independently.¹⁴⁵ Reportedly, British Airways executives communicated extensively with rivals about planned movements in the surcharge rate.¹⁴⁶

Notably, two airlines, Lufthansa and Virgin Atlantic, escaped sanctions by entering an amnesty program with the Department of Justice early on, and it became apparent that their cooperation was vital to securing the guilty pleas of British Airways, Korean Airlines, and Qantas.¹⁴⁷ Lufthansa also moved to extricate itself quickly from the civil suits discussed below with an \$85 million settlement.¹⁴⁸

However, the worldwide investigation grew even larger on October 10, 2007, when U.S. and European regulators launched a similar spate of coordinated raids on the offices of major freight forwarders, such as Expeditors International, Deutsche Post, and Panalpina, with subpoenas to collect further evidence of price-fixing through surcharges.¹⁴⁹ Industry sources indicated that the investigators focused inquiry on accounting records between the forwarders and airlines that document how fuel surcharges are invoiced and paid.¹⁵⁰ Some insiders speculated that the airlines rewarded favored forwarders for their cooperation in the conspiracy by selectively rebating or forgiving fuel surcharges, thus increasing profit on shipments.¹⁵¹

In December 2007, European Union regulators announced charges against eleven carriers for violations of competition laws for their fuel surcharge pricing practices, including British Airways, Air France-KLM Group, and Air Canada.¹⁵² As it had in

¹⁴⁵ Wilke et al., *supra* note 133.

¹⁴⁶ See Dominic O'Connell, *Catch Me If You Can*, SUNDAY TIMES (London), Aug. 5, 2007.

¹⁴⁷ Kevin Done, Stephanie Kirchgaessner & Michael Peel, *More To Come In Aviation Price-Fixing Investigations*, FIN. TIMES (London), Aug. 25, 2007, at 15, available at 2007 WLNR 16554910.

¹⁴⁸ Robert Wall, *Paying the Price*, AVIATION WK. & SPACE TECH., Aug. 6, 2007, at 46, available at 2007 WLNR 16708238.

¹⁴⁹ Michael Fabey, *Forwarder Probe Widens*, TRAFFIC WORLD, Oct. 22, 2007, at 29, available at 2007 WLNR 20045292.

¹⁵⁰ *Surcharge Probe Targets Billing*, TRAFFIC WORLD, Dec. 3, 2007, at 29, available at 2007 WLNR 23540959.

¹⁵¹ Geoffrey Arend, *Arrests Reported In Air Cargo Price Fixing*, AIR CARGO NEWS, <http://www.aircargonews.com/index071229Archive.html> (last visited Jan. 23, 2008).

¹⁵² *Europe Charges Airlines With Price Fixing*, N.Y. TIMES, Dec. 28, 2007, at C4, available at 2007 WLNR 25549723.

the U.S. case, Lufthansa obtained conditional immunity for its cooperation in the European investigations.¹⁵³

F. THE CIVIL CLASS ACTION SUITS

A slew of civil suits in the United States followed hot on the heels of news of the criminal investigations naming most of the major international airlines, including Lufthansa, British Airways, and Virgin Atlantic.¹⁵⁴ Twenty-three of these suits were eventually consolidated and transferred to the Eastern District of New York for pre-trial proceedings.¹⁵⁵ The suit filed by shippers in the Central District of California in March 2006 provides a good example of the allegations leveled against the defendants in this litigation.

The class-action suit names twenty-one different entities comprising some of the largest international air cargo carriers worldwide for violations of Section 1 of the Sherman Act.¹⁵⁶ After a description of the size and scope of the airfreight industry and the major players, the lawsuit describes the process by which the air carriers imposed various surcharges, including security and fuel surcharges, on both passenger and cargo fares, and details a pattern of parallel increases in the level of fuel surcharges from 2000 to 2006.¹⁵⁷ The plaintiff-shippers allege that this pattern was the result of a conspiracy between the defendants to fix, raise, and maintain prices on airfreight sold in the United States and elsewhere.¹⁵⁸ To effectuate this conspiracy, the plaintiffs maintain that the defendants participated in meetings and conversations to reach agreements to manipulate airfreight rates, and that they issued price announcements and quotations in accord with those agreements.¹⁵⁹ The plaintiffs point to the airlines' membership in various trade associations and worldwide industry group conferences in places such as Washington, D.C., Singapore, Dubai, Hong Kong, and Istanbul as evidence of these meetings.¹⁶⁰

¹⁵³ *Id.*

¹⁵⁴ See, e.g., Complaint at 1–2, *Printing Techs., Inc. v. Deutsche Lufthansa AG*, No. CV06-1489 (C.D. Cal. Mar. 10, 2006).

¹⁵⁵ *In re Air Cargo Shipping Servs. Antitrust Litig.*, 435 F. Supp. 2d 1342, 1343–44 (J.P.M.L. 2006).

¹⁵⁶ Complaint at 4–10, *Printing Techs., Inc. v. Deutsche Lufthansa AG*, No. CV06-1489 (C.D. Cal. Mar. 10, 2006).

¹⁵⁷ See *id.* at 17–19.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 23–24.

¹⁶⁰ See *id.* at 23–31.

As noted above, Lufthansa managed to reach an \$85 million settlement with plaintiffs for release from the civil suits.¹⁶¹ Other airlines, such as Air France-KLM Group, are still weighing their options and attempting to measure their level of exposure to criminal and civil liability.¹⁶² For these airlines, the cost of accepting a plea bargain could well be worth the risk of greater civil damages at trial.¹⁶³ Interestingly, no freight forwarders were named in any of the current class action suits, and thus far, no civil suits have been brought against forwarders, so it is unclear at present how these suits will ultimately affect them.

III. THE CRIMINAL INVESTIGATIONS & MATSUSHITA STANDARD FAIL TO PROTECT CONSUMERS

A. CRIMINAL PROSECUTIONS HAVE NOT AFFECTED CONCERTED INCREASES IN FUEL SURCHARGES

As noted earlier, the surcharge controversy and surrounding criminal and civil cases demonstrate the shortcomings of the present approach of the courts in the application of antitrust law to the oligopolistic pricing practices. In particular, the focus of both the criminal and civil allegations on meetings and discussions between officers and executives of the accused corporations illustrates the “cops-and-robbers” mentality described by Posner and the importance attached to the presence of an express agreement to construct a violation of Section 1. One inference to be drawn from this focus is that current enforcement of the antitrust laws values punishment of classically-defined criminal conduct over the protection of consumers from the harmful effects of such conduct, contrary to the original intent of the legislation.

Ironically, the successful prosecution of British Airways, Korean Airlines, and Qantas demonstrate the perverse effect of the current over-reliance on the conspiracy aspect of Section 1 violations at the expense of examining anticompetitive effects. Despite the fact that these high-profile convictions have generated almost \$1 billion in criminal fines, in addition to restitution payments from Lufthansa and Virgin Atlantic,¹⁶⁴ they have provided no effective relief to the consumers whom the antitrust laws are

¹⁶¹ Wall, *supra* note 148, at 46.

¹⁶² See David Knibb, *Cargo Confession Race*, AIRLINE BUS., Dec. 17, 2007, available at 2007 WLNR 25953504.

¹⁶³ *Id.*

¹⁶⁴ Press Release, U.S. Dep't of Justice, *supra* note 140.

supposed to protect. Far from abating, fuel charges have instead continued to increase in the same lockstep pattern of parallel action that prevailed before any investigation began, as the table below demonstrates.

As of January 2008, the following is a sampling of fuel surcharges on international air cargo for export from the United States, levied by various air cargo carriers (including some of those involved in the criminal cases) and freight forwarders:

TABLE 1

<u>Carrier</u>	<u>Effective as of</u>	<u>Fuel Surcharge</u>
American Airlines	December 2007	.80 USD per kilogram ¹⁶⁵
Air Canada	December 2007	.75 USD per kilogram ¹⁶⁶
British Airways	November 2007	.80 USD per kilogram ¹⁶⁷
Korean Airlines	December 2007	.80 USD per kilogram ¹⁶⁸
Cargolux Airlines	December 2007	.80 USD per kilogram ¹⁶⁹
Lufthansa Cargo	November 2007	.79 EURO per kilogram ¹⁷⁰
<u>Freight Forwarder</u>	<u>Effective as of</u>	<u>Fuel Surcharge</u>
DHL Global	November 2007	.80 USD per kilogram ¹⁷¹
EGL International	December 2007	.80 USD per kilogram ¹⁷²
BAX Global	December 2007	.80 USD per kilogram ¹⁷³

¹⁶⁵ AA Fuel Surcharge Instructions, Historical Fuel Surcharges, <https://www.aacargo.com/shipping/fuelsurcharge.jhtml> (last visited Jan. 23, 2008).

¹⁶⁶ Fuel Index, <http://www.aircanada.com/cargo/en/fuelindex/> (last visited Jan. 23, 2008).

¹⁶⁷ Fuel Surcharge, <http://www.baworldcargo.com/surcharges/> (last visited Jan. 23, 2008).

¹⁶⁸ Fuel Surcharge, http://cargo.koreanair.com/ecus/fpg/servlet/SurChargeServlet?version=eng&menu1=menu6_1&menu2=menu6 (last visited Jan. 23, 2008).

¹⁶⁹ Cargolux Fuel Index, <http://www.cargolux.com/services/surcharges.php> (last visited Jan. 23, 2008).

¹⁷⁰ *British Airways and Lufthansa Cargo Hike Fuel Surcharge*, Nov. 17, 2007, domain-b.com Aviation & Aerospace, http://www.domain-b.com/aero/airlines/20071117_fuel.html (Conversion from dollar to euro based on Jan. 18, 2008 exchange rate).

¹⁷¹ Fuel Surcharge Amendment – Update, <http://www.dhl-dgf.com/frameset.cgi?winLocation=http://www.dhl-dgf.com/worldwide/northamerica/resource/2007/046.html> (last visited Jan. 23, 2008).

¹⁷² Press Release, E. Joseph Bento, President of Global Freight Management, EGL (Nov. 26, 2007), available at <http://www.cevalogistics.com/portal/page/portal/CEVAHome/Solutions/Customertools/Fuel%20Surcharges/International%20Airfreight%20FSC/International%20Airfreight%20FSC%20112607pdf.pdf>.

¹⁷³ BAX Global News, <http://www.baxglobal.com/News/FuelSurcharge/USInternational.aspx> (last visited Jan. 23, 2008).

This table, while far from exhaustive, shows that the prosecutions have in no way dampened the airlines' enthusiasm toward the fuel surcharges, and their only effect—if any at all¹⁷⁴—has been to punish and, hopefully, eliminate active collusion. Unfortunately, the oligopoly problem renders this little more than a hollow victory for consumers.

If not impeded by legal action, the use of fuel surcharges will only increase due to several new pressures on the air cargo market. High among these is the general fear of recession in the U.S. market that could lead to an economic decline worldwide.¹⁷⁵ Industry analysts predict the rate of growth of the air-freight market to diminish over the next few years, and indeed, some carriers already feel the pinch: after six consecutive profitable quarters, American Airlines showed a \$69 million loss in the last quarter of 2007, which it attributed to rising fuel costs.¹⁷⁶ Even worse, the unexpected leap in oil prices to over \$100 a barrel has brought hedging activities—airlines' primary vehicle to control costs—to a screeching halt.¹⁷⁷ All of these factors could lead to greater reliance on fuel surcharges to sustain air-freight profits and greater incentive to collude—explicitly or tacitly—to keep surcharges artificially high.

Further, instead of reducing their reliance on fuel surcharges in reaction to the success of the criminal prosecutions, airlines and freight forwarders have moved to reduce their exposure to potential liability by curtailing activities that plaintiffs or regulators could use to sustain conspiracy charges. For example, industry insiders report that they have canceled trips to certain forums and given greater scrutiny to the participation of their executives in trade associations and their physical attendance at conferences and meetings.¹⁷⁸ In other words, at best, the prose-

¹⁷⁴ The only visible effect that the author could ascertain is that Lufthansa, Virgin Atlantic, and Qantas no longer publish nor refer to the fuel surcharge levied on air cargo on their corporate websites. Further, DHL has removed from its website any description of the methodology the company uses to calculate fuel surcharges, in response to the class action lawsuits. See Jet Fuel Surcharge, http://www.dhl.ch/publish/ch/en/information/shipping/fuel_surcharge.high.html (last visited Jan. 23, 2008).

¹⁷⁵ See Mark Landler & Heather Timmons, *World Markets Plunge on Fears of U.S. Slowdown*, N.Y. TIMES, Jan. 22, 2008, at A1, available at 2008 WLNR 1206334.

¹⁷⁶ *Business This Week*, ECONOMIST, Jan. 19, 2008, at 93, available at 2008 WLNR 949691.

¹⁷⁷ See Justin Baer, *Climbing Oil Prices Fuel U.S. Airlines' Fears*, FIN. TIMES (London), Jan. 7, 2008, at 18.

¹⁷⁸ See, e.g., Peter Conway, *Fear Factor: The Impact of Price-fixing Accusations on the Air Cargo Industry*, AIRLINE BUS., Oct. 24, 2007, <http://www.flightglobal.com/arti->

cutions have caused the industry to regulate their behaviors that are the *least* directly harmful to consumers, or at worst, simply made future conspiracies more difficult to detect.

B. CURRENT APPROACH UNDER *MATSUSHITA* WILL
FAIL TO PROTECT CONSUMERS

If the same focus and associated bias toward punishing express collusion evident in the criminal investigations influence the future disposition of the civil class action suits, the law will function just as the near-sighted police officer described earlier, and those conspirators just on the blurry edge will continue the same damaging behavior undeterred. Under the current *Matsushita* standard, the civil class action suits will only survive summary judgment if the court finds sufficient “plus factors” to infer the presence of active collusion among the defendants, which, as discussed above, includes evidence that each defendant acted contrary to its own economic self-interest or in a manner inexplicable in the absence of an illegal agreement.¹⁷⁹ This could prove a difficult hurdle, since the nature of the fuel surcharge system almost perfectly exemplifies the oligopoly problem.

The key factor that implicates the oligopoly problem is that the scheme functions just as effectively in the absence of active collusion. In effect, the use of the spot-price index is a new form of price signaling that eliminates the need for repeated communications between competitors: once the spot-price index of trigger points is established and tied to corresponding surcharges, the initiating firm has signaled its intentions for all price levels to anyone with internet access. As fuel prices rise and fall, each airline knows within a fraction of a cent how competitors will respond, and thus, that they themselves can safely match that surcharge without risking a loss of trade volume.

The link between the surcharge and the price of fuel lends an air of reasonableness to the practice that could be enough to defeat a search for “plus factors.” The natural defense that carriers raise to justify surcharges is that they are necessary to recoup costs from the rapidly rising cost of fuel driven by recent shocks in the oil market. The de-coupling of the fuel surcharge from the base rate of airfreight and the use of a pre-determined

[cles/2007/10/24/218777/fear-factor-the-impact-of-price-fixing-accusations-on-the-air-cargo.html](http://www.fuelwatch.com/cles/2007/10/24/218777/fear-factor-the-impact-of-price-fixing-accusations-on-the-air-cargo.html).

¹⁷⁹ See, e.g., *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1301 (11th Cir. 2003).

index based on spot-prices gives the impression that the surcharge is somehow revenue-neutral—that the carriers are simply passing through the higher cost of fuel to consumers. Thus, the defendants can assert that each is simply operating in a manner directly in accord with its own economic self-interest. If the court accepts this premise, then it is likely that claims against carriers who did not directly participate in communications with other airlines about surcharge levels, as British Airways, Virgin Atlantic, and Lufthansa obviously did, will not survive summary judgment. Plaintiffs will be stonewalled by the “cops-and-robbers” approach described by Posner.

This would be unfortunate, because in practical terms no such pass-through relationship exists. First, because the surcharge is applied by chargeable weight, it makes no distinction between the difference in fuel consumed on short-haul flights and long-haul routes. Second, because freight forwarders purchase a majority of the carriers’ cargo capacity six months to a year in advance, the surcharges being “passed through” to consignors at the time of shipment are out of phase. Third, there is no economic evidence that the almost-uniform scheduled step increases of five to ten cents per kilogram correlated to various trigger-points in the spot-price index have any meaningful relationship to operating costs.

Based on the multitude and complexity of factors that affect the actual fuel cost borne by the airlines—including hedging activities and differences in operating efficiencies and economies of scale between carriers—it seems highly unlikely that the “one size fits all” pattern of fuel surcharges is anything other than arbitrary. If this is so, then the segmentation of airfreight rates into a base rate and a fuel surcharge rate is a distinction without economic substance, and thus one would expect fuel surcharges among carriers to be subject to the same price competition as their base rates. In other words, in the absence of tacit or express collusion to maintain the rigid index system, fuel surcharges should fluctuate just as base airfreight rates do: in response to demand in the market, not in a contrived relation to an underlying commodity. In fact, the passenger market displays this trend,¹⁸⁰ even while uniform surcharges on cargo rates have persisted.

¹⁸⁰ *Major Airlines Abandon Higher Fuel Surcharges*, TULSA WORLD, Jan. 23, 2008, at E6, available at 2008 WLNR 1345500. A retreat by Northwest forced American,

Although the segmentation of airfreight rates may have no realistic economic basis, it allows carriers to increase revenue collusively while maintaining the illusion of competition.¹⁸¹ For example, a recent Banc of America survey of base airfreight showed that for most of 2007, trans-Atlantic prices showed only small increases, while trans-Pacific rates were flat or even falling.¹⁸² During that same time, however, fuel surcharges steadily advanced.¹⁸³

C. A PROPOSED APPROACH TOWARD TACIT COLLUSION

The civil class action suits provide an opportunity to tailor the application of Section 1 to more effectively counter the oligopoly problem by recognizing that, at least in some instances, tacit collusion is just as damaging to consumers as active collusion. To meet this opportunity, the court should apply Section 1 in a manner that protects both consumers and truly independent action by participants in concentrated markets.

A melding of the approaches suggested by Posner and Piraino discussed above would adequately address these concerns. This proposed approach would take the form of the two-step inquiry proposed by Posner, which begins with an examination of the industry at issue to determine susceptibility toward collusion.¹⁸⁴ In the second prong of the test, the court would inspect any pattern of parallel conduct in accord with Posner's analysis, but with a purpose-based inquiry as described by Piraino.¹⁸⁵ If the conduct is undertaken contrary to the participant's economic self-interest, as shown by the risk of immediate loss of revenue or profits, then sufficient basis would exist to find an illegal conspiracy or combination under Section 1. In the context of the air cargo litigation, the application of these approaches to a rule

Delta, and United Airlines to roll back fuel surcharges—but only on passenger fares. *Id.*

¹⁸¹ See Baker, *supra* note 64, at 166. Baker describes how Northwest thwarted a price increase on round-trip passenger fares initiated by Continental Airlines in February 2000, however, Continental had successfully led the implementation of an increased fuel surcharge just three weeks earlier. *Id.*

¹⁸² *Trans-Atlantic Air Rates Rise*, TRAFFIC WORLD, Jan. 3, 2008, available at 2008 WLNR 222575.

¹⁸³ See, e.g., American Airlines Cargo Fuel Surcharge Instructions, *supra* note 129.

¹⁸⁴ See discussion *supra* Part I.C for full description of Posner's proposed approach.

¹⁸⁵ See discussion *supra* Part I.D for full description of Piraino's proposed approach.

of reason analysis of anticompetitive impact would almost certainly find that the current use of fuel surcharges in the air cargo industry is an unreasonable restraint on trade or commerce, regardless of whether it is the product of active or tacit collusion.

D. APPLICATION OF THE PROPOSED APPROACH TO AIR CARGO FUEL SURCHARGES

To begin with, as shown above, the airfreight industry manifests many, if not all, of Posner's economic attributes that identify susceptibility to collusion: concentration of relatively few sellers, significant barriers to entry in the form of high capital investment costs, and a standardized, fungible product.¹⁸⁶ Further, because of the high-value and often perishable nature of airfreight goods, demand is probably inelastic at the competitive price.¹⁸⁷

Ample evidence is also present to show a pattern of collusive behavior sufficient to satisfy the second element of Posner's inquiry. As already noted, the various indexes of fuel spot-prices function as one giant mechanism to exchange prospective price information between the airlines, and a pattern of parallel action in response is evident.¹⁸⁸ Moreover, the operation of the spot-price indexes resembles another practice identified by Posner as an indicator of collusion: base-point pricing. Both base-point pricing and the indexed system of fuel surcharges impose uniform levels of charges that bear no direct relationship to underlying expenses, but are instead tied to some other variable: the location of the base point in one case and fuel spot-prices in the other. This indicates that the motivation behind each pricing scheme is not to recoup expenses but to stabilize prices. The final element of a demonstrably anticompetitive effect on the market would require economic analysis outside the scope of this comment, but, given the fact that in some cases fuel surcharges exceed the base airfreight rate on some routes, it is likely that plaintiffs could establish that airfreight prices exceed the competitive rate.

Grafting the purpose-based inquiry proposed by Piraino into the second prong represents a less radical departure from the current approach that would preserve an element of intent or

¹⁸⁶ See discussion *supra* Part II.A.

¹⁸⁷ *Id.*

¹⁸⁸ See discussion *supra* Parts II.D, E, & F.

mens rea in the analysis, yet still recognize and combat the effects of tacit collusion. The key element to establish under this analysis is that each defendant acted contrary to its own economic self-interest as a result of the agreement, such as through the announcement of planned price increases at the risk of loss of profits or revenue. Again, the price-signaling aspects of the fuel surcharge index system and the resultant pattern of uniform increases by carriers demonstrate offer and acceptance to participate in a price-fixing scheme necessary to form a conspiracy in Piraino's view.

One last element of the purpose-based inquiry remains: to distinguish truly independent action from the requisite purpose to engage in a conspiracy, either expressly or tacitly, Piraino suggests that the court look to whether the announcement was made with a business purpose.¹⁸⁹ Using the airline industry as an example, Piraino notes that communications of planned increases in passenger rates have such a justification, since customers use this information to plan their travels.¹⁹⁰

This leads to an interesting result in the context of fuel surcharges, since the same justification does *not* apply toward shippers of airfreight, who make regular, recurring purchases rather than sporadic flights. Thus, the application of a purpose-based approach could lead to a grant of summary judgment regarding claims for surcharges on passenger fares, while claims for surcharges on cargo would survive. While perhaps counter-intuitive, this result would nonetheless be in accord both with the concept of a continuum of regulation of questioned practices in relation to their anticompetitive effects and with the disparate behavior of fuel surcharge levels displayed between the cargo market and the passenger market.

While this admixture of approaches surely has its own drawbacks, it nonetheless addresses the dual concern that any sanction of tacit collusion necessarily entails—protecting consumers from anticompetitive prices while preserving the economic efficiency of interdependent-yet-independent action in oligopolistic markets.

D. LOOKING FORWARD

No matter what course the air cargo litigation ultimately takes, if a stronger emphasis on the anticompetitive effects of

¹⁸⁹ See Piraino, *supra* note 57, at 39.

¹⁹⁰ *Id.*

fuel surcharges—and toward tacit collusion in general—does not surface, the original intent of the Sherman Act (to protect consumers) will continue to be thwarted. A consumer feels the sting of anticompetitive prices regardless of whether the price is the result of a shady deal in a smoke-filled room or of conscious participation in an unspoken agreement. In most cases, the forces of the marketplace supply the needed level of protection, but in concentrated, oligopolistic industries, those intrinsic safeguards break down. In these instances, it is appropriate for the law to intervene to fill the gap.

The current imposition of fuel surcharges in the international air cargo market is an example of one of those instances. All consumers suffer the effects of uncompetitive prices on air-freight through higher retail prices on the goods shipped. Unfortunately, the punishment of a few blatant conspirators has not deterred the pattern of collusion that exists in setting and maintaining the rates of surcharges above a competitive level. The solution to this problem requires an expansion of the current application of antitrust law to focus more on the *effect* than the *intent* of questionable business practices to provide better consumer protection in keeping with the goals of the legislation. As noted at the beginning, punishing bad actors is indeed a worthy goal, but ultimately the pursuit has little meaning if consumers still pay the price for the collusion. Catching the bad guys may be good, but making sure consumers are no longer getting robbed is even better.