

Antitrust and Sharing Information about Product Quality

John Han†

INTRODUCTION

On June 24, 2005, the Antitrust Division of the Department of Justice entered into a consent decree enjoining an insurance group, the Professional Consultants Insurance Company (PCIC), from sharing information about limitation of liability contract terms used by its members.¹ PCIC provides insurance against errors and omissions for its three owners, all actuarial companies that design corporate employee benefits packages.² Responding to a series of large industry-wide claims, many actuarial insurers, including PCIC, began experimenting with limitation of liability contract provisions to reduce exposure.³ PCIC shared information about the benefits of limitation of liability terms and future plans for implementation at an industry trade conference.⁴ Adoption of the terms was described as an industry “best practice.”⁵ Many companies incorporated highly similar provisions into their insurance contracts soon after.⁶ The Antitrust Division alleged that PCIC’s dissemination of “competitively sensitive information” violated § 1 of the Sherman Act;⁷ by sharing information about one feature of otherwise independent insurance products, insurers reduce the “potential for losing clients to firms not using [limitation of liabil-

† B.A. 2002, Kalamazoo College; M.S. 2004, University of California at Berkeley; J.D. Candidate 2007, The University of Chicago.

¹ See Complaint, *United States v Professional Consultants Insurance Co, Inc*, Civil Action No 05-01272, *5-9 (D DC filed June 24, 2005), online at <http://www.usdoj.gov/atr/cases/f209700/209728.pdf> (visited June 7, 2006) (“Complaint”); Amended Final Judgment, *United States v Professional Consultants Insurance Co, Inc*, Civil No 1:05CV01272 (D DC filed Nov 26, 2005) online at <http://www.usdoj.gov/atr/cases/f209800/209839.pdf> (visited June 7, 2006) (“Consent Decree”).

² See Complaint at ¶ 2 (cited in note 1).

³ See id at ¶ 9.

⁴ See id at ¶ 15.

⁵ Id at ¶ 15(a).

⁶ See id at ¶ 17 (“The sharing of this information eliminated or reduced competitive uncertainties and concerns about the potential for losing clients to firms not using [limitation of liability (LOL)], and thus facilitated decisions of PCIC members and other competitors to begin implementing LOL.”).

⁷ Id at ¶ 19. See also 15 USC § 1 (2000) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.”).

ity].”⁸ But neither the Consent Decree nor courts have answered whether and when sharing information about product quality violates § 1.

This Comment argues that the best interpretation of existing case law indicates that sharing product quality information⁹ should be irrebutably presumed legal under § 1. Part I examines existing cases. Sharing information, without more, does not currently violate § 1. Past courts have treated information sharing as only one piece of evidence in a larger inquiry into (a) price fixing and (b) quality standardization. Price fixing is a per se violation of § 1.¹⁰ In markets with significant quality-oriented competition, standardizing product quality can also violate § 1.¹¹ But sharing information about product quality is several evidentiary steps removed from both of these § 1 offenses. More probative evidence is frequently available. Meanwhile, many significant procompetitive effects may justify the data exchange. Part II discusses how sharing product quality information invigorates price competition, promotes efficiency by reducing socially costly “price dispersion,” and enables procompetitive benchmarking.

Part III explains why courts should apply an irrebuttable presumption of § 1 legality for product quality information sharing. In evaluating the legality of sharing information about product quality as a precursor to § 1 violations, courts are ill-equipped to make fine distinctions between the anticompetitive and procompetitive case. Moreover, the cost of error is greater for the false positive than the false negative case. The former may deter competitively vital behavior, while the latter only takes away information sharing as evidence of other § 1 violations—the harm is small precisely because product quality information sharing can facilitate either competition or tacit agreement, and should therefore not be considered evidence of either. Thus, this situation fits the prototypical case in which evidence scholars have argued that a presumption of legality is warranted.¹²

Part IV applies the foregoing analysis to the recent PCIC decree. The Antitrust Division’s allegation that PCIC violated § 1 by sharing

⁸ Complaint at ¶ 17 (cited in note 1).

⁹ For the purpose of this analysis, product quality is defined roughly as any nonprice term.

¹⁰ See *United States v Socony-Vacuum Oil Co.*, 310 US 150, 218 (1940) (“[T]his Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.”).

¹¹ See *United States v First National Pictures, Inc.*, 282 US 44, 54–55 (1930) (holding that standardizing contract provisions violated § 1 when significant quality competition existed beforehand); *Paramount Famous Lasky Corp v United States*, 282 US 30, 43–44 (1930) (same).

¹² See Frederick Schauer and Richard Zeckhauser, *On the Degree of Confidence for Adverse Decisions*, 25 J Legal Stud 27, 34 (1996) (demonstrating that legal presumptions vary by context depending on the greater of costs of error for the false positive or the false negative case).

information about insurance products seems incorrect. Well-established case law makes clear that information sharing is never an independent § 1 violation. The Complaint could have been modified to allege instead that PCIC violated § 1 not by sharing information but by conspiring with competitors to standardize product quality. Although plausible, the Complaint alleges insufficient facts under that theory as well. Even if standardizing the insurance contracts was itself anticompetitive, it should have produced offsetting procompetitive effects. Most important, information sharing would be relatively weak evidence of illegal standardization when compared with other facts probably available, such as competitor adoption of identical terms at a single point in time. Yet the PCIC decree may be explained by the fact that even though information sharing is itself legal, decrees may enjoin otherwise legal behavior as a prophylactic measure to “ensure that the violation will cease and competition will be restored.”¹³

I. SHARING INFORMATION ABOUT PRODUCT QUALITY AS EVIDENCE OF PRICE FIXING OR QUALITY STANDARDIZATION

This Part demonstrates that sharing information about product quality is not an independent violation of § 1; it is only evidence of price fixing or quality standardization. Part I.A gives a primer to § 1 and defines economic competition. Parts I.B and I.C show that sharing product quality information is typically weak evidence of both price fixing and quality standardization.

A. “Competition” and § 1 Defined

Section 1 of the Sherman Act states that, “Every contract . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.”¹⁴ Thus, § 1 forbids cooperative activity that reduces competition. “Competition” is a measurement of market success in producing Pareto-efficient transactions;¹⁵ that is, connecting goods and services with buyers who value them more than the marginal cost of production.¹⁶ Put another way, competition is a measure

¹³ *Toys “R” Us, Inc v FTC*, 221 F3d 928, 940 (7th Cir 2000).

¹⁴ 15 USC § 1.

¹⁵ Pareto-efficient transactions are those that make at least one transacting party better off, while making the other party no worse off. For a general discussion, see Louis Kaplow and Steven Shavell, *Fairness versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice*, 32 J Legal Stud 331, 342–51 (2003) (analyzing social policies for Pareto optimality).

¹⁶ See Phillip E. Areeda and Herbert Hovenkamp, 1 *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 100a at 3 (Aspen 2d ed 2000) (“[O]ptimal competition occurs when the firms in a market price their output at marginal cost and costs are minimized by internal efficiency, research and development, and attainment of economies of scale.”).

of market output.¹⁷ In competitive markets, a product's price approaches the marginal cost of production; every buyer who values the good for more buys it and consumer welfare (the basic value promoted by antitrust law¹⁸) is maximized. Anticompetitive conduct, in turn, is any behavior that reduces market output.¹⁹ Collectively raising prices above marginal cost or limiting production are two common ways competition is reduced. But any concerted reduction in output violates § 1.²⁰

Some forms of cooperative behavior, such as price fixing, are per se § 1 violations. Such categories of behavior have been adjudged "strict liability" offenses because they almost always reduce market output.²¹ But not every competition-reducing activity is illegal under § 1. Most firm behavior is reviewed under the so-called rule of reason rather than under a per se § 1 analysis because the behavior produces some competition-enhancing effects and other competition-reducing ones.²² To determine liability then, courts perform a competitive cost-benefit analysis to assess a behavior's net competitive effect.²³

B. Sharing Information about Product Quality as Evidence of Price Fixing

Price information sharing cases offer a framework to examine the § 1 legality of sharing information about product quality. The legality of firms sharing information about price can be measured solely by its strength as evidence of price fixing.²⁴ Information sharing is

¹⁷ Market output is simply the number of goods sold. See *id.* To reduce market output is to reduce competition. To enhance the former is to enhance the latter. See E. Thomas Sullivan, *On Nonprice Competition: An Economic and Marketing Analysis*, 45 U Pitt L Rev 771, 798 (1984).

¹⁸ See Areeda and Hovenkamp, 1 *Antitrust Law* ¶ 100a at 4 (cited in note 16) ("[T]he principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively.").

¹⁹ See *id.* ¶ 100a at 3–4 ("[T]he best measure of competition is equilibrium output. Thus a market with three sellers but an output of 100 units per day is more competitive than one with ten sellers but an output of only 80 units per day.").

²⁰ See Sullivan, 45 U Pitt L Rev at 787 (cited in note 17) ("The best measure of competition is whether total output is restricted, for output restriction is the core of cartel behavior.").

²¹ See *Northern Pacific Railway Co v United States*, 356 US 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal.").

²² See, for example, *Broadcast Music, Inc v Columbia Broadcasting System, Inc*, 441 US 1, 24 (1979) (remanding a case for the trial court to conduct a rule of reason analysis).

²³ See *id.* at 8 n 11 (describing rule of reason analysis as "an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable").

²⁴ See Richard A. Posner, *Information and Antitrust: Reflections on the Gypsum and Engineers Decisions*, 67 Georgetown L J 1187, 1197–99 (1978) (arguing that sharing price information should only be evidence of price fixing rather than an independent offense).

never an independent offense,²⁵ let alone illegal per se.²⁶ That is to say, it is well established that taken alone, without evidence of an independent agreement in restraint of trade, sharing price information does not violate § 1.

Two cases guide the Court's current approach in examining price information sharing under § 1. In factually similar cases decided four years apart, the Court held sharing information about price illegal in *American Column & Lumber Co v United States*²⁷ but legal in *Maple Flooring Manufacturers Association v United States*.²⁸

In *American Column*, a trade association of 365 competing hardwood manufacturers made up more than one-third of the national market.²⁹ The association's constituency implemented a comprehensive program of sharing information about "sales, prices, production, and practices."³⁰ Separate from the information sharing, the Court found evidence of an agreement to collectively reduce production in (a) meeting transcripts,³¹ (b) joint price and production forecasts,³² and (c) extraordinary increases in market prices after the alleged agreement.³³ The Court held this agreement dispositive of § 1 illegality.

The Court reached the opposite conclusion in *Maple Flooring*. That case involved an association of wood flooring manufacturers and shippers that constituted 74.2 percent of the national market.³⁴ Detailed information was exchanged about (a) average costs of production, and (b) shipping rates from Cadillac, Michigan, to all other points in the nation.³⁵ The allegation then was that the average cost plus the basing-point shipping rate fixed a minimum price charged by each

²⁵ See *Sugar Institute, Inc v United States*, 297 US 553, 598 (1936).

²⁶ See *United States v Citizens & Southern National Bank*, 422 US 86, 113 (1975).

²⁷ 257 US 377 (1921).

²⁸ 268 US 563 (1925).

²⁹ See 257 US at 391, 410.

³⁰ Id at 394–96. Price and production information was exchanged and "subdivided as to grade, kind, [and] thickness." Id at 395.

³¹ See id at 402–03, 406–07. For example, one member of the trade association is documented to have stated at a meeting that "[o]verproduction has always been the curse of the lumber industry in America. It has caused more trouble and hardship than any other one factor. It would be criminal folly, therefore, for the lumber manufacturers to indulge themselves in any such form of commercial suicide." Id at 403.

³² See id at 403, 410. The association jointly employed an analyst to create price and production forecasts. The Court found that this "single interpreter of their common purposes" was evidence of a tacit understanding among the producers. See id at 411.

³³ See id at 409 (noting that oak prices increased anywhere from 33.3 to 296 percent; gum from 60 to 343 percent; ash from 55 to 181 percent).

³⁴ See *Maple Flooring*, 268 US at 566 (holding that trade associations could lawfully disseminate information about their product so long as no agreement existed regarding their prices or production).

³⁵ See id at 566–67.

competitor.³⁶ The government, unable to prove the existence of an actual agreement, sought to enjoin the information sharing as “necessarily arbitrary and [possibly] a cover for price fixing.”³⁷ But the Court concluded that, although the information exchange demonstrated an opportunity for agreement on price or production, none was executed in fact.³⁸ The Court emphasized three pieces of evidence that no agreement had taken place. First, the information exchanged was made publicly available and read by up to 95 percent of the defendants’ buyers.³⁹ Second, no actual uniformity in prices resulted: individual firm prices still fluctuated with supply and demand.⁴⁰ Third, the association persuasively argued that it shared the data for the procompetitive purpose of reducing price dispersion.⁴¹

The distinction between these two cases turns on the existence of an agreement to reduce output in the former but not in the latter. Neither information sharing itself nor the nature of the information traded (whether public or private, current or historical, individuated or aggregated) was crucial in either case.⁴² The *Maple Flooring* Court emphasized the fact that the information in that case was read by both buyers and sellers, making it an unlikely device for covert action.⁴³ But the *American Column* Court expressed skepticism that simply “because the meetings were nominally open to the public, or because sev-

³⁶ See *id.* at 572. Under basing-point freight pricing, each seller has a “natural freight advantage territory”—shipments close to the manufacturer cost less to deliver. The seller agrees not to exclude competition by reducing price, instead inviting others “to share the available business at matched prices in his natural market.” *Triangle Conduit & Cable Co v FTC*, 168 F.2d 175, 181 (7th Cir. 1948). In exchange, the seller receives a reciprocal invitation into other distant markets. *Id.* See also Richard A. Posner, *Antitrust Law* 91–93 (Chicago 2d ed. 2001) (concluding that basing point pricing systems indicate the existence of a price cartel); Richard A. Posner and Frank H. Easterbrook, *Antitrust: Cases, Economic Notes, and Other Materials* 345–46 (West 1981) (same).

³⁷ *Maple Flooring*, 268 US at 570.

³⁸ *Id.* at 575.

³⁹ See *id.* at 573–74. According to the Court:

[The information shared did not] differ in any essential respect from trade or business statistics which are freely gathered and publicly disseminated in numerous branches of industry producing a standardized product . . . whose statistics disclose volume and material elements affecting costs of production, sales price, and stock on hand.

Id. at 574.

⁴⁰ See *id.* at 567–68.

⁴¹ See *id.* at 582–84. Price dispersion is the variance in market prices from the efficient price. Thus, reducing price dispersion sets market prices closer to the efficient price. For a thorough exposition of price dispersion, see Part II.B.

⁴² See *American Column*, 257 US at 407 (holding that trade meeting statements, joint price forecasts, and actual uniformity in prices produced a “concert of action” between the producers to reduce supply); *Maple Flooring*, 268 US at 575 (“The government, however, does not charge, nor is it contended, that there was any understanding or agreement, either express or implied, at the meetings or elsewhere, with respect to prices.”).

⁴³ See 268 US at 574.

eral voluminous reports were transmitted to the Department of Justice,” no covert use of the information was possible.⁴⁴

Thus, as illustrated, courts treat price information sharing as circumstantial evidence of opportunity for agreement on price.⁴⁵ Information sharing has fallen in with a larger set of other contextual factors that courts look to when determining whether parties have formed an agreement. These factors include, among others, seller concentration, historically anticompetitive tendencies, and inelastic demand.⁴⁶ Courts place more emphasis on direct evidence of anticompetitive effect (such as anticompetitive intent or actual agreement) than these contextual signals.⁴⁷ But courts may be willing to base liability on circumstantial evidence alone when tacit coordination among competitors is particularly likely but proving that agreement especially difficult.⁴⁸ The use of circumstantial evidence in this way is not unique to antitrust law, but rather a common evidentiary technique.⁴⁹

There are three common forms of evidence that a cartel is in place. First, means among alleged conspirators to monitor compliance with an agreement is evidence of opportunity to agree. Receiving information supports an agreement only to the extent that it helps firms predict what competitors will do. Even actual agreement is innocuous unless firms can observe whether others have kept their end of the

⁴⁴ 257 US at 411. Public information is less likely to reduce competition not due to any inherent difference with private information, but because it lacks incidental aspects of communicating private information that make tacit agreement easier to achieve. Information traded in private conceals potential mutual monitoring and punishment for breach of the agreement, both of which are components of conspiracy unique to private information. Compare *Tag Manufacturers Institute v FTC*, 174 F2d 452, 462 (1st Cir 1949) (explaining that “secrecy more readily suggests the inference that the agreement is inspired by some unlawful purpose and precludes the argument that the information thus secretly exchanged serves a function similar to that of market information made available through the activities of commodity exchanges, trade journals, etc.”), with *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F2d 432, 447 (9th Cir 1990) (“*Petroleum Products*”) (noting that public disclosure “does not immunize the exchange of price information from legal sanction where the conditions of the market suggest that the exchange promotes collusive rather than competitive pricing”) (internal quotation marks omitted), quoting Richard A. Posner, *Antitrust Law: An Economic Perspective* 147 (Chicago 1976).

⁴⁵ See, for example, *Milk and Ice Cream Can Institute v FTC*, 152 F2d 478, 483 (7th Cir 1946) (“[E]ach of the prohibited acts is directed solely at price fixing in connection with an agreement or conspiracy. It is not a valid criticism to say that they are enjoined from the [information sharing] mentioned when used independently or even by an agreement unrelated to the price structure.”).

⁴⁶ See *United States v Container Corp of America*, 393 US 333, 337 (1969).

⁴⁷ Agreements sometimes produce paper trails. See, for example, *American Column*, 257 US at 402, 407 (discussing trade association meeting transcripts and memorandums as direct evidence of a conspiracy among members to fix prices).

⁴⁸ See, for example, *Container Corp*, 393 US at 337.

⁴⁹ See generally Schauer and Zeckhauser, 25 J Legal Stud 27 (cited in note 12).

deal.⁵⁰ Second, methods to enforce breaches of agreement also demonstrate opportunity to agree. Without an enforcement mechanism, the probability of a devastating loss in demand from a unilateral price increase is high. A mechanism for enforcing the agreement inverts this risk profile. The probability of loss in demand due to a unilateral price increase is significantly reduced; at the same time, the probability of loss through competitor retribution for breach becomes almost certain.⁵¹ Third, behavior that would be irrational in the absence of an agreement (for example, increasing prices in a climate of decreasing costs) is also strong evidence of cartel action. Prices should fluctuate with supply, demand, and costs of production. Changes in price should also have economic explanations. The absence of either is evidence of conspiracy.⁵²

All evidence taken together must show that an agreement existed in fact, because § 1 forbids concerted action but not parallel behavior that is not the result of an agreement.⁵³ Some commentators have suggested that in concentrated markets where anticompetitive consequences are particularly likely, § 1 liability may be predicated solely upon information sharing even without an underlying agreement.⁵⁴ But removing the agreement requirement ignores the plain language of §

⁵⁰ See *American Column*, 257 US at 411 (finding that a price information sharing program created a mechanism to monitor compliance with the existing agreement to fix prices).

⁵¹ See, for example, *Cement Institute*, 333 US at 730 (discussing evidence that cartelists had the means to, and did in fact, punish recalcitrants).

⁵² See *Triangle Conduit*, 168 F2d at 179 (holding that price uniformity without an explainable relationship to supply and demand is evidence of an agreement). See also Lawrence Anthony Sullivan, *Handbook of the Law of Antitrust* 272 (West 1977).

⁵³ See *United States v International Harvester Co*, 274 US 693, 708–09 (1927) (“[T]he fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination.”); *Petroleum Products*, 906 F2d at 444 (“We recognize that interdependent pricing may often produce economic consequences that are comparable to those of classic cartels. Nonetheless, proof of such pricing, standing alone, is generally considered insufficient to establish a violation of the Sherman Act.”). See also *Clamp-All Corp v Cast Iron Soil Pipe Institute*, 851 F2d 478, 484 (1st Cir 1988) (same); *Pevely Dairy Co v United States*, 178 F2d 363, 368 (8th Cir 1949) (same).

⁵⁴ See, for example, Sullivan, *Handbook of the Law of Antitrust* at 703 (cited in note 52) (interpreting *Container Corp* as standing for the proposition that in some markets information exchange can violate § 1 by affecting the level of prices, even without actual agreement). Other commentators disagree, arguing that information sharing should only be considered evidence of price fixing. See Posner, 67 *Georgetown L J* at 1197–98 (cited in note 24) (“[A]n agreement simply to exchange price information should not be regarded as a violation of the antitrust laws. Such an agreement should only be admissible as evidence of an agreement to fix prices, which would be, in my view, unlawful whether express or tacit.”). See also *Container Corp*, 393 US at 337–38. The Court found a violation of § 1 in a market with a structure conducive to cartel formation: (a) the “industry is dominated by relatively few sellers,” (b) “[t]he product is fungible,” (c) “[t]he demand is inelastic,” and (d) prices actually tended toward uniformity with the information disclosure. *Id.* at 337. The Court accepted the evidence because actual agreement among competitors seemed too difficult to prove. *Id.* at 337.

1 requiring a “contract, combination[,] . . . or conspiracy.”⁵⁵ Moreover, courts have rejected this line of reasoning, preferring only to broaden what is evidence of an agreement rather than discard § 1’s “conspiracy” requirement altogether.⁵⁶ Thus, one court observed that existing cases together “could be interpreted as saying that when the conduct or effect cannot be otherwise explained, an anticompetitive agreement can be inferred from exchange of detailed current price information.”⁵⁷

Information about product quality may be used to derive price. Knowing exactly what a competitor produces allows a more accurate assessment of that competitor’s costs of production, and correspondingly the price that the competitor will charge in the marketplace. But to the extent that information about product quality helps firms estimate what competitors will charge, it poses less of an antitrust danger than price information itself. Thus, price information sharing cases set a sensible limit for product quality information sharing cases: as evidence of fixing price, sharing product quality information should be presumptively legal in situations in which price information sharing has been held legal. Put another way, like price information, sharing information about product quality should be presumptively legal taken alone, without proof of a separate agreement to fix output.⁵⁸

C. Sharing Information about Product Quality as Evidence of Anticompetitive Standardization

This Part examines when quality standardization may independently violate § 1. Subpart 1 explains why standardization does not violate § 1 in markets for most physical products. Subpart 2 explains why standardization may sometimes violate § 1 in markets for contract terms as alleged in the PCIC case.

In some respects, price information is useful to firms only if it is accompanied by information about product quality; products must be

⁵⁵ See 15 USC § 1.

⁵⁶ See *Theatre Enterprises, Inc v Paramount Film Distributing Corp*, 346 US 537, 541 (1954) (“Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but ‘conscious parallelism’ has not yet read conspiracy out of the Sherman Act entirely.”).

⁵⁷ *Zenith Radio Corp v Matsushita Electrical Industrial Co*, 513 F Supp 1100, 1153 n 65 (ED Pa 1981), revd in part, *In re Japanese Products Antitrust Litigation*, 723 F2d 238 (3d Cir 1983), affd, *Matsushita Electrical Industrial Co, Ltd v Zenith Radio Corp*, 475 US 574 (1986). See also Posner, 67 Georgetown L J at 1199 (cited in note 24) (arguing that “[m]arket structure becomes relevant only when . . . the existence of the agreement to exchange information provides circumstantial evidence of an underlying agreement to fix prices”).

⁵⁸ See *Sugar Institute*, 297 US at 598 (“The natural effect of the acquisition of the wider and more scientific knowledge of business conditions . . . and the subsequent stabilizing of production and price, cannot be said to be an unreasonable restraint or in any respect unlawful.”).

comparable in quality for prices to have meaning. Information about product quality can help firms standardize products. Whether standardization is anticompetitive and thus violates § 1 depends on whether competition is primarily quality based to begin with. Put less abstractly, whether standardization reduces net competition depends on a tradeoff between (a) economies of scale in production (or the cost of producing design variants),⁵⁹ and (b) the level of market demand for improvements (or the benefit of producing design variants). Both factors can be measured according to market output. Professor Lancaster states the matter clearly:

If there are no economies of scale associated with individual product variance . . . , then it is optimal to custom produce to everyone's chosen specification. If there is no gain from variety and there are scale economies, then it is clearly optimal to produce only a single variant if those economies are unlimited, or only such variety as uses scale economies to the limit Most cases involve a balance of some variety against some scale economies.⁶⁰

1. Quality standardization does not independently violate § 1 in markets for most physical products.

Markets for physical products with dominant designs⁶¹ by definition possess (a) high scale economies and (b) low market demand for improvements.⁶² With such products, standardization is typically pro-competitive. Taking advantage of scale economies increases output by lowering the cost of production. At the same time, standardization does not reduce output because the market does not demand much “im-

⁵⁹ Economies of scale are “factors which make it possible for larger organizations or countries to produce goods or services more cheaply than smaller ones.” John Black, *A Dictionary of Economics* 138 (Oxford 1997).

⁶⁰ Kevin Lancaster, *The Economics of Product Variety: A Survey*, 9 *Marketing Sci* 189, 192 (2000). See also E. H. Chamberlin, *Product Heterogeneity and Public Policy*, 40 *Amer Econ Rev* 85, 89–90 (May 1950):

The issue might be put as efficiency versus diversity—more of either one means less of the other. But unless it can be shown that the loss of satisfaction from a more standardized product . . . is less than the gain through producing more units, there is no “waste” at all[.] How are the two to be compared—a larger, less heterogeneous output as against a smaller, more heterogeneous one? The price system . . . appears to afford no test.

⁶¹ A dominant design is one that accounts for most of a market's demand. For the seminal definition of the term “dominant design,” see William J. Abernathy and James M. Utterback, *Patterns of Industrial Innovation*, *Tech Rev* 40–47 (June/July 1978).

⁶² See Jean Tirole, *The Theory of Industrial Organization* 286 (MIT 1988) (reviewing economic literature that concludes that the optimal degree of product design variety is lower for product variations that have high cross-elasticities in demand—that is, there is a single dominant design that would benefit from economies of scale in production without a reduction in output).

provement.”⁶³ Simply put, standardization in these markets increases price competition without reducing quality competition.⁶⁴ Unless there is a separate agreement to fix prices, net competition increases. In this setting standardization can only be evidence of price fixing; it cannot separately violate § 1.

Compare the outcome in *Tag Manufacturers Institute v FTC*⁶⁵ to that in *Bond Crown & Cork Co v FTC*.⁶⁶ In *Tag Manufacturers*, a trade organization of printed label manufacturers standardized the design of tags⁶⁷ and shared price information.⁶⁸ Reversing the FTC’s decision, the First Circuit allowed the information sharing and quality standardization to continue because no separate agreement had taken place to fix prices.⁶⁹ By contrast, in *Bond Crown & Cork*, the court held that the “standardization of the product . . . [although] innocent enough by itself,” was illegal because it was a part of a larger price fixing scheme.⁷⁰

Similarly, in *National Macaroni Manufacturers Association v FTC*,⁷¹ the Seventh Circuit enjoined pasta manufacturers from standardizing the blend of durum wheat used in pasta solely because doing so formed a monopsony buyer cartel⁷² depressing wheat prices below the competitive level.⁷³ Other courts have also held that product standardization in markets for physical goods with dominant designs is only illegal to the extent that it supports a separate price cartel.⁷⁴

⁶³ That the market prefers few variants is a corollary of the assumption that some dominant design exists.

⁶⁴ See Tirole, *The Theory of Industrial Organization* at 286 (cited in note 62) (concluding that the optimal degree of product design variety is low for markets in which there are economies of scale in production and a dominant design).

⁶⁵ 174 F2d 452 (1st Cir 1949).

⁶⁶ 176 F2d 974 (4th Cir 1949).

⁶⁷ See 174 F2d at 453.

⁶⁸ See id at 453–54.

⁶⁹ See id at 463.

⁷⁰ 176 F2d at 979. *Bond Crown & Cork* involved bottle caps thoroughly standardized in both design and price for almost ten years preceding the litigation. Id at 976.

⁷¹ 345 F2d 421 (7th Cir 1965).

⁷² A monopsony is a “market situation in which one buyer controls the market.” *Black’s Law Dictionary* 1028 (West 8th ed 2004). Monopsony is the opposite of monopoly, which is a seller with no rivals. Id.

⁷³ See 345 F2d at 425, 427. Although the FTC in *Macaroni Manufacturers* concluded without explanation that standardizing macaroni products had reduced quality competition, the Seventh Circuit’s holding enjoining the practice was justified only because the standardization tended to “ward off [buyer] price competition for durum wheat in short supply by lowering total industry demand to the level of the available supply.” Id at 426.

⁷⁴ See *C-O-Two Fire Equipment Co v United States*, 197 F2d 489, 493 (9th Cir 1952) (arguing that “standardization of a product that is not naturally standardized facilitates the maintenance of price uniformity”); *Milk and Ice Cream Can Institute*, 152 F2d at 482 (holding that the harm of design standardization was exclusively its promotion of price uniformity). In both cases, product standardization was enjoined *because* of the existence of a separate agreement to fix

The courts in these cases were correct to hold that standardization alone did not violate § 1. Standardization increased price competition by making previously differentiated products comparable and reducing buyer search costs. At the same time, net competition was not reduced because competition for tags, bottle caps, and macaroni was primarily price-based to start with.

But standardization can support an inference of price fixing, which does violate § 1, because standardization makes tacit coordination less difficult.⁷⁵ Similar product designs make price information “more serviceable”;⁷⁶ in markets with differentiated products, a price cartel must share “complex schedule[s]” of price information to operate.⁷⁷ In this way, quality standardization may increase the antitrust risk of sharing basic price information.

However, sharing product quality information still presents less of an antitrust risk than sharing price information. Exchanging product quality data can be evidence of quality standardization, which can in turn be evidence of an *opportunity* to fix prices easily. By contrast, exchanging price information can be direct evidence of an opportunity to price fix. Thus, taken as evidence of price fixing, price information sharing cases again set a sensible outer limit for product quality information sharing cases: where price sharing has been held legal, product quality information sharing is presumably also legal.

2. Quality standardization can independently violate § 1 in markets for contract terms.

Markets for nonphysical products without dominant designs, such as markets for contract terms, have (a) limited scale economies in pro-

prices. See *C-O-Two Fire Equipment Co*, 197 F2d at 493; *Milk and Ice Cream Can Institute*, 152 F2d at 482. A similar result was reached in *FTV v Cement Institute*, 333 US 683 (1948). In that case, cement manufacturers had, “in the interest of eliminating competition, suppressed information as to the variations in quality that sometimes exist in different cements” in order to promote product uniformity. *Id.* at 715. Quality competition was reduced by the cartel’s suppression of information about design variation. Although price competition is typically heightened with perfectly standardized products (see Part II.C.1, discussing why price competition is invigorated when design is standardized), the Court found a separate agreement that also eliminated price competition and consequently enjoined the information exchange altogether. See *id.* at 709.

⁷⁵ See *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F3d 651, 656–57 (7th Cir 2002) (“[T]he product [] is highly standardized. . . . So colluding sellers would not have to agree not only on price but also on quality, design, post-sale services, and the like.”).

⁷⁶ *Tag Manufacturers Institute*, 174 F2d at 462. Consider *Rosefielde v Falcon Jet Corp*, 701 F Supp 1053, 1066 (D NJ 1988) (“[I]t is difficult to make comparisons among different models of business jets because their characteristics vary widely.”).

⁷⁷ *Rosefielde*, 701 F Supp at 1064, quoting Department of Justice, *1984 Merger Guidelines*, online at <http://www.usdoj.gov/atr/hmerger/11249.pdf> (visited June 7, 2006).

duction,⁷⁸ and (b) high market demand for improvements.⁷⁹ In such markets, standardization can sometimes be anticompetitive and independently violate § 1. Standardization reduces output by eliminating some variants the market prefers. Meanwhile, there is no advantage to producing only few designs because scale economies in production are limited.⁸⁰

Accordingly, the Supreme Court in *Paramount Famous Lasky Corp v United States*⁸¹ enjoined members of a trade association of film distributors from standardizing exhibition contract terms.⁸² The standardization in question forced theaters to submit to the terms of a standard form, a factor on which, in the Court's view, the distributors had previously competed.⁸³ The Court reached the same result in *United States v First National Pictures, Inc.*,⁸⁴ in which motion picture distributors standardized credit requirements for theaters.⁸⁵ The Court held that this violated § 1 in part because distributors had previously competed on credit terms.⁸⁶

Even in markets in which standardization can independently violate § 1, sharing information about product quality is illegal only to the extent that it supports the larger standardization agreement. Clearer evidence that standardization has occurred, such as identity between

⁷⁸ Contract provisions benefit from scale economies in design but not in production. That is, reusing standard forms reduces costs because of assured legal effect. But the marginal cost of reproduction does not change with volume; printing contract number one thousand costs as much as printing the first contract. All products benefit from similar economies of scale in design; before marketing, no firm knows which products will generate market demand sufficient to sustain the cost of production. By contrast, physical factors typically have scale economies in both production *and* design. Both manufacturing *and* designing car number one thousand costs less than manufacturing *and* designing the first car. Unit costs fall as the total number of cars sold rises because fixed costs are spread over more cars.

⁷⁹ The government in *United States v Professional Consultants Insurance Co* alleged that market demand for alternative contract terms was eliminated by standardization of terms. See Complaint at ¶ 18(c) (cited in note 1) (“The use of LOL terms . . . has been significantly more prevalent than would have been the case in the presence of unrestrained competition among the PCIC members and other actuarial consulting firms.”).

⁸⁰ See Lancaster, 9 Marketing Sci at 192 (cited in note 60) (concluding that “if there are no economies of scale associated with individual product variance[,] . . . then it is optimal to custom produce to everyone's chosen specification”).

⁸¹ 282 US 30 (1930).

⁸² Id at 41, 44.

⁸³ See id at 43 (holding that collective refusal “to contract for display of pictures except upon a standard form . . . produce[s] material and unreasonable restraint of interstate commerce in violation of the Sherman Anti-Trust Act”).

⁸⁴ 282 US 44 (1930). It is important to note that both *First National Pictures* and *Paramount Famous Lasky* were summary in nature, neither giving treatment to information sharing case law.

⁸⁵ Id at 50, 54.

⁸⁶ See id at 54–55 (holding that the agreement “to a standard form . . . will suffice, we think, to show the challenged arrangement conflicts with the Sherman Anti-Trust Act”).

goods made by different producers, is typically available. Meanwhile, sharing information about product quality has procompetitive effects that courts should take into account in any antitrust analysis.

II. COMPETITION-ENHANCING EFFECTS OF SHARING INFORMATION ABOUT PRODUCT QUALITY

Sharing information about product quality can increase competition in three ways, all of which should be given weight under the rule of reason. Part II.A examines how sharing information about product quality invigorates price competition.⁸⁷ Part II.B shows how sharing information about product quality reduces costly price dispersion.⁸⁸ Part II.C discusses how sharing information about product quality can increase competition by facilitating competitive benchmarking.⁸⁹

A. Invigorating Price Competition

Quality standardization invigorates price competition by making previously differentiated products fungible.⁹⁰ Buyers find it easier to compare prices between standardized products, subjecting sellers to heightened price competition.⁹¹ Firms have an incentive to differentiate their products in order to mute this increased price competition:⁹² doing so effectively grants those firms a degree of monopoly power.⁹³

At the same time, firms have incentive to produce according to a standard for two reasons, both of which produce net competitive gain and are supported by the sharing of product quality information. First, firms may standardize to take advantage of a dominant design that accounts for most of a market's demand.⁹⁴ Second, firms may stan-

⁸⁷ See Sullivan, *Handbook of the Law of Antitrust* at 275–77 (cited in note 52) (“The few relevant cases tend to emphasize the potential of such [product standardization] programs to stimulate price competition by facilitating price comparison by buyers and thus support such programs as presumptively lawful.”).

⁸⁸ See Posner, 67 *Georgetown L J* at 1188 (cited in note 24).

⁸⁹ See generally Brian R. Henry, *Benchmarking and Antitrust*, 62 *Antitrust L J* 483 (1994). Standards may also increase product quality, see Thomas R. Saving, *Market Organization and Product Quality*, 48 *S Econ J* 855, 866 (1982) (arguing that although monopoly reduces market output, product quality is not affected by the reduction in competition), and stimulate competition by reducing buyer search costs, see Sullivan, 45 *U Pitt L Rev* at 789–90 (cited in note 17). See also *Clamp-All Corp v Cast Iron Soil Pipe Institute*, 851 F2d 478, 487 (1st Cir 1988).

⁹⁰ See Sullivan, *Handbook of the Law of Antitrust* at 275 (cited in note 52).

⁹¹ See *id.*

⁹² See Tirole, *The Theory of Industrial Organization* at 286 (cited in note 62) (“Firms want to differentiate to soften price competition.”).

⁹³ See *id.* (“If the product is differentiated[,] . . . each seller has a little pocket of monopoly power[,] . . . [If, however, the product is uniform,] . . . competition would be expected to prevent any one seller from raising his price to any of his customers above his cost.”).

⁹⁴ For an explanation of dominant design, see note 61.

standardize to take advantage of positive externalities between firms.⁹⁵ Information, advertising, and public research conducted by one firm benefit other firms that produce according to the same standard.⁹⁶ Sharing information about product quality supports competition in these ways.

B. Reducing Price Dispersion

To the extent price is a function of product quality, sharing information about product quality can reduce costly price dispersion.⁹⁷ Market dispersion is inconsistent pricing between firms in the marketplace. Knowing what competitors charge for similar products facilitates pricing consistency and reduces price dispersion.

Minimizing price dispersion has a procompetitive effect that should be taken into account in any rule of reason analysis.⁹⁸ Because uniform prices can be produced either by collusion or efficient markets, evidence of price uniformity only becomes significant when considered in connection with separate evidence of an agreement to fix prices.⁹⁹

Economist David Teece explains the value of minimizing price dispersion:

Suppose a firm has the task of estimating some parameter of great importance, such as future demand, the weather, or possibly even the price of a key input. The statistic of interest is quite uncertain. Each firm in the industry has some separate foundation for estimating its value. By sharing such imperfect knowledge,

⁹⁵ See Tirole, *The Theory of Industrial Organization* at 286.

⁹⁶ For the same reasons that quality standardization makes price coordination easier, it also reduces buyer search costs. Advertising becomes a public good benefiting any firm that produces according to the standard. But advertising has an ambiguous effect on competition. It can either increase demand elasticity by showing buyers similarities between products, or decrease demand elasticity by particularizing buyer preferences. See Sullivan, 45 U Pitt L Rev at 789–90 (cited in note 17).

⁹⁷ Price dispersion is the variance of market prices from the efficient price. See Posner, 67 Georgetown L J at 1188 (cited in note 24) (“The purpose of a legitimate exchange of price information is to narrow the dispersion of prices—that is, to eliminate as far as possible those prices in the tails of the price distribution that reflect the ignorance of buyers or sellers concerning the conditions of supply and demand.”).

⁹⁸ For example, the defendants in both *Maple Flooring* and *American Column* made price dispersion arguments, but the Court accepted the price dispersion arguments only in the former case. See *Maple Flooring*, 268 US at 582–84; *American Column*, 257 US at 392–393.

⁹⁹ Sharing product quality information brings actual prices closer to efficient prices according to the semistrong efficient capital markets hypothesis. That hypothesis, which asserts that prices reflect all publicly available information, has been widely accepted in federal case law. See *Basic, Inc v Levinson*, 485 US 224, 241–47 (1988) (adopting the fraud-on-the-market presumption, which embraces the semistrong efficient capital markets hypothesis).

firms in an industry are likely to increase the accuracy of their judgments. . . . With better estimates of uncertain common values, operations and investments can be scheduled more confidently and efficiently, thereby lowering long-term costs.¹⁰⁰

The benefits of reducing price dispersion manifest in various forms. Primarily, reducing price dispersion increases allocative efficiency.¹⁰¹ That is to say, the closer prices are to value, the less sellers over- or underinvest in production, and the less buyers over- or underpurchase.¹⁰² Information reduces the time and difficulty firms face in setting efficient prices.¹⁰³ Increased information sharing should lead to price reductions as competition forces cost savings to be passed on to consumers.¹⁰⁴

Information sharing is less important for reducing price dispersion in (a) markets selling products with a naturally uniform composition such as sugar, (b) markets where prices are regulated,¹⁰⁵ (c) “stable industr[ies]” with low demand variance and little innovation (as compared with turbulent markets, which require “specialized, risky investments”),¹⁰⁶ and (d) concentrated markets.¹⁰⁷ In each of these situations, information is still required to set efficient prices. But that information is available through historical and public channels that lack the aspects of private communication that make conspiracy easier.

¹⁰⁰ David J. Teece, *Information Sharing, Innovation, and Antitrust*, 62 *Antitrust L J* 465, 479 (1994).

¹⁰¹ See *id.* at 467 (“[P]roducers must be well informed about competitors’ prices and plans if resources are to be allocated efficiently.”).

¹⁰² See *id.* at 479 (“Basically, cost savings are generated because overinvestment and underinvestment are minimized, and operations are better tuned to supply and demand than might otherwise be the case.”).

¹⁰³ See Posner, 67 *Georgetown L J* at 1194 (cited in note 24):

[A firm could] pick a price at random and then observe the market response to [its] offer. . . . This process of trial and error would lead [the firm] gradually to the profit-maximizing price and output, which in a competitive market would also be the socially optimal price and output. . . . This blind groping for an ever-changing equilibrium may not be the most efficient way to set price and output levels in a market.

See also *Cement Manufacturers Protective Association v United States*, 268 *US* 588, 605 (1925):

[A]ny change in quotation of price to dealers, promptly becomes well-known in the trade through report of salesmen, agents, and dealers of various manufacturers. . . . [U]niformity has resulted not from maintaining the price at fixed levels, but from the prompt meeting of changes in prices by competing sellers.

¹⁰⁴ See Posner, 67 *Georgetown L J* at 1194–95 (cited in note 24). Lower costs are also considered a procompetitive factor under the rule of reason. See *United States v Aluminum Co of America*, 148 *F2d* 416, 430 (2d *Cir* 1945).

¹⁰⁵ See, for example, *Pevely Dairy Co v United States*, 178 *F2d* 363, 366 (8th *Cir* 1949) (noting that dairy product prices are fixed by government regulation).

¹⁰⁶ See Teece, 62 *Antitrust L J* at 468 (cited in note 100) (demonstrating that industries with stable demand require less information sharing to reduce price dispersion than industries with turbulent demand).

¹⁰⁷ See Posner, 67 *Georgetown L J* at 1199 (cited in note 24).

In many situations, product quality information is available through reverse engineering or just by looking at a product. Detailed information sharing in such circumstances may indicate that a price cartel is in place.¹⁰⁸ But, if information about product quality is not otherwise available, communicating with competitors becomes an important part of the competitive process.¹⁰⁹

C. Benchmarking

Sharing information about product quality also underpins competitive benchmarking. Benchmarking is an economic process in which a company collects information about and mimics the techniques of its superior-performing peers to enhance its own efficiency.¹¹⁰ When an underperforming rival uses benchmarking to improve its competitive position, its peers are subject to enhanced price and quality competition.¹¹¹ The superior firm has an incentive to refine its processes further (whether in management, manufacturing, or research and development).¹¹² Information exchange enables the underperforming peer to catch up, and the process begins again. Therefore, evidence of benchmarking intent should support legality for product quality information sharing under the rule of reason.¹¹³

*In the Matter of General Motors Corp*¹¹⁴ involved Toyota and General Motors sharing price, production, advertising, and engineering information through a joint venture to design, manufacture, and market a new car. The relevant market was highly concentrated,¹¹⁵ and the Federal Trade Commission (FTC) found that the information sharing occasioned by the joint venture would “significantly increase the likelihood of noncompetitive cooperation between GM and Toy-

¹⁰⁸ See *id.* (“[Detailed information sharing] would thus be a strong basis for an inference that the agreement was a mask for something more sinister.”).

¹⁰⁹ Consider *id.* at 1201 (“The consequences of not knowing at what price your competitor is going to sell his product are serious in a market in which each sale is a large fraction of one’s annual business.”).

¹¹⁰ See Teece, 62 *Antitrust L J* at 477 (cited in note 100). Also see generally Henry, 62 *Antitrust L J* 483 (cited in note 89).

¹¹¹ See Teece, 62 *Antitrust L J* at 477 (cited in note 100) (“Benchmarking, by bringing in external information to the firm, . . . galvaniz[es] companies to compete once they recognize how far behind they are and what they can do to improve.”).

¹¹² See *id.* at 478 (“Sharing information of one’s own successes may lead to the receipt of information from other firms concerning their successes.”).

¹¹³ See *id.* (“[W]ere agencies and third parties to litigate over information exchange in bona fide benchmarking programs, it would have its own long run anticompetitive effects, throttling down one of the major forces of organizational renewal currently at work in America.”).

¹¹⁴ 103 *FTC* 374 (1984).

¹¹⁵ See *id.* at 375.

ota, the effect of which may be substantially to lessen competition.”¹¹⁶ The FTC enjoined the sharing of information unrelated to the operation of the joint venture.¹¹⁷ But the joint venture itself, along with the significant level of information exchange necessary for its operation, was upheld. One FTC Chairman explained:

[T]he joint venture offers a valuable opportunity for GM to complete its learning of more efficient Japanese manufacturing and management techniques. Moreover, to the extent the [] venture demonstrates the Japanese system can be successfully adapted to the United States, the venture should lead to the development of a more efficient and competitive U.S. industry.¹¹⁸

There was general agreement among the Commissioners that benchmarking would produce significant procompetitive effects.¹¹⁹

Courts, like the FTC, seem to agree regarding the procompetitive benefits of benchmarking. For example, in *Virginia Academy of Clinical Psychologists v Blue Shield of Virginia*,¹²⁰ psychologists sued several managed care companies alleging that standardizing terms of service so as to require doctor supervision of psychological services violated § 1.¹²¹ In setting its policy, one managed care company consulted closely with peers as to (a) “who should be paid for providing mental health care,” (b) “how much they should be paid,” (c) “when they should be paid,” and (d) “for what they should be paid.”¹²² That firm benchmarked an effective billing policy from its peers. The peer firms then had increased incentive to distinguish themselves by improving quality or lowering price. The district court held, and the Fourth Circuit affirmed, that § 1 “does not prohibit a business entity which needs information and advice from obtaining information and advice from other knowledgeable business entities. The operation of a medical insurance plan would be, for all practical purposes, impossible if consultation and cooperation with provider groups were barred.”¹²³

¹¹⁶ Id at 376.

¹¹⁷ See id at 384.

¹¹⁸ Id at 387–88 (Statement of Chairman James C. Miller III).

¹¹⁹ See id at 397 (Dissenting Statement of Commissioner Patricia P. Bailey) (noting that “hands-on experience with Japanese management techniques” would help GM “produce a cheaper car”).

¹²⁰ 469 F Supp 552 (ED Va 1979), affd in part, vacd and remd in part, 624 F2d 476 (4th Cir 1980).

¹²¹ 469 F Supp at 555.

¹²² Id at 558.

¹²³ Id at 559. The Fourth Circuit held that among the three alleged conspirators, two Blue Shield providers actually agreed to fix policy terms constituting a collective boycott in violation of § 1, but that the third provider did not: the “decision as to the Blue Shield Plan does not affect the Neuropsychiatric Society of Virginia” because “there was no conspiracy between the two

The Supreme Court considered benchmarking a procompetitive reason for sharing product quality information in *United States v Citizens and Southern National Bank*.¹²⁴ In that case, the Court upheld a large urban bank's sharing of price and service information with several smaller suburban banks. No agreement had formed between the institutions¹²⁵ and the Court held that the smaller banks' study of the larger bank's practices increased competition because, by having access to "expert advice[] and proved banking services, branches of several city banks can often enter a market not yet large or developed enough to support a variety of independent, unit banks."¹²⁶

III. EVIDENCE POLICY SUPPORTS AN IRREBUTTABLE PRESUMPTION OF LEGALITY

This Part argues for an irrebuttable presumption of § 1 legality for product quality information sharing. An irrebuttable presumption in this context would economize on judicial decision costs while almost always reaching the correct result.

Evidence scholars have noted that "a legal system's choice among [] standards [of proof] is an exercise in trading off the harms that flow from different types of error."¹²⁷ The expected cost of erroneously enjoining procompetitive information sharing is extremely high. As discussed in this Comment and widely acknowledged by economists, information sharing is an essential ingredient in the process of competition.¹²⁸ Meanwhile, the expected cost of precluding use of information

groups." "It was not illegal for NSV . . . to make recommendations aimed at persuading Blue Shield to adopt its proposal and use its services, absent some form of coercion." *Virginia Academy of Clinical Psychologists*, 624 F2d at 483. Thus the Fourth Circuit affirmed the lower court's holding that § 1 "does not prohibit a business entity which needs information and advice from obtaining information and advice from other knowledgeable business entities." *Id* at 479.

¹²⁴ 422 US 86 (1975).

¹²⁵ *Id* at 114.

¹²⁶ *Id* at 112. The circumstances were slightly more complex, but largely immaterial in considering the legal status of benchmarking. City banks held 5 percent of suburban banks, waiting for a state statute to pass allowing them to purchase the remaining equity. The statute was passed, but the acquisitions spawned this antitrust prosecution. See *id* at 89–90. For another example of benchmarking justifications for sharing information about product quality, see *Rosefelde*, 701 F Supp at 1053 ("[T]he Meyer and Tuck surveys were commenced because of unfamiliarity with competitors' policies.").

¹²⁷ Schauer and Zeckhauser, 25 J Legal Stud at 34 (cited in note 12):

[For example,] as long as a wrongful deprivation of liberty is more harmful than nonpunishment of those who deserve it, any version of Blackstone's maxim will generate something close to the standard of proof beyond a reasonable doubt. In contrast, the preponderance standard used in most civil litigation reflects the view that a failure to find for a deserving plaintiff is no less harmful than holding liable a nonculpable defendant.

¹²⁸ Economist David Teece argues that information sharing benefits include (a) enhancing allocative efficiency, Teece, 62 Antitrust L J at 467–68 (cited in note 100); (b) increasing industrial

sharing, even as evidence of an underlying output cartel, is minor. Information sharing as evidence of an agreement setting output is highly circumstantial. Better evidence is frequently available; agreements characteristically have mutual monitoring, enforcement mechanisms, and non-self-interested firm behavior.¹²⁹ Avoiding the more costly of these two types of error justifies presuming legality from the beginning.

Courts already perform this analysis, trading off error costs, to some extent, when adjudicating preliminary injunctions. As with preliminary injunctions, judicial decisions in antitrust information sharing cases are often made under factually ambiguous circumstances. Moreover, antitrust remedies very often use injunctions. The standard for issuing a preliminary injunction includes four parts. The party seeking the injunction must demonstrate (a) that there is a strong likelihood of success on the merits,¹³⁰ (b) that irreparable harm will occur without the injunction,¹³¹ (c) that the balance of hardships strongly favors injunction,¹³² and (d) that injunction will serve the public interest.¹³³ The lack of anticompetitive certainty in antitrust information sharing cases undermines each of these criteria respectively by failing to show (a) probable anticompetitive effects, (b) irreparable harm without injunction, (c) greater harm to consumer welfare from continued information sharing than from injunction, and (d) whether injunction or continued information sharing better serves the public interest.

Adjudicating the § 1 legality of information sharing involves separating the procompetitive from the anticompetitive case. Situations like this, in which courts must distinguish liability from nonliability rather than only the extent of liability, support a presumption of nonliability.¹³⁴ In an analogous discussion from the criminal law context, Professor Schauer explained:

Where innocence is truly innocent, . . . it may be appropriate to employ a higher burden of proof than where innocence is compatible with “not quite guilty,” as in many cases that do not involve

innovation, *id* at 468–69; (c) increasing industrial organization, *id* at 469–70; (d) forming “industrial clusters,” *id* at 469–73; (e) establishing dominant standards, *id* at 473–77; (f) benchmarking, *id* at 477–78; (g) supporting common industry values, *id* at 478–79; and (h) identifying industry-wide objectives to align resources, *id* at 479–80.

¹²⁹ See notes 50–51 and accompanying text.

¹³⁰ See Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, 11A *Federal Practice and Procedure* § 2948.3 (West 3d ed 1998 & Supp 2004).

¹³¹ *Id* at § 2948.1.

¹³² *Id* at § 2948.2.

¹³³ *Id* at § 2948.4.

¹³⁴ See Schauer and Zeckhauser, 25 *J Legal Stud* at 36 (cited in note 12).

questions of identity but only how close the defendant's conduct was to the border between the culpable and the nonculpable.¹³⁵

Here, the distinction is not between degree of anticompetitive harm, but rather anticompetitive conduct and competitively essential conduct. Anticompetitive and procompetitive information sharing may appear indistinguishable. And while the former is the precise behavior § 1 was designed to enjoin, the latter is the precise behavior the antitrust laws were designed to protect. A presumption of legality for product quality information sharing would draw a bright line for businesses and reduce chilling effects near the border of § 1.¹³⁶

An irrebuttable presumption of legality also bears a close analogy to existing presumptions courts use in antitrust. As a market grows more concentrated, competitors increasingly set prices in response to one another and independent but parallel actions can sometimes appear indistinguishable from cartel behavior. Thus, to avoid enjoining procompetitive actions courts have held that the inference of cartel pricing must be *more* likely than one of interdependent pricing for a conspiracy to be found.¹³⁷

IV. THE PROFESSIONAL CONSULTANTS INSURANCE COMPANY CASE

This synthesis of existing legal and economic literature sheds light on the consent decree between the Government and PCIC. This Part argues that the Antitrust Division's allegation that PCIC violated § 1 by sharing information about insurance products was incorrect. Well-established case law dealing with the exchange of price information sets an outer limit for the § 1 legality of sharing information about product quality. Those cases make clear that information sharing is

¹³⁵ *Id.*

¹³⁶ Consider *United States v United States Gypsum Co*, 438 US 422, 441 (1978):

The imposition of criminal liability on a corporate official, or for that matter on a corporation directly, for engaging in such conduct which only after the fact is determined to violate the statute because of anticompetitive effects, without inquiring into the intent with which it was undertaken, holds out the distinct possibility of overdeterrence.”

¹³⁷ See *Rosefielde v Falcon Jet Corp*, 701 F Supp 1053, 1062 (D NJ 1988) (stating that “the plaintiffs must show ‘the inference of rational, independent choice [is] less attractive than that of concerted action’”) (alteration in original), quoting *Bogosian v Gulf Oil Corp*, 561 F2d 434, 446 (3d Cir 1977). In *Rosefielde*, the plaintiff alleged in part that the defendant trade association members conspired to fix contractual terms of sale. See 701 F Supp at 1073. The court rejected this claim, reasoning that “although [the members] all adopted [such] policies[,] . . . inferences of conspiracy made from . . . consciously parallel business behavior cannot be made without the existence of certain ‘plus factors.’” *Id.* at 1074, quoting *Apex Oil Co v DiMauro*, 822 F2d 246, 253 (2d Cir 1987).

never an independent violation of § 1.¹³⁸ Therefore, a court assessing the merits would have been forced to dismiss the Complaint for failure “to state a claim upon which relief can be granted.”¹³⁹ However, although the legal allegations contained in the Complaint are notably incorrect, consent decrees do not issue rules of law.¹⁴⁰ The PCIC Decree is thus consistent with existing cases to the extent that it only enjoins sharing information about product quality, otherwise legal, as a prophylactic measure to “ensure that the violation will cease and competition will be restored.”¹⁴¹

The Government could have readily modified the Complaint to allege instead that PCIC violated § 1, not by sharing information, but by agreeing with competitors to standardize products.¹⁴² Although that charge is plausible, the existing Complaint does not support such a theory. The market for actuarial insurance contracts may have been characterized by significant product quality competition as to limitation of liability before the standardization.¹⁴³ But, it is hard to imagine why PCIC would choose an anticompetitive level of product quality when its own equity holders would have exclusively borne the resulting harm.¹⁴⁴ Even if the standardization reduced quality competition, it should have generated other procompetitive effects. First, without a separate allegation that prices were fixed, a court should have assumed

¹³⁸ See generally *Maple Flooring*, 268 US 563 (holding that sharing price information does not violate § 1).

¹³⁹ See FRCP 12(b)(6).

¹⁴⁰ See *Beatrice Foods v FTC*, 540 F2d 303, 312 (7th Cir 1976) (holding that a consent decree “is not a decision on the merits and therefore does not adjudicate the legality of any action by a party thereto”).

¹⁴¹ *Toys “R” Us Inc v FTC*, 221 F3d 928, 940 (7th Cir 2000).

¹⁴² The nature of the information sharing allegation suggested that the competitors had also formed a tacit agreement to standardize product quality: “The PCIC official advises that ‘a strong argument can be made that it is not in any firms’ individual best interest to avoid implementing reasonable contractual safeguards.’” Complaint at ¶ 16(a)–(d) (cited in note 1). *Paramount Famous Lasky* and *First National Pictures* can be distinguished from the PCIC case in this sense because those cases dealt with a standardization claim, not an information sharing claim.

¹⁴³ As in *Paramount Famous Lasky* and *First National Pictures*, evidence from the PCIC case indicated that there was substantial market demand for a variety of liability provisions. The Government alleged: “The use of LOL terms . . . has been significantly more prevalent than would have been the case in the presence of unrestrained competition among the PCIC members and other actuarial consulting firms.” Complaint at ¶ 18(c) (cited in note 1). At the same time, contract terms do not have economies of scale in production.

¹⁴⁴ See Complaint at ¶ 2 (cited in note 1) (stating that PCIC is owned by three actuarial companies who are also its exclusive clients). Because the market was extremely concentrated, it is plausible that procompetitive effects from the standardization were muted. Increased price competition from standardization may have been offset by interdependent pricing, and prices may not have been dispersed before the standardization because each competitor may have been well informed about the other firms’ prices and products. But the Antitrust Division failed to allege any of these facts. From the facts alleged in the Complaint, the standardization in the PCIC case appears procompetitive.

that standardization increased price competition.¹⁴⁵ Second, standardizing liability terms may have reduced socially costly price dispersion by helping firms calibrate new efficient prices after the recent large industry-wide insurance recoveries.¹⁴⁶ Third, if one firm discovered an effective way to limit liability (after the recent unexpected recoveries) while adhering to buyer preferences, allowing other firms to benchmark that technique would increase, not decrease, competitive incentives.¹⁴⁷

Even if PCIC violated § 1 by standardizing terms, information sharing is relatively weak evidence when compared with other facts probably available, such as competitor adoption of identical contract terms. Given the procompetitive justifications for sharing information about product quality, any court hearing this case on the merits should have been cautious about considering information sharing even as evidence of anticompetitive standardization.

CONCLUSION

Antitrust laws regulate observable behaviors that signal deeper economic machinations themselves impractical for courts to inspect. As a matter of law, information sharing, without more, does not violate § 1 of the Sherman Act. However, information sharing may facilitate both competitive and anticompetitive ends. In evaluating its legality as a precursor act, courts are ill-equipped to make fine distinctions between the anticompetitive and procompetitive case. The cost is greater for erroneously enjoining vital procompetitive behavior than for not considering information sharing as evidence of cartel action. Given all of this, courts hearing cases involving sharing information about product quality should exclude that behavior from their larger antitrust inquiry.

¹⁴⁵ See Part II.A.

¹⁴⁶ See Complaint at ¶ 9 (cited in note 1).

¹⁴⁷ PCIC and its competitors performed behavior consistent with benchmarking. See *id.* at ¶ 15(c) (noting that “a senior official of one of the non-PCIC competitors” had “as part of the firm’s consideration of LOL, requested and received from a PCIC official sample LOL language to help the firm develop LOL terms for its own client contracts”).