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Criminal Agreements in Antitrust Prosecutions: Through a Looking Glass

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Sentence first – verdict afterwards. Red Queen, Alice's Adventures in Wonderland From a criminal defendant's perspective, Lewis Carroll's Alice's Adventures in Wonderland makes an apt point of reference in assessing the law of conspiracy in criminal antitrust cases.

> Alice had never been in a court of justice before, but she had read about them in books, and she was quite pleased to find that she knew the name of nearly everything there. 'That's the judge,' she said to herself, 'because of his great wig.' The judge, by the way, was the King; and as he wore his crown over the wig… he did not look at all comfortable, and it was certainly not becoming. 'And that's the jury-box,' thought Alice, 'and those twelve creatures', you see, because some of them were animals, and some were birds, 'I suppose they are the jurors.' She said this last word two or three times over to herself, being rather proud of it: for she thought, and rightly too, that very few little girls of her age knew the meaning of it all. However, 'jury-men' would have done just as well. The twelve jurors were all writing very busily on slates. 'What are they doing?' Alice whispered to the Gryphon. 'They can't have anything to put down yet, before the trial's begun.' 'They're putting down their names,' the Gryphon whispered in reply, 'for fear they should forget them before the end of the trial.' **** 'Herald, read the accusation!' said the King. On this the White Rabbit blew three blasts on the trumpet, and then unrolled the parchment scroll, and read as follows: -- 'The Queen of Hearts, she made some tarts,
> All on a summer day:
> The Knave of Hearts, he stole those tarts

And took them quite away!' 'Consider your verdict,' the King said to the jury.

In Alice's Wonderland, white was black and up was down. In the world of criminal antitrust, the agreement is the crime even if no act is performed to further that agreement and even if the agreement is never effectuated. Put differently, the Knave of Hearts need not ever take the Queen's tarts away to be convicted. Imagine what 12 jurors write on their slates in antitrust cases -- it may well be that the accusation itself, to such jurors, seems enough to proceed right to a verdict and sentence. **Sherman Act Violations**

To properly plead a criminal violation of Section 1 of the Sherman Act, the Government must allege (1) that an illegal conspiracy existed at the time alleged; and, (2) that the defendants knowingly became members of that conspiracy. *See United States v. Gypsum Co.,* 438 U.S. 422 (1978) (where the Supreme Court emphasized that criminal antitrust cases require proof of specific intent). In a Sherman Act case, the conspiratorial agreement itself constitutes the complete offense. *Nash v. United States*, 229 U.S. 373, 378 (1913). The Government need not prove that any overt acts were taken in furtherance of the conspiracy or that the agreement was successful effectuated. The agreement is the crime, even if it is never carried out. *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 224-25 n. 59 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927). The evidence must show that the conspirators, explicitly or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan such as, to fix prices, suppress competition, divide markets, or rig bids. *United States v. Paramount Pictures*, 334 U.S. 131, 142 (1948). **Are Antitrust Violations Forever?**

Prosecution of a Sherman Act violation is subject to a five-year statute of limitations. 18 U.S.C. § 3282. The five-year period begins to run when the conspiracy is complete. *United States v. Coia,* 719 F.2d 1120, 1124 (11th Cir. 1983) (*citing Toussie v. United States,* 397 U.S. 112 (1970)). The Government is therefore required to prove that the conspiracy alleged continued beyond a date five years immediately prior to the date of the indictment. A conspiracy is complete, for purposes of the statute of limitations, when its objectives are either abandoned or achieved. *United States v. Kissel*, 218 U.S. 601, 608 (1910) (holding that once formed, a conspiracy continues until it succeeds or is abandoned). The objectives of the conspiracy are determined by looking to the conspiratorial agreement. *United States v. Dynalectric Co.*, 859 F.2d 1559, 1563-64 (11th Cir. 1988) ("[T]he limits of a conspiracy to restrain trade depend on what the conspirators agreed to do.") *See also Grunewald v. United States,* 353 U.S. 391, 397 (1957) ("[T]he crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement.") Looking to the conspiratorial agreement provides no simple answers, however, because explicit agreement is not a necessary part of a Sherman Act conspiracy. *United States v. General Motors*, 384 U.S. 127, 142-43 (1966) (*citing United States v. Parke, Davis & Co.*, 362 U.S. 29, 43 (1960); *United States v. Bausch & Lomb Optics*, 321 U.S. 707, 722-23 (1944)). The existence of an agreement can be inferred from the conspirator's words and actions. *See United States v. Paramount Pictures Inc.,* 334 U.S. 131, 142 (1948) ("It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the Defendants confirmed to the arrangement.") (*citing Interstate*

Circuit v. United States, 306 U.S. 208, 226-27 (1939); *United States v. Masonite Corp.*, 316 U.S. 265, 275 (1942)). By implication, in the absence of an express agreement, the scope and terms of an agreement must be inferred through examination of the conspirators' words and actions. *See Coia,* 719 F.2d at 1124-25 (noting that both conspiracy and its enduring nature can be proved circumstantially). Once the primary objectives of the conspiracy are determined by looking to the conspiratorial agreement, the court must then determine whether, on the evidence presented, those objectives were accomplished, abandoned, or continued into the limitations period. As far back as *Kissel*, the Supreme Court cautioned that "the mere continuance of the result of [the] crime does not continue the crime …." 218 U.S. at 610. Although a conspirator's act may be related to the conspiracy or may be a result of the conspiracy, it does not necessarily continue the conspiracy by furthering the conspiracy's primary objectives. When a conspiracy statute requires proof of an overt act, the Government must additionally prove that at least one overt act was performed in furtherance of the conspiracy within the statue of limitations. *Grunewald,* 353 U.S. at 397. However, proof of an overt act is not required to establish a violation of the Sherman Act, and therefore courts examine only whether the conspiracy's objectives were accomplished or abandoned within the limitations period. *See Coia,* 719 F.2d at 1125 (finding that when overt act not required, facts in time period close to commencement of limitations period supports inference that conspiracy continued into limitations period); *United States v. Grammatikos,* 633 F.2d 1013, 1023 (2d Cir. 1980) (holding that with respect to conspiracy statutes that do not require overt act, indictment satisfies requirement of statute of limitations if conspiracy is alleged to continue into limitations period). However, an indictment's language is not determinative for limitations purposes. *United States v. Hitt*, 107 F. Supp. 2d 29, 31 (D.D.C. 2000). A conspiracy is "complete" for statute of limitations purposes when the purposes of the conspiracy have been accomplished. *United States v. Harrison*, 329 F.3d 779, 783 (11th Cir. 2003); *United States v. Gonzalez*, 921 F.2d 1530, 1548 (11th Cir. 1991). Similarly as mentioned above, a Sherman Act conspiracy is actionable until its proven end has been achieved. *United States v. Kissel*, 218 U.S. 601, 607-08 (1910). But even if the result of the conspiracy is continuing, the conspiracy itself does not thereby become continuing. *See Fiswick v. United States,* 329 U.S. 211, 216 (1946). "[T]he crucial question in determining when the conspiracy stops and whether the statute of limitation has run is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as overt act may properly be regarded as in furtherance of the conspiracy." *Grunewald v. United States*, 353 US. 391, 397 (1957). In *Grunewald,* the Supreme Court held that acts taken to conceal an otherwise completed conspiracy to defraud the IRS could not legitimately be used to extend the statute of limitations on the underlying crime. The Supreme Court further emphasized that the government should not be permitted to circumvent these principles by clever pleading tactics. In fact, the Supreme Court characterized the government's attempt to avoid the statute of limitations by defining the *Grunewald* indictment as "continuing" and by expressly including acts of concealment as overt acts in the indictment as "no more than a verbal tour de force." *Grunewald*, 353 U.S. at 402. *United States v. Dynalectric*, is instructive. There, the Eleventh Circuit inferred that the central purpose of a bid-rigging conspiracy included not just the coordination of non-competitive bids, but also obtaining

financial self-enrichment by doing so. The Court therefore found that the bid-rigging conspiracy continued until the conspirators collected money on their contracts and divided the proceeds. The Court stated, "[i]t is inconceivable to us that any business would conspire to restrain trade solely for the sake of restraining trade…without also having the further goal of financial self-enrichment by virtue of the restraint of trade. 359 F.2d at 1568 (*citing United States v. Northern Improvement Co.,* 814 F.2d 540, 542 (8th Cir. 1987) ("We do not deal here with criminal behavior that is an end in itself. Common sense tells us that the conspirators' purpose was to reap the benefit of the conspiracy…")).

Is the Agreement the Crime or Not?

It is well-settled law that in criminal antitrust cases, the agreement is the crime. It is also well-settled law that statutes of limitations measure from when the crime is completed. The rationale of *Dynalectric* is that, while the agreement may be the crime, the reach of that crime can be ongoing and long term, trumping limitations issues. **Conclusion**

In criminal antitrust cases, defendants hear that price fixing and similar conduct is a *per se* violation of law; that economic necessity is no defense; that proof of a likely effect on foreign trade and commerce is good enough; that circumstantial evidence can be used to convict; and that pleading co-defendants can testify about their understanding of whether an agreement was reached. Hearing all this, most criminal defendants assume they will be convicted, which likely accounts for the many guilty pleas in criminal antitrust cases. A few brave souls, however, resist the siren's song of the Government's plea offers and go to trial. For some, it turns out that despite the Alice in Wonderland feel of antitrust prosecutions, jurors actually write on their slates two magical words: "not guilty".

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