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AN OUTSIDER LOOKS AT A CRIMINAL ANTITRUST TRIAL

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I. INTRODUCTION

This article is about an antitrust criminal trial, which the author followed as an outsider, and the author's perspective on some of the issues that arose.

From January 9 through March 13, 2012, Judge Susan Illston presided at the criminal antitrust trial in *United States v. AU Optronics Corporation* et al., NO. CR. 09-00110 SI in the United States District Court for the Northern District of California. AU Optronics Corporation ("AUO"), a Taiwanese corporation; its American subsidiary, AU Optronics Corporation America ("AUOA"); and five of its executives were charged with conspiring with other Taiwanese and Korean manufacturers to fix prices of TFT-LCD panels from 2001 to 2006. TFT-LCD panels are the flat screens used in laptop computers, desktop computer monitors, and televisions, as well as a host of other electronic products, such as cell phones and iPods.

AUO's alleged co-conspirators included three other Taiwanese companies (CPT Corporation, Chi Mei, and Hannstar) and two Korean companies (Samsung and LG Display). From the fall of 2001 to the fall of 2006, these six companies met as a group in Taiwan, generally on a monthly basis, to exchange production and pricing information and to agree on TFT-LCD prices. They referred to their meetings as "Crystal Meetings." In the period of the alleged conspiracy, there were approximately 50 such Crystal Meetings, all of which were well documented by one or more of the attending companies. The reports of the Crystal Meetings prepared by various participants, including AUO, LG Display, and Chunghwa, recorded express price-fixing and price-stabilization agreements reached at the meetings. The conspirators, including AUO, also entered into price-fixing agreements in one-on-one bilateral meetings and email and telephone communications throughout the period of the conspiracy.

Although most sales of the panels by the conspirators were originally made to makers of finished products outside the United States, substantial sales were made to United States buyers for delivery both inside and outside the United States (e.g., Dell, HP/Compaq, IBM, Apple); and roughly 30 percent of laptops, monitors, and flat screen TVs containing TFT-LCDs made by the conspirators were ultimately sold to consumers and other end users in the United States, which was the largest market for products containing TFT-LCD. During the period of the conspiracy, the conspirators manufactured in excess of 80 percent of TFT-LCD's world-wide. The conspirators also engaged in

considerable price-fixing activity in the United States in connection with serving their major American customers, such as Dell in Texas. At the Crystal Meetings, the conspirators specifically discussed these major American customers and the prices they would be charged.

Four of the conspirators pleaded guilty to felony violations of Section 1 of the Sherman Act before Judge Illston and paid fines: LG Display, $400 million; Chi Mei, $220 million; CPT, $65 million; and Hannstar, $30 million.[1] A number of their individual executives entered guilty pleas, were sentenced, and served time in federal prison, although largely minimum security. Another conspirator, Samsung, applied for leniency under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, by being the first conspirator to report the conspiracy to the Antitrust Division of the United States Department of Justice and essentially ratting out the other conspirators, even though Samsung was apparently one of the initiators of the conspiracy.

Only AUO withstood the Department of Justice and insisted on going to trial. The result of its intransigence was that AUO, AUOA, and AUO's two top executives were found guilty as charged; the jury acquitted two lower level executives; and the jury failed to reach a verdict on a mid-level executive, whom the DOJ has said it plans to retry. The jury also determined that the price-fixing conspiracy affected more the $500 million of United States commerce, a finding exposing AUO to a criminal fine of $1 billion.

II. THE DEFENSE: "MEET TO COMPETE"

AUO's defense at trial was the absence of any agreement by AUO to fix or stabilize TFT-LCD prices. According to defense counsel, AUO went to the Crystal Meetings only to obtain information from its competitors so that it could better compete in a highly competitive market, which it in fact did. It never really entered into any agreement on TFT-LCD prices with any of its competitors. It simply collected information on their future pricing intentions, which it then used to its own advantage by undercutting its competitors' prices to gain market share. When AUO's words and actions manifested agreement on prices at Crystal Meetings, AUO was really just bluffing, as in a poker game. The others at the meetings also understood that they were not really agreeing on prices, because prices were in fact being set by the market and not the manufacturers of TFT-LCD, as evidenced by steadily declining prices, rampant cheating or deviation from allegedly agreed-to prices, numerous large buyers with oligopsony power, and other dynamics of the marketplace. The essence of the defense, as phrased by counsel for one of the individual defendants, was "meet to compete," which was what AUO was allegedly doing in exchanging pricing and production information with competitors and in attending Crystal Meetings.[2]

AUO presented its defense without calling as witnesses any of the individual defendants or other employees of the corporate defendants. Instead, AUO relied on cross-examination of the prosecution's witnesses, who were employees of other conspirators that

1 Two Japanese companies, Sharp ($120 million) and Hitachi ($31 million), pleaded guilty to more limited, but related conspiracies to fix prices for TFT-LCD sold to particular United States customers (Dell, Motorola, Apple).

2 Clever as this coinage might have been, it fell far short of "If the glove doesn't fit, you must acquit." This particular defendant, whose counsel crafted the phrase, was convicted. Indeed, the Government nicely turned the tables on the defense in closing argument: Once again, "Meet to compete" — you've heard that phrase said by some of the lawyers here; some of the defense counsel. It's a catchy phrase, but it's completely an empty one. I think "Meet to cheat" is a more appropriate phrase there. Meet to cheat your customers. Meet to cheat your consumers of your products. [Trial Transcript, Rough, 4806:12-17.]

had pleaded guilty and agreed to cooperate with the Government, and testimony of an expert economist, Bruce Deal, who relied on a plethora of industry data and statistics for opinions that the actions not only of AUO, but also of the other admitted conspirators, were inconsistent with a conspiracy to fix and stabilize TFT-LCD prices; and that, even if such a conspiracy existed, it had no actual effect on TFT-LCD prices.

The Government's case consisted of: (1) testimony of several customers victimized by the conspiracy (Dell and HP/Compaq); (2) testimony of employees of other conspirators who admitted and described the conspiracy and their role in its implementation – extremely strong direct evidence, although subjected at times to skillful and effective cross-examination; (3) reports of Crystal Meetings prepared by AUO and other conspirators, which expressly admitted and detailed price-fixing agreements reached at the meetings – in essence irrefutable evidence very difficult to rebut; (4) summaries of the documentary evidence providing an overview of the history and number of Crystal Meetings; and (5) the testimony of expert economist Dr. Keith Leffler, who calculated the effect of the conspiracy on United States commerce and rebutted the testimony of Mr. Deal, apparently quite effectively.

III. AN OUTSIDER'S OBSERVATIONS

During the proceedings, which this observer followed by reading daily transcripts and actually attending one day of trial, there were three quite interesting legal issues that arose. These involved: (1) what the jury was to be told about the exchange of competitive pricing and production of information as evidence of conspiracy; (2) how the jury was to evaluate the claim that AUO did not conspire because its executives harbored unexpressed intentions not to agree on prices, and to use the information received at Crystal Meetings to undercut competitors' prices; and (3) the extent to which the jury was free to draw adverse inferences from AUO's failure to call any employee as a witness to deny AUO's participation in the conspiracy.[3]

Following the jury's verdict, a final question presented itself: Given the overwhelming direct evidence of the conspiracy, including the testimony of actual participants and first-hand contemporaneous written reports of the Crystal Meetings, did the "Meet to Compete" defense ever really stand a chance? This observer's conclusion is that it did, as shown by the acquittal of the two lower-level AUO executives, one of whom attended Crystal Meetings, while the other knew about the meetings, and the failure to reach a verdict with respect to the mid-level executive, who both attended and wrote reports of the Crystal Meetings for his superiors, in which he admitted and described price-fixing agreements.

The reason the "Meet to Compete" defense proved as effective as it did, however, in the view of this observer, is the treatment the other three issues received from the Government and the Court during the trial. It is these three issues that will now be addressed.

A. The Exchange of Competitive Information

A linchpin of the "Meet to Compete" defense was the premise that under Section 1 of the Sherman Act, the exchange of pricing and production information with

3 Full disclosure requires the author to state that during the AUO criminal trial he filed amicus briefs on the first two issues on behalf of the Indirect Purchaser Plaintiff Classes in *In Re TFT-LCD (Flat Panel) Antitrust Litigation*, 3:07-md-01827-SI in the United States District Court for the Northern District of California. Much of the discussion to follow relies on those briefs.

competitors is permissible and even pro-competitive. The defense asked for and received both a preliminary and final jury instruction on this issue. The instruction said:

> Evidence has been introduced concerning the exchange of information about prices between the defendants and employees of other companies manufacturing TFT-LCDs alleged to be co-conspirators. The Government claims that such exchanges are part of the evidence establishing that the defendants entered into an agreement or future mutual understanding to fix prices, as alleged in the indictment.
>
> It is not unlawful for a person to obtain information about a competitor's prices, or even to exchange information about prices, unless done pursuant to an agreement or mutual understanding between two or more persons, as charged in the indictment. Nevertheless, you may consider such facts and circumstances, along with other evidence, in determining whether there was an agreement or mutual understanding between two or more persons, as alleged in the indictment. [Trial Transcript, Rough ("Tr."), 1395:24-1396:13; 4718:24-4719:9.]

Although clearly a correct statement of the law, on the record in the case, this was arguably a much more favorable instruction than the defense was entitled to receive. The reason is that the undisputed evidence of record was that AUO and its competitors were exchanging information about ***future prices*** and their ***intentions regarding future prices*** at the Crystal Meetings, not information about historical past prices.

The seminal cases dealing with information exchanges are *Eastern States Lumber Ass'n v. United States*, 234 US 600 (1914) (price-fixing conspiracy found from information exchange combined with other factors); *American Column & Lumber Co. v. United States,* 257 U.S. 377 (1921) (same); *United States v. American Linseed Oil Co*., 262 US 371 (1923) (same); *Maple Flooring Ass'n v. United States*, 268 US 563 (1925) (no conspiracy from information exchange without more); *Cement Mfrs. Ass'n v. United States*, 268 US 588 (1925) (same result as *Maple Flooring*); and *United States v. Container Corp. of America*, 393 US 333 (1969) (price-fixing conspiracy found from information exchange combined with other factors). The bottom line from these cases is that an information exchange among competitors is legally neutral standing alone and not sufficient by itself to establish a price-fixing conspiracy. In more modern parlance, one or more "plus factors" will be necessary to support a finding of a conspiracy to fix prices. Chief among such plus factors, however, is exchanging information about future prices, as occurred in the Crystal Meetings.

Numerous authorities have held that exchanges of information about future prices stand on an entirely different footing from exchanges of information about past prices, and are more than sufficient to establish an unlawful agreement to fix prices. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432, 461-62 (C.A.9 (Cal.), 1990):

> In response to this evidence, the appellees raise two arguments. First, they contend that these exchanges of information were "innocuous" and that no inference of conspiracy can be drawn

> from them. This argument cannot be squared with the Supreme Court's holding that, under certain circumstances, the exchange of production and supply information may supply "an attractive basis for cooperative, even if unexpressed, 'harmony' with respect to future prices." *American Column & Lumber Co. v. United States,* 257 U.S. 377, 398, 42 S.Ct. 114, 116, 66 L.Ed. 284 (1921); see also Sullivan, Antitrust Sec. 97 (1977) (Data as to production figures "can be used to police production quotas imposed by a cartel or, in an oligopolistic structure, can facilitate interdependent action in reducing output.").

American Column Lumber Co. v. United States, 257 U.S. 377 (1921):

> This elaborate plan for the interchange of reports does not simply supply to each member the amount of stock held, the sales made and the prices received, by every other member of the group, thereby furnishing the data for judging the market, on the basis of supply and demand and current prices. It goes much farther. It not only furnishes such information, with respect to stock, sales and prices, but also reports, giving the views of each member as to 'market conditions for the next few months'; what the production of each will be for the next 'two months'; frequent analyses of the reports by an expert, with, we shall see, significant suggestions as to both ***future prices*** and production; and opportunities for future meetings for the interchange of views, which the record shows were very important. It is plain that the only element lacking in this scheme to make it a familiar type of the competition suppressing organization is a definite agreement as to production and prices. But this is supplied: By the disposition of men 'to follow their most intelligent competitors,' especially when powerful; by the inherent disposition to make all the money possible, joined with the steady cultivation of the value of 'harmony' of action; and by the system of reports, which makes the discovery of price reductions inevitable and immediate. The sanctions of the plan obviously are financial interest, intimate personal contact, and business honor, all operating under the restraint of exposure of what would be deemed bad faith and of trade punishment by powerful rivals. [Emphasis added.]

Todd v. Exxon Corp., 275 F.3d 191, 211 (2nd Cir., 2001):

> Alongside the "structure of the industry involved," the other major factor for courts to consider in a data exchange case is the "nature of the information exchanged." *Gypsum*, 438 U.S. at 441 n.16. There are certain well-established criteria used to help ascertain the anticompetitive potential of information exchanges. As part of the analysis, a court should consider, "broadly speaking, whether it was of the sort in *American Column & Lumber Co. v. United States* ... or of that in *Maple*

> *Flooring Manufacturers Ass'n v. United States." Battipaglia*, 745 F.2d at 175 (citations omitted). Applying the relevant criteria reveals anticompetitive potential in this case.
>
> The first factor to consider is the time frame of the data. The Supreme Court has made clear that "[e]xchanges of current price information, of course, have the greatest potential for generating anti-competitive effects and although not per se unlawful have consistently been held to violate the Sherman Act." *Gypsum*, 438 U.S. at 441 n.16 (citing *Am. Column & Lumber; Am. Linseed Oil Co.*; and *Container Corp.*). The exchange of past price data is greatly preferred because current data have greater potential to affect future prices and facilitate price conspiracies. ***By the same reasoning, exchanges of future price information are considered especially anticompetitive.*** [Emphasis added.]

United States v. Serta Associates, Inc., 296 F. Supp. 1121, 1127 (N.D. Ill., 1969):

> Similarly, circulation of a price list among competitors was forbidden in *Interstate Circuit, Inc. v. United States,* 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939), because the list prices were likely to be the prices ***for the future***, thus allowing the competitors to price their merchandise accordingly; the instant local restrictions on advertising, when combined with the "suggested retail prices," result in an even more accurate prophecy of retailers' future prices. [Emphasis added.]

See, *Fleischman v. Albany Med. Ctr.*, 728 F.Supp.2d 130, 153 (N.D. N.Y., 2010):

> Information exchanges that involve future terms of competition (e.g., prices or wages) can allow firms to communicate their plans for future prices or wages to their rivals and create a means by which rivals can communicate back how they will respond. Thus, information exchanges involving future or planned terms of competition can provide a means by which rivals can reach agreement.
>
> *See* Expert Report of Gregory S. Vistnes, at 4. In forming this opinions, Vistnes relied on economic theories published in various economic journals.

On the basis of the foregoing authorities, the Court could have refused to give the instruction on information exchanges, or it could have added language that the exchange of information about future prices is different and sufficient to establish an unlawful agreement to fix prices. In any event AUO should have no complaint or issue for appeal based on the instruction given. It got far more than it should have from the Court on this point.

B. The Undisclosed Intention Not to Agree

Throughout the trial, defense counsel attempted to lay the groundwork for an argument that defendants could not be found guilty if they ostensibly agreed to price-fixing at Crystal Meetings, but secretly intended not to abide by the agreements reached. For

example, the following questioning occurred during the cross-examination of Brian Lee, a CPT employee who attended Crystal Meetings and prepared meticulous reports of the meetings and agreements reached:

> Q Well, you don't know what was in anybody else's mind at those meetings, do you?
> A It is true that we can't read other people's mind. However, the figures that we were discussing were written on the whiteboards. One is one, two is two, everything is very clear. It's not possible to miscomprehend. [Tr., p. 1561:12-17.]
>
> * * *
>
> Q Even back then, you didn't know what anybody was thinking, did you?
> A You're right.
> Q Except yourself. You knew what you were thinking.
> A Yes.
> Q As for anybody else, all you had was what they said, right?
> A Yes. [Tr., p.1567:4-11.]
>
> * * *
>
> Q Well, you had no idea what Dr. Hsiung was thinking at the time about that, do you?
> A I do not know what he was thinking, but we had understanding as to whether the price had rebate. [Tr., p. 1690:16-19.]
>
> * * *
>
> Q You would agree with me that an agreement requires people to be thinking the same things (Indicating) as the words they're saying. Right?
> A Yes.
> Q Requires both people, if we're just talking about two people, to have all their cards on the table. Right?
> THE COURT: Mr. Berson, –
> MS. PATCHEN: Objection –
> THE COURT: – the colloquialisms are very complicated in this case, so perhaps you could just try to avoid them.
> MR. BERSON: All right.
> BY MR. BERSON:
> Q It requires people to say what they mean, and mean what they said, doesn't it?
> MS. PATCHEN: Objection. That's vague, Your Honor.
> THE COURT: Overruled.
> You can answer that.
> THE WITNESS: Yes. [Tr., pp. 1730:9-1731:2.]

Such questioning, which generally proceeded without objection from the Government, and hence without comment or ruling by the Court, was particularly troubling. To this observer, such questioning, as well as the argument for acquittal it was intended to support, seriously and fundamentally misconceived both the law of contracts or agreement and the law of antitrust criminal intent.

First, the idea that there can be no agreement if a party has an undisclosed intention not to agree, but provides an objective manifestation of assent, appears flatly contrary to basic contract law. If defendants at the Crystal Meetings objectively manifested their assent to price-fixing agreements, then they in fact agreed, regardless of any undisclosed intent not to agree or not to abide by the price-fixing agreements. *Gooding v. Shearson Lehman Bros., Inc.*, 878 F.2d 281, 284 (9th Cir., 1989) ("[T]he undisclosed intentions of the parties are ... immaterial ... the outward manifestation or expression of assent is controlling."); *Bretz v. Portland General Elec. Co.*, 882 F.2d 411, 413 (9th Cir. 1989) ("In Montana, as in most other jurisdictions, '[t]he mutual assent essential to the formation of a contract ... must be gathered from the outward objective manifestations of the parties and not by the subjective undisclosed intent of one of the parties.'"); *Bolander v. Godsill*, 116 F.2d 437, 439 (9th Cir., 1940):

> Considered from a standpoint as to manifestation of assent to deceased's offer, it is clear that whatever may have been Godsil's secret intention, her acts in looking after [the] deceased manifested an acceptance of the offer. The secret intention of Godsil was, therefore, immaterial. 1 Restatement of the Law, Contracts, p. 25, § 20; 17 C.J. S., Contracts, p. 361, § 32.

Franklin Life Ins. Co. v. Mast, 435 F.2d 1038, 1045 (9th Cir., 1970); *Associated Milk Producers, Inc. v. Meadow Gold Dairies, Inc.*, 27 F.3d 268, 273 (7th Cir., 1994); *Goldberg v. Bear, Stearns & Co., Inc.*, 912 F.2d 1418, 1420 n.1 (11th Cir., 1990); *Industrial Products Mfg. Co. v. Jewett Lumber Co.*, 185 F.2d 866, 869 (8th Cir., 1950) ("Though there must be a meeting of the minds of the parties to constitute a contract, such meeting of the minds is to be determined by the expressed, and not by the secret, intention of the parties."); *EBC Inc. v. Clark Bldg. Sys. Inc.*, 618 F.3d 253, 263 (3d Cir., 2010) ("It is well established in Pennsylvania that '[i]n ascertaining the intent of the parties to a contract, it is their outward and objective manifestations of assent, as opposed to their undisclosed and subjective intentions, that matter.'").

Thus, where the evidence established that defendants clearly and objectively manifested their assent to price-fixing agreements, as it overwhelmingly did here, the defendants should not have been allowed to claim that no agreement was formed by reason of their unexpressed intention not to agree. The Government could have objected to these questions and suggestions; and, if it did, the Court should have sustained the objection and instructed the jury that such an unexpressed intent not to agree is irrelevant and must be disregarded.

Nor would such a ruling and instruction run afoul of the law of the criminal antitrust intent required for a conviction of felonious price-fixing. The Supreme Court treated the issue of intent definitively in *United States v. United States Gypsum Company*, 438 U.S. 422 (1978). First, the Court held "that the criminal offenses defined by the Sherman Act should be construed as including intent as an element." 438 U.S. at 443. In defining the requisite intent, however, the Supreme Court made clear that the prohibited intent exists when a defendant knows that a price-fixing agreement "is practically certain to follow from his conduct, whatever his desire may be as to that result." *Id.*, at 445. "Where carefully planned and calculated conduct is being scrutinized in the context of a criminal prosecution, ***the perpetrator's knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent***." *Id.*, at 445-46; [Emphasis added.] Thus, according to the Supreme Court, "action undertaken with knowledge of its probable

consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws." *Id.*, at 444. *Accord*: *United States v. Brown*, 936 F.2d 1042, 1046 (9th Cir., 1991).

Thus, regardless of any alleged unexpressed intent not to agree, if defendants objectively manifested their assent to price-fixing agreements at the Crystal Meetings, all that need be shown for a conviction is defendants' knowledge that the probable consequences of their conduct would be "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). The Government was entitled to exclude this evidence and to have the jury instructed that AUO's alleged undisclosed intention not to agree could not be considered as a defense once the jury found that AUO had objectively manifested its assent to price-fixing agreements and understood the probable consequences of doing so.

C. Adverse Inferences from AUO's Failure to Call Witnesses

On this issue, the rules of evidence run into the Fifth Amendment. At trial, AUO and AUOA called no witnesses other than the expert economist. They called no current employee to deny their participation in the conspiracy, although there clearly were employees other than the individual defendants who could have given such testimony. The individual defendants, as was their Fifth Amendment right, did not testify.

The law is clear that as corporations AUO and AUOA have no Fifth Amendment right against self-incrimination. *United States v. White*, 322 U.S. 694, 699 (1944):

> Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation. *Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652; *Wilson v. United States*, 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771, Ann.Cas.1912D, 558; *Essgee Co. v. United States*, 262 U.S. 151, 43 S.Ct. 514, 67 L.Ed. 917.

The law is also clear that the introduction of weak evidence when strong is available permits an adverse inference against the proponent of the evidence. *Interstate Circuit, Inc. v. United States*, 306 US 208, 226 (1939):

> The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. *Clifton v. United States,* 4 How. 242, 247. Silence then becomes evidence of the most convincing character. *Runkle v. Burnham,* 153 U.S. 216, 225; *Kirby v. Tallmadge,* 160 U.S. 379, 383; *Bilokumsky v. Tod,* 263 U.S. 149, 153, 154; *Vajtauer v. Commissioner of Immigration,* 273 U.S. 103, 111, 112; *Mammoth Oil Co. v. United States,* 275 U.S. 13, 52; *Local 167 v. United States,* 291 U.S. 293, 298.

Thus, had AUO and AUOA been the only defendants in the criminal trial, the Government surely could have commented on their failure to call witnesses and their silence in the face of the incriminating evidence against them, and could have requested and perhaps received an *Interstate Circuit* instruction. In the criminal trial, the Government in fact did neither.

This presents the interesting question of whether the presence of the individual defendants, who did have Fifth Amendment rights, changed the calculus, prevented the Government from commenting on the failure of the corporate defendants to call witnesses, and thereby somehow imparted to the corporate defendants Fifth Amendment protection they would not otherwise have enjoyed. There appears to be no authority on point. Conceivably, the argument would be that commenting on the silence of the corporate defendants would impermissibly call attention to the failure to testify of the individual defendants, so as to violate their Fifth Amendment rights and infect the proceedings sufficiently to warrant reversal of any conviction of the individual defendants. Under the circumstances, the Government could justifiably have chosen not to comment on the corporate silence, as a tactical matter, in order not to risk reversal of individual convictions. It also could reasonably have concluded that the evidence was sufficiently strong to convict the corporate defendants without a need to comment on their failure to call witnesses.

Nonetheless, there can be no basis for thinking that commenting on the silence of the corporate defendants posed a risk of reversal of their convictions, unless the Government feared an ultimate overruling of *United States v. White* by the Supreme Court – not so farfetched a possibility in light of *Citizens United v. Federal Election Commission*, 558 U.S. 1 (2010), and the propensity of five current Supreme Court Justices to view corporations as giant persons walking the earth.

One other aspect of this issue is intriguing. In *Griffin v. California*, 380 U.S. 609 (1965), the Supreme Court held that it was error to instruct a jury that it could ***not*** draw an adverse inference from a criminal defendant's exercise of his Fifth Amendment right not to testify, because such an instruction drew undue attention to the defendant's silence. In *Carter v. Kentucky*, 450 U.S. 288 (1981), however, the Supreme Court held that it was error to refuse to give an instruction, if requested by the defense, that the jury could not draw an adverse inference from the defendant's exercise of his Fifth Amendment right not to testify. Thus, the Supreme Court conferred on defendants the choice of whether or not to instruct on the exercise of Fifth Amendment rights.

In the AUO criminal trial, counsel for the individual defendants elected the *Carter v. Kentucky* alternative. They requested and received the following instruction:

> A defendant is presumed to be innocent, unless and until the Government proves the defendant guilty beyond a reasonable doubt. In addition, a defendant does not have to testify or present any evidence to prove innocence. The Government has the burden of proving every element of the charge beyond a reasonable doubt. The defendant – a defendant in a criminal case has a constitutional right not to testify. You may not draw any inference of any kind from the fact that a defendant did not testify. [Tr., 4709:24-4710:9.]

In addition, defense counsel stressed the right of the individual defendants to remain silent free of adverse inferences both in voir dire/opening statements and closing arguments. *E.g.*:

> The Judge is going to instruct at the end of this case that you can't consider whether someone else – whether a defendant testifies, or not. It's a choice they have. And if they don't testify, you can't hold it against them. Would you be able to

> ignore whether someone testified or not, and judge the case entirely on what happens here in court from that witness stand? Would you be able to do that? [Tr., 182:23-183:5.]

Inasmuch as the individual defendants so clearly chose the path of *Carter v. Kentucky*, one could argue that, with the jury expressly instructed about the right of the individual defendants to remain silent, and receiving repeated reminders from defense counsel, there could be no possibility of undue prejudice to the individual defendants from the Government's commenting on the failure of the corporate defendants to call witnesses.

IV. CONCLUSION

This author does not claim to be even close to being an expert or aficionado of criminal law, but merely an interested, if not fascinated, observer of an interesting and fascinating criminal trial, a very major and important one, in which the Government, defense counsel, the Court, and finally the jury all did a masterful job. The result was an exemplary proceeding and a truly just and significant result. Price fixers were held to account, as they should have been; and the importance and wisdom of the antitrust laws were reconfirmed. The foregoing thoughts and comments are those of a kibitzer, who found the entire process an absorbing intellectual challenge. The issues discussed were chosen because of their knottiness and the likelihood of their recurrence in future trials, and in the hope that their explication may provide guidance in shaping the development of antitrust law in a positive and productive direction that will preserve and protect the competitive process, as the antitrust laws were meant to do.