

**MSBA Antitrust Section**  
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**Price-Fixing, Bid-Rigging, and Mergers: the Shift from Structure to Effects**

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([http://www.micradc.com/economists/warren\\_boulton.html](http://www.micradc.com/economists/warren_boulton.html))

Rick Warren-Boulton (RWB) gave a lively presentation at the Section's October 14, 2009 meeting. He offered a series of case studies on price-fixing, bid-rigging, and mergers. The common theme of these case studies is that they demonstrate the need for a shift away from an analysis based on theoretical "structure" to one based on empirical "effects." RWB observed that the Merger Guidelines are based on structural analysis of markets, but he predicted a "big change" in those guidelines toward estimating effects, especially in cases involving bid markets. Current bid theory no longer attempts to define markets; every bid creates a separate market.

Price-Fixing. The characteristics of illegal price-fixing are (1) higher prices (involving gradual price increases to prevent detection on the front end and gradual price decreases on the back end to reduce the probability of conviction or to minimize the estimate of damages, (2) lower variances in market prices, and (3) little correlation between costs and prices. Recent studies suggest that price increases due to cartel behavior are on the order of 20% to 30% -- much higher than the 10% previously assumed in the US and the EU.

RWB's first case study involved a Japanese shipping company with global operations and three rivals who pled guilty. The company denied participation in the conspiracy and retained RWB to help disprove the company's involvement. RWB used a control price based on spot rates, generated predicted competitive prices across the time period, and compared the predicted competitive prices to the actual prices before, during, and after the alleged conspiracy to show that the predicted competitive prices matched the actual prices.

RWB's second case study involved a German cement conspiracy. When the cartel was exposed, cement prices had dropped 50%. A cartel member retained RWB to appeal the penalty and show that the actual price increase (i.e., damages) had been less than 50%. Cartel members had assigned market shares based on respective manufacturing capacity as reported by an industry association. But the cartel led to over-capacity (which would not have been built in the but-for world), and this excess capacity in turn led to a collapse in prices. RWB did not have access to pre-cartel prices because the conspiracy had been in effect since World War II. Using two comparative measurements – margins on cement-manufacturing in Europe vs. the U.S., and an event study on stock prices – RWB showed that, whereas the after-conspiracy prices had declined by 30 Euros/ton, the margin comparison standard suggested that the illegal price increase had been only 2.11 Euros/ton and the event study predicted illegal price increases of only 3.93 Euros/ton.

Bid-Rigging. RWB reviewed the theory of bid-rigging: the lowest-cost firm wins the bid at a price equal to or slightly less than the second lowest-cost firm's cost. Consequently, the customer never pays what it is willing to pay. Successful collusion necessarily can occur only if it involves the top two bidders (that is, the two lowest-cost providers), and the price increase due to collusion is the difference in cost between the second and third lowest-cost bidders. In order to identify a bid-rigging agreement or predict the effects of a merger in a bid market, one need only have information relating to the top three bidders. The general rule is that, absent efficiencies, mergers among the top two bidders in bid markets will always result in price increases.

Mergers. RWB discussed a case study merger that affected 140 different geographic “markets.” RWB treated each customer location as a separate market and performed analyses predicting price effects ranging from an increase of 0.193% to a decrease of 3.708%. This method results in tailored predictions about price rather than generalized inferences based on the resulting market structure. This method also provides a concrete way to take account of substantial merger efficiencies, in contrast to the “standard deduction” for efficiencies under the Merger Guidelines.