

Our View: Oil's Potential Trillion-Dollar Antitrust Liability

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Do not be surprised if you hear that executives at United Airlines (UAL) are breaking out the champagne. After reading a May 2 press release from the Federal Trade Commission¹, they may be hoping to rake in as much as \$300 million in antitrust damages from the world oil industry, including some producing countries. If they succeed, they should name at last one of their best jets the "Scott Sheffield."

UAL should thank Sheffield for the hundreds of texts and emails he sent and received from ministers and others in oil-exporting countries, along with perhaps records of contracts with officials in US companies. These communications will form the basis of numerous lawsuits alleging price fixing and violations of US antitrust laws. In its criminal referral to the Justice Department², the FTC provided just a small example of these communications. The lawyers for UAL and other plaintiffs will use them to skewer some companies and producing nations.

The oil industry is in BIG trouble. This is not, however, the first time an industry has been brought down by insiders. Many of the most successful antitrust prosecutions have been based on information provided by someone privy to internal operations or a confidential written document uncovered during discovery because some executive ignored his or her lawyers' warnings.

In the 2009 film *The Informant*, Matt Damon starred as Mark Whitacre, in a true story about a former Archer Daniels Midland (ADM) employee who disclosed the existence of cartel price fixing for the agricultural product lysine. ADM and lysine producers ultimately paid fines of over \$100 million for their actions.³

The treasure trove of emails and WhatsApp® messages to and from Sheffield and others in the industry exposes oil-exporting countries and independent oil firms such as Hess, Occidental, Devon, and Chesapeake to potential criminal and/or private litigation for conspiracy, just as Whitacre's actions exposed ADM. The potential damages are huge.

The materials discovered in connection with the ExxonMobil-Pioneer merger may be sufficient to extend liability to the oil-exporting countries cooperating with Pioneer and possibly other oil producers because the commercial actions of nations that affect US consumers are not protected by sovereign immunity. The litigation will be long. It may be successful, though, because hard evidence regarding communications between the countries and US oil producers is now available.

¹ "FTC Order Bans Former Pioneer CEO from Exxon Board Seat in Exxon-Pioneer Deal," Federal Trade Commission press release, May 2, 2024 [<https://tinyurl.com/bdennvne>].

² "In the Matter of Exxon Mobil Corporation," Federal Trade Commission complaint, May 2, 2024 [<https://tinyurl.com/mry54ja8>].

³ John Greenwald, Sally B. Donnelly, and William A. McWhirter, "The Fix Was In At ADM," *Time*, October 28, 1996 [<https://tinyurl.com/283kn5xp>].

It should not surprise anyone that Sheffield has exposed the industry to antitrust scrutiny. For years he has been a strong advocate of cooperation between oil-exporting countries and independent producers. As the record revealed by the FTC shows, he went from supporting open markets and aggressive exploration to pushing market management and, apparently, colluding with oil-exporting nations and possibly US producers to limit output and support prices.

I have warned of the antitrust exposure of US oil producers tied to speeches by Sheffield and others in the industry on several occasions. In January 2021, I highlighted in *Notes at the Margin* statements by Sheffield and executives at Occidental and Devon Energy discouraging production. I observed that a statement by Pioneer's Sheffield "could border on a violation of US antitrust laws regarding signaling."⁴ I followed that comment with this explanation of signaling:

Antitrust challenges to invitations to collude and other "signaling" communications are increasing. In the last several years, both U.S. antitrust agencies have launched extensive investigations and the Federal Trade Commission has obtained consent decrees in multiple actions arising from unilateral statements by business executives. The private bar is close behind, having filed two dozen lawsuits in just the last year alleging the major airlines have violated the antitrust laws through signaling.⁵

More than two years ago, in the February 7, 2022 *Notes*, I warned that "frackers risk antitrust investigation when hedging would be cheap."⁶ The report cited statements by Sheffield and ConocoPhillips CEO Ryan Lance that discouraged other producers from boosting production.

Obviously, no one listened. The consequences of their lack of attention may be very expensive. Airline executives and antitrust plaintiff lawyers everywhere can rejoice.

(Please note that the two *Notes at the Margin* reports mentioned are available for viewing and/or downloading online—the January 11, 2021 report at <https://tinyurl.com/53x4m22t> and the February 7, 2022 report at <https://tinyurl.com/bdcnufs2>.)

⁴ "Did the Fracking Trap Catch the Oil Producers' Coalition?" *Notes at the Margin*, January 11, 2021, pp. 9-10.

⁵ Paula W. Render, J. Bruce McDonald, and Thomas York, "Sending the Wrong Message? Antitrust Liability for Signaling," *Antitrust* 31, No.1 (Fall 2016) [<https://tinyurl.com/y5ggjtod>], p. 83.

⁶ "AI Rules Oil Markets; Frackers Risk Antitrust Investigation When Hedging Would Be Cheap," *Notes at the Margin*, February 7, 2022, pp. 8-9.