

Winter 2018

## When Cheating Is Good and Cooperation Is Bad: Conspiracies and the Continuing Violations Doctrine Under the Sherman Act

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### Recommended Citation

Brianna S. Hills, *When Cheating Is Good and Cooperation Is Bad: Conspiracies and the Continuing Violations Doctrine Under the Sherman Act*, 83 Mo. L. REV. (2018)

Available at: <https://scholarship.law.missouri.edu/mlr/vol83/iss1/11>

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## NOTE

# When Cheating Is Good and Cooperation Is Bad: Conspiracies and the Continuing Violations Doctrine Under the Sherman Act

*In re Pre-filled Propane Tank Antitrust Litig.*, 860 F.3d 1059 (8th Cir. 2017) (en banc)

*Brianna S. Hills\**

### I. INTRODUCTION

Courts have long recognized that statutes of limitation may be equitably adjusted under certain circumstances.<sup>1</sup> In other instances, courts have adjusted the statute of limitations not by making an equitable exception but by changing the definition of when the statute begins to run in the first instance.<sup>2</sup> In the antitrust context, courts have done the latter, occasionally invoking the continuing violations doctrine.<sup>3</sup> This doctrine allows a claimant to restart the limitations period if there is an overt act alone sufficient to be an antitrust violation.<sup>4</sup> The period restarts even if the overt act is performed under a pattern or course of prior violations that may have occurred outside of the limitations period.<sup>5</sup>

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1. See *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) (recognizing equitable tolling of the statute of limitations under the New York Civil Practice Act and holding that “[e]quity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that ‘laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced, – an inequity founded upon some change in the condition or relations of the property or the parties’” (quoting *Gallagher v. Cadwell*, 145 U.S. 368, 373 (1892))).

2. See, e.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338–39 (1971) (explaining that each time the plaintiff is harmed by a new act of conspiracy to violate the antitrust laws the statute of limitations resets).

3. See *In re Pre-filled Propane Tank Antitrust Litig.* (“*Ferrellgas II*”), 860 F.3d 1059, 1063 (8th Cir. 2017) (en banc); see also *Zenith Radio*, 401 U.S. at 338–39; *Varner v. Peterson Farms*, 371 F.3d 1011, 1018–20 (8th Cir. 2004).

4. See *Zenith Radio*, 401 U.S. at 338–39.

5. See *id.*

The Eighth Circuit considered the issue in *In re Pre-filled Propane Tank Antitrust Litigation* in the context of a price-fixing conspiracy among manufacturers of propane tanks.<sup>6</sup> This Note considers the framework employed by the majority and goes on to suggest ways to refine that framework to reduce error costs and protect competition. To do so, an appropriate continuing violations rule must advance two seldom-advised ends: encouraging cheating and discouraging communication.

## II. FACTS AND HOLDING

In the wake of increasing propane costs between 2006 and 2008, the two largest distributors of pre-filled propane tanks reduced the fill level of their tanks from seventeen pounds to fifteen pounds.<sup>7</sup> At the time of the price increase, the two distributors, Ferrellgas and AmeriGas (“Defendants”), made up approximately eighty percent of the American market for pre-filled propane exchange tanks.<sup>8</sup> Pre-filled propane exchange tanks (“propane tanks”) are used to power outdoor grills and heaters and can typically be filled with up to twenty pounds of propane.<sup>9</sup> In 2009, a class action was filed on behalf of a group of purchasers of propane tanks from retailers of the Defendants (“2009 Class”).<sup>10</sup> The 2009 Class alleged that Defendants had colluded to reduce the amount of propane in their tanks while maintaining the same price per tank, effectively increasing the price of the tanks.<sup>11</sup> The complaint alleged that colluding to increase prices violated section 1 of the Sherman Act in addition to state antitrust and consumer protection statutes.<sup>12</sup>

In its amended complaint, the 2009 Class, composed of indirect purchasers,<sup>13</sup> defined their class differently, referring to the class members’ common-

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6. *Ferrellgas II*, 860 F.3d at 1063–64.

7. *In re Pre-Filled Propane Tank Antitrust Litig.* (“*Ferrellgas I*”), 834 F.3d 943, 945 (8th Cir. 2016), *vacated en banc*, 860 F.3d 1059 (8th Cir. 2017).

8. Opening Brief of Plaintiffs-Appellants at 2, *Ferrellgas II*, 860 F.3d 1059 (No. 15-2789).

9. *Ferrellgas I*, 834 F.3d at 945.

10. *Id.* at 945–46. The class was created by consolidating individual cases to a single class in the Western District of Missouri. Opening Brief of Plaintiffs-Appellants, *supra* note 8, at 7.

11. *Ferrellgas I*, 834 F.3d at 945–46. Although the amount of propane in each tank was decreased, the tanks were correctly advertised. *Id.*

12. *Id.* at 946.

13. Litigants that do not purchase the product or service at issue directly from the defendant in an antitrust case but instead purchase from an innocent downstream seller are referred to as “indirect purchasers.” See PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 320b (4th ed. 2017). Indirect purchasers are subject to additional procedural limitations to filing suit, discussed *infra*.

ality as “persons who purchased a [p]ropane [t]ank sold, marketed, or distributed by any Defendant during the applicable limitations period.”<sup>14</sup> Settlement negotiations ensued with both Defendants, and the 2009 Class moved for preliminary approval of the resulting settlement agreements in early December 2009.<sup>15</sup> Both settlement agreements defined the class slightly differently. The AmeriGas agreement defined the settlement class as “people who purchased or exchanged one or more of AmeriGas’s pre-filled propane gas cylinders in the United States not for resale, between June 15, 2009[,] and November 30, 2009.”<sup>16</sup> The Ferrellgas agreement defined the class as “people who purchased or exchanged one or more of Ferrellgas’s pre-filled propane gas cylinders in the United States not for resale, between June 15, 2009[,] and the date of Preliminary Approval.”<sup>17</sup> The district court<sup>18</sup> granted approval of the settlement agreements.<sup>19</sup>

Over three years later, the Federal Trade Commission (“FTC”) issued a complaint alleging price fixing against the Defendants arising out of the effective price increase on their propane tanks in 2008. After several months, a group of both direct and indirect purchasers filed the suit at issue (“2014 Class”).<sup>20</sup> The complaint again alleged that the Defendants colluded to fix prices in violation of section 1 of the Sherman Act.<sup>21</sup>

The antitrust claims were all subject to a four-year statute of limitations.<sup>22</sup> The first complaint in this matter was filed in June 2014.<sup>23</sup> However, because the FTC filed an administrative complaint on March 27, 2014, the start of the limitations period was adjusted to March 27, 2010.<sup>24</sup> The district court held that the claims of the 2014 Class were barred by the statute of limitations.<sup>25</sup> The 2014 Class also asserted several equitable tolling theories, but the district court did not find them persuasive.<sup>26</sup> The district court granted Defendants’ Motion to Dismiss.<sup>27</sup>

The 2014 Class, made entirely of retailers that purchased tanks directly from the defendants, appealed.<sup>28</sup> For their sole point on appeal, the 2014 Class

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14. *Ferrellgas I*, 834 F.3d at 946 (quoting complaint).

15. *Id.*

16. *Id.* (quoting AmeriGas settlement agreement).

17. *Id.* (quoting Ferrellgas settlement agreement).

18. The Honorable Gary A. Fenner, United States District Judge for the Western District of Missouri, presiding. *Id.* at 945 n.1.

19. *Id.* at 946.

20. *Id.*

21. *Id.*

22. 15 U.S.C. § 15b (2012).

23. Opening Brief of Plaintiffs-Appellants, *supra* note 8, at 13.

24. *Id.*

25. *Id.* at i.

26. *Id.* at 13.

27. *Ferrellgas I*, 834 F.3d 943, 946 (8th Cir. 2016), *vacated en banc*, 860 F.3d 1059 (8th Cir. 2017).

28. *Id.*

argued that the district court erred in dismissing the claims as barred by the statute of limitations, instead alleging that the continuing violations theory applied.<sup>29</sup> It claimed that the continuing violations theory, which says that the statute of limitations should restart after each violation of the statute, would have prevented the dismissal below.<sup>30</sup> The 2014 Class alleged that two types of overt acts by the Defendants suffice to restart the statute of limitations: (1) continued sales at supracompetitive<sup>31</sup> prices to members of the class; and (2) “conspiratorial communications between Defendants” used to maintain and police their collusive agreement to raise prices.<sup>32</sup>

On appeal, a divided Eighth Circuit panel affirmed the decision of the district court, holding that the claims were barred by the statute of limitations.<sup>33</sup> The panel reasoned that while the continuing violations doctrine was cognizable as a mechanism for extending the statute of limitations under the Sherman Act, the two overt acts asserted by the class did not meet the requirements of the doctrine.<sup>34</sup> The panel majority held that the continuing violations doctrine did not apply unless the plaintiff specifically alleges a novel and overt act that constitutes a repeated invasion of the plaintiff’s interests; mere performance or reaffirmation of the prior invasion does not suffice.<sup>35</sup> The Eighth Circuit granted rehearing en banc, vacated the panel decision, and – again divided – reversed.<sup>36</sup>

### III. LEGAL BACKGROUND

The Sherman Act is a broad antitrust statute that prohibits contracts, combinations, and conspiracies in restraint of trade, as well as anticompetitive behavior by monopolists.<sup>37</sup> All claims brought under the Sherman Act, including section 1 claims, have a four-year statute of limitations after which the cause

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29. *Id.*

30. *Id.*

31. Supracompetitive is the term used in antitrust jurisprudence and scholarship for prices, profits, or output above the competitive market level, usually as a result of anticompetitive conduct. *See* *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223–24 (1993) (using the term “supracompetitive pricing” to refer to prices charged as a result of anticompetitive price coordination); Thomas A. Lambert, *Evaluating Bundled Discounts*, 89 MINN. L. REV. 1688, 1715 (2005) (“A rule that precludes monopolists from cutting their supracompetitive prices, unless such price cuts are necessary to achieve productive efficiencies, is inconsistent with the very goal of antitrust law, which is to protect consumers from supracompetitive prices.”).

32. *Ferrellgas I*, 834 F.3d at 947.

33. *Id.* at 950.

34. *Id.* at 947–50.

35. *Id.*

36. *Ferrellgas II*, 860 F.3d 1059, 1062 (8th Cir. 2017).

37. Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2012). The Sherman Antitrust Act was later amended and expanded by the Clayton Act, 15 U.S.C. §§ 12–27 (2012).

of action is barred.<sup>38</sup> Limitations periods in antitrust serve the same policy goals as in most other areas of law: “to put old liabilities to rest, to relieve courts and parties from ‘stale’ claims where the best evidence may no longer be available, and to create incentives for those who believe themselves wronged to investigate and bring their claims promptly.”<sup>39</sup> Limiting the time period in which suits may be brought may be especially important in antitrust cases, given that many practices subject to antitrust scrutiny are both procompetitive and wrongly condemned in exchange for treble damages.<sup>40</sup>

The statute of limitations begins to run “when a defendant commits an act that injures a plaintiff’s business.”<sup>41</sup> When that injury occurs, “a cause of action immediately accrues to [the plaintiff] to recover all damages incurred by that date and all provable damages that will flow in the future” from the acts of the defendant.<sup>42</sup> When there are repeated violations of the statute, a “continuing violation” occurs.<sup>43</sup> Each continuing violation will restart the statute of limitations, and the statute will run from each “overt act” by the defendant.<sup>44</sup> To be an overt act, conduct by the defendant must meet two requirements: (1) the act “must be a new and independent act that is not merely a reaffirmation of a previous act, and (2) it must inflict new and accumulating injury on the plaintiff.”<sup>45</sup> Acts that are the “inertial consequences of a single act do not restart the statute of limitations.”<sup>46</sup>

To determine whether an act is an “inertial consequence” or “independent act,” courts have considered whether the plaintiff knew or should have known of the initial anticompetitive act.<sup>47</sup> This explains the difference between treatment of two types of antitrust violations: *first*, conspiratorial behavior such as naked or hidden price fixing, “where courts are quick to extend the statute for ongoing payments or meetings,” and *second*, unilateral or non-conspiratorial arrangements such as refusals to deal, tying, or exclusive dealing, “where the courts show much more reluctance.”<sup>48</sup>

Eighth Circuit precedent largely conforms to this differentiation. *First*, when the antitrust violation includes colluding to restrain competition or price fixing, a continuing violation can occur “when conspirators . . . meet to fine-

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38. 15 U.S.C. § 15b (2012).

39. AREEDA & HOVENKAMP, *supra* note 13, ¶ 320a.

40. *See id.*

41. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971).

42. *Id.* at 339.

43. *Ferrellgas I*, 834 F.3d 943, 947 (8th Cir. 2016), *vacated en banc*, 860 F.3d 1059 (8th Cir. 2017); *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987).

44. *Varner v. Peterson Farms*, 371 F.3d 1011, 1019 (8th Cir. 2004).

45. *Ferrellgas I*, 834 F.3d at 947 (quoting *Varner*, 371 F.3d at 1019).

46. *Id.* (quoting *Varner*, 371 F.3d at 1019).

47. AREEDA & HOVENKAMP, *supra* note 13, ¶ 320c.

48. *Id.*

tune their cartel agreement”<sup>49</sup> or where a monopolist “uses unlawfully acquired market power to charge an elevated price.”<sup>50</sup> *Second*, when the antitrust violation includes use of unilateral, anticompetitive contracts, such as tying or exclusive dealing arrangements, “[p]erformance of the alleged anticompetitive contracts during the limitations period is not sufficient to restart the period.”<sup>51</sup> Mergers that violate the antitrust laws would similarly fall into this latter category, where post-merger sales by the merged firm would be inadequate to restart the limitations period.<sup>52</sup>

#### *A. Acts Sufficient for Antitrust Violations Involving Non-conspiratorial Behavior*

Many courts, including the Eighth Circuit,<sup>53</sup> have taken the position that claims must be predicated on “some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action.”<sup>54</sup> Under this test, “profits, sales, and other benefits accrued as the result of an initial wrongful act are not treated as independent acts” but instead as “ripples caused by the initial injury, not as distinct injuries themselves.”<sup>55</sup> This test centers around benefits accrued as a result of an anticompetitive contract, typically including exclusive dealing, tying, illegal merger, or refusal to deal, executed outside the limitations period that continues to cause anticompetitive prices and sales in the future.<sup>56</sup>

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49. *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265, 269 (8th Cir. 2004) (analyzing continuing violation theory under antitrust violation resulting from a merger).

50. *In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728, 736–37 (8th Cir. 2014).

51. *Varner*, 371 F.3d 1011 at 1020 (analyzing continuing violation theory under anticompetitive “tying” arrangement) (citing *Eichman v. Fotomat Corp.*, 880 F.2d 149, 160 (9th Cir. 1989)); *accord Aurora Enters., Inc. v. NBC*, 688 F.2d 689, 694 (9th Cir. 1982)).

52. *See AREEDA & HOVENKAMP*, *supra* note 13, ¶ 320c5 (noting “if there is one clear case where a subsequent act is a mere ‘reaffirmation’ rather than an ‘independent’ predicate act, it is the ongoing sales of the post-merger firm”); *Midwestern Mach.*, 392 F.3d at 271 (holding that post-merger sales were not independent overt acts capable of restarting the statute of limitations).

53. *See Ferrellgas I*, 834 F.3d 943, 949 (8th Cir. 2016) (citing *Al George, Inc. v. Envirotech Corp.*, 939 F.2d 1271, 1274 (5th Cir. 1991); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1052 (8th Cir. 2000)), *vacated en banc*, 860 F.3d 1059 (8th Cir. 2017).

54. *Al George*, 939 F.2d at 1274 (quoting *Imperial Point Colonnades Condominium, Inc. v. Mangurian*, 549 F.2d 1029, 1035 (5th Cir. 1977)).

55. *Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 600 (6th Cir. 2014) (internal quotation marks omitted) (distinguishing between conspiratorial and non-conspiratorial cases in applying the continuing violations theory).

56. *See Aurora Enters.*, 688 F.2d at 694.

In the unilateral conduct or monopolization case in which there is no allegation of collusion, a price increase that is merely the *result* of the earlier anticompetitive agreement will generally not be sufficient to restart the statute of limitations.<sup>57</sup> The same is not true for violations involving cartel behavior.<sup>58</sup>

*B. Acts Sufficient for Antitrust Violations Involving Cartel Behavior and Price Fixing*

Courts are more willing to apply the continuing violations theory to claims involving collusive or cartel behavior.<sup>59</sup> Horizontal cartel behavior<sup>60</sup> includes those antitrust violations in which the plaintiffs allege that the defendant competitors at the same level in the distribution chain either expressly or impliedly agreed to restrain competition in some way.<sup>61</sup> The classic and most obvious example is where two or more competitors agree to fix prices; however, agreements to divide markets, reduce output, rig bids, not to compete on quality, and others would also fall into this category, often called naked restraints on trade.<sup>62</sup> Two types of conduct by cartel members are candidates for overt acts sufficient to restart the statute of limitations: (1) meeting to “fine-tune” a collusive agreement and (2) continuing supracompetitive prices.<sup>63</sup>

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57. See *Z Techs.*, 753 F.3d at 598–99 (differentiating between collusion and non-collusion claims under the continuing violation theory and holding that supracompetitive prices resulting from a merger monopolization or unilateral monopolization will not suffice to restart the limitations period); *Midwestern Mach.*, 392 F.3d at 271 (holding that price increases resulting from a merger were not overt acts but instead inertial consequences of the merger); *Eichman v. Fotomat Corp.*, 880 F.2d 149, 160 (9th Cir. 1989) (“[R]eceipt of profits from an illegal contract by an antitrust defendant is not an overt act of enforcement which will restart the statute of limitations.”).

58. *Z Techs.*, 753 F.3d 594, 601–02.

59. See *AREEDA & HOVENKAMP*, *supra* note 13, ¶ 320c3 (“While the cases are not consistent, they are significantly more likely to restart the statute when the action complained of is conspiratorial rather than unilateral.”).

60. For the purposes of this Note, only horizontal cartel behavior is considered. Vertical cartel behavior was not at issue in the present case. Vertical cartel behavior could also create continuing violation liability, but it is a closer case. See *id.*

61. See *id.* ¶ 1902.

62. See *id.* at ch. 19.

63. See *id.* ¶ 320c.

### 1. Fine-Tuning by Cartel Members

Courts agree that meeting to “fine-tune” a collusive agreement would constitute a novel overt act that would restart the limitations period; what constitutes fine tuning, however, is not as clear.<sup>64</sup> A meeting during which cartel members adjusted the price to be charged or the output levels for each cartel member would suffice because each decision would independently violate the antitrust laws.<sup>65</sup> It follows that any meeting during which separate violations of the antitrust laws occurred would constitute an act capable of restarting the statute of limitations. Conversely, if cartel members are merely maintaining membership in the cartel without making new decisions that affect the arrangement, they will not be considered to be fine tuning a collusive agreement. Therefore, the limitations period will not reset.

### 2. Supracompetitive Prices

Whether continuing high prices *alone* constitutes an overt act capable of restarting the limitations period is an even closer question. In a 2014 case decided by the Eighth Circuit, *In re Wholesale Grocery Products Antitrust Litigation*, two dominant grocery wholesalers entered into an agreement that included non-compete provisions based on their geographic market, otherwise known as a horizontal market division.<sup>66</sup> As a result of the agreement, profit margins for wholesalers benefiting from the non-compete “were higher than possible in a competitive market.”<sup>67</sup> On the issue of statute of limitations, the united Eighth Circuit panel held that “a monopolist commits an overt act each time he uses unlawfully acquired market power to charge an elevated price.”<sup>68</sup> The court found that even though the written non-compete was executed in September 2003 and the suit was not filed until December 2008, the statute of limitations did “not preclude . . . recover[y] for inflated prices charged within the four years before” the complaint was filed.<sup>69</sup> The court reasoned that “it was not apparent until later that the wholesalers’ real agreement was . . . a blatant market division” and the limitations period only begins when “customers have reason to know of the violation and their damages are sufficiently

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64. See *Exhaust Unlimited, Inc. v. Cintas Corp.*, 326 F. Supp. 2d 928, 931–32 (S.D. Ill. 2004).

65. See AREEDA & HOVENKAMP, *supra* note 13, ¶ 320c2.

66. *In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728, 729, 736 (8th Cir. 2014).

67. *Id.* at 731.

68. *Id.* at 736.

69. *Id.* at 737.

ascertainable to justify an antitrust action.”<sup>70</sup> The Eighth Circuit purported to rely on *Klehr v. A.O. Smith Corp.*<sup>71</sup> on the statute of limitations issue.<sup>72</sup>

In *Klehr*, the Supreme Court of the United States explained that:

Antitrust law provides that, in the case of a continuing violation, say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the plaintiff, e.g., each sale to the plaintiff, starts the statutory period running again, regardless of the plaintiff’s knowledge of the alleged illegality at much earlier times.<sup>73</sup>

While this pronouncement would seem to definitively resolve the issue, because the Court was comparing the continuing violation theory to a similar theory under the Racketeer Influenced and Corrupt Organizations Act (“RICO”) statute of limitations, the language is only dicta.<sup>74</sup> Regardless, courts have consistently cited the language from *Klehr* in affirming this rule.<sup>75</sup>

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70. *Id.* at 736–37 (second quote quoting AREEDA & HOVENKAMP, *supra* note 13, ¶ 320c4).

71. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997).

72. *Ferrellgas II*, 860 F.3d 1059, 1066 (8th Cir. 2017) (en banc) (“The timeliness question in this case is controlled by *Klehr v. A.O. Smith Corp.* . . .” (quoting *In re Wholesale Grocery*, 752 F.3d at 736)).

73. *Klehr*, 521 U.S. at 189 (internal quotation marks omitted); *Ferrellgas I*, 834 F.3d 943, 947 (8th Cir. 2016), *vacated en banc*, 860 F.3d 1059 (8th Cir. 2017).

74. *Klehr*, 521 U.S. at 186–87 (using analogous antitrust principles to decide the statute of limitations under RICO’s statute of limitations and “last predicate act” rule).

75. See *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 290–91 (4th Cir. 2007) (“[I]n cases like this one involving allegations of ‘a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the plaintiff, e.g., each sale to the plaintiff, starts the statutory period running again.’” (quoting *Klehr*, 521 U.S. at 189)); *Morton’s Mkt., Inc. v. Gustafson’s Dairy, Inc.*, 198 F.3d 823, 828 (11th Cir. 1999) (citing *Klehr*, 521 U.S. at 189) (holding that with each sale of milk a price-fixed price constitutes a new overt act), *amended in part*, 211 F.3d 1224 (11th Cir. 2000); *Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 599 (6th Cir. 2014) (citing *Klehr*, 521 U.S. at 189); *Oliver v. SD-3C LLC*, 751 F.3d 1081, 1086 (9th Cir. 2014) (citing *Klehr*, 521 U.S. at 189); *In re Wholesale Grocery*, 752 F.3d at 736 (holding in the antitrust context that the question of statute of limitations “is controlled by *Klehr*”); *Molecular Diagnostics Labs. v. Hoffmann-La Roche Inc.*, 402 F. Supp. 2d 276, 286 (D.D.C. 2005) (citing *Klehr*, 521 U.S. at 189) (holding that each sale at a supracompetitive price constituted a continuing violation).

## IV. INSTANT DECISION

*A. The Eighth Circuit Panel Decision Below*

The Eighth Circuit panel – before rehearing en banc – affirmed the district court’s dismissal of the plaintiff’s claims as time barred under the statute of limitations.<sup>76</sup>

After discussing the continuing violation theory, the Eighth Circuit panel turned to the arguments on appeal.<sup>77</sup> The Class asserted the question of whether each sale of propane tanks by the defendants at supracompetitive prices under the price-fixing conspiracy constituted a continuing violation was controlled by *Klehr*.<sup>78</sup> The majority did not find the argument persuasive. Instead, it restricted *Klehr* to its facts, holding “the primary purpose” of the language related to the antitrust continuing violation theory announced in *Klehr* “was to clarify that, unlike under the last predicate act rule applied by the Third Circuit to RICO claims, the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period.”<sup>79</sup> Here, the Eighth Circuit majority interpreted *Klehr* as “not pronounc[ing] a new principle with respect to what constitutes a continuing violation under the Sherman Act.”<sup>80</sup>

After rejecting that *Klehr* controlled, the majority attempted to distinguish *Wholesale Grocery*.<sup>81</sup> In that case, decided just two years earlier, two grocery wholesalers entered into an agreement to divide territory.<sup>82</sup> The Eighth Circuit held that the continuing violations theory applied and although the agreement was executed outside the limitations period, “the anticompetitive nature of the wholesalers’ agreement was not revealed until several years after,” such that the subsequent “price increase by the wholesalers restarted the statute of limitations.”<sup>83</sup> Here, the Eighth Circuit panel found that *Wholesale Grocers* was inapposite and instead demonstrative of and “consistent with other decisions in which [it] held that in order to restart the statute of limitations, more than the mere performance or reaffirmation of an unlawful agreement is required to satisfy the overt act requirement of a continuing antitrust violation.”<sup>84</sup>

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76. *Ferrellgas I*, 834 F.3d at 945.

77. *Id.* at 946.

78. *Id.* at 947.

79. *Id.* at 947–48 (internal quotation marks omitted) (quoting *Klehr*, 521 U.S. at 189).

80. *Id.* at 948.

81. *Id.*

82. *Id.*

83. *Id.* (first quote quoting *In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728, 729, 736 (8th Cir. 2014)).

84. *Id.* at 948–49.

The majority then turned to the plaintiffs' arguments regarding conduct that should be sufficient.<sup>85</sup> First, the majority held "the sales of 15 pound tanks to Plaintiffs were the mere, unabated consequences of the original agreement between Defendants to lower the fill level of the propane tanks while maintaining the same price."<sup>86</sup> Instead, the majority, relying on *Varner v. Peterson Farms*, believed the additional sales at supracompetitive prices as a result of collusive price fixing were "mere reaffirmations of the agreement . . . insufficient to restart the limitations period."<sup>87</sup>

Second, the majority considered whether additional communications by Defendants would be sufficient to restart the limitations period.<sup>88</sup> Plaintiffs alleged that Defendants regularly communicated to monitor one another for compliance with their agreement and to "check that neither cheated on their anticompetitive agreement."<sup>89</sup> According to the majority, Plaintiffs did not allege any changing or fine-tuning of the agreement occurred at those meetings.<sup>90</sup> This fact was dispositive, and the majority held the communications "merely reaffirm and monitor the existing conspiracy but do not constitute overt acts sufficient to restart the statute of limitations."<sup>91</sup> Finding both of these acts insufficient, the majority held that because the original unlawful agreement fell outside the limitations period, "claims that Defendants [were] engaging in a continuing antitrust violation must fail."<sup>92</sup>

The majority further justified its holding on policy grounds, asserting that "antitrust law reflects a 'congressional objective of encouraging civil litigation not merely to compensate victims but also to turn them into private attorneys general.'"<sup>93</sup> The majority noted that "[t]he limitations period plays a role in limiting the public harm."<sup>94</sup> Apparently finding the public harm occurred only in 2008 when the original agreement to raise price was made and *not* in subsequent sales at anticompetitive prices, the majority found its decision was consistent with "the objectives of Congress in encouraging timely lawsuits for the public good."<sup>95</sup>

Judge Duane Benton dissented.<sup>96</sup> Contrary to the majority opinion, the dissent concluded *Klehr* controlled and quoted the relevant portion of that opinion:

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85. *Id.* at 949.

86. *Id.*

87. *Id.* (citing *Varner v. Peterson Farms*, 371 F.3d 1011, 1020 (8th Cir. 2004)).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 950.

93. *Id.* (quoting *Rotella v. Wood*, 528 U.S. 549, 550 (2000)).

94. *Id.*

95. *Id.*

96. *Id.* (Benton, J., dissenting).

Antitrust law provides that, in the case of a ‘continuing violation,’ say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the plaintiff, e.g., each sale to the plaintiff, starts the statutory period running again, regardless of the plaintiff’s knowledge of the alleged illegality at much earlier times.<sup>97</sup>

The dissent argued that the majority’s attempt to skirt the language in *Klehr* by limiting its application to RICO cases was erroneous because “federal courts ‘are not free to limit Supreme Court opinions to the facts of each case.’”<sup>98</sup> Moreover, even as dicta, the rule announced in *Klehr* should control because “federal courts are bound by the Supreme Court’s considered dicta almost as firmly as by the Court’s outright holdings,” especially where dicta “is of recent vintage and not enfeebled by any later statement.”<sup>99</sup> For Judge Benton, “the rule [was] clear” and controlling.<sup>100</sup>

Next, the dissent pointed out the inapplicability of another case on which the majority relied, *Varner*.<sup>101</sup> In that case, the Eighth Circuit rejected the continuing violation theory on the grounds that performance of an anticompetitive contract was not a sufficient overt act capable of restarting the limitations period.<sup>102</sup> The dissent recognized *Varner* was an antitrust case arising out of tying arrangement and not a price-fixing conspiracy subject to the rule in *Klehr*.<sup>103</sup> According to the dissent, this distinction holds true for *Midwestern Machinery Co. v. Northwest Airlines, Inc.*, which was cited by the majority and argued by the dissent as inapposite.<sup>104</sup>

After distinguishing conspiratorial and non-conspiratorial conduct, the dissent announced the rule for the former: “Under *Klehr*, [D]efendants here committed an overt act each time they used unlawfully acquired market power to charge an elevated price.”<sup>105</sup>

Finally, the panel dissent dispensed with the policy rationale asserted by the majority and pointed out that those concerns are “irrelevant” for several reasons.<sup>106</sup> *First*, according to the panel dissent, the plaintiff’s actual knowledge of the antitrust violation is not relevant to the question of whether the statutory period runs again.<sup>107</sup> *Second*, the panel dissent argued the *Klehr*

97. *Id.* (quoting *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997)).

98. *Id.* (quoting *McDonough v. Anoka Cty.*, 799 F.3d 931, 942 (8th Cir. 2015)).

99. *Id.* at 950–51 (quoting *McDonough*, 799 F.3d at 942).

100. *Id.* at 951.

101. *Id.*

102. *Id.* (citing *Varner v. Peterson Farms*, 371 F.3d 1011, 1020 (8th Cir. 2004)).

103. *Id.*

104. *Id.* (citing *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265, 271 (8th Cir. 2004)).

105. *Id.* at 951–52 (quoting *In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728, 736 (8th Cir. 2014) (internal brackets omitted)).

106. *Id.* at 952.

107. *Id.*

rule does not allow a plaintiff to collect damages for injurious acts that occurred outside the limitations period, therefore dispensing with the worry that it will encourage frivolous suits or harm the public good.<sup>108</sup> *Finally*, the panel dissent concluded that, as expressed in *Wholesale Grocery*, “the rule prevents companies from agreeing to divide markets for the purpose of raising prices, waiting four years to raise prices, then reaping the profits of their illegal agreement with impunity because any antitrust claims would be time barred.”<sup>109</sup>

### B. Rehearing En Banc

The Eighth Circuit granted rehearing en banc, vacated the panel decision, and reversed – with Judge Benton writing the majority opinion for a divided court.<sup>110</sup> The opinion largely echoed the arguments from his panel dissent and set out a framework for continuing violations of the Sherman Act in the context of horizontal agreements to fix price.<sup>111</sup> Relying on *Klehr*, the court held each sale in a price-fixing conspiracy at a supracompetitive price is an overt act that restarts the statute of limitations.<sup>112</sup> The majority also correctly pointed out that cases relied on by the panel majority that considered continuing violations for other illegal business practices are distinguishable and unhelpful.<sup>113</sup>

The dissenting opinion, written by Judge Shepherd and joined by three others, argued the majority incorrectly established that the conspiracy need not be ongoing at the time of the sale to the plaintiff.<sup>114</sup> Instead, according to the en banc dissent, a plaintiff arguing she was harmed by a price-fixing conspiracy needs to show not only that she purchased the product but also that the conspiracy was “alive and ongoing” at the time of sale to restart the statute of limitations.<sup>115</sup> The en banc majority’s interpretation, according to the dissent, would allow “a new lawsuit against the defendants four (or 40) years from now so long as fill levels remain at 15 pounds, even if price fluctuates.”<sup>116</sup>

## V. COMMENT

The panel majority and the en banc dissent simply get it wrong. *First*, they confuse different business practices made illegal under the antitrust laws

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108. *Id.*

109. *Id.* (quoting *In re Wholesale Grocery*, 752 F.3d at 736 (internal quotation marks and brackets omitted)).

110. *Ferrellgas II*, 860 F.3d 1059, 1062–63 (8th Cir. 2017) (en banc).

111. *Id.* at 1064–71; see *Ferrellgas I*, 834 F.3d at 950–52 (Benton, J., dissenting).

112. *Ferrellgas II*, 860 F.3d at 1065.

113. *Id.* at 1067–68.

114. *Id.* at 1072 (Shepherd, J., dissenting).

115. *Id.*

116. *Id.* at 1075 n.6.

in applying the continuing violations theory to this case. Antitrust is a notoriously difficult area of law,<sup>117</sup> and courts frequently misapply inapposite theories as a result. *Second*, both courts misinterpreted the Supreme Court's dicta in *Klehr*, and neither court gave appropriate deference. Given these errors, this Part concludes by refining the framework announced by the en banc majority and clarifying appropriate application of the continuing violations doctrine in the context of horizontal collusive agreements.

### A. A Theoretical Mix-Up

The panel majority muddled the continuing violations doctrine by applying it without reference to the antitrust practice at issue – a horizontal agreement to fix price. The existence of a continuing violation “depends heavily on the particular facts as well as the *type* of violation.”<sup>118</sup> The panel majority confuses the continuing violations doctrine as applied to tying arrangements and mergers with the straightforward horizontal conspiratorial price fixing that was present in this case. In both tying and mergers, any anticompetitive harm that occurs happens and is made public primarily at the moment those agreements are executed. For these antitrust violations, courts have been unwilling to extend the continuing violations doctrine past the date of execution unless new meetings or other cartel maintenance acts occur later and extend the limitations period.<sup>119</sup> This is not true for agreements involving price fixing, in which the anticompetitive harm occurs primarily at the point where a consumer purchases a product or service at a supracompetitive price.

For example, suppose in April 2017 two competitors enter into a naked price-fixing arrangement under which they agree to raise the price of their

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117. AREEDA & HERBERT HOVENKAMP, *supra* note 13, ¶ 337b (“[A]s any reader of this treatise will readily agree, applying antitrust law is very difficult.”). Justice Antonin Scalia famously said of antitrust law during his Senate confirmation hearing: “[I]n law school, I never understood [antitrust law]. I later found out, in reading the writings of those who now do understand it, that I should not have understood it because it did not make any sense then.” *Scalia Confirmation Hearing Day 1*, C-SPAN (Aug. 5, 1986), <https://www.c-span.org/video/?150300-1/scalia-confirmation-hearing-day-1> (quoted portion begins at 20:15).

118. AREEDA & HOVENKAMP, *supra* note 13, ¶ 320c (emphasis added). The treatise goes on to explain the continuing violations doctrine within the context of the different business practices made illegal by the antitrust laws.

119. *See, e.g.*, *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265, 271 (8th Cir. 2004) (“Applying this rationale to mergers makes no sense. If the initial violation was the merger itself, none of the ‘continuing violations’ *Midwestern* alleges can justify restarting the statute of limitations because these acts were not undertaken to further an illegal policy of merger or to maintain the merger.”); *Varner v. Peterson Farms*, 371 F.3d 1011, 1020 (8th Cir. 2004) (“We conclude that the *Varners* failed to plead sufficient facts to support a cause of action for a tying-contract antitrust violation or to establish an exception to toll the statutes of limitations. Performance of the alleged anticompetitive contracts during the limitations period is not sufficient to restart the period.”).

widgets by twenty percent. The competitors' conduct goes unchallenged for five years, when, in June 2022, a purchaser of the cartel's widget sues alleging the competitors fixed prices in violation of the Sherman Act. The anticompetitive harm occurred to the plaintiff not when the competitors made their nefarious agreement in April 2017 but instead in June 2022 when she purchased the widget at a price twenty percent higher than she would have but for the 2017 agreement. A rule under which that purchaser could not sue might effectively allow some antitrust violations to go unpunished. Once the four-year statute of limitations expires, colluders can charge supracompetitive prices with impunity for perpetuity.

The leading antitrust treatise provides some additional guidance on applying the doctrine in the case of straightforward price-fixing cases: "Whether continuing high prices alone should be sufficient to toll the statute [of limitations]" depends on whether, given the underlying facts, "continuing higher prices were a consequence of the price-fixing agreement."<sup>120</sup> In analyzing the facts, the treatise notes, "[I]f a cartel in a competitively structured market caused overnight increases in short-term prices, one would expect prices to move back to the [competitive] level very quickly after cartel enforcement ceased."<sup>121</sup> In such circumstances, "it would . . . be reasonable to infer continuing acts from continuing higher prices."<sup>122</sup> Thus, a price-fixing agreement necessitates continued oversight by the parties to that agreement such that new overt acts are required to maintain supracompetitive prices.

The panel majority applied an inapposite rule by confusing two types of cartel behavior: behavior where the primary anticompetitive harm occurs at the point of agreement and behavior where the primary anticompetitive harm occurs at the point of sale. Under the panel majority's analysis, a plaintiff harmed by supracompetitive prices as a result of a price-fixing agreement that occurred more than four years before would have no redress. Her claim would be barred even though at the time the limitations period expired she did not know of the conspiracy – indeed, she may not have even known she would have occasion to buy a propane tank.

### *B. Deference to Supreme Court Dicta*

The panel majority next erred in determining the language from *Klehr* did not deserve any deference from the court. *Klehr* was a RICO case that rejected the "last predicate act rule," which says a RICO action accrues when the plaintiff knew or reasonably should have known of the last predicate act that was a part of the same pattern of racketeering activity.<sup>123</sup> The last predicate act did not have to result in injury but must have been part of the same pattern.<sup>124</sup> The

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120. AREEDA & HOVENKAMP, *supra* note 13, ¶ 320c2.

121. *Id.*

122. *Id.*

123. See *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997).

124. See *id.* at 192.

Supreme Court compared the overt act requirement under a price-fixing conspiracy to the last predicate act rule under RICO.<sup>125</sup> That language, while dicta since no antitrust violation was alleged, answers the question of whether sales made under a price-fixing agreement constituted continuing violations.<sup>126</sup> The panel majority, instead of taking the language as the Supreme Court's pronouncement of an appropriate liability rule for continuing violations in price-fixing cases, attempted to limit *Klehr* to its facts, noting *Klehr* "merely illustrate[s]" the rule.<sup>127</sup> Federal appellate courts, however, "are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when . . . [the dicta] is of recent vintage and not enfeebled by any [later] statement."<sup>128</sup>

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125. *Id.* at 189.

126. *Id.*

Antitrust law provides that, in the case of a continuing violation, say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the plaintiff, e.g., each sale to the plaintiff, starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.

*Id.* (internal quotations marks omitted).

127. *Ferrellgas I*, 834 F.3d 943, 948 (8th Cir. 2016), *vacated en banc*, 860 F.3d 1059 (8th Cir. 2017).

128. *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557 (8th Cir. 1993) (alterations in original) (quoted in *McDonough v. Anoka Cty.*, 799 F.3d 931, 942 (8th Cir. 2015)); *see also* *United States v. Augustine*, 712 F.3d 1290, 1295 (9th Cir. 2013) ("This statement is dictum . . . but . . . we accord it appropriate deference."); *McCrary v. Metropolitan Life Ins. Co.*, 690 F.3d 176, 181 n.2 (4th Cir. 2012) ("[W]e cannot simply override a legal pronouncement endorsed just last year by a majority of the Supreme Court."); *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) (stating that federal court of appeals is "bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements"); *United States v. Becton*, 632 F.2d 1294, 1296 n.3 (5th Cir. 1980) ("We are not bound by dicta, even of our own court . . . . Dicta of the Supreme Court are, of course, another matter."); *Wright v. Morris*, 111 F.3d 414, 419 (6th Cir. 1997) ("Where there is no clear precedent to the contrary, we will not simply ignore the [Supreme] Court's dicta."); *Bangor Hydro-Elec. Co. v. FERC*, 78 F.3d 659, 662 (D.C. Cir. 1996) ("It may be dicta, but Supreme Court dicta tends to have somewhat greater force – particularly when expressed so unequivocally."); *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991) ("We think that federal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when . . . a dictum is of recent vintage and not enfeebled by any subsequent statement.").

While *Klehr* was decided in 1997, the Supreme Court has not made any similar pronouncements, in dicta or otherwise, that contradict that rule. Moreover, the federal circuits, including the Eighth Circuit in *Wholesale Grocery*,<sup>129</sup> have cited *Klehr* for the proposition that additional sales under a price-fixing cartel are overt acts that will restart the statute of limitations.<sup>130</sup> The leading antitrust treatise also cites *Klehr* as instructive on the continuing violations doctrine for price-fixing cases.<sup>131</sup> As a price-fixing case, *Klehr* directly controlled the Eighth Circuit here, and the panel majority erred in declining to follow the standard set forth in the opinion. The appropriate deference to Supreme Court dicta, accepted by all lower federal courts as largely binding, was ignored. More questionably, the Eighth Circuit ignored its own precedent from *Wholesale Grocery* and incorrectly relied on *Varner*.<sup>132</sup>

The en banc dissent agreed *Klehr* deserved deference but argued the en banc majority misinterpreted the Supreme Court's dicta.<sup>133</sup> According to the en banc dissent, the majority failed to recognize that, under *Klehr*, there must be an ongoing conspiracy at the time of sale in order for the sale to constitute an overt act capable of restarting the statute of limitations.<sup>134</sup> The dissent relied

129. *In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728, 736 (8th Cir. 2014) (“The timeliness question in this case is controlled by *Klehr* . . . . Under *Klehr*, a monopolist commits an overt act each time he uses unlawfully acquired market power to charge an elevated price.”).

130. *Oliver v. SD-3C LLC*, 751 F.3d 1081, 1086 (9th Cir. 2014) (citing *Klehr*, 521 U.S. at 189) (“[T]he Supreme Court and federal appellate courts have recognized that each time a defendant sells its price-fixed product, the sale constitutes a new overt act causing injury to the purchaser and the statute of limitations runs from the date of the act.”); *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 290–91 (4th Cir. 2007) (citing *Klehr*, 521 U.S. at 189) (noting that the complaint would be timely “so long as the plaintiffs made a purchase from the Defendants within [the limitations period]”); *Morton’s Mkt., Inc. v. Gustafson’s Dairy, Inc.*, 198 F.3d 823, 828 (11th Cir. 1999) (“[E]ven if there were no price-fixing conversations after 1987 . . . if plaintiffs purchased milk at a fixed price after that date, the purchase would constitute an overt act that injured it. A cause of action would accrue with each purchase and a new statutory period would begin to run.”).

131. AREEDA & HOVENKAMP, *supra* note 13, ¶ 320c1 (“[T]he Supreme Court’s *Klehr* decision limited the notion of continuing violations when no further injury flows from the subsequent acts.”).

132. *Varner* does not mention claims that defendants charged supracompetitive prices, or otherwise engaged in anticompetitive conduct. See *Varner v. Peterson Farms*, 371 F.3d 1011 (8th Cir. 2004). Instead, the Eighth Circuit in that case held plaintiffs had “failed to plead sufficient facts to support a cause of action for a tying-contract antitrust violation or to establish an exception to toll the statutes of limitations.” *Id.* at 1020. There was no cognizable antitrust claim at all, regardless of the issue of timeliness. Perhaps most perplexing, however, *Varner* contains no citation to *Klehr* or any other reference to the appropriate rule to be applied to price-fixing cases. There does not appear to be any basis for reading *Varner* to limit *Klehr* to the RICO context.

133. See *Ferrellgas II*, 860 F.3d 1059, 1071–72 (8th Cir. 2017) (en banc) (Shepherd, J., dissenting).

134. *Id.* at 1072.

on language from *Klehr*, arguing the Court's analogy presumed that "a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years continues to exist."<sup>135</sup> But the majority does account for this language. The en banc majority recognizes the plaintiff need not merely prove she bought a product that was, at one time, the subject of an illegal conspiracy among propane manufacturers to fix price.<sup>136</sup> She must also show the price she was charged – the *harm* she suffered – was supracompetitive.<sup>137</sup> On this point, the en banc dissent and majority ought to agree. With such confusion, a clearer pronouncement of the rule is in order.

### *C. An Alternative Proposal: When Did the New Anticompetitive Harm Occur?*

Underlying both the price-fixing rule announced in *Klehr* and the fine-tuning rule applied to other conspiracy claims is the idea that a continuing violation occurs when there is some act that causes *anticompetitive harm* to the plaintiff.<sup>138</sup> Recasting the inquiry in terms of when the most recent anticompetitive harm to the plaintiff occurred brings these seemingly disparate theories under one umbrella and should allow courts to choose the correct rule where the exact business practice at issue is not as clear as it was in the present case. This is not a novel idea: the Supreme Court has been clear, in the context of conspiracy claims, that "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act."<sup>139</sup> Applying that formulation to the business practices already discussed helps to clarify the inquiry.

#### 1. Price-Fixing Agreements

At issue in this case is a so-called "naked" agreement to fix price. Naked restraints of trade, as the term is used in antitrust jurisprudence, include any horizontal agreement among competitors that has the *effect* of raising price or reducing output.<sup>140</sup> This definition is broad in the horizontal restraint context and applies even where two competitors do not literally agree to set prices at  $X$

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135. *Id.* (internal quotation marks omitted) (quoting *Klehr*, 521 U.S. at 189).

136. *Id.* at 1063–64 (majority opinion).

137. *Id.* at 1068.

138. *See Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 338 (1971) ("In the context of a continuing conspiracy to violate the antitrust laws, such as the conspiracy in the instant case, this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.").

139. *Id.*; accord *Peck v. Gen. Motors Corp.*, 894 F.2d 844, 849 (6th Cir. 1990); *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987).

140. AREEDA & HOVENKAMP, *supra* note 13, ¶ 2000c.

dollars per widget.<sup>141</sup> For example, as is true in this case, an agreement to reduce output, especially where the parties also agreed to maintain the current price despite that reduction, is plainly a naked restraint of trade.<sup>142</sup>

Consistent with *Klehr*, for naked conspiratorial agreements, each sale of collusive items or services to the plaintiff at *supracompetitive levels* restarts the statutory period, regardless of the purchaser's knowledge of the alleged illegality.<sup>143</sup> The sale of an item at a supracompetitive price as a result of a price-fixing conspiracy will be an overt act sufficient to restart the statute of limitations where the plaintiff shows: (1) there was a conspiracy to fix the price of that item; (2) she purchased that item; and (3) the price of the product she purchased was "unlawfully high" – i.e., the price was supracompetitive as a result of the conspiracy. Contrary to the en banc dissent's warning, she cannot merely allege she bought a product that was at one time subject to the conspiracy. For the sale to be an overt act, it must have been at a supracompetitive level. That sale will restart the limitations period; the plaintiff will have four years from the date of sale to bring suit.

Under *Klehr*, this rule should and does hold true even where the defendants do not meet the fine-tuning requirement applied by some courts to other antitrust business practices. For the straightforward agreement to fix price, the anticompetitive harm occurs to the plaintiff-purchaser at the time she buys a collusive product or service at a supracompetitive price, not when the cartel agreed to do so.<sup>144</sup> This will be true for most price-fixing claims, which are typically brought by downstream purchasers and not by competitors who benefit from the cartel and thus do not have standing to sue as a result of the antitrust injury requirement.<sup>145</sup>

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141. *Id.* ¶ 2000b (“[T]he restraint on price may amount to less than outright price fixing, but nevertheless constitute a naked ‘price’ agreement. For example, *Catalano* applied the per se rule to an agreement among beer wholesalers to eliminate the ‘grace’ period given to stores between the time of delivery and when the payment was due. Even though the agreement did not pertain to the beer price itself, the Court treated the agreement as if it were mere price fixing.” (footnotes omitted)) (discussing *Catalano v. Target Sales, Inc.*, 446 U.S. 643, 648–49 (1980)).

142. *See id.* ¶ 2004b; *see also* *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 109–10 (1984) (holding that an agreement among competitors “not to compete in terms of price or output” is a “naked restraint,” and “no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement”).

143. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997).

144. *See Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968) (holding that plaintiff “proved injury . . . when it proved that [defendant] had overcharged it during the damage period and showed the amount of the overcharge”); *Am. Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 791 (9th Cir. 1996) (“[I]t is difficult to image [sic] a more typical example of anti-competitive effect than higher prices . . .”); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007).

145. *See AREEDA & HOVENKAMP*, *supra* note 13, ¶ 348a (“[A] rival is actually benefitted if its rivals merge, fix prices, or divide markets with the result that prices in the market increase. Such rivals lack injury-in-fact and are denied standing. Second, a rival may allege an antitrust violation by its rival(s) not to protect competition but to

This rule will encourage members of a price-fixing conspiracy to cheat on the agreement and lower price back to competitive levels in order to avoid creating antitrust liability for each sale made at supracompetitive levels. Because of the nature of competitive markets, most price-fixing agreements necessarily require some form of maintenance and policing, whether express or implied, in order to keep the members of the agreement from cheating.<sup>146</sup> Raising the price on a product will lead to higher profits, but, because of basic principles of supply and demand, it will also drive down output.<sup>147</sup> This gives each cartel member an incentive to “cheat” by lowering its price slightly below the cartel level in order to increase output and profits.<sup>148</sup> Once cheating begins to occur, the cartel is threatened and members risk losing access to supracompetitive profits.<sup>149</sup>

The incentive to cheat among cartel members has caused many such cartels to unravel. Given this truth, communications between cartel members intended to police or maintain a price-fixing agreement should also fall under prior precedent on “fine-tuning,” which allows acts that further the objectives of the conspiracy or are not merely the “unabated inertial consequences” of

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protect itself from competition. In that case the rival is injured in fact, but protecting rivals from greater competition or efficiency is inimical to the purpose of antitrust law. Such losses are not antitrust injury, so the rival is again denied standing.” (internal citations omitted)).

146. AREEDA & HOVENKAMP, *supra* note 13, ¶ 320c2 (“[I]f a cartel in a competitively structured market caused overnight increases in short-term prices, one would expect prices to move back to the [competitive] level very quickly after cartel enforcement ceased.”). The incentive to cheat creates instability in the cartel, essentially requiring some sort of policing in order to survive for an appreciable amount of time. *See id.* ¶ 2002f1 (“Individual members of a cartel always have an incentive to cheat and will do so when cheating seems profitable. As a result, the managers of the cartel must be vigilant about detecting cheating and disciplining the cheater.”); *see also* Mercedes-Benz Anti-trust Litig., 157 F. Supp. 2d 355, 362 (D.N.J. 2001) (complaint adequately alleged antitrust injury and stated claim and for price-fixing conspiracy among Mercedes-Benz distributor and numerous dealers with allegations of dealer meetings at which importance of not cutting price was discussed).

147. *See* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 726–27 (1988) (discussing cheating in the context of collusive vertical restraints of trade and holding that “without a further agreement on the price or price levels to be charged by the remaining dealer, almost always tends to restrict competition and reduce output”).

148. AREEDA & HOVENKAMP, *supra* note 13, ¶ 2002d. Consider an example discussed in the leading antitrust treatise. Suppose “the sellers are a cartel of ten identical firms, each selling 100 widgets per day at a price of \$10.00. Suppose that one firm in the cartel calculates that if it drops its own price to \$9.00, its individual sales would rise to 150 units. This individual cartel member’s revenues thus move from \$1,000 (100 widgets @ \$10.00 each) to \$1,350 (150 widgets @ \$9.00 each), and this increase would almost certainly be profitable.” *Id.*

149. Significantly, “the value of cheating is diminished as the number of cheaters grows, and if *everyone* cheats without limit, the market moves back to the competitive price.” *Id.*; *see also* THOMAS A. LAMBERT, HOW TO REGULATE: A GUIDE FOR POLICYMAKERS 144 (2017).

some pre-limitations act to be sufficient to restart the limitations period.<sup>150</sup> The Eighth Circuit panel majority recognized the alleged communications among the defendants were merely made to “reaffirm and *monitor* the existing conspiracy” and did not constitute acts sufficient to restart the statute of limitations.<sup>151</sup> In so deciding, the panel majority rejected the argument that “regularly communicat[ing] to assure compliance with the conspiracy and monitor[ing] the market to check that neither cheated” should constitute an overt act because those were only “mere reaffirmations” and not “fine-tun[ing].”<sup>152</sup> Treating policing and monitoring for cheating as a mere affirmation instead of new overt acts in furtherance of the price-fixing agreement indicates a lack of understanding of the economic forces at play: without monitoring for cheating, the “inertial consequence” would be an unraveling of the cartel.

Allowing plaintiffs to continue to challenge the anticompetitive cartel by creating antitrust liability for each sale at a supracompetitive price encourages cartel members to cheat on their agreement and lower price. The other category of overt acts that will restart the limitations period – monitoring and fine-tuning of the agreement by cartel members – will discourage communication between members, increasing the likelihood that the cartel will unravel. This rule serves the main purpose of the antitrust laws: to protect consumers.

## 2. Other Anticompetitive Business Practices

The continuing violations rules currently applied to other anticompetitive business practices can also be justified based on an approach that asks when the anticompetitive harm to the plaintiff occurred. Recall *Varner*, in which the Eighth Circuit announced the continuing violations rule to be applied to anticompetitive tying arrangements.<sup>153</sup> It held “when a complaining party was fully aware of the terms of an agreement when it entered into the agreement, an injury occurs only when the agreement is initially imposed; thus, the limitations period typically is not tolled by the requirements placed on the parties under the agreement.”<sup>154</sup> Similarly, in the context of anticompetitive mergers, the Eighth Circuit held “the statute of limitations does not begin to run until the plaintiff suffers injury. But where the plaintiff’s injury is immediate . . . the statute of limitations begins to run at that time.”<sup>155</sup> The difference in application for non-cartel practices is that the overt act requirement may not be fulfilled at the same time as the injury to the plaintiff and so must be determined separately.

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150. *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1052 (8th Cir. 2000).

151. *Ferrellgas I*, 834 F.3d 943, 949 (8th Cir. 2016) (emphasis added), *vacated en banc*, 860 F.3d 1059 (8th Cir. 2017).

152. *Id.*

153. *Varner v. Peterson Farms*, 371 F.3d 1011, 1018–19 (8th Cir. 2004).

154. *Id.* at 1020.

155. *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265, 276 (8th Cir. 2004) (internal citations omitted).

The current liability rule, under which only an initial agreement to fix price would constitute an overt act capable of restarting the limitations period, effectively allows firms to engage in illegal price fixing and, once four years has passed since the date the agreement was executed, indefinitely charge supracompetitive prices without punishment or oversight. Such a rule contravenes the goal of the antitrust laws to protect consumers and competition<sup>156</sup> and instead transforms the statute of limitations into a tool for barring claims designed to prohibit anticompetitive conduct.

## VI. CONCLUSION

The continuing violations doctrine under the Sherman Act allows an antitrust claimant to restart the limitations period where some overt act is sufficient to be considered an antitrust violation on its own. The Eighth Circuit considered the issue of what acts are sufficient to restart the limitations period in *In re Pre-filled Propane Tank Antitrust Litigation*.<sup>157</sup> The majority opinion from rehearing en banc corrected many of the failures of the panel majority below.<sup>158</sup> The rules for price fixing and the rules for other business practices are not the same. By misapplying the rule from one business practice to the business practice at issue and failing to defer to Supreme Court dicta, the Eighth Circuit panel majority broke from both its own precedent and that of its sister circuits.

The majority opinion on rehearing was largely curative. The continuing violations doctrine must be strictly analyzed within the context of the illegal business practice at issue. An alternative framework will guide lower federal courts attempting to apply the doctrine with uniformity. In the context of conspiratorial agreements to fix price, the sale of an item at a supracompetitive price will restart the statute of limitations where the plaintiff shows: (1) there was a conspiracy to fix the price of that item; (2) she purchased that item; and (3) the price of the product she purchased was “unlawfully high” – i.e., the price was supracompetitive as a result of the conspiracy. This rule serves the purpose of the antitrust laws – to protect consumers by promoting competition – by encouraging the unraveling of anticompetitive cartels. It does so by encouraging behavior rarely advised: cheat more, communicate less.

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156. See *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990) (“The antitrust laws were enacted for ‘the protection of *competition*, not *competitors*.’” (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962))).

157. See *Ferrellgas I*, 834 F.3d at 949.

158. See *Ferrellgas II*, 860 F.3d 1059 (8th Cir. 2017).