Einer Elhanke
Foul Smoke

The conventional wisdom is that those who favor free markets should disavow the current multi-billion dollar tobacco litigation. The conventional wisdom is wrong. For lack of the writer of news articles is the fact that plaintiffs in many of the tobacco cases allege an antitrust conspiracy that, if proven, means the current state of the cigarette market resulted not from a free market, but from a fundamental and devilous interference with the free market.

There are two product features sellers can conspire about: price and quality. Most antitrust conspiracies are about price. But conspiracies about quality are also covered by antitrust law. This is because we get entitled to both the produtc price and quality that would be produced by markets unhampered by anticompetitive seller conspiracies.

The tobacco litigation alleges a conspiracy to fix product quality. Specifically, it alleges that for decades cigarette manufacturers have agreed among themselves not to compete on product quality. This agreement allegedly included both an agreement not to independently market safer tobacco products and an agreement to withhold product safety information. Obviously, these two parts of the alleged conspiracy are linked: If a firm cannot advertise the relative safety of its cigarettes, there is not much point in it investing money to make safer cigarettes.

Who might manufacturers ever agree to fix cigarette quality in this way? For the same reason firms sometimes agree to fix prices: to prevent individual firms from pursuing their individual interest in expanding a market share by engaging in costly competition. To prevent them, in short, from competing by raising quality, just as price-fixing prevents them from competing by lowering price.

Either price or quality competition can, after all, eat away industry profits. Remember the auto industry before deregulation. The government set prices at high levels, but because auto quality was not completely regulated, auto rivals tended to engage in cost-quality competition. They offered better terms and more frequent flights with more empty seats. In the end, such quality competition ate away all the profits from the excessively high prices.

Obviously, one does not enter into agreements expecting them to have no effect. Thus, if this conspiracy is proven, the cigarette manufacturers themselves must have thought that without their agreement individual cigarette producers would have made safer cigarettes in an effort to expand their individual market share. Further, if individual cigarette makers had sold safer cigarettes, they would have also had an incentive to advertise the true harm of their rival's cigarettes.

And, indeed, the complaints in the tobacco litigation recent evidence that some individual cigarette makers did in fact develop safer cigarettes, but refrained from selling them because of this antitrust conspiracy. Instead, cigarette makers held these less carcinogenic cigs off the market, keeping them in reserve to retaliate in case other manufacturers broke the conspiracy by competing on product safety. Likewise, the complaints recount
Note that these antitrust claims are not
vulnerable to the cigarette makers’ favor-
ous defense that everyone knows cig-
aretes are carcinogenic and assumed the
risk by smoking them. Even if this were
true (and much information was distored
or withheld), what antitrust enunials us to
is not just the right to make price-quality
trade-offs when buying but the right to
have the ideal price-quality trade-offs avail-
able to us through competition. Just as it’s
would be no defense to a price-fixing
conspiracy that buyers know they are
paying too much, so too it is no defense to
a price-fixing conspiracy that buyers
know the quality is too low.

After all, if automakers competed to
make no-car safer than a Yugo, they could
not defend themselves by saying that
buyers know that cars in general (or
Yugos in particular) are unsafe and must
expect such risks so outweighed by the
benefits of driving. For the conspiracy
would be taking away from us the right to
choose the safer cars that competition
would produce. Likewise, smokers are
entitled not to be saddled with a restrained
market where all they can buy are Yugo
cigarettes.

Such short-circuiting of the competitive
process is precisely what antitrust law is
meant to redress. And just what antitrust
of the free market should vigorously op-
pose.

The writer is a professor at Harvard
Law School and counsel for health fund
plaintiffs in tobacco cases in several
states.