

ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

LW.11043.001
NYU School of Law
Spring 2018

Mondays, 4:10-6:00 pm
FH 316
Dale Collins
dale.collins@shearman.com
www.appliedantitrust.com

Week 3: Criminal Price-Fixing Investigations and Prosecutions ([Unit 3](#) continued)

We will start next week with a very short discussion of the Antitrust Criminal Penalty Enhancement and Reform Act of 20041 (ACPERA) (see slide 53 for all you need to know). We will also take a quick look at criminal complaints and arrest warrants.

Indictments and informations. Next, we will turn to indictments and informations. An *indictment* in a criminal case is analogous to a complaint in a civil case. The Fifth Amendment (p. 51) provides persons charged with a felony the right to be indicted by a grand jury. I have included a model grand jury charge (pp. 52-58) because you probably have never seen one, but feel free to only skim it or skip it altogether. An *information* is the charging document when the defendant waives its right to an indictment by a grand jury. Rule 7 of the Federal Rules of Criminal Procedure (p. 59) spells out the requirements for indictments and informations and you should read it with some care. Also read the Irving Materials information (pp. 60-66) and see how it tracks the requirements of Rule 7. Please bring a copy of the Irving Materials indictment to class. We will go through it with some care.

Criminal complaints and arrest warrants. In some situations—for example, when a suspect is about to flee the country—it is necessary to take the suspect into custody before a grand jury can indict them. The way to do this is through a *criminal complaint*. Rules 3 and 4 of the Federal Rules of Criminal Procedure (pp. 67-68) govern criminal complaints and arrest warrants. The remaining materials in this section (pp. 69-73) give an example of a criminal complaint in an antitrust case, a supporting affidavit, and an arrest warrant.

Pleas and plea agreements. We will then turn to pleas and plea agreements. You should have a very general sense of what Criminal Rule 11 (pp. 75-77) requires. Look closely at Rule 11(c). Make sure you understand the difference between a Type B and a Type C plea agreement. Read the IMI plea agreement (pp. 78-95). Check to see how the requirements of Rule 11 are reflected in the agreement and whether the IMI plea agreement is a Type B or Type C agreement. Please bring the IMI plea agreement to class, since we are going to walk through it. You can just skim the Pete Irving plea agreement (pp. 96-109), but see if you can find any differences between the form of the IMI plea agreement (regarding a corporation) and the Pete Irving plea agreement (regarding an individual).

Sentencing. We will finish the week with a discussion of sentencing. We have already seen the maximum sentences that may be imposed under the Sherman Act and the alternative fines provision of 18 U.S.C. §3571(d). But how are the actual sentences—or, in our case, the recommended sentences under a plea agreement—determined? Read slides 55-79 on sentencing and the sentencing guidelines. You may skim the statutory provisions in the required reading (pp. 111-116), but you should be aware that they exist. Section 2R1.1 of the Sentencing Guidelines is the only section that is specific to antitrust criminal offenses and is worth a careful read (pp. 117-120). That said, you will see that you will see that the sentencing memoranda draw on many of sections of the sentencing guidelines.

So far, I have been able to find only one sentencing memorandum in the *Ready-Mix Concrete* case and it is not especially enlightening, so we are going to read the *Kayaba Industry*, *AU Optronics*, and *Hitachi* sentencing memoranda and the judgments instead (pp. 121-329). Try to follow the reasoning

of the DOJ when calculating the sentencing ranges under the Guidelines. We will walk through some of these calculations in class. Keep in mind as you read these materials that Kayaba Industry entered a plea agreement¹ while AU Optronics was convicted at trial.

I appreciate that these materials are quite lengthy. If you feel the urge to cut down on the reading, I suggest the following:

Read all of the Kayaba materials (pp. 121-37)

In the AU Optronics materials, concentrate on pages 1-9 and 23-52 of the DOJ sentencing memorandum (pp. 148-56, 170-99) and the first 20 pages of the hearing transcript (pp. 204-23). The transcript is a great read, and if you have the time I encourage you to read the whole thing. You can see how Judge Susan Illston decided the dispute in the judgments she entered in the case (pp. 276-85).

Skim the Hitachi sentencing materials (pp. 286-329). This is an example of the DOJ's "Penalty Plus" approach. The papers also present an interesting dispute over the role of antitrust compliance programs in sentencing.

The notes do a fair job (I hope) of explaining the sentencing guidelines process, but if you really want to get an understanding of how these guidelines work you need to go back and read the relevant provisions of the statutes and the sentencing guidelines as they come up in the memoranda. The 2016 edition of the Sentencing Guidelines, which is the most current edition, may be found [here](#) on the United States Sentencing Commission's web site. The web page also has a link to a pdf of the complete guidelines.

That will do it for the week. Consider the remainder of the Unit 3 materials optional. If you want to reread the *Beaver* opinion for the legal analysis, keep in mind these questions:

Who were the defendants at trial?

What was the defense at trial? Was it successful?

What happened at the end of trial?

Who appealed? What was the error challenged in the appeal?

What must Beaver show in the appeal in order to succeed? (Think of this as the standard of review.)

What the appellant successful? If so, why; if not, why not?

What was the ultimate disposition of the case?

The *Beaver* indictment, verdict form, judgment, and sentencing memorandum for Chris Beaver are at pp. 367-84 in the reading materials. They are worth a quick read, but we will not discuss them in class (but we can always talk about them before or after class, or at a lunch). I have also included a section on appeals in a criminal case (pp. 386-92) and slides 80-83), including the notice of appeal for Chris Beaver, but again we will not discuss them in class unless you have any questions.

We will begin Unit 4 on private antitrust actions in Week 4.

Dale

¹ If you are interested in the plea agreement, you can find it in the supplemental materials on Unit 3 web page.