

## ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

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Georgetown University Law Center  
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### Week 2: [Criminal Price-Fixing Prosecutions \(Unit 3\)](#)

Now that we have introduced the Indianapolis ready-mix concrete conspiracy, we will spend the next two weeks examining criminal price-fixing investigations, prosecutions, plea agreements, and criminal sentencing.

We will start with a brief review the elements of a criminal Sherman Act § 1 violation and the associated penalties for its violation. Read the Sherman Act (p. 6 in the [reading materials](#)) with some care. The elements of a criminal Section 1 violation are unpacked in the class notes (slides 4-13 of the [class notes](#)). The Sherman Act does not have its own statutes of limitations, so the general five-year federal criminal statute of limitations applies (p. 6).

Take a look at the chart on the history of Sherman Act maximum penalties (p. 7) as well as the “alternative fines provision” of the Comprehensive Crime Control Act (p. 7). While the Sherman Act provides for maximum fines for criminal violations of \$10 million for individuals and \$100 million for corporations, the alternative fines provision—which provides for criminal penalties of twice the gain to the perpetrator or twice the loss to the victims—is uncapped. In large conspiracies, the alternative fines penalty can be much higher than the Sherman Act maximums. The Antitrust Division frequently uses the alternative fines provision in prosecuting international cartel members. Criminal sanctions for antitrust violations are also covered in the class notes (slides 17-30). Slide 21 gives a list of the highest criminal fines collected by the DOJ for Sherman Act violations.

As we discussed in the last class, Chris Beaver was also convicted of violating 18 U.S.C. § 1001, one of the several obstruction of justice statutes that comes up all the time in federal criminal cases. I have included in the reading materials a number of obstruction of justice-type provisions from the criminal code with which you should have some basic familiarity (and therefore need only skim) (pp. 9-13). You have already seen the *Flynn* information from last week’s reading. The *Groen* information (pp. 14-18) and the excerpt from the *Martha Stewart* case (pp. 19-21), which show what can happen to someone who tampers with evidence in the course of a federal antitrust investigation, are quick and interesting reads. The *Higashida* indictment (pp. 22-30) applies various obstruction of justice statutes to two individuals efforts to allegedly cover-up the participation of themselves and their company in one of the automotive auto parts price-fixing conspiracies.<sup>1</sup>

Much of the class on Tuesday will be devoted to the incentives of individual conspirators to reveal the conspiracy to the DOJ. The DOJ has been quite unsuccessful in detecting price-fixing conspiracies on its own through economic screening or other analytical tests, so it has had to depend on informants. Why did Richard Haehl, Shebly Materials’ Vice President—once

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<sup>1</sup> Higashida ultimately entered a guilty plea under a plea agreement to conspiring to obstruct justice and attempting to obstruct justice. As agreed, he was sentenced to 14 months in prison and a \$7500 criminal fine. You can find the docket sheet and various filings in the case (including the plea agreement and the transcript of the plea agreement/sentencing hearing in [Unit 3](#) on AppliedAntitrust.com).

approached by the FBI in the “dawn raid” interviews—quickly admit his criminal conduct and offer to help the DOJ investigate the conspiracy? To provide a conspirator the incentive to inform the government of the conspiracy and assist the government in the co-conspirators’ prosecution, the DOJ has adopted corporate and individual leniency policies (pp. 32-38). Shelby and IMI took advantage of these leniency policies. We will go through the Shelby conditional amnesty agreement (pp. 39-42) and the IMI conditional amnesty agreement (pp. 43-46) in class, so be sure to read them carefully and *bring copies to class*. We will go through these materials in class and you will need a copy in front of you. You may also find the class notes helpful (slides 42-52).<sup>2</sup>

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (pp. 47-49) provides some additional incentives for conspiracy members to turn states’ evidence. Under ACPERA, an applicant that has been granted leniency by the DOJ and who adequately assists the plaintiffs in a private follow-on action is subject only to actual damages (and not the usual treble damages) and only for injuries the applicant itself caused (and not for the injuries caused by its co-conspirators). With this and a quick read of the class notes (slide 53), you will know as much as you need to know about ACPERA, so just skim the statute or skip it altogether.

The DOJ leniency policies are designed to induce informants not only to come forward but also to testify against their co-conspirators. This raises the question as to the scope of admissible informant testimony. We asked last week what admissible testimony, if anything, Gary Matney of Prairie Material could provide based on his discussions with Scott Hughey of Carmel Concrete. As you will recall, Hughey, in his efforts to convince Matney to join the conspiracy, told Matney about the identities of the other companies involved and the specific price agreements they reached. Now we ask the same question regarding Price Irving of IMI, who was a conspiracy member and who was present at the various meetings. What admissible testimony, if anything, can Irving provide about the conspiracy? To help answer this question, you should review the selected rules of the Federal Rules of Evidence (Unit 1 pp. 126-29).

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.

In some situations—for example, when a suspect is about ready 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.

We probably will not get any further than this (and probably will not get this far) on Tuesday, so read the [class notes](#) only through slide 53. We will finish the rest of Unit 3 in Week 3.

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<sup>2</sup> I did not include in the required reading the Antitrust Division’s FAQs on its leniency policy. If you are interested in the DOJ’s leniency policy, the FAQs state the official position of the Antitrust Division and are worth a fast read. You can find these in the Unit 3 materials on the [DOJ leniency policy](#).

In preparing for the class, keep in mind the following questions:

*On the basics:*

What are the elements of a Section 1 criminal price-fixing violation?

What are the maximum penalties for an enterprise and for an individual found guilty of criminal price fixing?

*On prosecutorial discretion:*

How does the DOJ decide which types of cases to bring criminally? (This is in the class notes.)

*On the DOJ's leniency policy:*

Why did Richard Haehl, Shelby Materials' Vice President, quickly admit his criminal conduct and offer to help the DOJ investigate the conspiracy?

How does the DOJ's leniency policy incentivize individual conspirators to admit guilt and cooperate in the DOJ's investigation?

What is the ACPERA, how does it operate, and why does the DOJ support it?

Shelby was the first to admit guilt. What happened to it?

IMI was the second to admit guilt. What happened to it?

To what extent can Price Irving of IMI testify about what other conspiracy members did or said in the course of the conspiracy meetings?

If you have any questions, please send me an email. Have a great week and I will see you on Tuesday.

Dale