

ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

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Georgetown University Law Center
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Tuesdays, 5:45 pm - 7:45 pm
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Week 4: Criminal Price-Fixing Investigations and Prosecutions (Unit 3 continued)/ The Private Right of Action (Unit 4)

This week we will finish Unit 3 and start on Unit 4 on private antitrust actions. Unit 4 will take us through at least Week 6 (and maybe a little beyond). When we finish this unit, we will turn to antitrust class actions.

Unit 3

The remaining topic for class in Unit 3 is sentencing. I assigned this material for last week, so hopefully all you have to do is review it. Here is the reading guidance from last week on these materials:

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 (Unit 3 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 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.

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

Unit 4

After a brief discussion of the role of private litigation in the scheme of U.S. antitrust enforcement, we will turn to the high-level requirements for a bringing a private cause of action. These include—

1. A *private right of action*, which enables the plaintiff to bring the case to the court for adjudication (Clayton Act §§ 4(a), 16).
2. *Subject matter jurisdiction*, which gives the court the power to adjudicate the subject matter of the dispute (28 U.S.C. §§ 1331, 1337).
3. *Personal jurisdiction* over the defendant, which empowers the adjudicating court to bind the defendant to the judgment (28 U.S.C. § 1391; Clayton Act §§ 4(a), 16, 22).²
4. The rules of *venue*, which determine in which federal district court (forum) the case may be brought and adjudicated.

The Unit 4 class notes through slide 37 will be helpful in guiding you through these introductory topics.

Commencing civil actions. With these broad requirements of subject matter jurisdiction, private right of action, personal jurisdiction, and venue in mind, we will dissect the *Boyle* complaint (Unit 4 pp. 8-16). *Boyle* is the first of the follow-on private actions against the members of the Indianapolis ready-mix price-fixing conspiracy. It represents a standard form of a garden variety private antitrust price-fixing complaint for treble damages and injunctive relief. We will organize much of the class in Weeks 4-6 around the *Boyle* complaint, so read it carefully (and bring a copy to class). That said, do not concern yourself with the paragraphs containing the class action allegations, since we will cover those in detail when we start the class action unit in Week 7.

As you read the *Boyle* complaint, ask yourself paragraph by paragraph (or sentence by sentence) why the plaintiffs included it. Review Federal Rules of Civil Procedure (FRCP) 2, 3, 7, 8, 10, and 11 to get a sense of the general rules of pleading (pp. 17-21). Pay particular attention to Rule 11—it plays a critical role in all federal private actions.

The private cause of action. Paragraph 4 of the *Boyle* complaint invokes the Clayton Act's private cause of action for treble damages under Section 4 and for injunctive relief under Section 16. Read the private cause of action section in the required reading (pp. 23-40) and the associated class notes (slides 4-11). This section will also introduce the three key features of private antitrust treble damages litigation: treble damages, joint and several liability, and no right of contribution.

Subject matter jurisdiction and the reach of the Sherman Act. Paragraph 5 of the *Boyle* complaint alleges the grounds for the court's subject matter jurisdiction. We are going to look at subject matter jurisdiction broadly in three parts:

1. The constitutional authority for the federal government to regulate anticompetitive conduct through the antitrust laws.
2. The constitutional authority for the federal courts to adjudicate generally cases arising under the federal antitrust laws (this is what Paragraph 5 addresses).
3. The constitutional authority of a court to adjudicate the particular antitrust case before it.

These topics are addressed in the subject matter jurisdiction section in the reading materials (pp. 42-50) and the associated class notes (slides 12-21). When reading Paragraph 5 of the complaint, be sure that you know the role of each of the four statutory provisions cited in the paragraph.

Also, we will briefly discuss the almost unintelligible Section 6a of the Sherman Act, better known as the Foreign Trade Antitrust Improvements Act or FTAIA. Good luck trying to parse it. It is some of the worse

² As a quick aside, personal jurisdiction over the plaintiff is essentially automatic, since the plaintiff's appearance in court upon the filing of its complaint gives the court jurisdiction over the plaintiff.

drafted legislative language I have ever seen. You can find it on page 51 of the required reading.³ Hopefully, the notes in the required reading will be helpful.

We will be lucky if we can cover all of this material on Tuesday. But the reading is relatively light, so you should do it all. As always, send me an email if you have any questions.

Dale

P.S. If you are printing out the materials, do not print beyond the assigned pages. There is a fair chance I will be changing some of the later materials in Unit 4.

³ For anyone who is interested, Unit 26 on AppliedAntitrust.com has more materials and cases on extraterritoriality.