

ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

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Class 1: Introduction to Price Fixing (Unit 1)

Welcome again to the course. Links to the required reading and the class notes for the first day of class are embedded in this note and also may be found in the modules page on Canvas and the course page on AppliedAntitrust.com. This memorandum gives you my thoughts on how you should approach these materials.

Required reading. The [required reading](#) starts with the major substantive provisions of the federal antitrust statutes (pp. 5-6). If you are used to reading modern statutes, you should find the form of the federal antitrust statutes quite interesting. The antitrust statutes enable one of the economy's most significant types of economic regulation, yet instead of taking hundreds of pages of text, as do many modern statutes, the substantive provisions of the antitrust laws take a little more than a page. You might also note that they do not give you a clue about what activities are prohibited.

In class, after some introduction to the overall structure and aims of the course, we will discuss the Indianapolis ready-mix concrete conspiracy. The Seventh Circuit's *Beaver* opinion covers the facts of the conspiracy in an unusual level of detail (pp. 8-29). In addition to being convicted of price fixing, Chris Beaver was convicted of making false statements to the FBI in violation of 18 U.S.C. § 1001 (p. 30). Section 1001 is one of the several obstruction of justice statutes that comes up all the time in federal criminal cases and is one of several important mechanisms to ensure truthfulness and evidence integrity in federal investigations. This, by the way, is the statute to which former National Security Advisor Michael Flynn pleaded guilty (pp. 31-32).¹

Other than Section 1001, do not worry too much about the law in the opinion for the first class; we will go back and cover that in the next two classes. In this class, we will examine what the conspirators were trying to do, why they were trying to do it, and what difficulties they faced in executing their cartel agreement. The map in the reading materials shows the locations of the defendants' ready-mix concrete plants (p. 33). The Vondrak presentation is both a quick read and a good summary of the conspiracy (pp. 34-54). (Frank Vondrak, by the way, was one of the lead Justice Department attorneys in the criminal investigation.) Be forewarned, however: the Vondrak presentation is no substitute for a careful reading of the *Beaver* opinion.

I also have included the affidavit from the FBI agent in support of the search warrants that were executed near the beginning of the investigation (pp. 55-91), as well as the FBI interview notes for Scott Hughey of Carmel Concrete (pp. 92-98). The search warrants were executed on May 25, 2004. Although Hughey was interviewed at home on that date, the notes are from a later interview in the Antitrust Division Midwest Field Office in Chicago on August 20, 2004. They are both fun reads and give some additional facts about the conspiracy.²

¹ If you are interested in the court filings in either the Flynn or Michael Cohen cases, click [here](#) for a link on AppliedAntitrust.com.

² The interview notes of most of the other participants in the Indianapolis Ready Mix Concrete conspiracy may be found [here](#) on AppliedAntitrust.com.

One of the most interesting questions in criminal antitrust law is why individuals engage in price fixing—a felony punishable by up to 10 years in prison and a fine of up to \$1 million. As you ready the Indianapolis ready-mix price fixing conspiracy materials, think about what Richard Haehl, Gus “Butch” Nuckols, Price Irving, Scott Hughey, and Christopher Beaver may have considered (or not considered) as they joined and then carried out their price-fixing conspiracy. Unfortunately, there has been little systematic study of the reasons for the willingness of individuals to participate in price-fixing conspiracies. The best overview I have found is the working paper by Andreas Stephan of the University of East Anglia (pp. 100-24). You can just skim it if you like.

I have included some materials on antitrust criminal investigations and search warrants (pp. 124-50). Most of the material comes from the chapter in the Antitrust Division Manual on conducting investigations, but there are also some forms Antitrust Division attorneys use for requesting FBI assistance and applying for a search warrant. There is no need to read this material in detail and you may just skim it.³

Finally, I have included some selected rules from the Federal Rules of Evidence (pp. 152-55). These are worth a careful read. Be prepared to discuss in class what admissible evidence the Antitrust Division had just from Gary Matney (the cooperating witness) prior to the execution of the search warrants.

Class notes. The class notes are usually very important since they summarize the technical points I would like you to know, whether or not we discuss them in class. Sometimes the class discussion will adhere closely to the notes, while other times there will be less connection. Hopefully, you will find the notes self-explanatory, so even when we do not discuss a particular topic in class, you should be able to understand it. But if you have any questions, send me an email or bring them up in class, and I will see if I can do a better job. Here are the [class notes](#) for this class. They are an easy read.⁴

Preparing for class. In preparing for the class, keep in mind the following questions (not all of which may be answered by the materials and the class notes):

On the economics:

What were the Beaver conspirators trying to do?

What did they agree to do?

What was their plan to implement their agreement (and why did they implement when they did)?

What does economic theory say about the likelihood that the conspirators will be successful over the long-run in implementing their agreement? Do we see that problem in the Beaver conspiracy?

How successful were the conspirators in implementing their agreement?

On the public policy:

Why should society be concerned about what the *Beaver* conspirators were trying to do?

How does the Sherman Act address these policy concerns?

On the investigation process (which we may not reach in the first class):

How did the DOJ learn about the existence of the Indianapolis conspiracy? Who told the DOJ? What motivated them? What happened to the informant and his company?

³ The Department of Justice has pulled the Antitrust Division Manual from its web site for revisions. I have found no indication when a new version will be released. I do not know what changes the ATD’s leadership has in mind, but I suspect that the materials in the required reading will not materially change.

⁴ If you are unfamiliar with the “prisoner’s dilemma” oligopoly game (slide 7) and needs some more background, take a look at Jason Welker, [Game Theory Intro The Prisoner's Dilemma as a Model for Oligopoly Behavior](#) (YouTube).

What did the DOJ do after it found out about the conspiracy?

What was the involvement of the FBI?

To what extent can Gary Matney of Prairie Materials testify about what Scott Hughey of Carmel Concrete told him about Hughey's involvement in the conspiracy? About what Hughey told him about the involvement of others in the conspiracy?

You can find all required reading and the class notes on the course page on Canvas and AppliedAntitrust.com. Take a look at the page and note the supplemental and reference materials that are included. I suspect you will not have the time to read any of the extra materials, but you may find it helpful at some point to know that they exist. FWIW, I am trying to collect on AppliedAntitrust.com the important court filings for each of the cases we will discuss in class, but this is a work in progress.⁵

Finally, if you have a moment, look at the [basic antitrust reference materials page](#) on AppliedAntitrust.com. It contains numerous links you might find of interest.

If you have any questions or comments, send me an email. See you on Tuesday, January 17.

P.S. You might also take a look at a short note on what I think is important in [reading cases](#), which you might find helpful as the course proceeds.

⁵ AppliedAntitrust.com came into being as I was collecting materials for the first Antitrust survey course I taught at Yale many years ago. Over time, it grew into my online filing cabinet for antitrust materials. Anything I find interesting I put somewhere on the site. The result is a somewhat eclectic and by no means complete collection of antitrust materials.