

ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

LAWJ/G-1396-07
Georgetown University Law Center
Spring 2023

Tuesdays, 3:30 pm - 5:30 pm

Dale Collins
wdc30@georgetown.edu
www.appliedantitrust.com

Week 4: Criminal Price-Fixing Investigations and Prosecutions (Unit 3 continued)

Pleas and plea agreements. This week we will continue our discussion of criminal price-fixing investigations and prosecutions by examining pleas and plea agreements. You should have a very general sense of what Criminal Rule 11 (pp. 74-76) 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. 77-94). 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. 95-108), 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).¹

Criminal 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 59-87 on sentencing and the sentencing guidelines. You may skim the statutory provisions in the required reading (pp. 110-115), but you should be aware that they exist. Section 2R1.1 of the Sentencing Guidelines is the only section specific to antitrust criminal offenses and is worth a careful read (pp. 116-19). That said, you will see that the sentencing memoranda draw on many sections of the sentencing guidelines.

So far, I have found only one sentencing memorandum in the *Ready-Mix Concrete* case. It is not especially enlightening, so we will read the Kayaba Industry, AU Optronics, and Hitachi sentencing memoranda and the judgments instead (pp. 120-328). Try to follow the DOJ's reasoning 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 agreement² while AU Optronics was convicted at trial.

I appreciate that the case 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. 120-36)

In the *AU Optronics* materials, concentrate on pages 1-9 and 23-52 of the DOJ sentencing memorandum (pp. 147-55, 169-198) and the first 20 pages of the hearing transcript (pp. 203-22). The transcript is a great read, and if you have the time, try to read the whole thing. You can see how Judge Susan Illston decided the dispute in the judgments she entered in the case (pp. 275-284).

¹ The Antitrust Division updated its model plea agreements on April 4, 2022. That said, the essence of a plea agreement has not changed significantly since the time of the IMI and Irving plea agreements. Of course, when you are counselling clients, be sure to use the current model letters. See [Model Annotated Corporate Plea Agreement–Rule 11\(c\)\(1\)\(B\)](#) (Apr. 4, 2022); [Model Annotated Corporate Plea Agreement–Rule 11\(c\)\(1\)\(C\)](#) (Apr. 4, 2022).

² If you are interested in the plea agreement, you can find it in the supplemental materials on [Unit 3 web page](#) of AppliedAntitrust.com.

Skim the *Hitachi* sentencing materials (pp. 285-328). This is an example of the DOJ’s “Penalty Plus” approach. The papers also present an interesting and ongoing debate 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 understand 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 2021 edition of the Sentencing Guidelines, which is the most current edition, may be found [here](#) on the United States Sentencing Commission’s website.³ The web page also links to a pdf of the complete guidelines.

Finally, read the slides on the grounds for appeal of a criminal conviction and the standards of review (slides 89-92).

We probably will not finish all of Unit 3 on Tuesday. On Thursday we will complete whatever remains and then turn to Unit 4: Private Antitrust Actions.

Please let me know if you have any questions.

³ Since early 2019, the United States Sentencing Commission had been operating without the quorum of four voting members required by statute to promulgate amendments to the sentencing guidelines, policy statements, and commentary. The operative sentencing guidelines are those promulgated in 2018. The 2021 edition of the Sentencing Guidelines Manual contains the text of the Guidelines Manual incorporating amendments effective on or before November 1, 2018. On August 4, 2022, the Senate confirmed seven new members to serve on the Commission, restoring a quorum for the first time in three years. See Press Release, U.S. Sentencing Commission, [Acting Chair Judge Charles Breyer, Incoming Chair Judge Carlton W. Reeves Applaud Senate Confirmation of New Commissioners](#) (Aug. 5, 2022).