

## ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

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Georgetown University Law Center  
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Tuesdays, 3:30 pm - 5:30 pm  
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### Week 3: Criminal Price-Fixing Investigations and Prosecutions (Unit 3 continued)

This week, we will continue our discussion of criminal price-fixing investigations and prosecutions.

*DOJ prosecutorial policy and process.* First, read the class notes on DOJ prosecutorial policy (slides 34-36) and criminal prosecution process and protections (slides 37-49). You may already know much of this material from other courses, but if not, the class notes will give you some essential background. We probably will not spend too much time in class on these topics unless you have questions.

*DOJ leniency program.* Much of the class 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, Shelby Materials' Vice President—once 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. 32-35). Shelby and IMI took advantage of these leniency policies. You should find the class notes helpful (slides 50-63).<sup>1</sup> We will go through the Shelby conditional amnesty agreement (pp. 36-39) and the IMI conditional amnesty agreement (pp. 40-43) in class, so be sure to read them carefully and *bring copies to class*. These letter agreements are based on older models, but the essence is the same as the current models. Still, when counseling clients, you should be familiar with the current model letters adopted in 2022. At least skim the 2022 model corporate conditional leniency letter and the model individual conditional leniency letter in the reading materials (pp. 44-54).

If you have the time, I strongly encourage you to read a short nine-page article by Don Klawiter on the Antitrust Division's leniency program. It reviews the purpose and history of the Division's leniency program, critiques the April 2022 “updates,” and offers some suggestions for further modifications. Klawiter is one of the country's most experienced antitrust criminal defense lawyers. It is a first-rate article. You can access the article through the HeinOnline ABA Law Library Collection on the Georgetown Law Library site.<sup>2</sup>

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 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 64), you will know as much as you need to know about ACPERA, so just skim the statute or skip it altogether (pp. 56-59).

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. Earlier, we asked 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, in his efforts to convince Matney to join the conspiracy, Hughey 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, a

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<sup>1</sup> I did not include in the required reading the Antitrust Division's detailed [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. The Division maintains a web page devoted to its [leniency program](#). It is worth a look.

<sup>2</sup> Donald C. Klawiter, [A Really New Leniency Program: A Positive, Cooperative, and Enthusiastic Partnership for Effective Antitrust Enforcement](#), *Antitrust*, Summer 2022, at 56.

conspiracy member 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 applicable rules of the Federal Rules of Evidence (Unit 1 pp. 126-29).

*Indictments and informations.* An *indictment* in a criminal case is analogous to a complaint in a civil case. The Fifth Amendment (p. 61) provides that natural persons charged with a felony with the right to be indicted by a grand jury. Courts have not extended this protection to corporations, but the Antitrust Division's practice is to indict corporations as well as individuals. I have included a model grand jury charge (pp. 62-68) 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. 69) spells out the requirements for indictments and informations and you should read it with some care. Also read the Irving Materials information (pp. 70-76) and see how it tracks the requirements of Rule 7. We will discuss the provisions of the Irving Materials indictment in class, so be sure to bring a copy.

*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. 77-78) govern criminal complaints and arrest warrants. The remaining materials in this section (pp. 79-83) give an example of a criminal complaint in an antitrust case, a supporting affidavit, and an arrest warrant.

Next week, we will focus on pleas and plea agreements. Please let me know if you have any questions.