

ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

LAW 1396
Georgetown University Law Center
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Week 3: Criminal Price-Fixing Investigations and Prosecutions (Unit 2 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 and criminal prosecution process and protections. Slides 36-38 explain the Antitrust Division's basic charging policy: while Sherman Act § 1 can be enforced either criminally or civilly, the Division generally reserves criminal prosecution for "hard core" cartel conduct. Slides 39-51 walk through the criminal prosecution process and the principal constitutional and procedural protections that shape it, including the role of the grand jury and indictment practice, jury trial rights, and the relationship between the *per se* rule and the Sixth Amendment, jury instructions, and the government's burden to prove each element beyond a reasonable doubt. 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 with an incentive to inform the government of the conspiracy and assist in the prosecution of co-conspirators, the DOJ has adopted *corporate and individual leniency policies* (pp. 32-36). Shelby and IMI took advantage of these leniency policies. You should find the class notes helpful (slides 52-68).¹ We will go through the Shelby conditional amnesty agreement (pp. 37-40) and the IMI conditional amnesty agreement (pp. 41-44) in class, so be sure to read them carefully and *bring copies to class*. These letter agreements are based on older models, but their essence is largely the same as that of the current models. I have included a note on the changes that would have to be made to the Shelby letter to reflect current Division policy (pp. 52-55). While the note will suffice for class purposes, when counseling clients, you should be familiar with the model letters adopted in 2025 (pp. 45-51, 56-59), but there is no need for you to read them for class.

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.²

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 provides some additional incentives for conspiracy members to turn state's evidence. Under ACPERA, an applicant that has been granted leniency by the DOJ and that 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

¹ I did not include in the required reading the Antitrust Division's detailed [FAQs](#) on its leniency policy (last updated Jan. 3, 2023). 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.

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

caused by its co-conspirators). With this and a quick read of the class notes (slide 69), you will know as much as you need to know about ACPERA, so just skim the statute or skip it altogether (pp. 61-64).

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 disclosed the identities of the other companies involved and the specific price agreements they had reached. Now we ask the same question regarding Price Irving of IMI, a conspiracy member who attended 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).

DOJ whistleblower rewards program. In July 2025, the Antitrust Division, working with the U.S. Postal Inspection Service and the U.S. Postal Service Office of Inspector General, announced a Whistleblower Rewards Program that, in appropriate cases, pays monetary awards to individuals who provide voluntary, original, and timely information about criminal antitrust violations and related offenses that have a sufficient “Postal Service nexus.” Unlike leniency, the program does not confer immunity, but it creates an additional incentive for employees and other insiders to report cartel conduct. As explained in the class notes (slides 70-74), eligibility generally requires information not already known to DOJ or its postal law enforcement partners and that leads to a resolution with at least \$1 million in criminal fines or comparable recovery, with awards discretionary but presumptively in the range of 15% to 30% (subject to a 30% cap, including shared awards).

Indictments and informations. An *indictment* in a criminal case is analogous to a complaint in a civil case. The Fifth Amendment (p. 66) provides that natural persons charged with a felony have 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. 67-73) because you probably have never seen one, but feel free only to 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. 74) spells out the requirements for indictments and informations, and you should read it with some care. Also read the Irving Materials information (pp. 75-81) 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. 82-83) govern criminal complaints and arrest warrants. The remaining materials in this section (pp. 84-88) 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.

STOP CARTELS PROTECT COMPETITION GET REWARDED

DOJ Antitrust Division - Whistleblower Rewards Program



What's Illegal?

- **Price fixing:** Companies agree to raise, lower, or hold prices or wages instead of competing.
- **Bid-Rigging:** Companies collude so bids look competitive, but the winner has been pre-arranged.
- **Market Allocation:** Businesses carve up customers, products, or regions instead of competing.

These practices cheat consumers, hurt honest businesses, and violate the Sherman Antitrust Act.

For more information on the program and other qualifying conduct scan the QR code below.

Why Report?

- **Cash Awards:** If your original tip leads to a criminal fine or recovery of \$1 million+, you may receive 15-30% of the recovery (minimum \$150,000 award).
- **Confidentiality:** DOJ helps protect whistleblower identity and federal law bars retaliation.
- **Impact:** Your report can stop cartels, protect consumers, and reward you.

Up to
\$100
MILLION fine
per company

NDAs do not prevent employees from reporting corporate criminal conduct to the Department of Justice.

15-30%
REWARD

How to Report

1. Visit justice.gov/antitrustrewards
2. Submit details, who, what, when, where, and how the illegal scheme operates.
3. DOJ reviews, investigates—and if it leads to prosecution and recovery—you may be rewarded.



*This whistleblower rewards program is a partnership between the U.S. Postal Service and the U.S. Department of Justice, Antitrust Division.

**Participants in the illegal conduct may be eligible for financial awards and/or individual immunity under the Antitrust Division's Leniency program if they are first to report and satisfy other requirements.