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Department of Justice

CRIMINAL ENFORCEMENT OF THE ANTITRUST LAWS: TARGETING NAKED CARTEL RESTRAINTS

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It is a pleasure and honor to appear before the Antitrust Section of the American Bar Association for my annual interrogation by the bar's leading lights. In this the last year of President Reagan's Administration, there is a great deal of discussion about the propriety of the enforcement policy of the past seven years. Most of this discussion has centered on civil enforcement: whether the merger guidelines' exclusive focus on economic market power is too narrow; whether small businesses are helped or hurt by the current, efficiency-sensitive analysis of vertical agreements; and whether the more skeptical approach to allegations of monopolization tolerates too much harmful strategic behavior by large firms.

This Administration has, of course, been in the forefront of the effort to anchor antitrust to sound economic principles. And, not surprisingly, I do not believe that the decrease in civil enforcement statistics has been bad for the country. Rather, it reflects the fact that federal enforcement agencies no longer file cases based on unsound theories that inhibit private procompetitive conduct. Moreover, because we have clearly spelled out our approach to civil enforcement -- for example, in the merger guidelines -- business people are able to structure their commercial affairs in ways that avoid antitrust problems.

In the case of civil enforcement, less has meant more -- more economic efficiency, more low prices for consumers, and more freedom from government interference in markets. While we have not convinced everyone that the current approach to civil enforcement is the correct one, it does enjoy wide-spread support in the bar, academia and the courts. There may be changes at the margin in a new Administration, but it has been the courts over the last ten to fifteen years that have been most responsible for the current state of antitrust. Their attitude is unlikely to change no matter who is elected in November. At the same time, I fully expect the debate to rage on.

Criminal Enforcement

In my remarks this afternoon, I want to address a different debate about another aspect of current policy -- this Administration's criminal enforcement record and policy. While the number of civil cases filed annually by the Antitrust Division during this Administration has been down somewhat, criminal antitrust enforcement is at an all-time high. From 1890, when the Sherman Act was passed, to 1949 -- a 60-year period that included Thurman Arnold's tenure -- the Division filed 531 criminal antitrust cases. During the first seven years of this Administration, we have filed 555 criminal antitrust cases. In fact, just this week this Administration

convicted its 1000th Sherman Act defendant. This Administration has set by a wide margin the all-time record for the number of criminal antitrust cases filed in a single year, and, as far as we can determine, there are now more grand jury investigations underway than at any time in this century.

Our criminal enforcement also reflects a significant increase in activity over the previous Administration. For example, from FY 1977 through FY 1980, the Carter years, the Division averaged not quite 38 criminal cases a year; from FY 1981 through FY 1987, the Reagan years, we have averaged almost 80 criminal cases a year. At the same time, the number of grand jury investigations has almost tripled. Moreover, we have achieved this dramatic increase at the same time that our staffing has been decreased by more than 40 percent.

These achievements probably won't make headlines. Were it not for the Department's consistent efforts to publicize these statistics, they might be unknown to all but the criminal defendants and their attorneys. Reporters don't believe protecting consumers is news unless you block a merger between two steel companies or indict the head of one of the country's biggest corporations. In fact, we file cases every week that have more direct impact on consumers than both of those actions together.

Because the public attention to our enforcement efforts has been so sparse, however, some misperceptions have developed. First, from the reports of the news media, one might be led to believe that we only bring criminal cases against small bid riggers and that rampant criminal antitrust violations by large corporations are not being prosecuted. Second, from some in the defense bar, one might get the impression that in our zeal to prosecute small companies, we have thrown economic logic and reason out the window.

In my remarks this afternoon, I want to explain why the facts support two very different conclusions. Today, the Division is casting its prosecution net more widely than ever before -- not only are we uncovering more criminal violations, we are pursuing a wider variety of violations, in a larger number of geographic areas and involving more diverse companies, than at any time in the Division's history. Moreover, while we are relentless in pursuing criminal antitrust violations, we are exceedingly careful to ensure that we prosecute only conduct that is unambiguously anticompetitive and clearly illegal. Those convicted under our indictments deserve no sympathy.

Diversifying Criminal Prosecutions

The facts are the best support for my claim that the Division's criminal enforcement is not simply targeting small cases against small fry. For example, some of the defendants in our criminal cases have included subsidiaries of firms such as Itel Corporation, a $1.2 billion company; DynCorp, a $750 million company; Waste Management, Inc., a $2.8 billion corporation; and General Cinema Beverages, a $1 billion company. The name, size, and scope of some of the targets currently under investigation are even more impressive -- though, for obvious reasons, I cannot yet discuss them.

Moreover, the criminal cases filed by this Administration have involved more -- and more diverse -- industries than the criminal cases filed in the previous Administration. This is apparent if one compares the last fiscal year -- 1987 -- with FY 1980. In 1980, the Division filed 55 cases (the most filed during any year of the Carter Administration): 35 against roadbuilding conspiracies, 6 against pre-stressed concrete conspiracies, 4 against price fixing on stenographic services, with the other ten in other industries. Last year, on the other hand, we filed 92 cases (8 fewer than the record in 1984): 20 against electrical contractors, 18 against antique-auction pools, 13 against roadbuilding, 6 against motion picture splits, 5 against price fixing in the soft-drink

industry, 5 against waste-hauling conspiracies, 3 against bid rigging on dredging, 3 against price fixing on moving and storage services, 3 against price fixing on bakery products, 4 against conspiracies in steel and alloy pipe markets, with 12 in other industries. In short, our criminal cases were far more diverse last year than in the busiest of the Carter years, and the diversity of our criminal targets continues to increase. For example, we are laying the investigatory groundwork for cases against organized crime infiltration of legitimate business.

Even when we indict local conspiracies among relatively small companies, our cases typically represent an important attack on pervasive, nationwide criminality. For example, while each roadbuilding case has generally involved a small bid rig, we have brought cases against bid riggers on highway projects in almost every state and secured hundreds of convictions on projects totalling billions of dollars. It has been estimated that the cost of building roads in this country was increased ten percent or more as a result of these crimes. The economic impact of the felonious activity in that industry -- and thus of our criminal prosecutions -- was therefore enormous.

Similarly, our auction cases generally involve conspiracies among relatively small dealers. Yet, when you

talk about auctions, you're talking about a huge industry, which has been estimated at something like half a trillion dollars a year. And our investigations indicate that illegal pooling has been quite extensive in a number of areas. Therefore, although the cases we bring may appear small in themselves -- in part because the dealers generally formed different conspiracies each time there was an auction -- the cumulative impact of our efforts to deter such bid rigging may far exceed the impact that antitrust prosecutions have ever had on any industry.

Finally, anyone who knows me or the rest of the prosecutors in the Division knows there is nothing that we would rather do than find and prosecute nationwide price fixing by big corporations. Believe me, we are looking. You can also take my word that we have some leads that we are currently following.

Having said that, let me add that it is undoubtedly true that there are many fewer large, nationwide conspiracies among prominent, publicly-held corporations than there were before the mid-1970s when antitrust violations were upgraded from misdemeanors to felonies. The increased penalties associated with that change were intended to increase deterrence of price fixing. With judges more willing to mete out tough sentences, including jail time, and with the advent of stiff mandatory

fines and jail sentences under the Sentencing Guidelines, the cost of engaging in antitrust crimes has risen astronomically. Surely, corporate managers and directors are far more reluctant to commit antitrust crimes today. It is less likely that they will run the risk of penalties that will destroy their lives in order to increase their firms' profits -- particularly since they personally will participate only slightly, if at all, in those ill-gotten gains. I am not saying we are complacent with respect to the possibility of price fixing by large corporations. But if the recent increases in antitrust penalities have had their contemplated effect, then you should not be surprised that we are finding less collusion among large corporations.

Appropriate Focus of Division Cases

At the same time that we have been expanding our aggressive attack on criminal antitrust violators, we have been careful to target only that conduct that is truly worthy of criminal sanction. Criminal penalities are essential to deter conduct that is unambiguously anticompetitive, particularly because such conduct is usually covert. But the economic benefits of strong deterrence could quickly be overwhelmed if criminal penalties were imposed indiscriminately on commercial behavior that was not anticompetitive.

The Antitrust Division today, as for most of its existence, has recognized this truth. The naked cartel restraints that we target for criminal prosecution under Title 15 of the United States Code truly and unambiguously harm competition and consumers. The targeted conduct, such as price fixing, bid rigging and market allocation among competitors, has long been clearly illegal. The parties generally know their conduct amounts to fraud and commercial theft, and they try to hide its true collusive nature from their customers even if they are oblivious to the legal risks under the Sherman Act.

In general, the conduct that we have prosecuted criminally can be described by four inter-related criteria: (1) with one possible exception, the classes of prosecuted conduct involve agreements among competitors; (2) the agreements have as their inherent likely effect the raising of price and restricting of output (2A) without the promise of any significant integrative efficiencies; (3) the conduct is generally covert and fraudulent; and (4) the perpetrators are aware of the probable anticompetitive consequences of their conduct. Because our targets meet these criteria, our zeal and the very severe penalties we seek are not only appropriate, they are essential.

Let me briefly explain each of these criteria.

(1) Agreement Among Competitors

First, with only a limited exception that I will discuss later, the Division limits its criminal cases to actual agreements among competitors. Of course, an agreement is a legal prerequisite where the count is an alleged violation of Section 1 of the Sherman Act or an alleged conspiracy to monopolize under Section 2.

Our cases invariably involve a meeting of the minds among the defendants. Generally, we can prove that agreement directly on the basis of testimony from witnesses to the agreement's formation; however, on occasion we may rely on strong circumstantial evidence where there are very few participants in the agreement.

We have not brought, nor should we bring, criminal cases on the basis of conscious parallelism, even where it is implemented by the unilateral adoption of facilitating devices, such as the use of fully delivered pricing. Whatever the merits of adopting the novel approach to conspiracy outlined by Judge Posner over ten years ago 1/ or of challenging conduct

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1/ R. Posner, Antitrust Law: An Economic Perspective, 55-77 (1976).

like that involved in the FTC's Ethyl/Methyl case 2/ in the context of a civil suit -- and I think such theories are dubious at best -- they are a totally inappropriate basis for criminal charges.

This Administration has challenged criminally only agreements among competitors -- that is, horizontal conspiracies. With very few deviations, the Division has not criminally prosecuted vertical agreements. That tradition is appropriate because it is often very difficult to distinguish between price vertical restraints, which remain per se illegal, and non-price vertical restraints, which are analyzed under the rule of reason.

Also, when I speak of competitors, I am talking about those persons who are actual, potential or apparent competitors. It is sometimes argued that there is no agreement among competitors in the context of a bid rig if companies that are incapable of performing the contract submit the collusive complementary bids. However, if the defendant held himself out as a competitor at the time of the bid, he should not be able to walk away from that claim after the fraud is uncovered. At

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2/ E.I. duPont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984).

the very least, the fraudulent, collusive bid misled the consumer(s) into believing there was competition and therefore into foregoing a search for other bidders and possibly lower bids.

(2) Effect to Restrict Output and/or Raise Price

Second, the Division has prosecuted and should prosecute only naked cartel restraints, such as price fixing, bid rigging or market allocations. That is, the Division prosecutes criminally only those classes of horizontal agreements that carry such a significant threat of restricting output and/or raising price that one need not inquire into the surrounding economic circumstances to conclude they pose a serious danger to consumer welfare. In the absence of this focus on such inherently anticompetitive agreements, criminal enforcement might well deter a whole host of procompetitive and competitively neutral conduct. For example, if two competitors agreed to adopt an innovative distributional scheme that was not inherently anticompetitive but could be determined to restrict output only after a thorough "rule of reason" analysis, it would likely be very difficult to ascertain at the time the conduct was undertaken whether or not it was illegal. It is inappropriate to indict firms and individuals operating in this gray area of the law. Rather, to be criminal, the conduct must be anticompetitive on its face.

(2A) No Significant Integrative Efficiency

An integral corollary to a conclusion that a horizontal restraint is inherently anticompetitive is the recognition that the restraint is "naked" -- that is, has no significant, economic potential other than raising price and restricting output. Therefore, the classes of horizontal agreements that conform to this second criterion include only those that do not generate any significant integrative efficiencies. This is the teaching of ASCAP/BMI 3/ and its progeny.

It is important that the efficiencies be significant and related to some integration of the parties. For example, an agreement that appears to be a minimum price-fixing agreement is not saved from criminal attack simply because the defendants claim that it eliminates the transaction costs that consumers would otherwise incur in searching out the lowest price. Such an "efficiency" is both trivial and implausible. Similarly unpersuasive are arguments that a naked cartel agreement is necessary to restrain ruinous competition that makes it

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3/ Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

impossible to maintain high quality or that creates too much confusion for consumers. 4/

Moreover, we are interested in integration beyond the mere integration of price and output decision-making. ASCAP/BMI provides perhaps the best known example of such an integrative efficiency. The integration necessary for sports leagues, such as was present in the NCAA case, 5/ is another example.

This prosecution approach is appropriate in order to avoid chilling bona fide, procompetitive joint ventures. On the other hand, form cannot substitute for substance. Neither joint venture labels that are a sham to disguise naked price fixing nor post hoc claims of dubious efficiencies that are dreamed up by lawyers and economists hired for the defense should or do block criminal prosecution.

Assuming that a horizontal agreement falls within some category of naked cartel restraints -- that is, conforms to criterion 2 and its corollary -- it is an appropriate target of

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4/ See Remarks of Charles F. Rule, Assistant Attorney General, Antitrust Division, "Antitrust in the Health Care Field: Distinguishing Resistance from Adaptation," North Haven, Connecticut (March 11, 1988).

5/ National Collegiate Athletic Ass'n. v. Board of Regents, 468 U.S. 85 (1984).

criminal prosecution. The fact that a particular agreement is unsuccessful or has no actual competitive effect is irrelevant. It is enough that the defendants entered into an agreement that clearly presents an inherent and unmitigated threat to consumers.

(3) Covert and Fraudulent Conduct

Third, the conduct subject to criminal challenge will generally be covert and fraudulent. Criminal conspirators usually conclude their agreements in secret and do not tell their customers. In fact, the conspirators ordinarily take steps to disguise the true nature of their anticompetitive conduct -- for example, signing affidavits of non-collusion in order to fool bid-letting authorities into believing they are getting honest, independent bids. The conspirators, of course, are not simply trying to defraud their customers, who, if they were aware of the conspiracy, would likely undertake self-help to get lower prices. The conspirators also want to avoid prosecutors. Conspirators' actions to conceal the true nature of their agreements are a strong indication that there is no legitimate procompetitive objective associated with those agreements. True joint ventures operate in the sunshine.

By covert, I mean that the class of agreements will typically not be open and forthright and so will not always be

detected. Of course, simply because a particular conspiracy is not concealed -- perhaps because the conspirators are inept or careless -- the conspirators do not have a legal defense to a criminal indictment, and we will not refrain from bringing a criminal case.

Nevertheless, the fact that naked cartel restraints are generally covert makes criminal punishment essential. In order to deter an anticompetitive agreement, the expected cost of the conduct -- that is, the likely penalty multiplied by the probability of getting caught -- must exceed the illegal profits the conduct is expected to generate. When not all violations are detected, the probability of detection is less than one and the actual penalties meted out must exceed the expected benefits from the conduct. Otherwise, the conduct will remain economically profitable and will continue no matter how much society expresses its disapproval.

It has been said that the probability of detecting naked cartel restraints may be less than ten percent. 6/ It is certainly true that people who enter into naked cartel

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6/ Statement of Douglas H. Ginsburg, Assistant Attorney General, Antitrust Division, U.S. Sentencing Commission Hearings Concerning Alternatives to Incarceration (July 15, 1986).

agreements often believe there is a significant chance they will successfully evade detection and prosecution. Thus, the stiff criminal penalties we seek are appropriate.

(4) Intent

Fourth, the targets of our criminal prosecutions possess the requisite criminal intent. Because we target naked cartel restraints which are per se illegal, it is sufficient that the conspirators intended to enter into the agreement. 7/

As the Supreme Court has indicated, criminal intent is a necessary prerequisite to a criminal case in order to ensure that businessmen and women are not unfairly condemned for ambiguous conduct or conduct the legality of which is obscure. The fact that we have confined our criminal prosecutions to conduct that generally conforms to the previous three criteria ensures that we are fair. It also is impossible to imagine a situation where the other three criteria are met and the

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7/ If conduct is not per se unlawful, the parties must have at least general criminal intent, which is satisfied when the parties had knowledge of the probable consequences of their conduct and the conduct actually has an anticompetitive effect. United States v. United States Gypsum, Co., 438 U.S. 422, 444 (1978). Conduct undertaken with the purpose to restrain trade may be prosecuted criminally even if it does not actually produce the sought-after effects. Id. at 444 n.21.

requisite intent is absent. Indeed, the fact that the parties conceal their agreement strongly corroborates the existence of the requisite intent.

Monopolization

Naked horizontal restraints have been the grist of the Division's criminal-prosecution mill. With very rare exceptions, the Division has not challenged vertical agreements unless they are the instrumentalities of such a horizontal conspiracy. Similarly, because unilateral conduct alleged to be illegal monopolization is generally not clearly anticompetitive, it has rarely been a target of criminal prosecution.

In some circumstances, however, a criminal monopolization case would be warranted. For example, if an agreement among competitors meets the criteria I have described and the conspirators collectively have monopoly power, then both a Section 1 count and a Section 2, conspiracy to monopolize count might be in order. A Section 2 count would be particularly appropriate if the conspirators engaged in some obviously and irrefutably harmful conduct to keep out interlopers -- for example, blowing up their plants.

Similarly, even if the conduct were unilateral, a criminal monopolization case would be justified in circumstances where violence is used or threatened as a means of discouraging or eliminating competition. But I do not believe criminal prosecution would be appropriate if the alleged exclusionary conduct was nonviolent, commercial conduct such as pricing or investment. Of course, even where violent conduct is involved, the Division would have to prove beyond a reasonable doubt that the defendants intended to monopolize a market -- although blowing up a competitor's plant is pretty strong evidence -- and had achieved success (for monopolization) or a dangerous probability of success (for attempted monopolization). While prosecuting criminal monopolization would be more difficult than a typical Section 1 case, Section 2 may prove to be a valuable weapon in our war against organized crime's corruption of legitimate business.

Auction Pools and Movie Splits

The criminal prosecutions of this Administration have hewed to these criteria. We may have brought cases against horizontal conspiracies that differed in their details. But each case has had the four criteria in common. Auction pools and movie splits provide two examples of that consistency.

Movie splits and auction pools both involve monopsony -- the exercise of collusive buying power. In the typical splits case, movie exhibitors in an area agree to allocate among themselves the exhibition rights to first-run movies. Then, when the movie distributors offer the new films to the exhibitors, the exhibitors bid only on the movies they have been allocated. The conspiring exhibitors do not bid on those movies that the exhibitors' agreement allocates to some other exhibitor.

In a typical auction pool case -- for example, one involving antique dealers -- the dealers agree on a maximum price they will bid for a particular antique or designate one member to bid. After winning the auction at an artificially low price, the dealers then allocate the goods among themselves, typically holding a second, private auction (often called a "knockout" auction) and dividing the additional proceeds. For example, if there are 4 dealers in the pool who purchase an antique for $1000 and hold a "knock-out" auction where the price is bid up to $2000, the additional $1000 often is split equally among the dealers, each getting $250 that should have gone to the original seller.

It can be seen that each of these cases meets all of the criteria for criminal antitrust liability. First, in both instances, it is clear that the parties to the agreement are

competitors. Thus, had the agreement not been reached, the firms would have bid against each other to acquire the product.

Second, the agreements in the aggregate represent an unmitigated threat to consumer welfare. Both movie splits and auction pools have the effect of reducing the prices bid for a particular good. This restriction leads in turn to an artifically low price at which movies are distributed or antiques are sold. Initially, and most obviously, this results in a transfer of wealth from the movie distributor to the exhibitor or from the antique seller to the antique dealer. Moreover, the ultimate collective effect of all movie splits and auction pools is likely to be a reduction in the quantity of antiques and new first-run films offered on the market relative to the quantity produced under conditions of unrestrained competition. In other words, the decreased return to antique sellers and movie producers is likely to decrease their productive efforts.

As a corollary to the anticompetitive threat of such agreements is the absence of any promise that they will generate significant countervailing integrative efficiencies. In fact, in these cases there has been no integration whatsoever beyond the collusion involved in the bidding activity itself. All the parties have done is eliminate competition among themselves in the acquisition of movies or antiques.

Third, in all of these cases, the activity has been fraudulent and largely covert. Only with the investment of substantial resources and a few breaks has the Department been able to uncover the existence of these agreements. It is thus very likely that the probability of detecting splits and auction pools is substantially less than one.

Fourth, it is clear to me that the parties knew that their agreement would restrict competition. In the case of movie exhibitors, it appears that some hoped to exaggerate confusion over whether splits were per se illegal in order to obscure the unambiguous anticompetitive threat posed by their agreements. Nevertheless, the exhibitors knew what they were doing. As for auction pools, the dealers have been well aware of the effect of their agreement. The best they can say is that because, like bid-rigging roadbuilders, they have gotten away with the crime so long, it has become a way of life. Luck, however, does not negate intent.

One final note about movie splits and auction pools: courts have now confirmed that such agreements are per se illegal. 8/ But a court need not formally attach the per se

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8/ See United States v. Capitol Service, Inc., 756 F.2d 502 (7th Cir.), cert. denied, 106 S. Ct. 311 (1985) (movie splits); United States v. Seville Industrial Machinery Corp. Cr. No. 87-31, Slip Op. (D.N.J. Jan. 20, 1988).

label to a particular variety of naked cartel restraint before we will prosecute it criminally. Uncertainty concerning the legality of certain conduct is an equitable consideration that we will consider in appropriate circumstances. But where, as in these cases, the conduct meets the criteria I have described, the Department considers it entirely appropriate to bring the first splits, auction pool, or other case as a criminal indictment.

The Importance of Clarity and Certainty

In auction pools and movie splits, as well as the other criminal cases brought by this Administration, the Division has prosecuted only naked cartel restraints. Indeed, throughout its history, the Division has generally been careful to limit its criminal prosecutions to clearly anticompetitive horizontal agreements. 9/ There have been a few isolated exceptions -- for example, the Cuisinart criminal case and some of Thurman Arnold's more adventuresome and novel prosecutions earlier in the century.

9/ See, e.g., "Antitrust Enforcement to Preserve the Competitive Marketplace," Remarks by John H. Shenefield, Assistant Attorney General, Antitrust Division, Cleveland, Ohio (Apr. 18, 1979); "To Indict or Not to Indict -- A Question of Prosecutorial Discretion Under the Sherman Act," Remarks by Donald I. Baker, Assistant Attorney General, Antitrust Division, Arlington, Virginia (Feb. 28, 1977); Report of the Attorney General's National Committee to Study the Antitrust Laws 349-50 (1955).

The enormous breadth of the Sherman Act, however, makes the indiscriminate use of the criminal sanction a particularly dangerous threat to the economy. Unlike most criminal statutes, the Sherman Act does not provide a precise checklist of conduct that may be met with a criminal prosecution -- all antitrust violations are potentially felonies. Yet, the Act has not been interpreted as if it were primarily a criminal statute; courts have instead "construed it to have a generality and adaptability comparable to that found to be desirable in constitutional provisions." 10/ It would offend the notion of fundamental fairness to bring the weight of the government's criminal enforcement powers to bear against conduct, the legality of which could be determined only after the fact. Even after months of sophisticated economic analysis, it is often impossible to provide a definitive, completely accurate calculation of the net competitive effect of particular conduct that does not meet the criteria I have described. To brand an individual a felon and deprive him of his liberty under such circumstances would be truly Kafka-esque.

Even leaving aside arguably subjective considerations of "fairness," there are strong economic reasons for antitrust

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10/ United States v. United States Gypsum, Co., 438 U.S. 422, 439 (1978) (quoting Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933)).

prosecutors to refrain from attacking classes of commercial conduct that do not amount to naked horizontal cartel restraints. The absence of such a responsible enforcement policy would raise the legal cost associated with engaging in innovative business practices and so would chill at least some legitimate, efficient business practices. If private parties cannot tell with any degree of certainty at the time their conduct is undertaken whether it is anticompetitive or procompetitive and if they face stiff penalties if the conduct subsequently proves to be anticompetitive on balance, they may avoid the conduct altogether. This chilling effect is further increased if the analysis results not infrequently in the condemnation of conduct that in fact is not, on balance, anticompetitive.

The requirement of general intent is by itself not enough to alleviate the threat of such jury inaccuracies. Often, it will be difficult to determine whether the defendants knew or cared why a particular agreement would increase their profits. However, a simple hope that an agreement will be profitable and perhaps a careless articulation of that hope might be enough to establish intent in the eyes of a jury. Yet if the conduct increased the defendants' profits because it increased economic efficiency and competition, then they should be praised, not thrown in jail.

Moreover, if the conduct is of a type that is open and "above board" and has the potential for generating significant procompetitive benefits, criminal sanctions are simply unnecessary. Enforcement agencies -- or private plaintiffs for that matter -- can analyze such conduct and enjoin it when it is on balance anticompetitive. Private parties who are injured can obtain civil damages. There is nothing to suggest that civil sanctions are inadequate to deal with commercial conduct that falls outside the four criteria I have discussed.

At a time when we are experiencing a dramatic and I believe appropriate increase in the penalties meted out to antitrust felons, it is essential that we make clear that criminal penalties will not be imposed on conduct with an ambiguous effect on competition. The four criteria that characterize the Division's criminal cases and that I have described today should alleviate any concern that our indictments will deter any non-anticompetitive conduct. Let me stress, however, that those criteria are not <u>legal</u> constraints on the cases we criminally prosecute -- that is, a fact that we might take into account in deciding not to prosecute is not necessarily a fact that would constitute a legal defense, entitling the defendant to introduce evidence and obtain a jury instruction. However, this reality makes it even more essential that we exercise our prosecutorial discretion responsibly and consistently. An adventuresome criminal

enforcement program that failed to give deference to the criteria that have traditionally been present in our cases would harm rather than protect consumer welfare. Moreover, such a program would quickly erode the public support for vigorous criminal prosecution of truly naked cartel restraints.

Conclusion

In short, the Division today is tougher than ever on true antitrust crime. And antitrust felons have very good reason to worry. We are relentlessly pouring our resources into rooting out and destroying naked cartel practices. But in our zeal to investigate new industries and areas of the country, we have exercised our powers responsibly, indicting only those classes of conspiracies that represent an unambiguous threat to consumers. If and when such conspiracies come into our sights, we will pull the trigger, and, given the improvement in our marksmanship over the last seven years, you can count on us hitting our target. Meanwhile, innocent bystanders are safe!

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