Department of Justice

FOR RELEASE UPON DELIVERY
SATURDAY, APRIL 22, 1978
9:30 A.M. (EST)

CURRENT TRENDS IN ANTITRUST ENFORCEMENT:

A PROSECUTOR'S PERSPECTIVE

Remarks By

WILLIAM E. SWOPE
Director of Operations
Antitrust Division

1978 Southeastern Corporate Law Institute

Grand Hotel
Point Clear, Alabama
April 22, 1978

I am pleased to be at Point Clear today and to have the opportunity to talk with you about the Antitrust Division and some aspects of our enforcement program. I will try to be brief, since I suspect that your interest in such a discussion faces considerable competition from our beautiful surroundings. Indeed, I am somewhat surprised to see anyone attending the seminar this morning. I can only assume that all the early starting times were taken.

The Antitrust Division's mandate is really quite simple--to make competition work. In the not too distant past, this mandate was fulfilled almost exclusively by conducting investigations and prosecuting violations. Today we play a much broader role. In addition to pursuing an active enforcement program, we serve as an advocate for competition policy before regulatory agencies, within the administration, and before the Congress. All this involves the commitment of substantial resources. For example, in 1977 we were involved in nearly 400 regulatory agency matters--filing comments, appearing at hearings, and preparing reports. On the legislative front, we prepared over 250 reports and testimony concerning proposed legislation. All this is in addition to over 600 investigations pending and some 140 civil and criminal cases in litigation.

As our role has expanded, so have our resources. In 1970, the Division's budget was less than $10 million. Today it

is over $30 million. Our total staff has increased from about 600 persons a few years ago to over 900 today.

Although there are a great many interesting things going on in the Division, today I would like to focus on the Division's traditional enforcement activities. The Division is, first and foremost, a law enforcement agency, and this is the aspect of the Division's program with which I am the most familiar.

Undoubtedly the most visible and, in some circles at least, the most controversial aspect of our enforcement program is the emphasis being placed on criminal enforcement. I must say that we are delighted that people are finally becoming aware of the fact price fixing is a serious crime and that we are serious about prosecuting violators.

My impression is that, prior to 1975, price fixing was considered to be a minor transgression. The odds were against being caught, and, even if an individual were prosecuted, the chances of receiving a jail sentence were slight. Two events have significantly changed the name of the game.

As you know, in December 1974, Congress made Sherman Act violations a felony and substantially increased the maximum penalties. This was coupled with greater emphasis being placed on criminal investigations and prosecutions by the Division. The results have been somewhat startling.

First, the risk of being prosecuted has substantially increased. In the late Sixties and early Seventies, on the average only 30 individuals were indicted each year. Today, the average is closer to 100 and the trend is upward. Secondly, the risk of significant sentences has also dramatically increased, particularly since the sentencing in the Folding Carton case in November 1976.

Between December 1974 and November 1976, 98 individuals were sentenced for misdemeanor violations. Of these, only 7, or just over 7 percent, received jail sentences and their total sentences averaged just under 41 days each. By comparison, in misdemeanor sentencing since November 1976, there have been 76 individuals sentenced, of whom 17 have been sentenced to serve actual jail time. Thus, nearly 25 percent of the individual defendants actually went to jail, a three-fold increase over the period immediately prior to November 1976. Also, the total time to be served by these individuals averaged just over 71 days, a significant increase in comparison with the 41 days averaged in the preceding period.

While we have had so far only limited experience with felony cases, the indications are that there are going to be dramatic increases in sentences under the felony statute.

Since December 1974, 294 corporate defendants have been sentenced in misdemeanor cases and they have received an average fine of about $23,000. By comparison, 41 corporate defendants have been sentenced in felony cases to date with fines averaging about $135,000, a six-fold increase. As far as individuals go, the numbers are even more dramatic. Twenty-one individual defendants have been sentenced in felony cases so far, and 15, almost 75 percent, have received jail time. By comparison, you will recall that in the period preceding November 1976, only seven percent of the individuals convicted of misdemeanor violations were sentenced to jail. Jail sentences under the felony statute have averaged 186 days each.

Because of a desire to achieve consistency in our approach to sentencing, the Antitrust Division has adopted internal guidelines for sentencing recommendations in felony cases. These guidelines provide for a base sentence of 18 months and set out certain aggravating and mitigating factors to be taken into consideration. As many of you probably know, under current parole provisions an 18 month sentence would most often lead to actual time served of just under six months.

The aggravating factors that we consider in determining a sentencing recommendation include: (1) the amount of commerce

involved; (2) the position of the individual; (3) the existence and degree of predatory conduct; (4) the length of participation in the violation; and (5) previous antitrust convictions, if any. As mitigating factors, we consider cooperation with the government and any severe personal, family, or business hardship. These internal guidelines are designed to insure that our sentencing recommendations are, to the maximum extent possible, reasoned and consistent.

Our push for tougher sentences is not, despite what some may believe, a manifestation of sadistic tendencies. Rather, it is a reflection of our belief that significant jail sentences act as a genuine deterrent to the types of individuals who are tempted to engage in criminal antitrust violations. While little sociological work has been done in this area, the evidence that we do have indicates that prison is particularly effective as a deterrent of antitrust violations.

There are a variety of implications for the antitrust practitioner that flow from our emphasis on criminal investigations and prosecutions and from the fact that the stakes have been raised. For example, it was common in years past for potential corporate defendants and their employees to be represented

by the same counsel. This has always carried with it the potential for conflicts of interest, but the potential is more pronounced today.

Like all prosecutors, we prefer to provide grants of immunity sparingly. When dealing with individuals who are subjects of an investigation, we are as a general rule insisting that a prospective witness offer some assurance that he or she possesses and is willing to provide useful information as a condition precedent to being called before the grand jury and granted immunity. In this regard, increasing reliance is being placed on the use of pre-testimony interviews or some other form of disclosure in order to assess the value of an individual's testimony and the appropriateness of granting immunity. What this means is that a potential defendant's willingness to cooperate is being given increased weight relative to his culpability in deciding whether a grant of immunity would be in the public interest.

The sentencing guidelines also emphasize the importance of cooperation. During the investigative stage, cooperation may lead to immunity; after indictment, cooperation is an important mitigating factor considered in sentencing. In short, the possiblity of cooperation should be seriously considered by

the corporate employee who has been implicated in an antitrust violation. On the other hand, other potential individual or corporate defendants may very well believe it to be in their best interest to keep the facts from seeing the light of day. In such circumstances, it is difficult for me to see how a single lawyer can represent multiple potential defendants and provide each of his clients effective legal representation.

Our practice of seeking a proffer of testimony has recently been subjected to criticism as being somehow unfair, primarily because of a perceived danger that the procedure may encourage and stimulate slanted testimony. The theory is that an individual may seek to bargain for immunity by falsely implicating others. Our experience with grants of immunity does not support this fear. Moreover, it is difficult to see where this fear takes us. The problem of perjured testimony is by no means limited to witnesses who have received immunity, and trial lawyers have over the years developed techniques for testing the credibility of such witnesses. In the case of a witness who has been immunized, the fact of the immunity grant is known to the defense counsel and can be the subject of searching cross-examination.

Because of our obligation to insure the integrity of our prosecutions, we have a paramount interest in assuring that our witnesses are credible and that their testimony is free from perjury.

Before leaving the subject of witness cooperation, I would like to spend a moment on the subject of corporate cooperation. Recently, we have had the experience of corporate counsel disclosing price fixing conspiracies about which the Division was completely unaware. They were, of course, interested in exploring the possibility that such cooperation would lead to the client enjoying the status of an unindicted co-conspirator. Since the clients were publicly held corporations, I suspect that counsel was also concerned with the problems that might arise from failing to disclose a material fact--the price fixing violation--in required SEC reports.

While no advance commitments can be made, cooperation of this type will be taken into consideration both during the defendant selection process and at the time the Division formulates its sentencing recommendations. Whether the cooperating company would escape indictment would depend on a number of factors, including our assessment of the company's role in the illegal activity. Of course, cooperation will always be a significant factor at the sentencing stage.

One interesting by-product of the change of the Sherman Act to a felony has been the repeated challenges by felony defendants to the constitutionality of the Act. Their argument has been that the Sherman Act is unconstitutionally vague and that it violates the due process clause of the Fifth Amendment by imposing felony penalties without requiring that specific intent be an element of the offense. While these challenges have not been successful, they represent yet another manifestation of one of the popular criticisms of the antitrust laws--that the Sherman Act's broad proscriptions theoretically could produce a situation where an individual is found guilty of a crime based on conduct which he could not reasonably have known was forbidden.

The fact is that while the Sherman Act is broadly drafted, it has historically been treated as two separate statutes. One, a criminal statute, that deals with hard-core, per se antitrust violations such as price fixing, market allocations and boycotts. The second statute, the civil statute, is admittedly notable for its great breadth and flexibility in responding to competitive problems.

In making prosecution decisions, we have, as a matter of consistent practice since World War II, proceeded criminally only in two types of cases: cases involving per se antitrust

violations and cases where there is evidence that the defendants willfully violated the antitrust laws--where the defendants either knew they were violating the law or acted with flagrant disregard for the legality of their conduct. Even when dealing with per se violations, we have decided not to proceed criminally, particularly against individuals, when the evidence clearly demonstrated that the potential defendants did not appreciate the illegality of their actions.

One final point on criminal prosecutions. When Sherman Act violations became felonies, many predicted that the Division's conviction rate would fall significantly. It was believed that more cases would go to trial and that Division attorneys would fare poorly when matched against more experienced members of the private bar. To date, I'm happy to report that such fears have proven to be unfounded. So far, we have won every felony case that we have investigated and prosecuted to a jury verdict. Also, despite the increased penalties, 24 companies and 15 individuals have plead nolo contendere to felony charges. Of the 12 felony cases disposed of to date, seven have been disposed of entirely on nolo pleas.

In the future, you can expect to see continued emphasis placed on criminal prosecutions. Also, you can expect to see

more states and U.S. Attorneys enter the fray. One change John Shenefield has made in our price fixing program is to ask States and the U.S. Attorneys to help the Division by investigating and prosecuting localized matters where the violations are fairly clear-cut and do not require the expenditure of substantial resources. Hopefully, this will result in the attack on price-fixing going forward on an even wider front and permit the Division to concentrate on the more difficult cases.

Another high priority in the Antitrust Division at the present time is the so-called shared monopoly problem. In industries dominated by a few firms, it is possible to conclude that there is too much good fellowship and too little competition. Greater concern seems to be paid to the interests of the group rather than to the interests of the individual firms. In short, such industries appear to be achieving the same results one would expect in the case of a single firm monopoly, such as maintaining prices at high levels or excluding new entrants. These are not the inevitable results of a complex economy.

One area of concentrated industry behavior of particular concern is public signaling of pricing decisions or other

competitive moves. The classic price-fixing conspiracy generally involves clandestine meetings, follow-up communications, and elaborate machinery for ensuring group solidarity. In groups of often-contentious small businessmen this machinery may be necessary; it may not be necessary in a mature concentrated industry. One reads the business or trade press and is hard-pressed to escape the conclusion that some of the statements attributed to large firms or their spokesmen are meant not for the public or for their customers but for the competition.

In a variety of ways, notably through standardization of price lists and the like, the orchestration of an industry's price and production behavior can be accomplished. Public dissemination of elaborate pricing catalogues, public assurances that list prices are being adhered to, and complex price protection clauses that impose severe penalties for charging an off-list price can contribute to making an industry noncompetitive. And through publicly-exchanged statements it sometimes looks as though members of a concentrated industry are dickering over who's going to go up in price next, when and by how much. When we conclude that the net result of such public exchanges of information is an agreement among competitors, we will file suit.

I would like to turn now to an area of antitrust enforcement that will be undergoing significant change in the immediate future. I am referring to our merger enforcement activity under the Clayton Act. As I am sure many of you are aware, the Antitrust Improvements Act of 1976 contained a pre-merger notification requirement and provided that the FTC and the Antitrust Division were to establish regulations implementing this notification requirement. These regulations are currently being cleared by the General Accounting Office, and they should be issued in late May or early June.

The rules of pre-merger notification are fairly complex because of the immense variety of ways in which corporate consolidations occur. I cannot begin to describe to you all of the details of these regulations, but I can provide a brief overview of the regulations and the circumstances that will require you to file a pre-merger notice form.

The regulations will require notification to the Federal Trade Commission and the Antitrust Division of acquisitions if one of the parties has more than $100 million in sales or assets and the other has more than $10 million in sales or assets. For most purposes, an acquisition is deemed to occur if the acquiring party ends up with more than 15 percent or $15 million worth of the voting securites or assets of the acquired party.

A number of exemptions from pre-merger notification are created by the statute and the regulations, including exemptions for

-- acquisitions of goods or realty transferred in the ordinary course of business;
-- acquisitions of non-voting debt securities or convertible securities, until converted to voting stock;
-- transfers specifically exempted from antitrust scrutiny, as in some regulated industries;
-- acquisitions strictly for investment so long as no more than 10 percent of the voting securities of the issuer are acquired; and
-- non-corporate joint ventures.

If you do have to file, a form will be provided and you simply fill in the blanks. These forms are intended to elicit the kinds of information you would normally have available in the ordinary course of business.

With one exception, transactions subject to pre-merger notification cannot be consummated until 30 days after filing with the FTC and the Antitrust Division. The exception is for cash tender offers, where the waiting period is only 15 days. If the FTC or the Antitrust Division believe more information

is needed, a request for additional data can be made. That will further delay the consummation for the time needed to provide the information plus 20 days for the government to evaluate it. In cash tender offers, the additional delay is limited to 10 days.

Personally, I do not believe that the notification procedures will have any significant impact on the number of cases filed. Nor do I believe that any undue burden will be placed on those who must file. Today, all significant mergers are investigated by either the Federal Trade Commission or the Division, and such investigations invariably lead to requests for the type of information called for in the pre-merger notification forms. What will happen is that the enforcement agencies will have the necessary information available at an early stage and mergers cannot be consummated before we have an opportunity to evaluate them and make a determination as to whether a challenge is appropriate.

In recent years, the Division has filed relatively few Section 7 cases, and most of those filed involved challenges to horizontal mergers. To some persons this has suggested that the Division is not as concerned about mergers as it was in the

past, and they apparently believe that now is the time to try to slip one by. I can assure you that nothing could be further from the truth.

Merger enforcement is wholly reactive. In recent years merger activity has been at a low level and the vast majority of the mergers proposed have not been of the type likely to raise antitrust concerns.

There is some indication that we are entering a period of increased merger activity, and if this trend continues there will be a concomitant increase in our enforcement activity. With some confidence, I can predict that any significant horizontal merger will be challenged. I can also assure you that justifications based on poor financial condition, operational difficulties or the like will continue to be viewed with great skepticism.

In the late 1960's, there was a great deal of concern over aggregate concentration--the phenomenon of fewer and fewer companies controlling more and more of our nation's economy. However well founded such concerns may be today, I doubt that we will see an antitrust challenge based solely on the effect a particular merger will have on concentration in the economy as a whole. John Shenefield has indicated his belief that the

antitrust laws as presently written do not proscribe a merger based on size alone. This should not be taken to mean that concentration is not a matter of concern. Rather, it is likely that challenges to conglomerate mergers--those where there is no existing horizontal or vertical relationship--will be based on more traditional theories such as potential competition, entrenchment, or other anticompetitive effects.

Finally, a few words about the big case. Realistically, we must accept the fact that the prosecution of major antitrust cases, particularly monopoly cases, is going to be a time consuming process. The big case is big because it involves difficult legal issues and contested factual conclusions in the context of complex industry structures. The fact that it takes some time to resolve such cases should not be taken to mean a failure of the judicial process. I believe that most would agree that the successful litigation to break up the Standard Oil Trust had significant and long-term procompetitive consequences for the economy. What most people do not appreciate is that the case took nearly five years to litigate.

This is not to say that such cases need take so long. For our part, the Division must learn to resist the natural fear of leaving something out and instead draw our pleadings,

discovery requests, and witness lists as narrowly as possible. We must be willing to take responsible litigation risks to streamline and expedite the big case. In addition, procedural reforms may be desirable.

The big case and its problems are being studied by various groups. Indeed, the Presidental Commission for the Review of Antitrust Laws and Procedures, recently established by President Carter, has as one of its primary responsibilities the duty to recommend procedural and substantive revisions in the present system designed to insure that antitrust cases can be more effectively and efficiently brought to a just conclusion.

My remarks this morning have lightly touched upon a range of topics, and I hope they have given you some feel for where the Division's enforcement efforts are headed.

END