

CARTEL INVESTIGATION IN THE U.S.A

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I. Introduction

A cartel is an arrangement among supposedly legal corporations or national monopolies in the same industrial or resource development field organized to control distribution, to set prices, to reduce competition, and sometimes to share technical expertise.

¹ When the agreement is among competitors, the conduct is classified as horizontal. ² The reason for a cartel to exist is, ultimately, to increase the joint-profits of its members to a level as close as possible to that of a monopolist. ³ Hard-core cartels may agree to raise their list prices, to lower total production, or both; they may also reinforce this basic decision by fixing market shares for each member, allocating specific customers, imposing uniform selling conditions, and other illegal activities. ⁴ Effective cartels cause unrecoverable losses in production and consumption, and transfer income from customers to the stakeholders of cartel members. ⁵

The period after 1865 set the stage for the adoption of the Sherman Act in 1890. Public antagonism towards corporate trusts and pooling arrangements, which permitted competitors to form combinations, to set prices, and divide markets, grew during this period. ⁶ The first cartel case that the Supreme Court considered under the Act was in 1897. ⁷ The cartel was created by eighteen railroads, which provided rail service west of the Mississippi River. Their association set freight schedules and rates for all railroads. ⁸ The Supreme Court held that the necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it. ⁹

Section 1 of the 1890 Sherman Act ¹⁰ provides that “Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade...is hereby declared illegal. Every person who shall make any contract or engage in any combination or conspiracy

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¹ See <http://legal-dictionary.thefreedictionary.com/cartel>

² Sullivan, E. Thomas and Hovenkamp, Herbert. Antitrust Law, Policy and Procedure: Cases, Materials, Problems. Lexis Nexis: New Jersey, 5th ed., 2003, 187.

³ Connor, John M. (1996). “Global Cartels Redux: The Amino Acid Lysine Antitrust Litigation.” In John E. Kwoka, Jr. & Lawrence J. White (Eds.). *The Antitrust Revolution: Economics, Competition, and Policy*, New York: Oxford University Press, 4th ed., 2004, p. 256.

⁴ Id.

⁵ Id. at 257.

⁶ Sullivan and Hovenkamp, note 2 supra, at 26.

⁷ *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290 (1897)

⁸ Id. The Department of Justice (DOJ) charged that the cartel was a restraint of trade in violation of section 1 of the Sherman Act. The Court interpreted section 1 literally as condemning “every” restraint without exception as unlawful.

⁹ Id.

¹⁰ 15 U.S.C. § 1-7

hereby declared to be illegal shall be deemed guilty of a felony.”¹¹ An explicit agreement to fix prices is a “conspiracy in restraint of trade,” irrespective of the agreement’s actual impact on market prices or output.¹² This section attacks trusts by proscribing combinations in restraint of trade - what we call cartelization - agreement(s) among competitors formed with the intent or that have the necessary tendency to restrict the output of the cartel members.¹³

Section 2 of the Sherman Act condemns not only monopolization and attempts to monopolize, but also “every person who shall...combine or conspire with any other person or persons, to monopolize...” There seems to be little separate case law on the offense of conspiracy to monopolize, because any imaginable multi-party “conspiracy” to monopolize would also constitute a combination in restraint of trade under section 1, where the burden of proof is generally lighter.¹⁴

Under section 1 of the Sherman Act, if the alleged illegal conduct is likely to have no beneficial effect and if it significantly impairs competition, it is classified as “per se” illegal. From an evidentiary standpoint, the inquiry is over once the Court has determined that the conduct is, by its nature, anticompetitive. The per se analysis is a conclusive presumption of illegality. However, early in the Sherman Act’s history, the Supreme Court recognized that if the Act’s language was interpreted literally, then all contracts could be considered illegal, so the Supreme Court held that only “unreasonable restraints” are illegal.¹⁵ While certain acts, such as horizontal price-fixing, allocation of markets, and group boycotts are so clearly anticompetitive that they are considered per se illegal, other behavior is treated under a “rule of reason” analysis - an interpretation under which agreements are illegal if they unreasonably restrain or suppress competition. The former violations are customarily treated as criminal matters, the latter as civil ones. More than 90% of all cartels are indicted criminally.

Antitrust laws extend to every type of industry, and can apply at every level of market structure. Collusion has been seen in industries concerning vitamins, chemicals, bread, graphite electrodes, automotive paint suppliers, construction, synthetic rubber, and concrete to name but a few. Most of the cartels that were detected involved price-fixing. Other types of cartels detected were bid rigging¹⁶ and market allocation.¹⁷ Estimates vary but even the most optimistic estimates suggest that less than one-third of the operating cartels are detected and prosecuted.

¹¹ 15 U.S.C. § 2

¹² Connor, John M. “Global Cartels Redux”, at 257.

¹³ Clark, Nolan Ezra. “Antitrust Comes Full Circle: The Return to the Cartelization Standard”, 38 Vand. L. Rev. 1125, 1131.

¹⁴ The other relevant provisions that are applicable antitrust laws are section 2, 3, 7, and 8 of the Clayton Act and section 5 of the Federal Trade Commission Act.

¹⁵ See *Standard Oil Co. v. United States*, 221 U.S. 1 (1911)

¹⁶ Bid rigging is agreement in which one party of a group of bidders will be designated to win the bid. For example, NYC food distribution companies were found to be rigging bids of frozen food contracts awarded by the New York City Board of Education (NYCBOE) and were fined \$126 million in 2001.

¹⁷ In the Lysine and Citric acid case, executives from Archer Daniels Midland were found guilty for their roles in a conspiracy to allocate sales in the lysine market worldwide and to fix prices.

This paper begins by describing investigatory procedures in civil and criminal proceedings in the U.S. It next describes how cartels are detected and how the Department of Justice (DOJ) leniency program operates. Finally, it provides three case studies of cartel prosecution (the lysine cartel, the vitamins cartel, and the NASDAQ market-makers cartel), showing the relationship between private and public antitrust enforcement actions.

II. Investigation Procedure

The Antitrust Division of the Department of Justice (DOJ), together with the United States Attorney's office, is delegated the authority to enforce the criminal provisions of the federal antitrust laws. Both the DOJ and the Federal Trade Commission can enforce the federal antitrust laws through civil means. We will focus on the DOJ which brings almost all cartel cases in the federal courts. The FTC operates primarily through an administrative process.¹⁸

a. Civil Action

In investigating a civil charge, the DOJ may discover and examine records of a business under investigation by issuing a civil investigative demand (CID) before a formal complaint has been filed.¹⁹ The enforcement of a CID is analogous to that of a subpoena *duces tecum*²⁰ issued by a grand jury. Its scope is similar to that permitted under the Federal Rules of Civil Procedure. It is a procedural device that allows the DOJ to obtain information needed to pursue possible antitrust violations.²¹ A CID enforcement suit must be brought in the federal district court where the target company is found or transacts business.²²

After the civil suit has been filed, the Department can use the Federal Rules of Civil Procedure to acquire discoverable material. The civil action can be initiated for either injunctive relief under section 4 of the Sherman Act and section 15 of the Clayton Act, or damages under section 4A of the Clayton Act if the U.S. government itself was injured by the violation.²³ Injunctions sought by government enforcement action generally focus on restraining anticompetitive conduct or behavior. If the Department files a civil suit to recover damages, it is entitled to claim the same as that allowable to private parties when injured by reason of a price-fixing scheme.²⁴

¹⁸ See *Alza Corp. v. Mylan Labs, Inc.*, 310 F. Supp. 2d 610 (D. Vt. 2004)

¹⁹ Sullivan and Hovenkamp, at 65.

²⁰ A command to a witness to produce documents.

²¹ Rosenthal, Edward H., "Government Use of the Civil Investigative Demand to Obtain Materials Discovered in Private Antitrust Litigation", *Columbia Law Review*, Vol. 79, No. 4 (May, 1979), pp. 804-815.

²² *Id.* at 66.

²³ *Id.*: If the Department files a civil suit to recover damages, it is entitled to claim the same as that allowable to private parties when injured by reason of a price-fixing scheme.

²⁴ *Id.*

Under section 4B of the Clayton Act, the statute of limitation for a civil antitrust action for damage is four years from the time the claim for relief accrues. Since suits for injunctive relief are equitable in nature, no statute of limitation governs the commencement of that suit.²⁵

b. Criminal Procedure

Although the DOJ has various initial investigative tools which it uses,²⁶ if the conduct investigated by the DOJ appears to involve price-fixing or bid-rigging, then it will recommend a federal grand jury investigation to further investigate allegations of criminal antitrust violations.

The grand jury is a group of 16-23 individuals who listen to a hearing of the case from the point of view of the government. There is no presence of counsel for the accused or witnesses. There were approximately 56 sitting grand juries, around the U.S., investigating suspected international cartel activity as of the end of 2005.

The grand jury investigation will begin by the DOJ issuing subpoenas for documents in the name of the grand jury. This will most likely be the first time the defendant will hear about inquiries by the DOJ.

Having received the subpoenaed documents, the government will start the process of oral testimony and call witnesses before the grand jury. The documents obtained may be used in examining these witnesses.

On the completion of the hearings, the DOJ will prepare a draft indictment and a detailed fact memorandum that will be sent to the Assistant Attorney General for Antitrust. Defense counsel, who was not present at the grand jury hearing, may offer additional facts or arguments. The Assistant Attorney General will decide whether or not to indict certain individuals, or organizations, often after lengthy plea bargaining.

At the criminal trial, in a U.S. District Court, the government is required to prove beyond a reasonable doubt that the defendants have committed the acts charged in the indictment. There is also an appeal procedure available for defendants. However, the Court of Appeals does not sit for the purpose of reviewing the evidence in a jury case, as long as there was some evidence at trial that supports the verdict. Further appeal to the U.S. Supreme Court is theoretically possible but the Supreme Court rarely chooses to hear criminal antitrust appeals.

c. Enforcement Tools and Penalties

²⁵ Id.

²⁶ Through: 1) the voluntary cooperation of the target, 2) by exploiting the investigative powers of the Federal Trade Commission, 3) by initiating a suit with a “skeleton” complaint in order to invoke the discovery provisions of the Federal Rules of Civil Procedure, 4) civil investigative demand (CID)

Investigative procedures would not be as effective without enforcement tools to accompany them. The resources dedicated to detection and prosecution have become much more widespread and effective in recent years.

Antitrust enforcers, within the U.S. and internationally, are sharing information and learning investigative techniques from each other. The European Commission's use in cartel investigations of surprise early morning investigations, known as "dawn raids", has contributed to the increased use of search warrants in antitrust investigations in the U.S. Search warrants have been successful in obtaining records at the homes of persons participating in cartel activity.²⁷ Unlike a subpoena, a search warrant typically does not provide the recipient with advance notice. It gives the law enforcement officers the benefit of surprise and consequently creates a much more volatile situation. In addition to search warrants issued by a court, several administrative agencies have the power to inspect the records of government contractors or participants in government programs

A new tool that prosecutors in the U.S. are increasingly using is requiring corporations to waive attorney-client and work product protections as a condition for more lenient treatment.²⁸ The DOJ's leniency program is discussed elsewhere in this paper.

The Antitrust Procedures and Penalties Act of 1974 had a maximum fine of \$1 million for corporations and \$100,000 for others. In 1984, the Criminal Fine Enforcement Act increased penalties for antitrust violations and other federal crimes to \$250,000 for individuals. The Sentencing Reform Act of 1984 established sentencing guidelines for federal judges and allowed for fines of up to twice the gross pecuniary gain of the defendant or twice the loss of the victim. The increased sentences will bring antitrust prison sentences in line with those for other white-collar crimes and ensure that corporate fines accurately reflect the enormous harm inflicted by cartels on the economy.²⁹

²⁷A search warrant is an order issued by a judge, authorizing a law enforcement officer to search for and seize any property that constitutes evidence of the commission of a crime, property used as the means of committing a crime, contraband, etc. A subpoena is an order directing a person to appear and to testify at a given time and place. A subpoena duces tecum requires you to bring certain documents and things with you. Subpoenas may be issued by a court, by a grand jury, by a lawyer representing a party in a civil or criminal case, or by government agencies.

²⁸Larry D. Thompson, Deputy Attorney General U.S. Dept. of Justice, *Principles of Federal Prosecution of Business Organizations*, Section VI, January 20, 2003, available at http://www.usdoj.gov/dag/efc/corporate_guidelines.htm#back_3. He states that "one factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel."

²⁹Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice, *An Update of the Antitrust Division's Criminal Enforcement Program*, November 16, 2005, available at <http://www.usdoj.gov/atr/public/speeches/213247.htm>. See Connor, John and Helmers, C. Gustav. "Statistics On Modern Private International Cartels, 1990-2005", The American Antitrust Institute AAI Working Paper No. 07-01, available at <http://www.antitrustinstitute.org/recent2/567.pdf>. In 2005, aggregate cartel sales and overcharges totaled about \$1.2 trillion and \$300 billion, respectively.

The DOJ has other wide-ranging investigative tools. The DOJ can make use of informants, consensual monitoring/wiretap authority, and hidden microphones and video cameras. The DOJ adopted a policy in 2001 of placing indicted fugitives on a “Red Notice” list maintained by INTERPOL. This is essentially an international “wanted” notice that, in many INTERPOL member nations, serves as a request that the subject be arrested, with a view toward extradition. Multiple fugitive defendants have already been apprehended through a Division INTERPOL red notice,³⁰ and the DOJ will also seek to extradite international fugitives to the U.S. to stand trial for antitrust crimes and related offenses.³¹

The Federal Bureau of Investigation, a separate division of the DOJ, played a major role in breaking up the Lysine cartel. After the *Lysine* cartel investigation, the FBI leadership declared that antitrust crimes were one of the top priorities of its white-collar crime program and then backed it up by dedicating unprecedented resources to investigating antitrust crimes. Today, FBI agents are assigned to all of the Division’s ongoing international cartel investigations.³²

Additionally, when no incriminating documents are uncovered by investigators- a frequent event as increased deterrence will cause cartels to become more sophisticated- individual admissions are needed to prove existence of cartels. The ability to compel testimony under oath and under penalty of perjury is an invaluable tool. Another incentive to plead guilty is the DOJ’s ability to arrange for the restoration of rights to travel across U.S. borders, a right normally lost by felons. This explains success in convicting foreign executives guilty of cartel offenses. Thus, the DOJ trains investigative personnel in interviewing to obtain sworn witness statements.³³

III. Identifying Cartels

A DOJ investigation is typically generated by either a private complaint, a revelation in the media, or by an informant seeking protection under the leniency program.

Antitrust prosecutions today receive far more media coverage than in the past. News coverage of antitrust crimes has become almost sensational.³⁴ The increased news coverage and its resultant damage to a company’s reputation and perhaps to its decrease in stock value as well, seem to have led to other companies coming forward to disclose conspiracies. In addition to cooperating with the DOJ, a number of companies have issued press releases announcing their cooperation.

³⁰ *Id.*

³¹ *Id.*

³² Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice, *From Hollywood to Hong Kong-Criminal Antitrust Enforcement is Coming to a City Near You*, November 9, 2001, available at <http://www.usdoj.gov/atr/public/speeches/9891.htm>

³³ ³³ Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice, *Ten Strategies for Winning the Fight Against Hardcore Cartels*, October 18, 2005, available at <http://usdoj.gov/atr/public/speeches/212270.htm>.

³⁴ Scott D. Hammond, *From Hollywood to Hong Kong-Criminal Antitrust Enforcement is Coming to a City Near You*, note supra 31.

In addition to large fines and possible imprisonment, cartel participants may be subject to treble damage actions in the U.S by private actions. Section 4 of the Clayton Act provides that any person, whether an individual, business entity, or government, who has been injured in its “business or property” by reason of an antitrust violation may sue to recover treble damages, costs of that suit, and attorney’s fees.³⁵ While it is more typical for private actions to be filed after the government wins (and in many cases simply after it files a complaint), there are also instances of cartel cases being prosecuted privately or by various States before the federal government gets involved, or even without the government ever getting involved. About one-third of all major private cartel suits are not follow-on suits.

Once a governmental investigation begins, the DOJ has certain “red flags” that it will look for to decide whether the industry being investigated is involved in an illegal cartel. It will look to see if there are sharp price increases (particularly after low prices) or stable prices in a slumping industry; parallel prices; concentrated sellers (10 or less) or an industry association; high barriers to entry³⁶; joint sales agencies or inter-company sales (information sharing); homogenous products/commodities³⁷; relatively sophisticated intermediate goods and services (chemicals, pharmaceuticals, plastics); relatively predictable and stable market (moderate growth) and market participants; social or cultural cohesiveness. Cartels will increase capacity because it seeks to protect itself, and as a result large customers and small customers will be vulnerable.

IV. Leniency Program

The U.S. DOJ’s Conditional Leniency Policy was originally adopted in 1978. It was revised and became dramatically more effective in 1993.³⁸ From 1993 to 2004 the DOJ would automatically grant 100% fine discounts and immunize all corporate officers for the first qualifying leniency applicants; second applicants could receive substantial discounts of 70% to 80%. In the late 1990s, the DOJ was receiving about 25 amnesty applications per year. Efforts undertaken by the U.S. DOJ to publicize that policy significantly contributed to the increased prosecution of corporations and responsible managers. The incentives for companies engaged in an illegal cartel to come forward and blow the whistle are now a major factor threatening existing conspiracies. The rewards for amnesty applicants to cooperate with the government and private parties increased in 2004. They now include damages in civil cases being de-trebled, and joint and several liability eliminated. These provisions are subject to a sunset provision which will require their review by 2009.

Admission to the Leniency Program requires that applicants meet basic criteria, such as taking “prompt and effective action to terminate its part in the activity,” “reporting the

³⁵ 15 U.S.C. § 15.

³⁶ In the *Vitamins* cartel, entry was slow and impeded by sunk costs and excess capacity.

³⁷ In the vitamins industry, it is clear that for a given grade of bulk vitamin there is little or no differentiation across producers. Vitamins are widely viewed as “commodities,” that is, products so homogeneous that delivered price net of discounts is the only factor driving buyers’ decisions.

³⁸ Department of Justice Corporate Leniency Policy (August 10, 1993), available at <http://www.usdoj.gov/atr/public/guidelines/lencorp.htm>

wrongdoing with candor and completeness and providing full, continuing and complete cooperation to the Division throughout the investigation.” Additionally, it provides for automatic leniency if there is no pre-existing investigation³⁹, and leniency may still be available even if cooperation begins after an investigation is underway.⁴⁰ If a corporation qualifies for automatic amnesty, all officers, directors, and employees who cooperate are protected from criminal prosecution. To simply state it, if an investigation is not currently underway, the program generally allows the first corporation that comes forward to cooperate, along with its officers, directors, and employees, to avoid prosecution.

As mentioned above, the Corporate Leniency Program sets out condition for leniency for directors, officers and employees who come forward as part of a corporate confession. In addition, there is a specific Individual Leniency program, which allows for leniency for individuals who approach the DOJ on their own behalf and not as part of the corporation.⁴¹ Under the policy, the DOJ will agree not to prosecute individuals if they come forward before an investigation has begun if the following 3 conditions are met: i) when the individual comes to the DOJ, it has no prior information about the alleged activity, ii) the individual reports the illegal activity completely and honestly, and continues to cooperate with the DOJ throughout and investigation, and iii) the individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or the originator of, the activity.

There is another part to the Program that is titled Amnesty Plus. It sometimes occurs that a company operating in multiple lines of business finds that the cartel habit works in more than one line. Suppose a new investigation results after a company approaches the DOJ to negotiate a plea agreement in a current investigation and then seeks to obtain even more lenient treatment by offering to disclose the existence of a second, unrelated conspiracy. Under these circumstances, the company will receive amnesty, pays zero dollars in fines for its participation in the second offense, and none of its officers, directors, and employees who cooperate will be prosecuted criminally in connection with that offense.⁴²

³⁹ Conditions are: (i) DOJ is not already aware of cartel from another source; (ii) the corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity; (iii) the corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; (iv) the confession of wrongdoing is truly a corporate act; (v) where possible, the corporation makes restitution to injured parties; (vi) the corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or the originator of, the activity.

⁴⁰ If (i) corporation is first to come forward and qualify for leniency; (ii) DOJ does not yet have evidence that is likely to result in a sustainable conviction, (iii) company upon discovery of conduct “took prompt and effective action to terminate its part in the activity”; (iv) report with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; (v) confession truly a corporate act; (vi) Division determines that granting leniency would not be unfair to others. See Srivastava, Anita. “A Primer on US Criminal Antitrust”, July 2001, available at <http://www.antitrustinstitute.org/primer.cfm>

⁴¹ See <http://www.usdoj.gov/atr/public/guidelines/lenind.htm>.

⁴² Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice, *An Update of the Antitrust Division’s Criminal Enforcement Program*, November 16, 2005, available at <http://www.usdoj.gov/atr/public/speeches/213247.htm>

The corporate leniency program has been very successful. Under the old policy, the DOJ obtained roughly one amnesty application per year. Under the new policy, the application rate has jumped to roughly two per month.⁴³ Amnesty awards have been a part of several high-profile cases, including the Vitamins investigation for which the amnesty applicant received a fine reduction of almost \$200 million. Where single actors are involved in multiple violations, the opportunity to gain amnesty and leniency in one action by cooperating to disrupt another cartel further adds to the appeal of the program. Of the 56 grand juries in 2005 investigating international cartels, almost half began after evidence was uncovered in an investigation of a separate industry.⁴⁴

According to the Antitrust Division's chief criminal prosecutor, the following prerequisites appear to be essential cornerstones that must be in place before a jurisdiction can successfully implement a leniency program. The first is that the jurisdiction's antitrust laws must provide the threat of severe sanctions for those who participate in hardcore cartel activity and fail to self-report. The threat of criminal sanctions and individual jail sentences along with follow-up private actions for treble damages provides the foundation for an effective leniency program. Cartel activity will not be adequately deterred nor reported if the potential penalties are perceived by firms and their executives as outweighed by the potential rewards.⁴⁵ Second, organizations must perceive a high risk of detection by antitrust authorities if they do not self-report. If the firms perceive the risk of being caught by antitrust authorities as very small, then stiff maximum penalties will not be sufficient to deter cartel activity. Antitrust authorities must cultivate an environment in which business executives perceive a significant risk of detection by antitrust authorities if they either enter into, or continue to engage in, cartel activity.⁴⁶ The risk that other members of the cartel will go to the government first creates tension within a cartel and may lead to a race to the DOJ. Third, there must be transparency and predictability to the greatest extent possible throughout a jurisdiction's cartel enforcement program, so that companies can predict with a high degree of certainty how they will be treated if they seek leniency and what the consequences will be if they do not.⁴⁷

V. The Amino Acid Lysine Antitrust Litigation, 918 F. Supp. 1190

Complaint

There were five defendants companies that were involved in the illegal cartel; Archer-Daniels-Midland (ADM), Ajinomoto, Kyowa Hakko Kogyo, Sewon and Cheil

⁴³ Id.

⁴⁴ Balto, David and Carrol, George, "Top 10 Developments in Criminal Antitrust Enforcement in 2005", Robins, Kaplan, Miller & Ciresi L.L.P., May 2006, at 2.

⁴⁵ Hammond, *An Update of the Antitrust Division's Criminal Enforcement Program*.

⁴⁶ Id.

⁴⁷ Id.

Jedang. The Department of Justice was the plaintiff in the federal suits, but there were also many later private civil suits filed by buyers of lysine who were injured by the conspiracy's overcharges.

All of the five companies that were thought to be part of the conspiracy manufactured or imported lysine, which is an essential amino acid, a building block for proteins that speed the development of muscle tissue, in humans and animals, and can be produced as a by-product of bacterial fermentation.⁴⁸ The companies were suspected by the Department of Justice of violating section 1 of the Sherman Act by arranging price fixing agreements, a per se antitrust violation.

Evidence from cartel participants confirmed that the conspirators anticipated that the rewards from price fixing would far outweigh the costs of operating the cartel.⁴⁹ In 1992, a top ADM official expressed the expectation that their agreement would generate \$200 million in joint profits in a global market for lysine that varied from \$500 to \$700 million in annual sales.⁵⁰ ADM earned just about \$200 million in profits from the cartel over three years with its one-third share of sales in the worldwide lysine market.⁵¹ Additionally, total labor costs for all corporate conspirators did not exceed \$1 million for the entire duration of the cartel, which reveals that the costs of forming and maintaining a collusive contract is not high compared to the benefits the conspirators can receive.⁵²

Investigation and Evidence Gathered and Used

By the end of 1992, a high ADM official became an inside source of information for the FBI and he supplied evidence of illegal meetings taking place from 1992 to 1995. In the fall of 1992, Mark Whitacre - the former head of the Archer Daniels Midland bio-products division, which made lysine - informed an agent of the Federal Bureau of Investigation that Archer Daniels Midland was working with competitors to rig the markets for a number of the commodities it sold. He informed the agent, Brian Shepard, that he had personal knowledge of the schemes because he was participating in the price fixing in the lysine market. With this information, more than seventy FBI agents simultaneously raided the world headquarters of ADM, and interviewed a number of ADM officers in their homes. The FBI served subpoenas authorized by a federal grand jury sitting in Chicago, and the agents collected documents related to ADM's lysine, citric acid, and corn-sweeteners businesses. The FBI involvement in this case, although somewhat unusual, demonstrates the government's intention to apply tough - "blue-collar" investigative techniques to what had been formerly been treated as a gentle, "white collar" activity.⁵⁴ Within a day, investigators also raided the offices of the other four companies that were involved in the conspiracy. These subpoenaed documents, together with hundreds of secret tape recordings

⁴⁸ It is therefore an important supplement in animal feeds. Connor, "Global Cartels Redux", at 258.

⁴⁹ Connor, at 261.

⁵⁰ Id.

⁵¹ Id.

⁵² Id. at 262.

⁵³ For the whole series of events of how and why Whitacre informed the FBI, see *U.S. v. Andreas*, 216 F.3d 645 C.A.7 (Ill.), 2000 .

⁵⁴ Id., at 254.

and films of the conspirator's meetings and conversations, built a strong case that five companies had been illegally colluding on lysine prices around the world for at least three years.⁵⁵

The investigation and trial received unprecedented exposure in the media for a number of reasons, including the identity of the defendants (ADM was widely believed to be one of the politically best-connected companies in the country), the use of a government informant inside ADM, and the existence of video and audio tapes secretly recorded by the FBI clearly showing the conspirators in the act of fixing prices and carving up the world markets for lysine.⁵⁶

The way the DOJ collected the evidence was also unprecedented -- the co-opting of one of the company's top executives as a cooperating witness, the covert audio taping of telephone conversations and video taping of meetings in bugged conference rooms, and the simultaneous execution of search warrants by dozens of FBI agents at the offices of the corporate subjects around the U.S.

Outcome

The FBI raids were widely reported in the mass media and unleashed many legal actions. Three major antitrust actions were the result of an undercover investigation by the U.S. DOJ that had begun in 1992 with the cooperation of the ADM lysine division president. In 1992, the DOJ sought and obtained convictions for criminal price-fixing by the five corporate lysine sellers.⁵⁷ Thirdly, the DOJ prosecuted four lysine executives in a highly publicized jury trial held in Chicago in the 1998; three of the four were found to be guilty and heavily sentenced.⁵⁸

Within a year of the FBI raids, in 1996, about four hundred plaintiffs were certified as a single federal class, and the case called *Amino Acid Lysine Antitrust Litigation* was assigned to a judge in the U.S. District Court in Northern Illinois. The three largest defendants

⁵⁵ Id. at 252. The American Antitrust Institute produced a film, *Fair Fight in the Marketplace*, that includes a section on this cartel, which may be viewed at www.fairfightfilm.org. The film includes a snippet of the FBI informant's video of the conspiracy at work. The full FBI video has been available from the DOJ on request and is frequently shown in law schools. At least two best-selling books were written about this case: Eichenwald, Kurt, *The Informant*. Broadway Books: New York, 2000.; Lieber, James, *Rats in the Grain*. Four Walls Eight Windows: New York, 2000. The most extensive economic treatment is Connor, John, *Global Price Fixing: Our Customers Are the Enemy*. Kluwer Academic Publishers: Boston, 2001.

⁵⁶ Scott D. Hammond, >*From Hollywood to Hong-Kong-Criminal Antitrust Enforcement is Coming to a City Near You*".

⁵⁷ Connor, "Global Cartels Redux", at 252-253.

⁵⁸ See the transcript and exhibits of *U.S. v Michael D. Andreas et al.* Andreas received a thirty-six month sentence, the maximum allowed by the Sherman Act. Terrance S. Wilson received 24 months of incarceration. Both of them were fined \$350,000 each. Defendant Mark E. Whitacre, the informant, having turned out to have been an embezzler and a liar, was sentenced to serve 30 months and no fine was imposed on him.

offered the class \$45 million to settle the damages allegedly caused by their price fixing and later that year, final approval of the settlement occurred.⁵⁹

VI. In re Vitamins Antitrust Litigation (many related cases)

This is perhaps the best-documented global cartels case, which lasted from 1990-1999. The litigation also returned to victims an unprecedented total amount for any related series of antitrust cases in history, although arguably the total of damages and penalties worldwide were still less than the excessive profits gained through cartelization.⁶⁰

Complaint

The first suit in the case was filed in Alabama state court in 1997, on behalf of a class of indirect purchasers with a named plaintiff who had purchased vitamin products for use in his farming operations.⁶¹ The complaint alleged a conspiracy among the three major vitamins manufacturers, Hoffman La Roche, Rhone-Poulenc S.A, and BASF AG. Apart from the allegations that the defendants were fixing prices, it was also alleged that the defendants participated in meetings and discussions of prices, to have exchanged completely significant information, and to have monitored compliance.⁶²

The first private complaint, in federal court, which was filed in March 1998, on behalf of a class of direct purchasers⁶³ alleged that as early as 1990 and continuing into 1998, the Defendants conspired to fix prices, allocate markets, and engage in other collusive conduct with respect to certain vitamins, vitamin premixes and other bulk vitamin products. A subsequent filing in December 1998 on behalf of direct purchasers provided even more detail about an international cartel whose participants met regularly inside and outside the United States to fix prices and allocate customers.⁶⁴

To understand why there were so many different private cases, one must understand that the Supreme Court had held in 1976 that under the federal antitrust laws, only direct purchasers could have standing to bring an antitrust action for damages resulting from alleged overcharges.⁶⁵ Due to controversy immediately following this case, various states began passing “*Illinois Brick* repealer laws” permitting indirect purchasers to recover under state antitrust laws; in other states, courts interpreted existing statutes to permit recovery by

⁵⁹ Connor, at 253. The other two defendants settled for almost \$5million about a year later.

⁶⁰ Connor, John M, “The Great Global Vitamins Conspiracy: Sanctions and Deterrence,” Draft 2/14/06, available at www.antitrustinstitute.org

⁶¹ *Robertson v. F. Hoffman-LaRoche, Ltd.*, Complaint 7, CV-97-200a (Cir. Ct., Cullman City., Ala. Filed Dec. 5, 1997)

⁶² First, Harry, “The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law,” 68 *Antitrust L.J.*, 711, 713.

⁶³ *Donaldson & Hosenbein, Inc. v. Hoffmann-LaRoche*, Case No. 1: 980V0062 (D.D.C. filed Mar. 28, 1998)

⁶⁴ *Animal Science Prods., Inc. v. Hoffmann-LaRoche, Inc.*, ¶ 48a, Case No. 1:98CV02947.

⁶⁵ *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)

indirect purchasers.⁶⁶ These repealers are not preempted by federal antitrust laws.⁶⁷ Thus, there is at least the theoretical potential for duplicative litigation and/or multiple liability in the state and the federal courts. Indirect purchasers can only bring their complaints in state courts while direct purchasers can bring federal, or state, complaints. Vitamins were sold to direct purchasers who re-sold them to indirect purchasers. Both categories of purchasers could and did allege damages against the cartel.

Investigation

In 1997, a client of David Boies III, a son of a high profile attorney specializing in antitrust class action litigation, told him about what appeared to be secret price-fixing meetings in the vitamins industry. He began his own investigation and learned that vitamins manufacturers sell most of their output in dry powder form, eventually to be used for human and animal nutritional purposes in a wide variety of products.⁶⁸ In the initial stages of this distribution process, most vitamins are blended into “premixes,” which are combination of vitamins. Although the major vitamins manufacturers sell premix, there are also some independent blenders who buy straight vitamins from the manufacturers and sell them in blends.⁶⁹ Boies began talking to these independent blenders and found out that these companies also suspected some collusion was occurring with the vitamins manufacturers.⁷⁰ As time passed, his firm found more evidence, and by December 1997 decided they had gathered enough to file suit. The interesting statement made by Boies was that his firm uncovered and ultimately proved the collusion “without the benefit of government involvement.”⁷¹

During the same period, however, the Justice Department was also working on an investigation of price fixing in the vitamins industry. U.S. investigations first got wind of the vitamins cartel and Roche’s role in it in late 1996 from sources at ADM who were then cooperating with the DOJ in its investigation of the citric acid cartel. The FBI interviewed the head of Roche’s Vitamins division in March 1997.⁷²

Evidence

More evidence of the illegal activity began to appear in 1997, after the initial investigations. A partner in Boies’ law firm, Boies & Schiller, claims to have discovered evidence of price fixing. He began hearing many complaints from Roche customers. Customers who purchased from Roche would not be able to get price quotes from BASF or

⁶⁶ Davis, Ronald W., *Indirect Purchaser Litigation: Arc America’s Chickens Come Home to Roost on the Illinois Brick Wall*, 65 Antitrust L.J. at 391-93.

⁶⁷ *California v. ARC America Corp.*, 490 U.S. 93, 102-105 (1989).

⁶⁸ First, Harry, 711, 712.

⁶⁹ Id.

⁷⁰ Id. Their concerns were based not only on the high prices the vitamins manufacturers were bidding to these blenders, but also on the blenders’ inability at various times to get competing bids for the vitamins they needed.

⁷¹ Id. at 230.

⁷² Connor, John M, “The Great Global Vitamins Conspiracy: Sanctions and Deterrence,” at 25-26.

other suppliers. Buyers of vitamin C were threatened with unspecified retaliation should they try to resell purchased products.⁷³

In late 1997 and early 1998, lawyers working for Roche heard about allegations that some managers in the company were fixing vitamin prices.⁷⁴ This discovery seemed to be corroborating evidence because a top Roche official issued a directive specifically ordering that the conspiracy stop.⁷⁵

This additional information led Boies & Schiller to file a civil price-fixing suit in 1998. The allegations made in the suit, and perhaps other allegations, were forwarded to the DOJ and a grand jury was established.

Then, in 1999, after the choline chloride cartel was revealed, the DOJ negotiated with Rhone-Poulenc, a French pharmaceutical manufacturer, negotiated with the DOJ to admit them into the leniency-program. This explains why this apparently important participant in the conspiracy was not charged. The Rhone-Poulenc managers agreed to attend a conspiracy meeting and tape record it.⁷⁶ The evidence that the company revealed must have been highly incriminating because within two months, Roche and BASF pled guilty and received very high fines.⁷⁷ The government noted that information provided by Rhone-Poulenc, “together with information being provided by other, led directly to the charges” and to the decision of the defendants “not to contest the charges and to cooperate with our investigation.”⁷⁸

Likely Impact of the Vitamin Cartel

During the duration of the 16 vitamin cartels, vitamin prices increased by 60% to 100%.⁷⁹ In terms of direct overcharges on buyers, the total amount worldwide was about \$7 billion. Buyers in North America, the European Union, and Asia incurred roughly 90% of the global cartel overcharges.⁸⁰ The sales of these global cartels occurred in virtually every country in the world, but were concentrated in North America (20%), the European Economic Area (29%), and Asia (55%).⁸¹ For all of the cartels together the overcharges amounted to more than 40% of affected world commerce.⁸²

Outcome

⁷³ Id at 29.

⁷⁴ Id.

⁷⁵ Id.

⁷⁶ Id at 30.

⁷⁷ Id, at 43. Hoffmann-La Roche agreed to pay \$500 million in fines, almost five times the previous record antitrust fine. BASF paid \$225 million.

⁷⁸ First, Harry, 711, at 716.

⁷⁹ Connor, John M, “The Great Global Vitamins Conspiracy: Sanctions and Deterrence,” at 4.

⁸⁰ Id.

⁸¹ Id.

⁸² Id.

Almost all of the private vitamins cases settled. The only vitamins case that went to trial was the choline chloride conspiracy, where the jury decided that the cartel had overcharged purchasers because the defendants conspired to fix the price of choline chloride.⁸³ In 1999, six of the main vitamins companies agreed to a settlement in the private class-action litigation brought in federal court on behalf of direct purchasers of vitamins and vitamin premix.⁸⁴ Later in 2000, the Justice Department announced guilty plea agreements from two Swiss nationals and two German nationals, three of whom were high officers in BASF's Fine Chemicals Division and one of whom was in a similar position at Roche. In the same year, two more German pharmaceutical manufacturers were added to the list, Merck and Degussa-Huels Ag, along with two U.S. firms, Nepera, Inc., and Reilly Industries. These guilty pleas involved the vitamin C and vitamin B3. Fourteen chemical companies were convicted by the U.S. for price-fixing in the vitamins market. U.S. fines for these fourteen companies and fifteen of the officers were \$915 million. Two firms received amnesties from the DOJ under the leniency program. Additionally, sixteen senior executives of the vitamins manufacturers were criminally indicted, of which fifteen received personal sentences.⁸⁵

VII. In Re: NASDAQ Market-Makers Antitrust Litigation, 184 F.R.D. 506 (S.D.N.Y. 1999)

Complaint

The plaintiffs in this private class action against a cartel are a class of over 1 million individual and institutional investors who purchased or sold shares of certain securities on the NASDAQ through one or more Defendants or their commonly owned affiliates.⁸⁶ The defendants were 37 market-makers of the National Association of Securities Dealers Automated Quotation System exchange.

The complaint alleged violations of the Sherman Act arising out of price-fixing of spreads and stocks traded on the NASDAQ exchange.⁸⁷ The Defendants planned to file a motion arguing antitrust preemption, based on comprehensive regulation by the National Association of Securities Dealers, NASD, and by the Securities Exchange Commission,

⁸³ *In Re: Vitamins Antitrust Litigation*, Misc No. 99-197 (TFH) MDL No. 1285, (*Animal Science Products, Inc., et al. v. Chinook Group, Ltd., et al*)

⁸⁴ The settlement was for \$1.05 billion, the largest private antitrust price-fixing settlement in history. Details can be found in Barboza, David, "\$1.1 Billion to Settle Suit on Vitamins, N.Y. Times, Nov. 4, 1999, at C1.

⁸⁵ *Id.* at 48-49. (These cases were in different courts, for example, *United States v. Bronnimann*, No. 399-CR-316R (N.D. Tex filed Aug. 3, 1999)). In real (2005) dollars, U.S. fines were \$677 million. Two firms received amnesties that might otherwise have added \$550 million in fines and seven firms went unpunished. Because of discounts on fines, the vitamins conspirators paid only 19% of the maximum possible fines of \$4.8 billion. In addition, 16 senior executives of the vitamins manufacturers were criminally indicted of which 15 received personal sentences that averaged \$110,000 in fines and 8 months in prison.

⁸⁶ *In Re: NASDAQ Market-Makers Antitrust Litigation*, 184 F.R.D. 506 (S.D.N.Y. 1999) at 470.

⁸⁷ The collusion was based on the absence of odd-eighth quotations on many high-profile NASDAQ securities within a sample of 100 securities.

which regulates the NASD.⁸⁸ Plaintiffs' counsel met with the SEC's senior staff. At the end of the meeting, the SEC decided that the draft complaint would not be preempted, and the SEC would not support the defendants' anticipated motion.⁸⁹ Thus, the private plaintiffs successfully blocked that motion,⁹⁰ after it had been filed. After extensive briefing of the law, facts, and economic arguments for the motion, the plaintiffs prevailed against the defendants.⁹¹

The impact of this cartel was quite significant. In 1993, NASDAQ trading volume totaled more than 66.5 billion shares, with an average of 263 million shares traded each trading day. For that year, more than \$1.35 trillion in trades were executed through NASDAQ. The NASDAQ model fundamentally relied on competition between marketmakers to offer the best buy-side quotation and the best sell-side quotation.⁹² It was alleged that the price-fixing spread was a major source of market-maker profits and that the large numbers of market makers competing for business on actively traded NASDAQ Class securities should have resulted in a narrower spread than those on the exchanges. The spreads were, however, on average, approximately twice as large as spreads for comparable securities traded on the stock exchanges.⁹³ Defendants and their co-conspirators raised, fixed and maintained the spreads for Class Securities on NASDAQ to supra-competitive levels through, among other, the mechanism of collectively refusing to quote their bids and asks for Class Securities in so-called odd-eighths instead of widening the spread to even-eighths. Accordingly, \$.25 per share became the minimum spread, whereas the typical spread would have been half that amount.⁹⁴

Investigation

This case began with private plaintiffs investigating possible collusion on NASDAQ following publications of a 1993 Forbes article.⁹⁵ Neither the SEC nor DOJ opened formal investigations until 1994, after the class actions were filed. The preliminary investigation at the DOJ was assigned to a junior-level attorney, who accepted the industry's argument that collusion could not have occurred among so many market-makers and intended to terminate the investigation.⁹⁶ The investigations began to take shape though, after the 1994 publication, by two finance professors, entitled "Why Do NASDAQ Market-Makers Avoid Odd-Eighth Quotes?"⁹⁷ This article suggested that there was an absence of odd-eight quotations of many high profile NASDAQ securities and inferred "tacit" collusion from the

⁸⁸ Kaplan, Arthur, "Antitrust as a Public-Private Partnership: A Case Study of the NASDAQ Litigation", 52 Case W. Res. L. Rev. 111, 116 (2001).

⁸⁹ Id. at 118.

⁹⁰ They drafted a Consolidated Complaint expressly averring that defendants' spread-fixing was unauthorized by the NASD and the Securities Exchange Commission. Private plaintiffs then spoke with the SEC, which already had been contacted by the defendants.

⁹¹ *In re NASDAQ Market-Makers Antitrust Litigation*, 894 F. Supp. 703, 710 (S.D.N.Y. 1995)

⁹² Id. at 112.

⁹³ *NASDAQ*, at 707.

⁹⁴ Id.

⁹⁵ Gretchen, Morgenson, *Fun and Games on NASDAQ*, FORBES, Aug. 16, 1993, at 74.

⁹⁶ Kaplan, Arthur, at 116.

⁹⁷ William Christie & Paul Schultz, "Why Do NASDAQ Market Makers Avoid Odd-Eighth Quotes?", 49 J. FIN. 1813, 1840 (1994).

absence of plausible legitimate explanations.⁹⁸ The securities industry attempted to silence the co-authors of the article by threatening libel action⁹⁹ and by publicly criticizing their work, but widespread skepticism about collusion was not put to rest.

Evidence

In developing the cases filed by the private plaintiffs, private counsel conferred with economists and witnesses. Private counsel also arranged for maverick market-makers to break even-eight spreads that the market-makers were following, and monitored the resulting conversations, which reflected the enforcement of market-maker collusion.¹⁰⁰ Private counsel also obtained a document preservation order that prevented the ordinary periodic erasure and recycling of audiotapes.¹⁰¹ Without these early preservation orders, crucial evidence would have been lost to private plaintiffs and the government.¹⁰² These many hours of preserved audiotapes eventually provided important, direct evidence of collusion.

Throughout late 1994, 1995 and into 1996, the private plaintiffs and economists continued to encourage and assist the government investigation, although at times, defendants and their economists nearly convinced the DOJ that no conspiracy existed.¹⁰³ Plaintiffs and their economists¹⁰⁴ repeatedly met with the DOJ.¹⁰⁵ They provided the DOJ with direct evidence developed through their own investigation, including witness interviews. The plaintiffs' economists developed extensive additional economic evidence, which they shared with the DOJ's economists.¹⁰⁶

Outcome

Eventually, the industry having agreed to a settlement with the government, the DOJ (in the usual process of settlement) filed its own complaint and concurrent consent decree. The Antitrust Division's consent decree, forbade all forms of price-fixing, but also required antitrust compliance programs, appointment of antitrust compliance officers, annual complaint certifications and the taping and monitoring of a specified sample of market-maker telephone conversations.¹⁰⁷

⁹⁸ Kaplan, at 114.

⁹⁹ The industry also attempted to stop the usage of the word "collusion".

¹⁰⁰ Kaplan, at 116.

¹⁰¹ Id.

¹⁰² Id. at 117.

¹⁰³ Id at 119.

¹⁰⁴ Principally Professor Paul Schultz and Michael Barclay

¹⁰⁵ Kaplan at 119.

¹⁰⁶ Id.

¹⁰⁷ Id. at 120.

The settlements that followed the government complaints and private class actions were subsequently approved by the court.¹⁰⁸ The court also approved an innovative plan of distribution.¹⁰⁹

The settlements in the aggregate totaled approximately \$1.027 billion. This amount approximated the total of the plaintiffs' individual damages. The attorneys' fees were modest in percentage terms, which came out to be 13% of total recovery. Private antitrust class actions are usually brought by attorneys who put forward the expenses of the litigation and receive fees and expenses only if the class prevails. The amounts must be approved by the court. This settlement was agreed to be paid all in cash despite the defendants' advocacy that they be paid in the form of coupons.

VIII. Conclusion

We have provided an overview of the U.S. mechanisms for enforcing the antitrust laws against cartels, including the statutory framework, the key procedures, the inducements to blow the whistle on a cartel, and the criminal penalties and other remedies that are available. In three case studies, we have also shown that there is an intricate relationship between public and private enforcement in the U.S. In a very general way, the government uses its resources to ferret out evidence of illegality and the private bar, motivated by the prospect of treble damages and attorneys fees and funded through contingent fee arrangements dependent upon success, provides a mechanism for obtaining substantial damage awards (often in cases that are settled rather than tried) for harmed private parties. The combination of criminal sanctions (jail and fines) and multiple civil remedial actions provide a significant deterrent to joining a cartel and this is supplemented by clear benefits to the first member of an existing cartel who comes forward with evidence. Cartel-fighting, which can be considered one of the most successful of American exports,¹¹⁰ continues to be the highest priority of the American antitrust enterprise.

¹⁰⁸ See *NASDAQ*, 187 F.R.D. at 473.

¹⁰⁹ *Id.* at 492.

¹¹⁰ See Wyatt Wells, *Antitrust & the Formation of the Postwar World* (New York: Columbia University Press, 2002).