

# THE ANTITRUST INVESTIGATION\*

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This discussion will be directed not to the substance of the antitrust law, but to how the Antitrust Division conducts investigations in various situations and the possible involvement of a client. That is, if a client becomes involved with the Antitrust Division, what are the things his lawyer can do? How can he approach the Division? What will the Division do and not do?

Several aspects of the Department of Justice should be understood at the outset. The prime purpose of the Department of Justice is to provide the means for enforcement of federal laws and to furnish legal counsel for the United States in federal cases. The Antitrust Division is one of eight divisions within the Department; within this framework the laws are also enforced by the various United States Attorneys' offices located throughout the country. Each division is responsible for enforcing a particular area of federal law, and the Antitrust Division, of course, is primarily concerned with the Sherman and Clayton Acts. The Division has six field offices throughout the United States and several sections which are located in Washington. The Great Lakes Field Office in Cleveland has a staff of twelve and an area of enforcement which includes Ohio, West Virginia, Kentucky, and part of Michigan. Concurrent enforcement is achieved by sections in Washington, who may come into the territory, particularly on matters in which they have expertise such as banking and insurance. In the Antitrust Division the line of authority runs from the Field Office or Sectional Chief, to the Director of Operations, then to the Assistant Attorney General in charge of the Antitrust Division. Enforcement is, of course, limited by the jurisdictional requirements of interstate commerce, a prerequisite in any matter the Division investigates. Before it decides to bring a case, it must be satisfied that interstate commerce is involved.

The majority of investigations arise in the first instance because of complaints from citizens. These complaints come from the consuming public who allege they have been victimized by unlawful conduct of those from whom they buy goods, the injured businessman who has been victimized by a competitor, his supplier or some-

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times even his customer, the erstwhile conspirator who is conscience stricken (at least that is what he says) or in some way dissatisfied with the conspiracy. Another source is complaints from Congressmen. In the field of mergers and interlocking directorates, the prime source of information leading to investigation are newspapers and other publications. The field office combs through the Wall Street Journal and all the local city newspapers in its jurisdiction, as well as the trade journals and magazines. The SEC and the banking agencies also submit reports to the Division when they feel it is appropriate. The Division also has what is termed an identical bid procedure; federal agencies are required to report identical bids to the Attorney General on any award over 10,000 dollars. The Division has also obtained good cooperation from state and local agencies in reporting identical bids in substantial awards.

The businessman himself may come to the Department under the business review procedure, a procedure for the businessman seeking to know whether the Department considers a proposed course of conduct to be in violation of the law. There are prerequisites to this procedure;<sup>1</sup> it must relate to a proposed course of conduct and be in writing with a statement of all the facts. Several courses may then be followed by the Department. It may take no action at all, that is, may simply decline to pass on the matter. It may take action, (there is no guarantee against prosecution after all the information is received) or it may state a present intent not to bring a case. The author is unaware of a case in which the Department has proceeded criminally after having stated such an intent. But if it later develops that all the facts were not submitted, or the facts were otherwise than submitted, the Department will not feel bound by its earlier statement of intent.

Finally, the Antitrust Division is its own source of investigation. The Division sometimes initiates an investigation from a fact of wrongdoing specifically brought to its attention. It has the responsibility to prevent offenses against the free play of the competitive enterprise system. In addition to merely reacting to complaints, the Division attempts to program its enforcement so as to utilize its limited resources in the most effective way.

The Federal Trade Commission is a sister agency, enforcing some of the same laws as the Antitrust Division. There is a largely informal liaison procedure between the two agencies. Before a preliminary investigation is authorized, the agencies clear investigations with each other, so that a company will not be investigated by two

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<sup>1</sup> 2 TRADE REG. REP. ¶ 8559, at 14,031.

governmental agencies for the same act at the same time.

Having gotten a complaint and determined there may be some substance to it (and this check would usually be limited to an interview with the complainant or a check of public information sources), the field office will request authorization from the Director of Operations to conduct a preliminary inquiry. Upon authorization, the preliminary inquiry is generally conducted on the basis of voluntary interviews, letter requests for information and studies of basic public information. Of course, a check has been made with the FTC to make sure they are not doing the same thing. The result of the investigations can either be a decision to go on to a fuller investigation, to close the matter, or, in some instances, to file suit without further investigation.

There are fuller investigations which may be conducted after a decision to go beyond the preliminary inquiry. Authorization is again a prerequisite; the field office is not empowered to go on to the next step without getting authority from the Assistant Attorney General.

One type of fuller investigation is conducted by the Federal Bureau of Investigation, and this may be either criminal or civil in nature; it is, incidentally, dependent upon voluntary cooperation of interviewees. There is no real significance to the use of the FBI as opposed to Division staff so far as a client is concerned. The use of the FBI does not indicate the nature of the violation or whether a client is actually himself being investigated; rather it usually involves manpower considerations. With only twelve men in the Cleveland Office it is difficult to conduct a large-scale investigation that may take the field office over the country. Thus there is available, upon authorization of the Director of the FBI, the assistance of that agency.

The second means of investigation, where criminal remedies may be appropriate, is the grand jury. Undoubtedly, this is the Division's most effective investigative tool because it has compulsory process and testimony at its disposal. Justification for a grand jury must be shown to the Director of Operations and the Assistant Attorney General before the field office is authorized to proceed. The work of the antitrust grand jury is akin to the traditional work of such a body. It participates with the Division field office in the development of the investigation. The Division rarely has everything necessary to go before the grand jury on the first day and ask for an indictment. The grand jury in effect pursues the necessary investigation. As a result this procedure takes time, frequently extending over a year or more. The scope of inquiry is wide and the

investigation is secret. Witnesses feel freer to testify, knowing that what they say will generally become known only if they are called upon to testify in court. It is possible that the defendant who is indicted can convince the court of the need, for some compelling reason, to open up the grand jury record.<sup>2</sup>

One limitation on the use of the grand jury is that the violation must be criminal in nature. As a result of the *Procter & Gamble*<sup>3</sup> case, the grand jury cannot be used for what appears to be essentially a civil investigation. When a matter is purely civil, the Division must forego the use of the grand jury as a means of further investigation.

Perhaps most questions that are asked about the grand jury relate to subpoenas. There are two basic types; first, the *ad testificandum* subpoena. The witness who testifies pursuant to such a subpoena gets immunity from prosecution for anything to which he may responsibly testify.<sup>4</sup> He is not, of course, immune from perjury prosecution. Second is the subpoena *duces tecum*, directed to the corporation. A corporation receives no immunity; immunity by statute extends only to natural persons.<sup>5</sup> The witness who, pursuant to a subpoena *duces tecum*, submits documents on behalf of a corporation does not receive immunity.

A preliminary investigation of a civil matter (*e.g.*, a merger) may reveal the necessity for going into a fuller investigation involving compulsory process. The third means of fuller investigation, civil in nature, is the Civil Investigate Demand. The device is not available against a natural person. It is much more restricted than the grand jury investigation because it has compulsory process only for the production of documents and only against a business under investigation. The Act<sup>6</sup> provides that the Attorney General or Assistant Attorney General may cause a written demand to be served on any corporation, association, partnership or other legal entity, not a natural person, for production of documentary material relative to a civil antitrust investigation which there is reason to believe may be in the possession, custody or control of the entity.<sup>7</sup> The demand shall describe the class of documentary material so as to be

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<sup>2</sup> FED. R. CRIM. P. 6(e). See, *e.g.*, *Dennis v. United States*, 384 U.S. 855 (1966), noted in, 28 OHIO ST. L.J. 176 (1967); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959).

<sup>3</sup> *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958).

<sup>4</sup> 15 U.S.C. § 32 (1964); *United States v. Monia*, 317 U.S. 424 (1943).

<sup>5</sup> 15 U.S.C. § 33 (1964); *United States v. Maine Lobstermen's Ass'n*, 160 F. Supp. 115 (D. Me. 1957); *United States v. Detroit Sheet Metal & Roofing Contractors Ass'n, Inc.*, 116 F. Supp. 81 (E.D. Mich. 1953).

<sup>6</sup> 15 U.S.C. §§ 1311-1314 (1964).

<sup>7</sup> *Id.* § 1312 (b) (1964).

fairly identifiable by the recipient. The reasonableness of the demand and the privileges applicable to any document requested thereby are tested by the rules applicable to a grand jury subpoena.<sup>8</sup>

Where there are problems of compliance with a demand, the formal procedures require a petition to the district court.<sup>9</sup> The Department of Justice would use the petition to enforce compliance or to request penalties if a compliance is not forthcoming. The recipient of a demand, for example, would petition the court to set aside or modify the demand.

Finally, let us examine the various avenues of communication open to the lawyer whose client has become involved with the Anti-trust Division.

### 1. *Complaints*

Suppose a client has a complaint which he wants to make known to the Division. The quickest way to save time and red tape is to make the complaint directly to the field office in the area of its jurisdiction. The complaints that are sent to Washington are not passed upon in any way. They merely go through a mail room routine. It is determined who has jurisdiction and then eventually they go out to a field office or to a section for preliminary review and possibly a reply to the complainant. It is therefore recommended that if time is of the essence, the complaint be made directly to a field office.

### 2. *Preliminary Investigation*

Another way a client may become involved with the Division is by means of letters of inquiry, generally used in a preliminary investigative stage in civil investigations. While a letter of inquiry *may* mean that your client is under investigation, this is not necessarily so, since letters are frequently sent to competitors or others in the industry in an attempt to gain an understanding of the industry and of the facts involved.

If, upon receipt of one of these letters, a client has any problems, discussion with the field office is strongly suggested. Frequently field office staff asks questions in a manner which makes it difficult for the company to answer because of the setup of the industry or the company itself. To be fair to a client and to the Division, rather than ignore any request the lawyer should come in and discuss his client's problems. Of course, there is absolutely no legal

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<sup>8</sup> *Id.* § 1312(c) (1964).

<sup>9</sup> *Id.* § 1314 (1964).

compulsion; but if the Division gets large-scale "clamming up" in an industry, this is a factor in determining other investigative procedures to be considered. As pointed out by a prominent attorney from whom the author will later liberally quote, the letter of inquiry presents the attorney with an opportunity to prepare a statement in support of his client's position. Serious consideration is given to a statement of the attorney attempting to explain his company's position in answer to a letter of inquiry.

### 3. *Civil Investigative Demand*

Other involvement may be by Civil Investigative Demand, commonly referred to as C.I.D.'s. Most of a client's compliance problems can be resolved at the field office level: to modify, to extend the return date, to discuss the scope of the C.I.D., or simply to explain the company's problems—frequently there are problems the field office cannot anticipate. The field office will usually be able to agree after a conference to a fair and reasonable interpretation of the scope of the C.I.D. and be able to resolve most conflicts.

### 4. *Grand Jury*

Finally, a client may become involved with the Division through the grand jury. For the most part, because of Department of Justice policy the Division will not discuss the investigation, its progress, or the client's possible involvement. By the same token, however, the government does not disclose information concerning whether a particular client may be under investigation. If there is any publicity concerning a client under investigation, it will not come from the government and properly so, because frequently being under investigation by the grand jury might carry some stigma, regardless of the outcome. The field office will, however, as it does with C.I.D.'s, discuss problems connected with the grand jury subpoena and compliance with that subpoena. If the client testifies substantively he will receive immunity by virtue of the antitrust laws for everything except perjury committed at the hearing.<sup>10</sup> The immunity is not waived even if the witness does not claim it.<sup>11</sup> If the subpoena is for a corporation, there is no immunity.<sup>12</sup> As mentioned earlier, there is no immunity for a witness who appears before the grand jury to make a submission on behalf of the corporation and the examination is limited to facts regarding the file search and submission. There

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<sup>10</sup> *Id.* § 32 (1964).

<sup>11</sup> *United States v. Monia*, 317 U.S. 424 (1943).

<sup>12</sup> 15 U.S.C. § 33 (1964).

have been instances where a witness, appearing for a corporation, testifies substantively but not responsively. In such a case, a witness probably will not get immunity.

Set out below is the advice of a private antitrust practitioner:

When individual clients or individuals employed by corporate clients are subpoenaed to testify in person before a grand jury, such persons are, by statute, immune from prosecution or subjection to any penalty on account of any transaction, matter or thing concerning which they may testify before the grand jury. Therefore, so far as such witnesses are personally concerned, their exposure to prosecution, in connection with matters to which they may testify in an antitrust investigation, is limited to prosecution for perjury.

That a witness in a grand jury investigation may be so prosecuted should be made crystal clear to him. He should also understand, without equivocation, that other witnesses having knowledge of the facts with respect to which he will testify, will also testify, and that the Government will have available documentary evidence in the same areas. No grand jury witness should have any doubt about either the necessity or the desirability of his telling the truth.

Most grand jury witnesses are completely inexperienced in furnishing testimony under any circumstances. They should be fully advised of the procedure which will be followed in the grand jury, with particular emphasis on the facts that (a) they will not be represented by counsel; (b) the examination will be conducted by Government counsel, without any opportunity for legal objections to be made to questions which may be posed; and (c) members of the grand jury itself may interrogate. The putative witness should also be given the normal advice and instructions given to a witness preliminary to his appearance at a trial, *e.g.*, admonitions to be certain that he understands the questions, that he has a right to have questions clarified if he does not understand them, and that if Government counsel, in his interrogation, makes reference to documents, he is entitled to see the document before being required to answer questions with respect to it, etc.<sup>13</sup>

In conclusion, it should be stressed that much of the effectiveness of antitrust enforcement depends upon the cooperation of those interested in being protected from anticompetitive injury and from companies which are willing to prove that what they have done or are about to do is lawful by supplying full and complete information. Thus, while the Division has the duty to investigate, commerce and industry have the duty to see to it that the Division has all the relevant facts on which it can base a well-informed judgment as to whether or not an infraction of the law has occurred or is about

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<sup>13</sup> Davis, *Investigations by the Department of Justice—As Seen by the Potential Defendant*, 29 ABA ANTITRUST SECTION 54, 66 (1965).

to occur. The responsibilities of the Division are so broad, its resources in manpower and money so limited, that assistance and cooperation from the public and industry are essential if it is to do its job in a fair and effective manner.