

THE EFFECT OF JUSTICE DEPARTMENT AND FTC CASES ON PRIVATE ANTITRUST LITIGATION

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My topic is the effect of the Justice Department's antitrust enforcement efforts upon private antitrust litigants. The most dramatic effect results, of course, from § 5 of the Clayton Act under which a case successfully litigated by the Department may establish the violation on behalf of a private plaintiff. More frequently, if less direct, is the effect of the activities of a Division in investigations and in filed cases for which the Division has necessarily amassed information that could be most helpful, or damaging, as the case may be, to private litigants. I will touch upon the nature of this information, how it may surface, and its availability or the impediments to its availability. As you will see, having the Antitrust Division as your mistress or partner in a particular situation may be no bed of roses, and you may think what Robert Burton said a long time ago—"Every man, as the saying is, can tame a shrew but he that hath her."¹ However, you can expect no sympathy from the defendant's attorney who may use another Burton quote as a complaint: "They lard their lean books with the fat of other's works."²

I might note that vital antitrust enforcement depends not only upon the activities of the Division pursuing the complaints of citizens and acting on its own initiative, but also upon the bringing of effective private treble damage antitrust cases. In today's antitrust climate, private antitrust proceedings are not merely a means of compensating victims of antitrust conspiracy; they provide a very substantial and meaningful deterrent to violations of the antitrust laws. Indeed, until Congress acts on the government recommendation to increase the maximum Sherman Act fine for corporations from \$50,000 to \$500,000, the treble damage action provides the most significant financial deterrent to the majority of antitrust violations. One only has to think back to the 1964 *Philadelphia Electric* case³ in which three local Philadelphia utilities won a verdict of almost \$30,000,000 in treble damages in connection with their purchase of a single product, power transformers. Thus, to the extent that this deterrent aids us in enforcing the antitrust laws, we give a well deserved "thank you" to the members of the private bar.

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¹ DEMOCRITUS TO THE READER.

² ANATOMY OF MELANCHOLY.

³ *Philadelphia Elec. Co. v. Westinghouse Elec. Corp.*, 1964 Trade Cas. ¶ 71,123 (E.D. Pa.).

I am not the one to advise you on the nuances of how to try or defend a treble damage case; that topic is well covered by the experts—those who engage in the practice of trying such suits. Being with the Antitrust Division for my entire legal career does not exactly qualify me as an expert in private treble damage actions. The thrust of my presentation, therefore, is with respect to how the activities of the Antitrust Division can affect your client, and what aids there are to private plaintiffs in their claims after the government has made an investigation and perhaps brought a civil or criminal case. I might mention that plaintiffs think we do too little to aid them and defendants think we do too much. The result is that, in this area, as well as some others I could name, the Antitrust Division is thoroughly unloved.

Let me first discuss the structure of the Antitrust Division generally and its over-all mission. The Division has more than 300 attorneys located in Washington and seven field offices spread throughout the country. The basic responsibility of the Cleveland Field Office, known as the Great Lakes Office, is in a four-state area: Ohio, Michigan, West Virginia, and Kentucky, and it is staffed by 17 attorneys. Thus, you can see why the Division is anxious to see its efforts in antitrust enforcement buttressed by the enforcement effort of private treble damage cases.

To preserve and protect competition is the reason for the Antitrust Division's existence. Competition is our fundamental national economic policy, and the basic antitrust law that is designed to protect it was characterized very succinctly by the Supreme Court as "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."⁴ Antitrust law "rests on the premise," the Court pointed out,

that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political, and social institutions.⁵

Our efforts to accomplish our mission are divided into three main endeavors: First, seeking out and prosecuting anticompetitive practices (for example, such violations as price fixing, division of territories and customers, tie-in agreements, patent licensing abuse, and the like); second, trying to maintain a competitive economic structure (for example, prosecuting efforts to monopolize under the Sherman Act and proceeding against anticompetitive mergers and acquisitions under § 7 of the Clayton Act); and third, acting as an advocate for competitive policies wherever competition is likely to promote business efficiency in the regulated industries.

⁴ *Northern Pacific Ry. v. United States*, 365 U.S. 1, 4 (1958).

⁵ *Id.*

Now that I have given you a bird's-eye-view of the Division, I will turn to a topic of more immediate concern: how can the Division's activities affect you, when your client thinks he has been the victim of, or is accused of perpetrating, practices which may violate the antitrust laws?

When faced with anticompetitive pressures from others, a prospective private plaintiff has two basic alternatives: either to lodge a complaint with the government, or to institute a treble damage action. If damages are minimal and the victim is interested merely in bringing an end to the practice, the better choice is to inform the government and thus take advantage of the resources and experience of government staffs in prosecuting the violation. But if damages are substantial, the victim may wish to bring his own action, particularly with the increased availability of the class damage suit in recent years, in which litigation costs and discovery proceedings can be shared by the parties. In some situations, the better part of valor is to do both.

First, consider the situation in which the alleged victim desires to come to the Division with his tale of woe. You may be interested to know that there are no formal steps or procedures required for making a complaint to the Antitrust Division. It may be by letter, personal interview, telephone, telegraph, or even carrier pigeon. Your client, if he is the one complaining, should be prepared, however, to cooperate by giving us any and all information, documentary or otherwise, which bears on or substantiates his complaint. I might mention at this point that before any extensive investigation is instituted, we invoke a liaison procedure with the Federal Trade Commission, a sister agency with some overlapping jurisdiction in the area of antitrust enforcement. This assures that we are not duplicating their investigative efforts in a particular matter, or vice versa.

I would like to speak briefly about the mechanics of the Antitrust Division's procedures. Upon receipt of information indicating a possible violation, we initiate an investigation. It may involve a review of readily accessible industry information; the sending of letters of inquiry to the companies involved; the use of the FBI or staff attorneys to conduct interviews and file searches; the issuing of a civil investigative demand (an administrative subpoena to obtain documents); or the conducting of a grand jury investigation. Based upon the information gathered, a decision is made as to what, if any, action is warranted. I should emphasize, however, that the mere fact that an investigation is under way does not mean that litigation is imminent.

The decision as to whether action should be taken by the Division is not made lightly. Following a recommendation by the staff, the matter is reviewed by the Chief of the Section or Field Office involved, as well as the Office of Operations. It is then forwarded to the Deputy Assistant

Attorney General and the Assistant Attorney General for final review. Then the Attorney General makes the ultimate policy decision as to whether civil or criminal action should be instituted. The various levels of review include not only oral conferences, but written memoranda as well, detailing the evidence against each proposed defendant. I might mention that, during the course of these various levels of review, the proposed defendants, if they so request, are normally given an opportunity to present their views to the Department.

This brings me to the second part of my presentation, which deals with the avenues of assistance that may be available to the treble damage plaintiff by virtue of the activities of the Division when it has investigated and/or brought legal proceedings in regard to the same alleged anticompetitive practices. At the outset, I might observe that one often unnoticed advantage which private litigants have in the scheme of antitrust enforcement is the provision in § 5 of the Clayton Act which provides that the four year statute of limitations for private actions is tolled while a government suit is pending.⁶ This tolling continues throughout the government litigation and for one year following termination; if the government has brought both a civil and a criminal suit on the same matter, the tolling will continue until both matters are terminated. Thus, in a way, the private litigant can sit back and wait to see what develops before deciding to file, without a loss of damages due to the running of the statute of limitations. Of course, this presumes that the statute of limitations has not run on the claim at the time the government files its action.

The assistance a private litigant can receive from the government is inevitably affected by limitations on accessibility to information resulting from the laws and procedures under which we operate. Obviously, the federal government with its grand jury and Civil Investigative Demand procedures, has available to it very broad investigative powers. On the other hand, disclosure of the evidence developed by use of these powers is limited by the traditional doctrine of grand jury secrecy and, in the case of the Civil Investigative Demands, by specific statutory provisions.

The Division receives many requests for the release of grand jury testimony and documents, but it has taken the position that grand jury testimony and documents should not be released by the court for the purpose of treble damage litigation unless there has been a showing of particularized need for specific portions of the transcript or specific documents. Our basic reason for taking this position is, of course, the traditional secrecy of grand jury proceedings. We believe that secrecy encourages witnesses to provide information without fear of reprisal or intimidation. The Division is very reluctant to dispense with this secrecy unless the absence of a need for it together with a countervailing necessity for access to grand

⁶ Clayton Act, 15 U.S.C. § 16(b) (1970).

jury materials is clearly demonstrated. In regard to Civil Investigative Demands, the statute prohibits making the subpoenaed material available without the consent of the person who produced such material. Thus, any change in this situation must come from Congress rather than from a decision by the Department of Justice.

If you happen to be considering representing a private plaintiff, I hope I have not been too discouraging in setting forth the limitation upon the assistance which we are able to render to treble damage plaintiffs, because I do not think these limitations significantly inhibit the capacity of private plaintiffs to prosecute their claims. First of all, when the government has filed a legal action, the treble damage plaintiff will have available to him the government's indictment and complaint. The value of these documents should not be underestimated, because they can be, and frequently are, rather detailed in setting forth the alleged violations. Armed with the outline of the government's case as set forth in the indictment or complaint, private plaintiffs should have little difficulty in initially structuring their discovery in an attempt to build a substantial case.

Second, the Department has not objected, in appropriate cases, to the entry of orders impounding grand jury testimony and documents produced in response to grand jury subpoenas. The entry of an impounding order, of course, insures that, in the event a litigant shows particularized need for any portion of the grand jury testimony or for any grand jury document, this testimony or document will be readily available to him. This procedure strikes an appropriate balance between the desirability of protecting the secrecy of the grand jury proceedings and the interests of the private litigants who may have need for portions of the proceedings.

Third, while the government cannot and will not make available, on a wholesale basis, grand jury testimony and documents, this does not, of course, prevent information developed in the course of these proceedings from becoming available through the discovery process in private litigation. The skill of the private plaintiffs' bar in securing access to information which has been developed before federal grand juries does not need to be extolled.

The discovery tools for gaining access to such information are well grounded in precedent. In eliciting the names of possible deponents, the private plaintiff may simply ask each defendant to identify those of its employees who appeared before the federal grand jury. This particular interrogatory has received the sanction of the judicial panel on multidistrict litigation in its *Manual for Complex and Multidistrict Litigation*.⁷ Similarly, a private plaintiff may ask each defendant to identify each document or class of documents submitted by it to the grand jury. Again, such interrogatory has received judicial sanction. Once a plaintiff's lawyer has

⁷ MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION (CCH 1970).

the list of documents, a motion for production under federal rule 34 will secure for him all the documentary evidence which was available to the government. Thus, I think it can safely be said that the government's interest in protecting the secrecy of its grand jury proceedings does not substantially inhibit the ability of the private bar to prosecute treble damage claims on behalf of their clients.

We also receive requests for release of information which we have compiled in our non-grand jury investigations. These are directed at two types of documents—those which have been received from potential defendants and those which constitute internal memoranda summarizing the investigation. We believe that both types of documents are protected from disclosure despite the Freedom of Information Act. There are specific exceptions provided in that statute for intra-agency memoranda and investigatory files compiled for law enforcement purposes.

If there is any activity in a criminal or civil action filed by the government, counsel should be alert to the fact that pleadings, motions, briefs, etc., can be potential sources for a gold mine of information. But before getting to that, I will briefly discuss the situation in which the government action is actually litigated, thus bringing § 5 of the Clayton Act into play.⁸ Under subsection (a) of this provision, a successful government prosecution or suit will constitute prima facie evidence of the violation in subsequent damage actions brought under the same facts, provided, of course, that the plaintiff can prove the relation of the particular offense established by the prior judgment to his injury. Thus, another major area in which treble damage plaintiffs can obtain assistance is in the antitrust cases which the government has tried and won or has obtained a guilty plea. Under the same statute, however, the prima facie evidence rule does not apply to cases which are settled by consent decrees, and the courts have interpreted this limitation as applying to nolo contendere pleas in criminal cases, as well.

The question of when and under what circumstances we may or may not oppose nolo contendere pleas could be the subject of an entire article. Let me leave it at this—the government carefully evaluates the facts surrounding each plea, considering the nature of the offense, its duration, the existence of potential or actual treble damage plaintiffs, the size of such plaintiffs, and other pertinent matters.

Closely related to the government's position regarding nolo contendere pleas is the question of consent decrees in cases seeking civil injunctive relief. As you may know, we have a 30 day waiting period between the initial filing of a proposed consent decree with the court and the time it may become final. The purpose is specifically to give other interested persons time to comment on the decree and to consider objections to pro-

⁸ Clayton Act, 15 U.S.C. § 16(a) (1970).

posed consent decrees. This procedure was instituted in 1961 and we believe that it has served its purpose well. Sometimes modifications are made in the decrees at the suggestion of interested parties before the decree becomes final.

Private plaintiffs often object to the entry of consent decrees because they do not constitute *prima facie* evidence of a violation in subsequent damage actions. Our main consideration in negotiating consent decrees is over-all enforcement. We must balance the need for immediate injunctive relief against the possible concessions we may have to make and the interests of the private plaintiffs who may benefit either by a litigated decree or by a revealing civil trial. We consider the scope and effectiveness of the proposed relief, the strength of our case, the culpability of the defendants, our need for the resources which would be tied up in the trial of the case and other factors to which I alluded with respect to the acceptance of *nolo contendere* pleas in criminal cases. We also weigh carefully the effects of the decree upon other pending cases or investigations.

However, even if consent decrees have been obtained and *nolo contendere* pleas have been entered, there are possible avenues for obtaining information resulting from the litigation—usually some pleading or form of discovery which took place during the course of pretrial. In the criminal case, I have in mind specifically the bill of particulars. It is no secret that many defendants in criminal cases hesitate to utilize the bill of particulars extensively just for this reason. When *nolo contendere* pleas are entered, some district courts invite presentencing memoranda from the government. Very often these contain factual summaries of the basic case and the evidence against particular defendants. In a recent criminal case in which I was involved, I was more than mildly surprised when defense counsel insisted upon exchanging presentencing memoranda with the probation officer—and counsel for a private plaintiff was in court observing this proceeding. In those instances in which the memoranda are exchanged between government and private counsel, the court may be more willing to permit discovery, since disclosure has been made to the defendants and there is no longer any need to keep these memoranda under seal nor to preserve grand jury secrecy. However, I stress that this is purely in the discretion of the court.

Other facts may become part of the record, such as the various pretrial motions directed to jurisdiction (for example, interstate commerce) or other attacks on the indictment. The brief and affidavits filed in support of these motions could well contain information helpful to the private litigant.

In civil cases that have been settled by consent decree, the government has frequently engaged in extensive pretrial discovery in the nature of interrogatories, federal rule 34 motions, requests to admit, and depositions. This material is generally available to the private plaintiff and is usually

the source of a wealth of information which can be utilized by the private plaintiff in building his case. Also, oftentimes other motions, such as those directed against the complaint or against the answer, may be supported by briefs and other papers containing factual data relevant to a private action. Again, it is no secret that defendants in civil antitrust cases frequently push for an expeditious settlement to avoid putting the facts into the public record.

In conclusion, I would like to reiterate that both government and private antitrust enforcement efforts are needed to keep the process of competition operating freely in our nation's economy. And I include in those private efforts not only antitrust cases brought on behalf of plaintiffs, but also the very important work of corporate counsel in seeing to it that their clients do not violate the antitrust laws. Together, the government and the private bar are rendering the country a great service in preserving competition. With deference to some of the bar who are more often involved on the defense side of a private antitrust action, I must honestly admit that if I can help in some small way toward furthering private antitrust enforcement efforts, as an aid to our own efforts, then I feel I have accomplished a lot.