



Department of Justice

DUAL ENFORCEMENT PROBLEMS OF ANTITRUST

Remarks by

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When the average lawyer, or even the most sophisticated antitrust practitioner, thinks of the antitrust laws, the Sherman Act and, perhaps, the Clayton Act are probably the first statutes that come to mind. The Antitrust Division is charged with primary responsibility for enforcement of these federal antitrust laws, although the overwhelming majority of antitrust cases today are brought by the so-called private attorneys general, the lawyers for plaintiffs in private treble damage actions. State attorneys general also have a major role to play in enforcing the federal antitrust laws, both by bringing treble damage actions on behalf of their states and state agencies, and by bringing treble damage actions as *parens patriae* on behalf of natural persons residing in their states.

There is another major body of antitrust law -- at the state level -- which provides another route through which state attorneys general become involved in antitrust enforcement. Every state has some antitrust law of its own, although the coverage of state antitrust law varies widely. In a few states there is virtually nothing beyond the voidness at common law of agreements in unreasonable restraint of trade, while in many others there is extensive antitrust legislation. Some state antitrust laws have been passed only recently and, therefore, are yet to be subjected to judicial scrutiny and interpretation; others are quite old and bear significant judicial gloss. In some states antitrust violations may be

prosecuted criminally, while in others only civil remedies are available. In their terms and scope, state antitrust statutes vary from those directed only to certain specific types of agreements in restraint of trade, to legislation virtually copying the federal statutes including § 5 of the Federal Trade Commission Act. Historically, state courts have tended to employ a "rule of reason" approach in antitrust proceedings, but some of the more recent state cases have applied federal per se concepts in the outright condemnation of certain types of agreements. Unfortunately, this trend toward adopting federal per se concepts has embraced some of the more misguided notions in federal antitrust law, especially with respect to vertical arrangements between manufacturers and distributors, but I do not intend to discuss with you today the erroneous concepts that have found their way into federal and state antitrust case law.

Instead, I would like first to explain generally the relationship we would like to have with state attorneys general, with particular attention to our sharing information with you pursuant to Section 4F of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. */ I would then like to explore with you one question that arises from time to time in our dealings with those states that have criminal antitrust penalties, namely the issue of dual state and federal criminal prosecution.

*/ 15 U.S.C. § 15f.

The Antitrust Division is committed to assisting the states in their antitrust activities not only because of our statutory obligations under Hart-Scott-Rodino, but because we believe that such cooperation will result in the overall improvement of antitrust enforcement. During the past several years, the Division has cooperated with state attorneys general in developing state antitrust programs, in funding those programs, and in providing information that may assist the states in their mission of effective antitrust enforcement. The Division makes numerous referrals of state and regional matters to state attorneys general in an effort to benefit the states by calling to their attention matters that arise within their boundaries and to allocate most efficiently the Division's scarce resources. We also receive, and greatly appreciate, referrals from state attorneys general concerning matters that may either be too complex for their very limited antitrust enforcement staffs or involve persons not subject to their jurisdiction.

As you know, Hart-Scott-Rodino expanded and formalized our relationship with the states. Section 4F mandates that we provide state attorneys general with information, to the extent permitted by law, that may assist them in determining whether to bring a damage suit based upon violation of the federal antitrust laws. As a matter of course, we send to state attorneys general copies of all indictments that we secure and all of our press releases announcing new cases.

This is usually sufficient to generate requests for additional information from the appropriate states, but if no such request were received, the Antitrust Division would notify the appropriate state attorneys general under § 4F(a) of Hart-Scott-Rodino */ if we believed that any state might be entitled to recover damages as a result of the violation alleged in a civil or criminal antitrust prosecution filed by the United States. In making this judgment, the Division considers, among other relevant factors, the factual circumstances of the alleged violation, the posture of the state as a potential damage claimant under existing law and the likely effect of the alleged violation on any cognizable state interest. This notification procedure is utilized when, in the Division's judgment, a state damage action may lie based substantially on the same allegations made in a federal antitrust prosecution.

Of course, even without specific notification pursuant to § 4F(a), state attorneys general remain free to explore a potential antitrust cause of action and to request, under § 4F(b), **/ investigative files and other materials of the Antitrust Division relevant to an actual or potential civil cause of action. I stress civil because § 4F(b) may not be used to secure materials for a state criminal prosecution.

*/ 15 U.S.C. § 15f(a).

**/ 15 U.S.C. § 15f(b).

In accordance with the statute, we will disclose materials from our files to assist state attorneys general, to the maximum extent possible and appropriate, in fulfilling their state antitrust enforcement responsibilities. In general, a liberal policy will apply to disclosures under § 4F(b), but there are certain circumstances where, because of a statute, case law or other constraints, nondisclosure, or at least protective limitations upon the disclosures made, may be necessary.

For example, when the requested files include grand jury materials, it is the Division's position that such disclosure is prohibited without a court order pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure. Where the grand jury investigation and any resulting litigation have ended, the Division usually will not oppose an application by a state attorney general under Rule 6(e) for disclosure pursuant to § 4F(b) if the state is contemplating or has initiated suit, although there may be particular factors, such as specific hardships upon individual grand jury witnesses or other similar factors, which will lead the Division to seek limitations on the disclosure of grand jury materials even though the underlying prosecution has ended. On the other hand, as a matter of practice, the Division will deny disclosure, and oppose Rule 6(e) motions where necessary, with respect to (1) investigative files in pending grand jury investigations, (2) materials obtained by Civil Investigative

Demand, (3) the identity of confidential informants, (4) confidential business information, (5) files or materials obtained by the Antitrust Division through the premerger notification program, (6) files or materials obtained from the Internal Revenue Service or other federal investigative agencies whose files are protected by law from disclosure outside the Department of Justice, and (7) the work product, analyses and other deliberative memoranda of the Antitrust Division. In short, while it is the Division's policy to cooperate fully and liberally with state attorneys general, in some instances disclosures may be denied, delayed or limited in order to preserve the integrity of Antitrust Division prosecutions or investigations.

I cannot leave this subject without noting that the Antitrust Division certainly is not the final arbiter of § 4F(b) requests. As you know, the Supreme Court has held that Rule 6(e) of the Federal Rules of Criminal Procedure generally prohibits the disclosure of grand jury materials except upon a showing of "particularized need." */ It has been our position, however, that § 4F(b) of Hart-Scott-Rodino changed this standard of disclosure with respect to grand

*/ Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979); Dennis v. United States, 384 U.S. 855, 872 (1966); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959); United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958).

jury materials sought by state attorneys general for their civil antitrust actions. In our view, subject to the restrictions I have already noted, district courts should authorize the release of grand jury materials under § 4F(b) upon a showing of actual or potential relevance. The Fourth and Ninth Circuits have both agreed with our interpretation of § 4F(b), */ but just two weeks ago the Seventh Circuit held that even under § 4F(b) a state attorney general must establish a "particularized need" in order to obtain disclosure. **/ I do not know whether the State of Illinois intends to seek a writ of certiorari in this latter case, and I cannot say at this time what position the United States would take on this issue, if any, should this case go to the Supreme Court. I can assure you, however, that we do not intend to change at this time our policy with respect to the position we take in response to petitions by state attorneys general under Rule 6(e) and § 4F(b).

Let me turn now to the issue of dual criminal prosecution. This question is particularly important at this time because of our recent spate of criminal prosecutions concerning bid rigging on state construction projects. It is settled law that

*/ United States v. Colonial Chevrolet Corp., 629 F.2d 943 (4th Cir. 1980), cert. denied, 101 S. Ct. 1352 (1981); United States v. B.F. Goodrich Co., 619 F.2d 798 (9th Cir. 1980).

**/ State of Illinois Petition to Inspect and Copy Grand Jury Materials, No. 81-1294 (7th Cir., September 16, 1981).

there is no constitutional bar to federal prosecution for the same offense as to which there has been a state prosecution. The Double Jeopardy Clause simply does not apply in this situation. */ Furthermore, while Congress has expressly provided that as to certain specific offenses a state judgment of conviction or acquittal on the merits shall be a bar to any subsequent federal prosecution for the same act or acts, it has not included violations of the antitrust laws within this category. */ Nonetheless, since 1959 the Department of Justice has followed the policy of not initiating or continuing a federal prosecution following a state prosecution based on substantially the same act or acts unless there is a compelling federal interest supporting the dual prosecution. This policy has been known as the "Petite policy" since the Supreme Court granted the Solicitor General's petition in Petite v. United States ***/ to vacate the second of two federal subornation of perjury convictions after the government indicated its intention to avoid successive federal prosecutions arising from a single transactions just as it had earlier announced that it generally would avoid duplicating state criminal prosecutions. The Petite policy provides that only the

*/ Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 212 (1959).

**/ See 18 U.S.C. §§ 659, 660, 1992, 2101, 2117 and 15 U.S.C. §§ 80a-36, 1282.

***/ 361 U.S. 529 (1960).

appropriate Assistant Attorney General may make the finding of a compelling federal interest, and failure to secure the prior authorization of the Assistant Attorney General for a dual prosecution will result in a loss of any conviction through a dismissal of the charges unless it is later determined that there was in fact a compelling federal interest supporting the prosecution and a compelling reason to explain the failure to obtain prior authorization. This policy is, of course, intended to regulate prosecutorial discretion in order to ensure efficient utilization of the Department's resources and to protect persons charged with criminal conduct from the unfairness that can be associated with multiple prosecutions and multiple punishments for substantially the same act or acts. */

This dual prosecution policy applies, and authorization must be obtained from the appropriate Assistant Attorney General, whenever there has been a prior state proceeding (including a plea bargain) resulting in an acquittal, a conviction, or a dismissal or other termination of the case on the merits. It does not apply, and thus special authorization is not required, where the state proceeding has not progressed to the stage at which jeopardy attaches, or was terminated in a manner that would not, under the Double Jeopardy Clause, preclude a further state prosecution for the same offense.

*/ See Rinaldi v. United States, 434 U.S. 22, 27 (1977).

Accordingly, in the antitrust field we shall not hesitate to secure the indictment of price fixers, for example, simply because they have already been indicted in a state proceeding.

As I mentioned earlier, where the policy does apply, a subsequent federal antitrust prosecution may proceed if I authorize it based upon a finding that there is a compelling federal interest supporting the dual prosecution. The Department's policy provides guidance for this determination. Thus, a federal prosecution will not be authorized or continued subsequent to the completion of a state proceeding unless the state proceeding left substantial federal interests demonstrably unvindicated. The reference in the policy to "substantial federal interests" is intended to indicate that a significant federal prosecutorial interest must be present to justify authorization of a dual prosecution, which is an issue that must be determined on a case-by-case basis. As a general rule, however, cases coming within priority areas of federal jurisdiction are more likely to meet this requirement, and I consider the protection of free and unfettered competition to be a priority area of federal jurisdiction. Thus, as a general rule, I shall be inclined to authorize federal antitrust prosecution despite dismissal of, or an acquittal upon, parallel state charges, provided, of course, that I am satisfied that the evidence establishes guilt beyond a reasonable doubt. My inclination to authorize dual prosecution in the case of a state acquittal or dismissal will be strengthened

when there is a substantial basis for believing that the state result was affected by (1) blatant disregard of the evidence by the court or jury, (2) the failure to prove an element of the state offense that is not an element of the federal offense, (3) the unavailability of significant evidence in the state proceeding either because it was not timely discovered or because it was suppressed based on state law grounds or on an erroneous view of federal law, or (4) other substantial prejudice to the state's prosecution.

Even where a state antitrust prosecution results in a conviction, there are circumstances in which I would be inclined to authorize dual prosecution. I firmly believe that it is essential to the effective enforcement of the antitrust laws for culpable individuals to be sent to jail in cases involving clear-cut violation of undisputed antitrust law, such as agreements among competitors to fix prices, rig bids, or allocate customers or markets. Particularly in those states with relatively new and untested antitrust statutes, I suspect that judges will be reluctant to impose jail sentences; after all, even some federal judges seem unreasonably reluctant to impose significant jail sentences in antitrust cases. I shall be inclined to authorize dual prosecution in cases where we anticipate an enhanced sentence in our case, which may include situations where the state conviction was for a misdemeanor whereas a Sherman Act violation is a felony. A subsequent federal prosecution may also be

warranted where either the state antitrust charge carried a maximum penalty substantially below the maximum penalty under the Sherman Act, or the choice by the state prosecutor or grand jury of the state charges, or the state court determination of the severity of the sentence, was affected by any of the factors that I noted earlier as strengthening my inclination to authorize federal antitrust prosecution after state acquittal or dismissal.

Having said all this about when I would be inclined to authorize dual prosecution, I should add a word about when I would not. Where there has been a state antitrust prosecution resulting in a conviction and reasonable sentence, as a general rule there would not seem to be good cause to authorize or continue a federal prosecution. And even where the state prosecution results in an acquittal, I would probably tend not to authorize federal prosecution if the state prosecutors offered essentially the same evidence as we would offer, and there was no reason to believe that the verdict of acquittal reflected anything but a good faith reasonable doubt on the part of the judge or jury.

The principal goal of the Antitrust Division is to effectuate rational and effective enforcement of the antitrust laws in order to secure for the American public the benefits of a competitive marketplace. We shall make every effort to ensure that the relationship between the Division and state

attorneys general will always be based upon our mutual goal of effective antitrust enforcement in order to maximize the likelihood of our joint success in securing those benefits.