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"THE TREND TOWARDS HIGHER CORPORATE FINES: IT'S A WHOLE NEW BALL GAME"

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Introduction

The trend towards increasingly larger fines in criminal antitrust enforcement has resulted in the realization by the business community and the bar that criminal antitrust enforcement now involves a whole new order of magnitude in terms of its seriousness. For example, in an October 1996 Wall Street Journal article titled "ADM's $100 Million Price-Fixing Fine Blows Lid Off Usual Maximum Penalty," the paper reported that: "The ADM case marks a turning point in the way antitrust officials treat price fixers." In considering the significance of this trend, I will address: (1) how the landscape for calculating corporate fines is changing; (2) why it is changing; (3) why a $100 million fine in a criminal antitrust case is not an aberration but, instead, a sign of things to come; and (4) the increasing importance, in terms of potential reduction of huge fines, of cooperating with the government in antitrust investigations.

$10,000,000 Club

The historic $100 million fine recently imposed on Archer Daniels Midland Company ("ADM") for its participation in two international antitrust conspiracies in the food and feed additives industry is widely viewed as a singular achievement for criminal antitrust enforcement. To be sure, the record-breaking fine created a new, much higher summit in the landscape for sentencing corporations in antitrust prosecutions. However, it would be wrong to assume that this is a single pinnacle or that the trend towards higher fines is based on only one precedent-setting fine. Rather, ADM's fine is consistent with a clear pattern of increasingly higher fines for antitrust offenses.

In fact, in the past year, the trend towards higher fines has resulted in the creation of a popular new fraternity -- the $10,000,000 Club. The initiation fee for joining the Club is a check for at least $10,000,000 made payable to the United States Treasury. The Club already has seven charter members and will be opening its doors to new membership in the coming months, as a number of firms are trying to confirm their reserved places in the fraternity by submitting checks for even more than the minimum $10,000,000.

As I will demonstrate later, membership in the Club is not exclusive or limited to the ADM's of the world. Rather, any company that engages in a criminal antitrust conspiracy involving as little as $25 million in affected commerce is eligible for club membership.

Statistical Trends

First, I will present some statistics to demonstrate the trend towards increasingly higher fines in criminal antitrust enforcement. These numbers are based on the little over five-year time period from November 1, 1991 to date as our frame of reference. November 1, 1991 is a key date in this analysis, because it is the date on which the United States Sentencing Guidelines for organizations were amended, a major factor in the rise in corporate fines.

Higher Average Fines. In FY 1991, the average corporate fine for an antitrust offense was a little less than $320,000. Even without including the more than $170,000,000 in fines agreed to or imposed on defendants in the food and feed additives investigations in the past six months, the average fine imposed on an organization has more than tripled when compared to the period FY 1995 to date -- when corporate fines averaged over $1,000,000. When the food and feed additives fines are included in this equation, the average fine imposed on corporations since FY 1995 is roughly $3.1 million, a nearly *ten-fold* increase since FY 1991.

Higher Top-End Fines. Five years ago, the largest corporate fine ever imposed for a single Sherman Act count was $2 million. However, in the past couple years, fines of over $2 million have become commonplace. (See Attachment 1).

Last year ICI Explosives USA was the first firm to pay the $10,000,000 Sherman Act statutory maximum for its role in a price-fixing conspiracy involving commercial explosives. One month later, the second conspirator to cooperate in that case, Dyno Nobel, raised the bar again by agreeing to plead guilty to a two-count information and pay a fine of $15,000,000. As we have stated publicly before, the fines for both ICI and Dyno Nobel would have been higher but for their cooperation in the continuing investigation.

Of course, that record as the largest fine also was short lived. It fell when ADM established a new standard for corporate fines by agreeing to pay the $100 million fine in October 1996. Last month Haarmann & Reimer Corporation confirmed that the landscape for corporate fines is now at higher overall elevations by agreeing to pay a $50 million fine for its participation in the citric acid conspiracy.

In the first five months of FY 1997, the Antitrust Division has obtained fines in excess of $185 million. (See Attachment 2).

Reasons For Increasing Penalties

Factors. A number of factors are responsible for the increasingly heavy sentences for Sherman Act violations. Some of these factors, as explained below, are recent and, therefore, their full impact on sentencing is just beginning to materialize. The factors include:

- **the increase in the Sherman Act maximum fine from $1 million to $10 million per count in November 1990;**

- **the application of the new antitrust sentencing guidelines to corporate offenders in November 1991;**

- **the use of the double the gain/double the loss standard in 18 U.S.C. § 3571(d) to fine a defendant in excess of the $10 million Sherman Act cap;**

- **the reallocation of Division resources to focus on national and international cases involving larger volumes of commerce; and**

- **the change in perception by judges as to the seriousness of antitrust crimes.**

Perhaps the most instructive way to illustrate these factors is to examine their application in three sentencing hearings in the last year: the contested sentencing of Mrs. Baird's Bakeries and the jointly recommended sentences of ADM and Haarmann & Reimer.

Mrs. Baird's Bakeries

Mrs. Baird's Bakeries was found guilty at trial and in May 1996 was sentenced to pay a $10 million fine after a contested sentencing hearing. The fine in that case was many times higher than the previous court imposed record fine (as distinguished from an agreed-upon fine in a plea agreement). The Court rejected defendant's motion to depart below the $10 million statutory maximum, placed the defendant on probation for five years, required the corporation to provide 2,500 hours of community service "directed to the type of offense involved," and instructed the defendant to present to the Court and the government by a date certain a proposed plan of community service.

A Hypothetical Case

Without getting overly bogged down in the mechanics of the Sentencing Guidelines, the following calculations show how easily a company can find itself paying a fine of $10 million based on, say, only $30 million in affected sales.

Base Fine. Section 2R1.1(d)(1) instructs that for an antitrust offense, in lieu of pecuniary loss, use 20 percent of the volume of commerce affected by the offense in establishing a base fine. Thus, if the volume of affected commerce attributable to a hypothetical corporate defendant is $30 million, the company begins with a base fine of $6 million.

Culpability Score. Section 8C2.6 provides that the base fine (i.e., 20%) may be reduced by as much as one-quarter when the minimum antitrust multiplier of .75 is used (i.e., to 15%) or raised by as much as a factor of 4 (i.e., to 80%) depending on a defendant's culpability score. For purposes of this exercise, assume our hypothetical company has a culpability score of 8 based on the following factors: (1) the company receives a 4-point upward adjustment because it has more than 1,000 employees but less than 5,000, and a high-level executive participated in the conspiracy (§ 8C2.5(b)(2)), and (2) the company receives a 1-point reduction because it accepted responsibility and pled guilty but did not provide timely cooperation (§ 8C2.5(g)(2) and (g)(3)).

Scenario I. A culpability score of 8 results in a multiplier range of 1.6 to 3.2. Assuming no other mitigating or aggravating factors exist, our company (with a base fine of $6 million) has a sentencing range of $9.6 million to $19.2 million. (See Attachment 3).

Scenario II. If the facts are changed slightly and our hypothetical company does not deserve credit for affirmative acceptance of responsibility, the loss of the 1-point downward adjustment nets a culpability score of 9, a multiplier range of 1.8 to 3.6, and a resulting fine range of $10.8 million to $21.6 million. (See Attachment 3).

Scenario III. Consider one final variance on the case of the hypothetical company by assuming (1) that the same organization had designed, implemented, and enforced an "effective" compliance program, as defined in the Sentencing Guidelines, and was entitled to a 3-point reduction pursuant to § 8C2.5(f), and (2) that the organization provided full and timely cooperation in the investigation and was entitled to another 2-point reduction under § 8C2.5(g)(2). These reductions would result in a culpability score of 4, a multiplier range of 0.8 to 1.6, and an ensuing fine range of $4.8 million to $9.6 million for the organization. In which case, the company's minimum fine would be reduced by $6 million and its maximum fine would be reduced by $12 million as compared to the prior scenario. (See Attachment 3).

Corporate Amnesty. Although I will not take the time here to fully discuss the value of corporate compliance programs and the benefits of the Division's Corporate Leniency Policy, I would be remiss if I didn't take this opportunity to make a single point -- which is made painfully clear from the three sentencing scenarios I have described for the hypothetical company or, if you will, from the fate of ADM. The Division's amnesty program was designed to reward companies that report violations where they are detected, whether through a compliance program or otherwise, and then cooperate in the ensuing investigation. Companies that qualify for amnesty pay *zero dollars* in fines. However, companies that do not report misconduct and are then caught will face severe fines under the Sentencing Guidelines -- even, as the above hypothetical demonstrates, companies that do not have large sales.

The Statutory Maximum Fine Under 18 U.S.C. § 3571(d)
For A Criminal Antitrust Violation Is Twice The Gain
To, Or Loss Caused By, The Cartel, Not The Defendant

In order to get above the $10 million Sherman Act statutory cap in the sentencing of ADM and Haarmann & Reimer, the Division relied on the alternative fine calculation found in 18 U.S.C. § 3571(d) which provides: "If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process." Thus, the alternative maximum fine for an antitrust violation is twice the gross gain derived from the crime or twice the gross loss suffered by victims of the crime -- which means twice the gain derived by, or twice the loss caused by, *the cartel, not the defendant.* The plain meaning of § 3571(d), which must be applied to antitrust crimes in the same manner as to all federal crimes, is that "gross gain" equals the total gain derived by all persons from the offense and "gross loss" equals the total loss suffered by all persons other than the defendant as a result of the offense. This calculation ensures that the court will always be able to impose a fine sufficient to disgorge any ill-gotten gains from a violation plus an additional sum for punishment or, alternatively, a fine proportionate to the harm caused by the offense.

ADM's Sentencing Calculations

Turning next to the calculation of ADM's sentence, ADM's $100 million fine was based upon a fine of $70 million for its participation in an international lysine conspiracy, and another $30 million for conspiring with Haarmann & Reimer and others in an international citric acid conspiracy. The Division did not present the court at ADM's sentencing with a precise calculation of the amount of gain derived by the conspirators or the amount of loss suffered by the victims of the crime in the lysine and citric acid conspiracies. Rather, the amount of the fines imposed on ADM for its participation in these conspiracies were arrived at based on a combination of four factors:

(1) the fine range calculated under the Sentencing Guidelines for each offense;

(2) for the lysine fine only, an estimate of the loss suffered by the victims of that crime using the prior civil settlement of the lysine class action case as the equivalent of single damages;

(3) the dispositions of related matters in the investigations; and

(4) the value of ADM's cooperation to the Division's ongoing investigations.

Calculation Of The Lysine Fine

U.S.S.G. Calculation. Applying these factors to the calculation of the $70 million fine for ADM's participation in the lysine conspiracy worked as follows. First, the Division calculated the volume of affected commerce (U.S. sales) to be $150 million -- 20 percent of which results in a base fine of $30 million. Next, the Division recommended that ADM receive a culpability score of nine. This tally took into account a 5-point upward adjustment under § 8C2.5(b)(1)(B) based on the involvement of high-level executives at ADM in the offense and a 1-point reduction under § 8C2.5(g)(3) based on the fourth factor described above, ADM's acceptance of responsibility in the lysine investigation. ADM's culpability score of 9 resulted in a multiplier range of 1.8 to 3.6 and, based on the $30 million base fine, a fine range of $54 million to $108 million. (See Attachment 4).

Estimate Of Loss Suffered By Victims. Next, the Division looked to the $45 million civil settlement by the purchasers of lysine in the class action as an approximation of single damages caused by ADM and its co-conspirators (not twice ADM's civil settlement of $25 million). Twice the total civil settlement amount provides a maximum fine under the alternative fine statute of $90 million.

$70,000,000 Fine. Thus, based on the minimum fine calculated from the U.S.S.G. guideline range and the maximum fine allowable under our estimate of loss to the victims, the Division represented to the Court that the fine range was $54 million to $90 million. And, of course, the $70 million fine imposed on ADM for the lysine conspiracy falls squarely in the middle of that range. Furthermore, ADM's fine is, appropriately, significantly higher than the fines paid by ADM's co-conspirators who provided more timely cooperation to our investigation.

Calculation Of The Citric Acid Fine

U.S.S.G. Calculation. Turning next to the calculation of the $30 million fine imposed on ADM for its participation in the citric acid conspiracy, the rationale was as follows. First, the Division calculated that the volume of affected commerce was $350 million -- 20 percent of which results in a base fine of $70 million. This time, because of ADM's early cooperation, it received a 2-point reduction (and a lot more; see below), and received a culpability score of 8 for purposes of calculation of the guidelines range. As a result, the multiplier range was 1.6 to 3.2 and, based on the $70 million base fine, the U.S.S.G. fine range was $112 million to $224 million. (See Attachment 4).

Estimate Of Gain Or Loss. The Division did not provide the sentencing court with an estimate of gain derived by ADM and its co-conspirators or the loss suffered by the victims. This would have been difficult because ADM's cooperation was early and, therefore, the government had not concluded its investigation; and, furthermore, it was

unnecessary because ADM was entitled to a departure from the U.S.S.G. range based on its substantial assistance in the citric acid investigation. ADM's $30 million fine on the citric acid count, although stiff, would have been many multiples greater if ADM had not been the first citric acid conspirator to agree to plead guilty and cooperate in our investigation.

Haarmann & Reimer's Sentencing Calculations

U.S.S.G. Calculation. Haarmann & Reimer's estimated volume of affected commerce from its participation in the citric acid conspiracy was $400 million -- 20 percent of which results in a base fine of $80 million. In calculating Haarmann & Reimer's culpability score, it received a 5-point upward adjustment from the base fine of 5 because of the involvement of high-level executives in the offense and earned a 2-point reduction for its timely cooperation resulting in a culpability score of eight. As a result, the multiplier range was 1.6 to 3.2 and, based on the $80 million base fine, the U.S.S.G. fine range was $128 million to $256 million. (See Attachment 5).

Estimate Of Gain Or Loss. As with the calculation of the fines imposed on ADM, the Division was not far enough along in its investigation to present the court with an exact calculation of the gross gain or gross loss caused by the citric acid conspiracy. Moreover, a precise calculation was unnecessary because Haarmann & Reimer received a departure from the guidelines range based on its substantial assistance and, as described below, for its role in securing the cooperation of others in the citric acid investigation. Instead, the Division provided the sentencing court with Haarman & Reimer's sentencing guideline range for the offense, and both parties jointly recommended that the $50 million was an appropriate fine under 18 U.S.C. § 3571(d). Haarmann & Reimer's U.S.S.G. calculation demonstrates how easily the $100 million mark could be broken in future antitrust prosecutions, and likely would have been broken here if Haarmann & Reimer had not decided to plead guilty and cooperate.

Credit For Securing The Cooperation Of Others

As described above, the Division recommended that the court depart from the guidelines in sentencing Haarmann & Reimer based on its cooperation and substantial assistance in the citric acid investigation. However, in determining the amount of the departure, the Division gave Haarmann & Reimer additional credit based on the company's significant role in securing the cooperation of other co-conspirators; that is, Haarmann & Reimer encouraged other companies involved in the conspiracy to come forward and cooperate. This case represents the first time that the Division has recognized this type of cooperation. A firm that is cooperating and providing substantial assistance, and therefore is deserving of a reduction in the fine imposed, will receive a separate, cumulative reduction for securing the cooperation of others if: (1) that firm was the first to take steps to encourage its co-conspirators to cooperate with the government; and (2) that

firm's encouragement was both significant and effective in causing one or more conspiring firms to report their involvement in the conspiracy, cooperate in the investigation, and accept responsibility. The Division anticipates that the new policy will have a positive impact on the detection, investigation, and prosecution of criminal antitrust violations. Moreover, companies who chose to take advantage of this policy also stand to profit from it greatly. As demonstrated by Haarmann & Reimer's plea agreement, the reward for such cooperation may be worth tens of millions of dollars.

The Change In Perception By Judges As To <u>The Seriousness Of Antitrust Crimes</u>

Finally, the Division has observed a far greater appreciation by judges as to the seriousness of antitrust crimes. For example, when the court imposed sentence on ADM it said:

> **It's not a good day for corporate America when a plea like this takes place. I'm hopeful that this black day will be overcome by the new behavior of Archer Daniels Midland Company; that is, the behavior of cooperating with the government in its investigation. . . .**
>
> **I believe that the fine certainly serves as a deterrent to any company that might still be out there thinking that this type of behavior is acceptable.**
>
> **It simply is not acceptable. For any company to engage in price fixing is a sad day for corporate America because ultimately the consuming public are the victims of these type of conspiracies. I'm hopeful that the fine, and I know in my heart that the fine will deter other companies. . . .**
>
> **I do believe if no [sic] message went out today than the simple message of today's proceeding is that no American company is above the law, and if a hundred million dollars doesn't send that message, then I don't think there's a number on God's earth that I can set that would send that message, and so that will be the sentence of the Court.**

Expect the Trend to Continue: The Food And <u>Feed Additives Fines Are Not An Aberration</u>

<u>New Ball Game</u>. As discussed above, a $100 million fine in a criminal antitrust case is not an aberration but, rather, a sign of things to come for companies who are not deterred by the antitrust laws and decide to engage in price fixing or bid rigging. The food and feed additives investigation is not unique in terms of its enormity. To the contrary, we are currently investigating a number of matters that potentially affected larger volumes of commerce than the lysine or citric acid conspiracies. Moreover, the full impact of several

key factors which are responsible for the increasingly heavy sentences for Sherman Act violations is just beginning to materialize. It is a whole new ball game. An experienced antitrust attorney, who is here today, told me a few days ago: "You guys are knocking the cover off the ball." Well, we are going to do our best to keep our hitting streak alive.