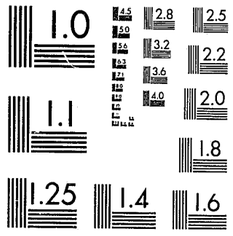

Department of Justice

PLEA BARGAINING IN CRIMINAL ANTITRUST PROCEEDINGS

by

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I appreciate the opportunity to participate in this workshop and to share with you my thoughts about some of the practical aspects of criminal antitrust proceedings between indictment and trial. I am sure each of you is aware that the activities which occur during this stage of a case are an extremely important part of the planning and tactics of a criminal case. How these activities are handled and resolved will have a substantial influence on the posture a case will be in by the time it must be tried. I have been asked to address three primary subjects during this particular phase of a case: arraignment, pleas and plea bargaining, and motion practice. Any one of these topics alone could easily fill the time I have been allotted. Rather than try to address all of the events which can occur during this time, many of which have been outlined in your materials, I have selected one major topic which I felt each of you would be interested in and must be aware of when you become involved in criminal antitrust litigation with the Antitrust Division. This topic concerns plea bargaining, plea agreements, and the policy and practice of the Department and the Antitrust Division.

Although plea bargaining has been a part of the criminal justice system for years, its use in criminal antitrust cases is a recent by-product of the fact that criminal antitrust violations are now felonies. Generally speaking, the practice

has been frequently criticized as demeaning and unfair because it allegedly compromises constitutional rights of the accused. Despite this criticism, the Antitrust Division has seen increasing numbers of lawyers prepared to engage in plea bargaining either before or after indictment of their clients. Before I tell you how the Division views plea bargaining and plea agreements, however, I would like to outline briefly the framework in which this practice takes place and the types of plea agreements which can result from it.

Basically, plea bargaining describes the process engaged in by prosecutors, defense counsel and defendants in which prosecutors offer a defendant the opportunity to avoid a trial in exchange for a guilty plea to the charges which have been made, reduced charges, dismissal of some of the charges, a particular sentence, or a combination of these items.

The Supreme Court has expressly recognized the propriety of this process, which it had tacitly approved for years. The Court's recognition of plea bargaining and its underlying rationale was spelled out in Santobello v. New York, 404 U.S. 257 (1971). The Court characterized plea bargaining as "an essential component of the administration of justice." The Court described the benefits brought about by this process and focused on the fact that all parties and the public benefit from the prompt disposition of criminal cases.

Between the lines of the Court's opinion, however, was the undeniable acknowledgement that the enormous volume and backlog of criminal cases in the nation's courts make plea bargaining essential. Unlike most prosecuting agencies, however, the Antitrust Division does not have a continually growing backlog of cases. As a result, we can be more selective in determining which cases warrant plea bargaining. This selectivity, in turn, enhances the effectiveness of our enforcement efforts by providing us with considerable flexibility in establishing the terms of the agreements we choose to enter. It also places a premium on timely cooperation.

Although the Court did not spell out the constitutional underpinnings of plea bargaining in Santobello, the Court has subsequently stated that these underpinnings are due process and effective representation by counsel. 1/ The Court also acknowledged that it basically views plea bargaining from a perspective which recognizes, first, that defendants who are advised by competent counsel and protected by other procedural safeguards are capable of making intelligent choices about whether or not to engage in this practice; and second, that there is a "mutuality of advantage" to both a defendant and a prosecutor who do engage in this practice, each of whom has his own reasons for avoiding a trial.2/ Based on these facts, among others, the Court has concluded that the acceptance of the

1/ Bordenkircher v. Hayes, 434 U.S. 357, 361-63 (1978)
2/ Id. at 363.

basic legitmacy of plea bargaining necessarily implies a rejection of any notion that a guilty plea, and I would add, any sentence resulting from that plea, is involuntary in a constitutional sense, simply because it is the end result of the bargaining process.3/

From this foundation we turn to Rule 11, Fed.R.Crim.P., which governs pleas and plea agreements. Rule 11 has four significant objectives: (1) to insure that a guilty plea or a plea of nolo contendere is voluntarily made; (2) to insure that the defendant is fully advised and understands the constitutional rights he is entitled to, as well as those that will be irrevocably waived, if he enters a guilty plea or a plea of nolo contendere; (3) to insure that all procedures are strictly adhered to concerning plea agreements; and (4) to insure that all proceedings are conducted in open court and are recorded.

For our purposes today, the most significant provision is subdivision 11(e). This provision codifies the accepted practice of plea bargaining and requires that any agreement reached must be disclosed in open court, subject to acceptance or rejection by the court. It also describes the types of agreements which may be reached and procedural safeguards which have been designed to prevent "abusive practices" in plea bargaining.

The most important subsection of this provision is 11(e)(1). Subsection (e)(1) contemplates three types of plea

3/ Id.

agreements: those in which the government might dismiss certain charges, (e)(1)(A); those in which the government may, in its discretion, make a sentencing recommendation, or agree not to oppose a defendant's request for a particular sentence, (e)(1)(B); and those in which both the government and the defendant agree that a specific sentence is the appropriate disposition of the case, (e)(1)(C).

An (e)(1)(A) or (e)(1)(C) agreement, that contemplates dismissal of certain charges, or a specific sentence, is both contingent and mandatory in nature. These agreements each have two interrelated promises to perform a particular act (one by the prosecution and one by the defendant), both of which are contingent upon acceptance or rejection of the whole agreement by the court. If either of these agreements is accepted by the court, the promises become mandatory and must be performed by both sides. If the court rejects any aspect of either agreement, any plea made in anticipation of the specified concessions can be withdrawn. These two types of agreements can only be fulfilled after court action, so that a determination can be made whether each party, particularly the defendant, received the concessions for which it bargained.

An (e)(1)(B) agreement, on the other hand, has legal consequences different from the other two. This type of agreement -- to recommend or not to oppose a defendant's request for a particular sentence -- is frequently referred to as a dis-

cretionary plea agreement. This is a partial mischaracterization. Under this type of agreement, the plea itself, if voluntary, is binding on a defendant; however, the disposition or sentencing aspect of the agreement is discretionary with the court. A prosecutor's obligation to a defendant can only be fulfilled when he performs as agreed, namely, by recommending a particular sentence or not opposing a defendant's request. Therefore the critical distinction between an (e)(1)(B) agreement and pleas made pursuant to the other two types of agreements is that the former, if voluntarily made, cannot be withdrawn simply because the court disagreed with the proposed sentencing disposition. See Rule 11(e)(2), Fed.R.Crim.P.

Finally, Rule 11(e)(1) prohibits the court from participating in plea discussions. The significance of this brief sentence cannot be over-emphasized. I have personally encountered several situations where defendants have tried to set up pretrial conferences, the purpose of which was to draw the court into plea bargaining discussions where an impasse had developed, or to try to get the court to divulge its inclinations on sentencing, or to order a pre-sentence report before a plea agreement was actually reached or submitted to the court. Not only is this practice prohibited by Rule 11, but I can comfortably assure you that we will

vigorously oppose any effort to pursue this backdoor approach to plea bargaining.

In addition to the legal framework which I have outlined, you should be aware of an additional source of information about this subject. This July, the Department published a pamphlet entitled "Principles of Federal Prosecution." This publication, in part, outlines the Department's policy concerning plea bargaining and plea agreements. I should emphasize, however, as I have done in the materials you have received, that these principles have been developed purely as a matter of internal Departmental policy, and as a guide to prosecutors in performing their duties. Neither these principles nor any internal procedures adopted by individual offices pursuant to them create any rights or benefits.

While it is not possible to discuss each provision of these guidelines now, allow me to make a few observations about them. These principles recognize that the manner in which federal prosecutors exercise their decision-making authority has far-reaching implications for the effectiveness of law enforcement, and the consequences for individual citizens. Therefore, these principles "have been designed to assist in structuring the decision-making process" by government attorneys. For the most part, they, like the Antitrust Division's sentencing guidelines which were published a few years ago, have been cast in general terms with a view toward "providing guidance rather than

mandatory results. The intent is to assure regularity without regimentation, [and] to prevent unwarranted disparity without sacrificing flexibility."

More specifically, in the area of plea agreements, these principles authorize government attorneys to engage in plea bargaining and to enter plea agreements in appropriate cases. The types of agreements authorized parallel those found in Rule 11. The principles also outline factors which a prosecutor should weigh in determining whether to enter into a plea agreement. These factors include, among others, a defendant's willingness to cooperate in the investigation, his willingness to assume responsibility for his conduct, the likelihood of obtaining a conviction at trial, the probable sentence upon conviction, and the public interest in trying a case rather than disposing of it by a guilty plea.

Of particular interest to each of you who represents defendants in criminal antitrust proceedings, the Principles require that a plea of nolo contendere be opposed unless the Assistant Attorney General concludes that the circumstances of a case are so unusual that accepting such a plea would be in the public interest. The underlying rationale for this position is based on three adverse consequences which result from nolo pleas, namely, diminished respect for the law, impairment of enforcement efforts, and reduced deterrence. The one example

cited in the Principles as an unusual circumstance is an unusually complex antitrust case where a plea of nolo contendere is the only alternative to a protracted trial.

As a practical matter, these Principles, as a whole, do not reflect any significant changes in the way the Department and the Antitrust Division have carried out their responsibilities in the past. They do, however, provide the public, counsel and defendants with a more concise statement of policy and procedure which will be taken into consideration when making important prosecutorial decisions.

Let me turn now to how the Antitrust Division generally approaches plea bargaining and plea agreements. As many of you know who have had occasion to discuss the possible disposition of a criminal case with us, it is the policy of the Division not to initiate such discussions. When such discussions are undertaken, they are considered strictly on a case-by-case basis; any agreement reached must be approved by the Director of Operations and the Assistant Attorney General. In addition, it has been and continues to be the policy of the Division to oppose vigorously pleas of nolo contendere with very few exceptions. The Division's policy and practice today is almost entirely focused on obtaining guilty pleas, incarceration, and substantial fines when plea bargaining is undertaken.

From our perspective, it is possible to view plea bargaining from three vantage points. Each bears a direct relationship to the status or progress of a particular investigation or case. These three vantage points occur before an investigation has commenced, during an investigation, and at the conclusion of an investigation, either before or after indictment.

In the pre-investigation category, the Division recently expanded its policy in the area of cooperation by corporations that disclose wrongdoing before the Division has knowledge of it. This statement of policy was first announced in October 1978. Under this policy, the Antitrust Division is prepared to give serious consideration to non-prosecution of corporations or officers who voluntarily report their illegal activities before detection by the Division. The Division will not, however, limit its prosecutorial discretion nor extend leniency automatically. The policy will only be applied to the first corporation to come forward. If others involved subsequently come forward, or all remaining corporations come in as a group, they cannot be given the same consideration. Their cooperation would, however, be given some weight at the sentencing stage of an ensuing case.

In addition, to be considered for such treatment, the voluntary confession must truly be a corporate act as

opposed to the confessions of individual executives or officials. If individual executives cooperate in the same manner, they may be given serious consideration for lenient treatment as well.

There are several other factors which will have a bearing on any decision of this nature: (a) whether the Division could have reasonably expected that it would have become aware of the criminal scheme if the corporation had not reported it; (b) whether the corporation, upon discovery of the illegal activity previously unknown to it, took prompt and effective action to terminate its part in the conspiracy; (c) the candor and completeness with which the corporation reports the wrongdoing and continues to assist the Division throughout the investigation; (d) the nature of the violation and the confessing party's role in it; and (e) whether the corporation has made or stated its intent to make restitution to injured parties. How these factors come out in the balance will vary from case to case. In two cases, where the Division has applied these standards, the reporting company was not named as a defendant in a criminal indictment, but was named as a co-conspirator and made a defendant in a companion civil case. In addition, no individuals associated with those companies were named as defendants.

Compared to more common forms of plea bargaining, this policy is a hybrid. It maximizes the Division's resources; and it provides us with necessary flexibility in measuring the cooperation of the first party to come forward

against the relative cooperation of others who may come later. In addition, it does not lock us into a particular disposition before we have enough facts to assess fully the impact of a violation and the involvement of all potential defendants. In sum, our pre-investigative policy places the maximum reward on early and continuous cooperation.

Plea bargaining during an investigation, at its conclusion, or after indictment can be treated together. The Division consistently has taken the view that a target cannot avoid indictment simply by offering to cooperate once he has been implicated in illegal conduct. However, we have been willing to give some consideration at the time sentencing recommendations are developed to those who provide substantial cooperation. In addition, it is the general policy of the Division not to engage in pre-indictment plea bargaining. Like every rule, however, there have also been exceptions to this policy. Having said this, there are several important corollary observations which should be made concerning these two policies. How receptive we are likely to be in these situations to engage in plea bargaining will depend on a number of factors: (a) the facts and circumstances peculiar to each potential or actual defendant and the investigation or case as a whole; (b) when the cooperation is offered and its value in relation to the status of the investigation or case; (c) the nature and impact of the violation; (d) the likelihood of success at trial;

(e) the cooperating party's relative culpability and our sentencing objectives based on the facts of the case; and (f) the willingness and manner in which an individual or corporation cooperates during all remaining phases of the investigation or case. Each of these factors is consistent with the Department's Principles of prosecution.

In this regard, imagine if you will, a sliding scale which starts at the beginning of an investigation and ends at the time a case is tried. The most important and influential factor on this scale will usually be when the cooperation was offered and its relative value. Thus to the extent that plea bargaining may be considered during an investigation or case, a potential defendant will be able to estimate the probable value of his cooperation. It is not difficult to see, therefore, that the length of an investigation, the expenditure of resources, and the information gathered are critical factors. All eventually merge, as time passes, to make overtures of cooperation less valuable. When this happens, the Division's interest in compromising the prosecutorial objectives that have evolved in a particular case will diminish correspondingly.

This is not to say that plea bargaining will not be considered or explored prior to or after indictment. It does mean, however, that in most cases where this does occur, plea bargaining will have to await indictment, where discussions are

likely to be more limited and closely aligned to post-trial sentencing objectives. These objectives will usually translate into a guilty plea, incarceration and/or fines for individuals, substantial fines for corporations, and cooperation with the prosecution where appropriate.

This position is clearly reflected in the Division's activity during the fiscal year which ended on September 30, 1980. In the past year, the Antitrust Division filed the largest number of criminal cases since World War II. The Division brought 55 criminal cases,nearly double the amount filed in fiscal year 1979, and about four times the number filed in 1972, when only 20% of our cases were criminal. This past year nearly 68% of our cases were criminal. The past year's criminal cases resulted in charges against nearly 160 corporations and individuals. There were nearly as many individual defendants as corporate defendants. This increase in individual defendants represents a 300% increase since 1977. These cases resulted in more than $ 8 million in fines, with individual defendants being fined an average of $27,000. Approximately 2,150 jail days were imposed against all individual defendants; and the average jail sentence imposed was over three months. Of all of the criminal cases brought this past year, at least half were disposed of by plea agreements, and in many of these cases, the agreements were mandatory in nature. By this, I mean that the agreements resulted in guilty pleas, incarceration, and/or substantial fines depending on the facts of the particular case. The conclusion to be drawn

from these results is clear. We are not only asking for and insisting on stiffer penalties, we are getting them.

Why has there been such a marked increase in both case filings and the severity of sentences obtained? There are a number of factors which answer this question. First is the strong commitment under the present Assistant Attorney General to root out and prosecute criminal violations. It is Sandy Litvack's view that "consistent and agressive enforcement is the most credible deterrent" to antitrust violations and "that nothing discourages anticompetitve conduct as much as the realization that the penalty is jail." In addition to this commitment, however, are several facts of life, beyond the statistics I have referred to, which have reinforced this philosophy. When Congress elevated antitrust violations from a misdemeanor to a felony in 1974, it conveyed an important policy message to the courts, counsel and potential defendants which emphasized the underlying seriousness of antitrust violations. By doing this, Congress effectively increased the risk of significant sentences for those who would be convicted in the future. Through our own increased commitment to enforce the antitrust laws and the acceptance of Congress' message by the courts who have imposed increased jail sentences and fines, this change in the law has now become a reality which every executive must recognize.

The past era of misdemeanor violations where fines were insubstantial and jail terms were non-existent is gone forever. In those days, the primary concern of defendants was treble damages, which were to be avoided or minimized at all costs. The risk of engaging in unlawful activity was minimal when weighed against the punishment being meted out. While treble damages are still of great concern, defendants now face the likelihood of incarceration and substantial fines. This fact has done more to increase the effectiveness and deterrent value of antitrust enforcement than anything else. To state this another way, the concern and fear of individual defendants going to jail today has taken on new meaning because the likelihood of it becoming a reality has been greatly enhanced. A major shift, therefore, has occurred in the cost-benefit analysis and perception by individual executives about their involvement in anticompetitive activity. That shift has resulted from our track record; and it now requires every potential antitrust defendant to examine more closely, and more seriously, the risk of being caught. The bottom line is that few, if any executives, are willing to risk serving a jail term.

What all of this boils down to is that the ante has been increased for those who wish to plea bargain during the later phases of an investigation or after a case has been filed.

We are not troubled by the fact that, unlike the U.S. Attorneys around the country, we do not have the flexibility to negotiate pleas for lesser-included offenses. We are more committed than ever before to try the criminal cases that we develop.

To conclude, there is one point which those of you who may represent potential or actual defendants in criminal antitrust cases should bear in mind: the earlier that complete cooperation is offered, the more likely it is to have a favorable influence on the relative severity of any agreement which may result from plea bargaining. Analyze the pros and cons in the context of the sliding scale I described earlier, and you will be able to adjust your expectations and those of your clients accordingly.

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