WHITHER THE MAJOR COUNT?
THE ROLE OF TITLE 18 CHARGES
IN RECENT ANTITRUST DIVISION PROSECUTIONS

-- *by James A. Backstrom and John C. Truong**

A survey of Antitrust Division prosecutions in the past 14 months discloses a trend toward including a wider variety of non-Sherman Act counts than in the past, in some cases to the exclusion of a Section One count itself. While the Division has been known to bring Title 18 charges in price-fixing and bid-rigging prosecutions previously, recent cases show a broader use of those counts than seen previously.

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Over half of the Division's most recent prosecutions have involved non-Sherman Act offenses. While a number of cases charged offenses such as obstruction of justice and even witness tampering, not unknown historically in Division inquests, others alleged mail and wire fraud conspiracy, bribery kickbacks and even money laundering. Significantly, the Sherman Act was not the major count in several of the prosecutions.

The New York Field Office's wide-ranging inquest into corruption in the advertising and printing industry offers examples of the range of counts the Division is bringing and its success in obtaining guilty pleas to them. Late last month,

an independent broker of printing services for Wall Street pleaded guilty not only to violating Section One, but also to conspiracy to commit commercial bribery and mail fraud in violation of 18 U.S.C. § 371. Earlier in February, the Division announced guilty pleas from the owner of a New York office supplies company and two former purchasing agents to charges of conspiring to commit mail fraud related to embezzlement and kickback schemes. The previous day, the Division announced that a former Home Box Office, Inc. executive pleaded guilty to charges based on her receipt of $439,000 in kickbacks from printing vendors and her orchestrating a bid-rigging scheme involving those vendors. A New Jersey printing company and its owner also pleaded guilty to related conspiracy charges. The counts charged a conspiracy to commit bribery and mail fraud and fraudulent statements on tax returns (26 U.S.C. § 7206(1)), as well as a violation of the Sherman Act.

The Division's initiative in bringing tax counts was evident earlier last year when it announced guilty pleas by the former vice president of a chain of supermarkets in the New York metropolitan area to fraud and tax charges relating to his receipt of $250,000 in cash kickbacks from vendors that supplied produce to the company's supermarkets. The essential allegation was that the defendant steered contracts to favored vendors in exchange for kickbacks. The liaison among the Division's New York Office, the Federal Bureau of Investigation and the Internal Revenue Service was credited with making this approach possible.

Last year, the Cleveland Field Office had a rare opportunity to employ the money laundering statute (18 U.S.C. § 1956(h)), which carries a maximum punishment of 20 years. According to the Division, the scheme enabled a former audio-visual company executive to obtain or solicit over $3.5 million in kickbacks from vendors seeking contracts from his company. He allegedly required kickbacks for favorable support in contract negotiations and successful execution of any contract awarded. As in the New York Field Office cases, the Division credited the Federal Bureau of Investigation and the Internal Revenue Service in the investigation.

Although the Division long has brought prosecutions alleging Title 18 offenses related to attempts to obstruct or impede antitrust grand juries, it has encountered especially elaborate schemes recently.

In September 2003, as part of a multi-year investigation into price fixing in the carbon products industry, the Division charged four former executives of Morganite Inc. with a conspiracy to obstruct justice, witness tampering (18 U.S.C. § 1512(b)(1)), document destruction (18 U.S.C. § 1512(b)(2)(B)), and aiding and abetting (18 U.S.C. § 2(a)). The prosecution followed the Division's earlier Sherman Act, price-fixing and obstruction of justice case against Morganite and its United Kingdom parent. Both companies pleaded guilty, and a total of $11 million in fines were imposed.

According to the indictments, defendants and their confederates formed a task force to search company files and remove, conceal or destroy any documents they found reflecting a pricing agreement. Allegedly, a "script" was prepared for co-conspirators to follow if they were questioned in the investigation. Price-fixing meetings were falsely characterized as joint venture meetings, and references to pricing discussions with competitors were omitted, all to convince the Division to close its inquest and avert an inquiry by European antitrust authorities. One defendant is even alleged to have schemed to separate, retire or otherwise co-opt employees deemed prone to disclose the price-fixing conspiracy to investigators.

A more recent example of a price-fixing inquest yielding a charge of obstruction of justice (18 U.S.C. § 1503) is the DRAM investigation. In December, the Division charged Alfred P. Censullo, an executive for Micron Technology Inc., North America's largest producer of dynamic random access memory products, commonly known as DRAM, with destroying documents subpoenaed by a San Francisco grand jury. A key allegation in the criminal information is that, after being notified of the grand jury investigation and subpoena, the defendant altered

handwritten notations in his notebooks by inserting additional words, phrases and symbols to change the meaning of the original notes which, according to the government, related to competitor pricing information. It also is alleged that pages containing competitor pricing information were removed and initially withheld, and obvious alterations that would have tipped off the Division. Censullo entered a guilty plea in the United States District Court for the Northern District of California pursuant to a cooperation plea agreement.

The Division's initiation of non-Sherman Act charges to address unusual behavior in commerce is not news. In the infamous Empire Gas investigation of the 1970's, the Division accused a liquefied petroleum distributor, its president and two private security firms of trying to destroy the business and property of competitors, even trying them on firearms charges. They were acquitted, and only the companion Section 2 civil case remains in Division lore.[1] But the government's new willingness and success in employing a wide variety of Title 18 substantive offenses are notable, involving as they do impressive partners like major United States Attorneys Offices and the IRS. Moreover, the Division is responding to increasingly elaborate schemes to impede its investigations. While it still is the "major count" in most Division prosecutions, the Sherman Act count now joins a growing number of weapons in the government's arsenal against cartels and efforts to conceal them. ■

Endnotes

[1] *United States v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976).