

LATHAM & WATKINS LLP

United States Antitrust Law, Policies & Procedures

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Overview

- U.S. Antitrust Laws
 - Civil vs. Criminal Enforcement
 - Elements of Sherman Act Violation
- U.S. Department of Justice Antitrust Enforcement
 - Corporate & Individual Prosecutions
 - Policies and Procedures
- Corporate Leniency Policy
- Parallel Civil Litigation
- International Antitrust Enforcement
- Areas of Risk for Criminal Antitrust Conduct

U.S. Antitrust Laws

- Legal Framework

U.S. Antitrust Laws

- **Sherman Act Enacted in 1890** (original antitrust law)
 - Dual system of public and private enforcement
 - Aimed at preserving free and open competition
 - Competition produces the best products at the cheapest price
- **Most Antitrust Laws Are Civil Violations**
 - Mergers (Clayton Act)
 - Monopolization (Section 2 of the Sherman Act)
 - Price Discrimination (Robinson Patman Act)
 - Certain Anticompetitive Agreements (Section 1 of Sherman Act)
 - Most State Antitrust Laws (e.g. Cartwright Act in California)
- **One Area of Antitrust Law Has Criminal Penalties**
 - Price Fixing, Bid Rigging, Customer or Territorial Allocation, and Output or Capacity Restrictions – Prosecuted under Section 1 of Sherman Act

Section 1 of Sherman Act (15 U.S.C. § 1)

- “[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.”
 - U.S. DOJ prosecutes criminally only those agreements between competitors that the courts have characterized as *per se* violations
 - *Per se* agreements are conclusively presumed to be illegal without any inquiry into the precise harm or business excuse for their use
 - *Per se* agreements include price fixing, bid rigging, customer or territory allocation, or output restriction.

Elements of Section 1 Sherman Act Violation

- (1) **“Contract, combination, or conspiracy”**
 - Agreement or mutual understanding
- (2) **“Unreasonable restraint of trade.”**
 - Only certain agreements are illegal: price fixing, bid rigging, customer or territorial allocation, or out put restriction.
- (3) **Conduct must affect interstate or foreign commerce**
 - Affected commerce must cross state or national borders

Element 1 – contract, combination, or conspiracy

- **Some form of agreement or mutual understanding**
 - Agreement does not need to be written or spoken, it can be inferred or assumed from the circumstances – “wink of an eye”
 - Ignorance of the law is not a defense
 - Most defenses are based on lack of agreement
- **Between two or more competitors**
 - Agreement between a manufacturer and distributor or customer generally not criminally prosecuted
- **Between separate unrelated entities**
 - Agreement between a parent and subsidiary is not a violation
- **Unilateral decision to raise prices is legal**
- **Agreement is the crime**
 - Does not matter if agreement carried out or if it succeeds

Element 2 – Unreasonable Restraint of Trade – Per Se Violations

- **Price Fixing**
 - Any agreement to raise, lower, maintain or stabilize prices
 - No need to agree on the same price (price range, floors, levels)
 - Agreements on rebates, discounts, terms of sale that effect price
- **Bid Rigging**
 - agreement to eliminate, reduce, or interfere with job or contract awarded on the basis of bids.
 - Agreements on prices to bid, who should win the bid, who should bid high, who should bid low, or who should refrain from bidding
- **Customer or Territorial Allocation**
 - Agreements to divide customers, markets, territories, market shares
- **Output Restriction**
 - Agreements to reduce capacity or output (e.g. OPEC)
 - Reduce Supply = Increase in Prices

Element 3 – Interstate Commerce

- Conspiracy must “**affect interstate commerce in goods and/or services.**”
 - Element is easily met and frequently stipulated
- International Cases (Conduct Outside the U.S.)
 - FTAIA (The Foreign Trade Antitrust Improvements Act)
 - To Bring a Case Based on Events Solely Outside the US
 - Fixed Products must be Import Commerce (imported into U.S. by the Defendants) **or**
 - Conduct had a (1) “**direct, substantial, and reasonably foreseeable effect**” on U.S. commerce; and (2) “such effect gives rise to a claim” under the Sherman Act.

Sherman Act – Severe Criminal Penalties

- **Individuals**
 - 10 years imprisonment
 - \$1 million in fines
- **Corporations**
 - \$100 million in fines or
 - Alternative Fine Statute: “twice the gross pecuniary gain or twice the gross pecuniary loss.” 18 U.S.C. § 3571(d)
 - Under this statute the DOJ has obtained negotiated fines of up to \$500 million from a single corporate defendant.
 - But, if you go to trial, “gain” or “loss” must be proven by the government to a jury beyond a reasonable doubt under *Apprendi*
- **Collateral Consequences**
 - Debarment (prohibited from bidding on government contracts)
 - Prima Facie Evidence of a Violation in Parallel Civil Cases
 - Potential Investigation or Prosecution in Other Jurisdictions

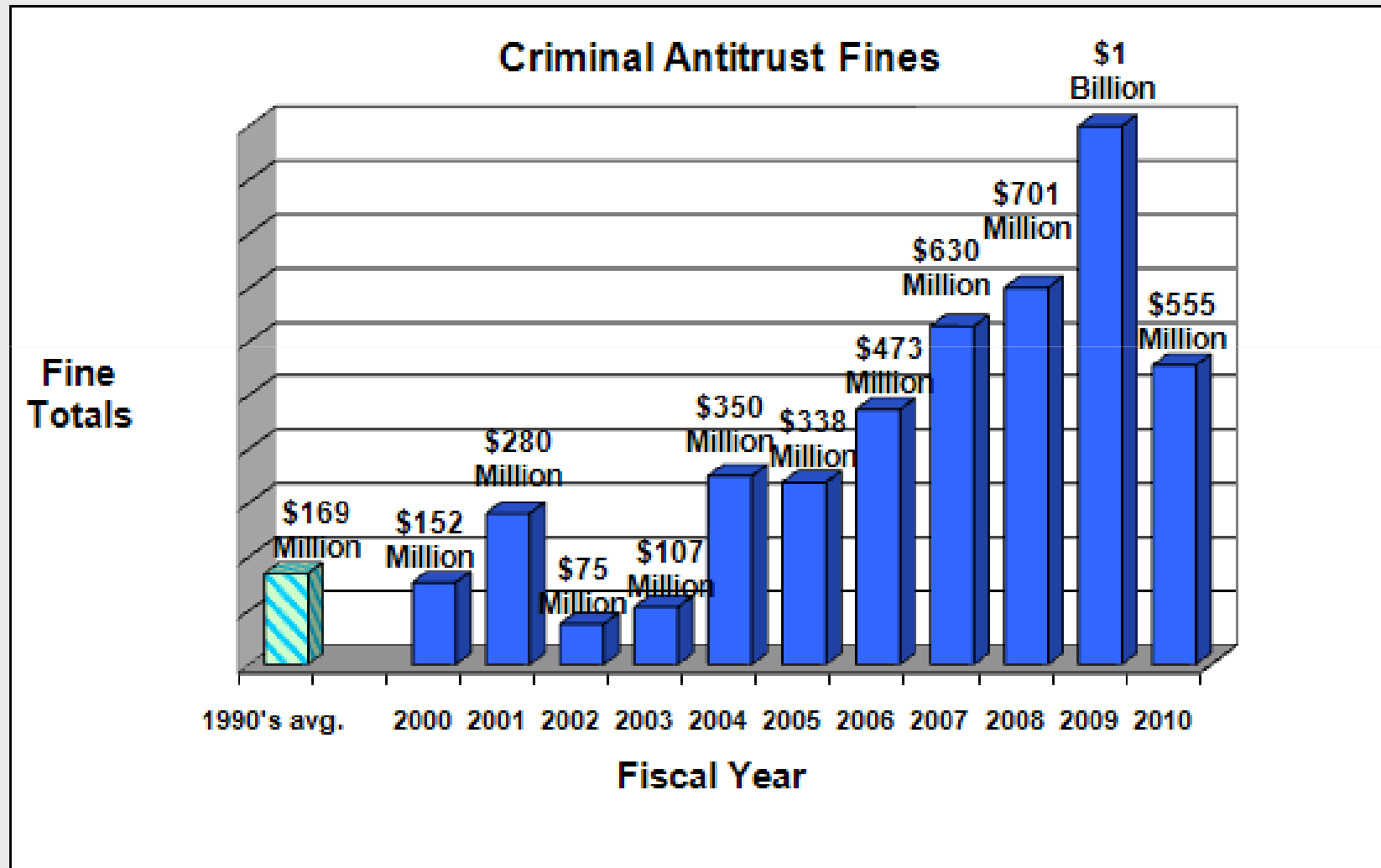
Antitrust Enforcement in the U.S.

- Policies, Statistics, and Procedures

US DOJ – Antitrust Enforcement

- **U.S. Department of Justice, Antitrust Division**
 - Exclusive Jurisdiction to Enforce Sherman Act
 - One section in D.C. and Seven Field Offices responsible for Criminal Enforcement (San Francisco, New York, Chicago, Philadelphia, Cleveland, Dallas and Atlanta)
- **Priorities and Policies**
 - (1) corporate prosecutions with large criminal fines;
 - (2) increased jail time for individuals
 - (3) international price fixing cases (larger volume of commerce)
 - (4) efforts to make foreign nationals go to jail in U.S.
 - (e.g. MOU with Department of Homeland Security on relief from deportation)
 - (5) heavy reliance on self reporting through corporate leniency policy which provides immunity for those who report first

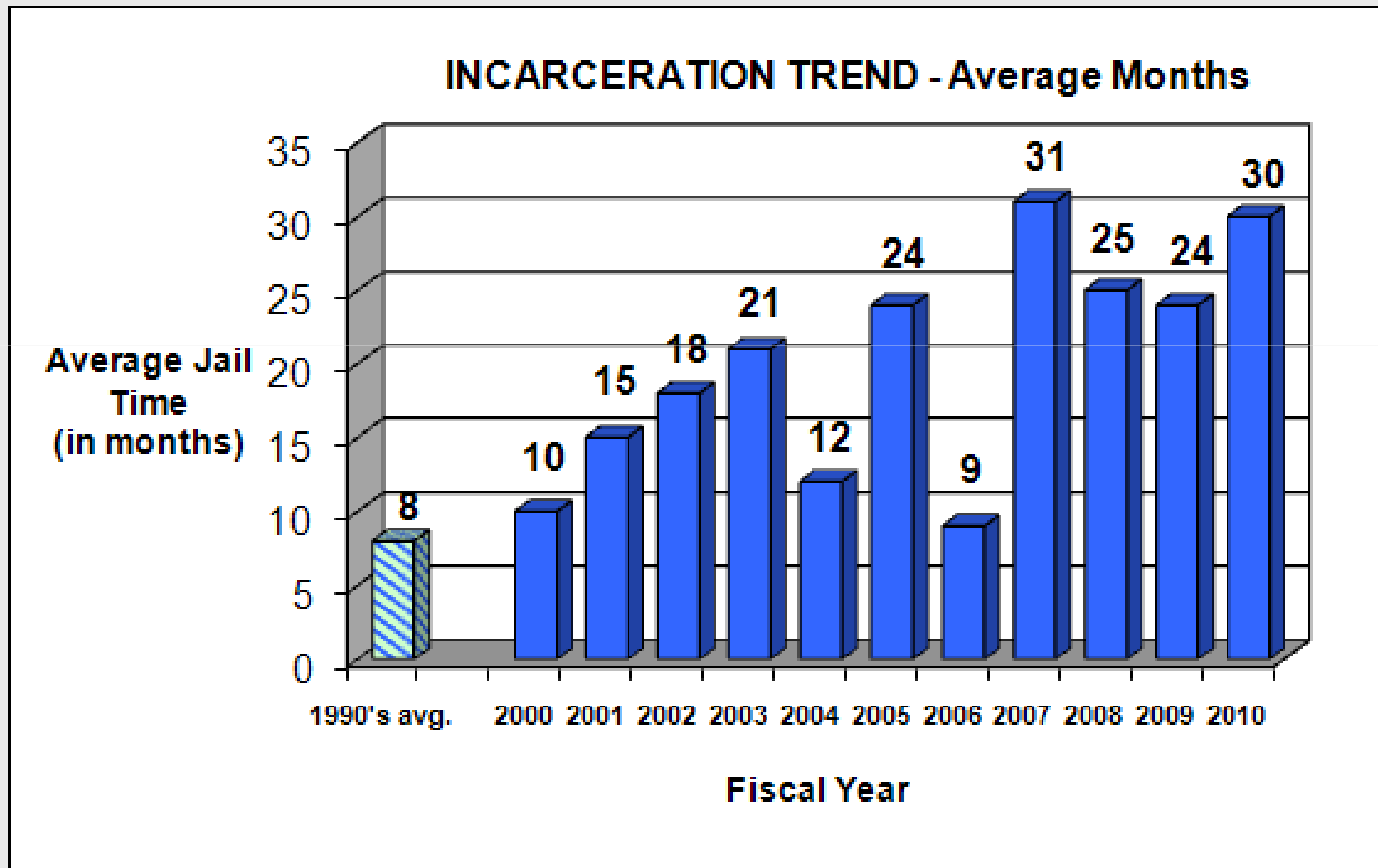
DOJ Statistics – Criminal Fines



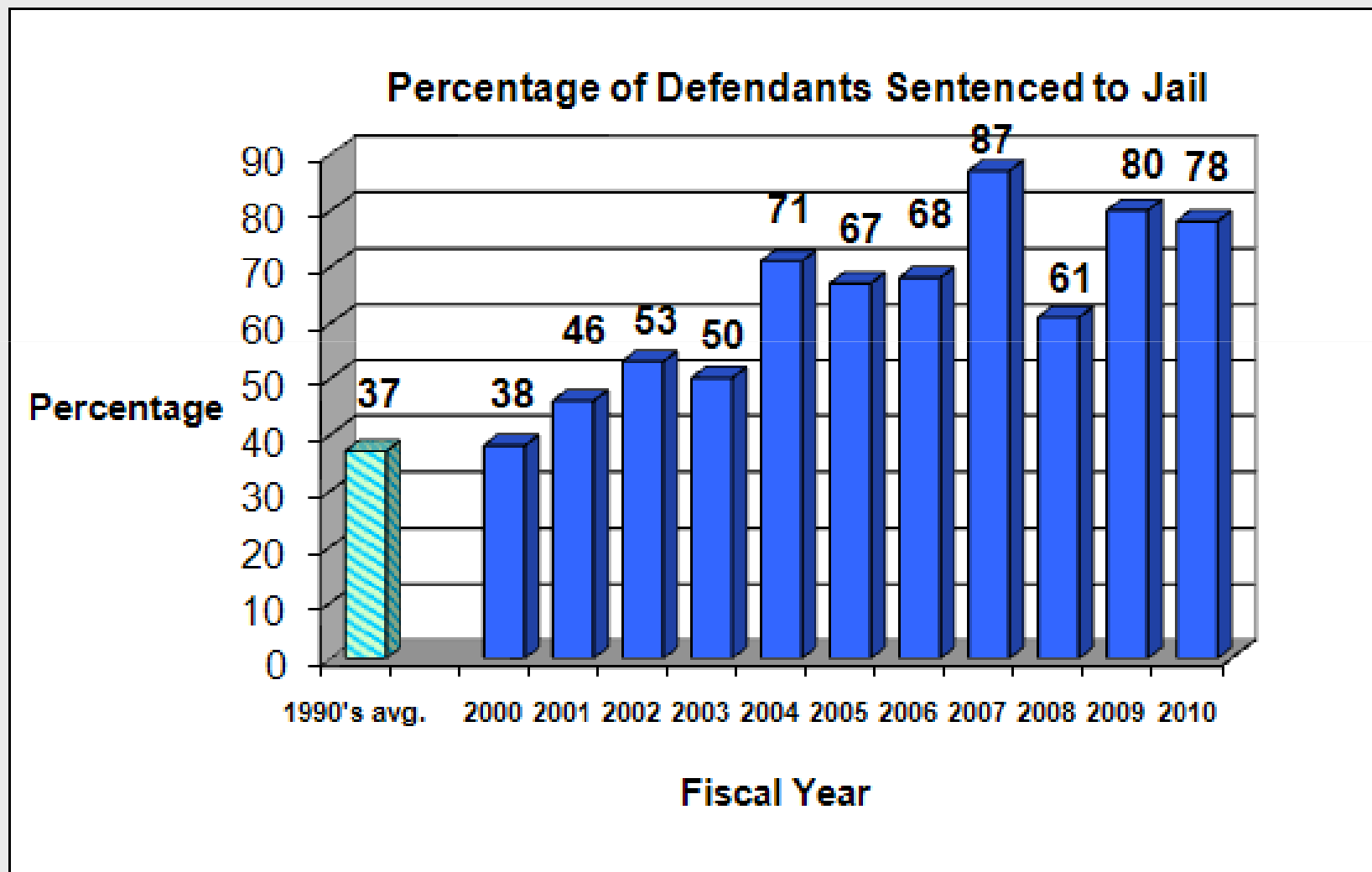
Top Ten Cartel Fines in the U.S.

- \$500 Million: Hoffmann-La Roche (Vitamins, 1999)
- \$400 Million: LG Display (LCD, 2009)
- \$350 Million: Air France/KLM (Air Cargo, 2008)
- \$300 Million: Korean Air Lines (Air Cargo, 2008)
- \$300 Million: British Airways (Air Cargo, 2008)
- \$300 Million: Samsung Electronics (DRAM, 2006)
- \$225 Million: BASF AG (Vitamins, 1999)
- \$220 Million: **Chi Mei Optoelectronics** (LCD, 2010)
- \$185 Million: Hynix Semiconductor (DRAM, 2005)
- \$160 Million: Infineon Technologies AG (DRAM, 2004)

DOJ Statistics – Longer Jail Sentences



DOJ Statistics – More Jail Sentences Imposed

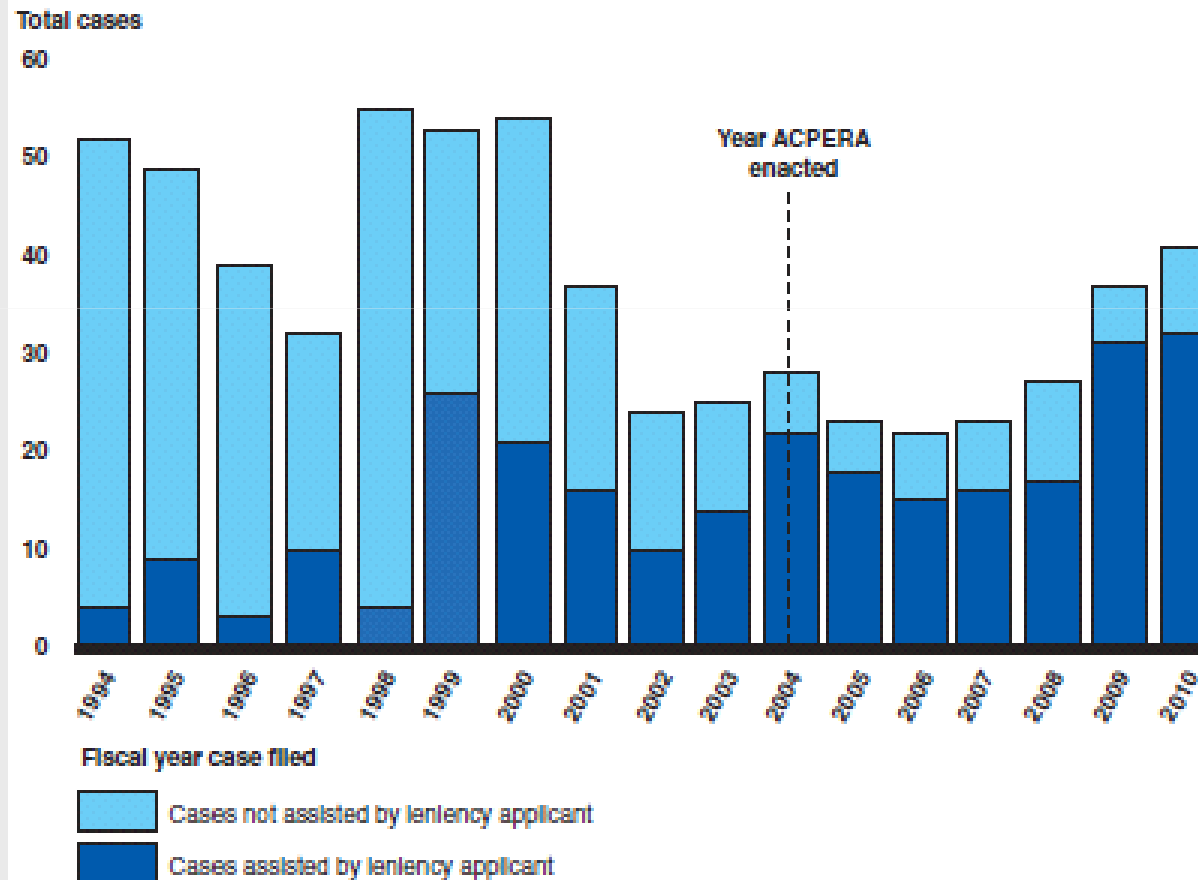


Corporate Leniency or Amnesty Policy

- **Full immunity to the first company** (and its employees) that comes it and reports its involvement in a criminal antitrust conspiracy.
 - Biggest source of cases for the DOJ
 - “Amnesty Plus” – if not the first amnesty applicant, you can get a reduction on your fine if you bring in a new product for amnesty – allows the government to roll one case into the next.
 - Immunity to all current and former employees who agree to cooperate.
 - Creates a race to be first to the prosecutor’s door
 - Adopted by 50 other countries around the world
- **ACPERA** (Antitrust Criminal Penalty Enhancement and Reform Act) (2004) – reduction in civil liability for amnesty applicant
 - Single (not treble) damages and no joint and several liability.
 - Requires defendant to cooperate with plaintiffs in civil case

DOJ's Increased Reliance on Leniency Applicants To File Cases

Figure 8: Number of Criminal Cartel Cases Filed Each Fiscal Year, Broken Out by Those Assisted and Not Assisted by a Leniency Applicant



Source: GAO analysis of Antitrust Division data.

Cartel Enforcement - Aggressive Investigative Techniques

- **Use of Other Criminal Statutes**
 - Obstruction of Justice
 - Mail/Wire Fraud Statutes
- **Extradition of Foreign Nationals**
 - Ian Norris (2010)
- **Covert Surveillance**
 - Audio and Video Recording
 - Wiretap authority for antitrust offenses (2006)
- **Search Warrants**
- **Border Watch**
 - Track travel into and out of the U.S.
- **Interpol Red Letter Notices** (international arrest warrant)

Industries Subject to Cartel Investigations

- Air & Water Transportation (cargo/passenger)
- Computer Components/ Consumer Electronics
- Banking & Financial Industry (Private Equity)
- Food Industry
- Oil & Gas
- Automobile Parts
- Chemical
- Home Appliances
- Government Procurement
- Cement/Ice/Paper (commodities)
- Construction
- Software, High-Tech, Labor Agreements

Chronology of a Criminal Antitrust Case

- **Grand Jury Investigation**
 - Government investigates and collects information to determine if a crime occurred: search warrant, subpoenas, leniency applicant
- **Plea Agreement**
 - Admission of guilt by defendant
 - Parties negotiate the terms of the resolution: fines, jail time
 - 90% of cases are resolved by plea agreement
- **Indictment**
 - Formal charges by the government of a violation
 - Government must provide all relevant evidence to the defendant
 - Defendant can file motions to limit evidence or dismiss charges
- **Jury Trial**
 - Government must prove guilt “beyond a reasonable doubt.”
- **Appeal**

Taiwan Companies Affected by U.S. Antitrust Laws

- **TFT-LCD Investigation**
 - Chunghwa Picture Tubes (2009)
 - \$65 million fine; 6 executives charged and 3 pled guilty
 - Chi Mei Optoelectronics (2010)
 - \$220 million fine; 5 executives charged and 4 pled guilty
 - HannStar Display Corp. (2010)
 - \$30 million fine; 2 executives charged and 1 pled guilty
 - AU Optronics (2010)
 - indicted along with it's U.S. subsidiary and six executives
- **Air Cargo Investigation**
 - China Airlines (2010) (\$40 million)
 - Eva Airways Corp. (2011) (\$13.2 million)
- **Auto Lights Investigation**
 - Sabry Lee (2011) -- \$200,000
 - Three Taiwanese executives charged and two pled guilty (other was arrested on an airplane in the Los Angeles airport).

Civil Damage Lawsuits

- Follow-on civil damage claims

Private Civil Damage Lawsuits – Compensation to Customers for Harm Caused by the Cartel

- **Who can sue?**
 - Customers, both direct (federal law) and indirect purchasers (state law)
 - Individuals, small and large businesses, government agencies
- **How can they sue?**
 - Individual law suits by each customer
 - Numerous customers can join together and file a class action
- **How much money can they recover?**
 - Triple damages (price overcharge x 3)
 - Joint and several liability – Each defendant is liable for harm caused by all the defendants combined
- **Where do they sue?**
 - Initially, state and federal court all over the country
 - Cases are consolidated into a single lawsuit in federal court

Chronology of a Civil Damage Lawsuit

- **Complaint**
 - “A short and plain statement of the claim” filed by the customer
- **Motion to Dismiss (or Answer)**
 - complaint must contain sufficient facts to demonstrate “plausible” claim for relief to survive a motion to dismiss
- **Discovery**
 - Request for documents, admissions, interrogatories, depositions
 - Extremely costly and time consuming
- **Motion for Class Certification**
 - Numerous, Common, Typical, Adequate, Ascertainable
 - Crucial stage of proceedings that can ultimately resolve the case
- **Motion for Summary Judgment**
- **Trial**
- **Appeal**

Civil Damage Lawsuits -- Challenges

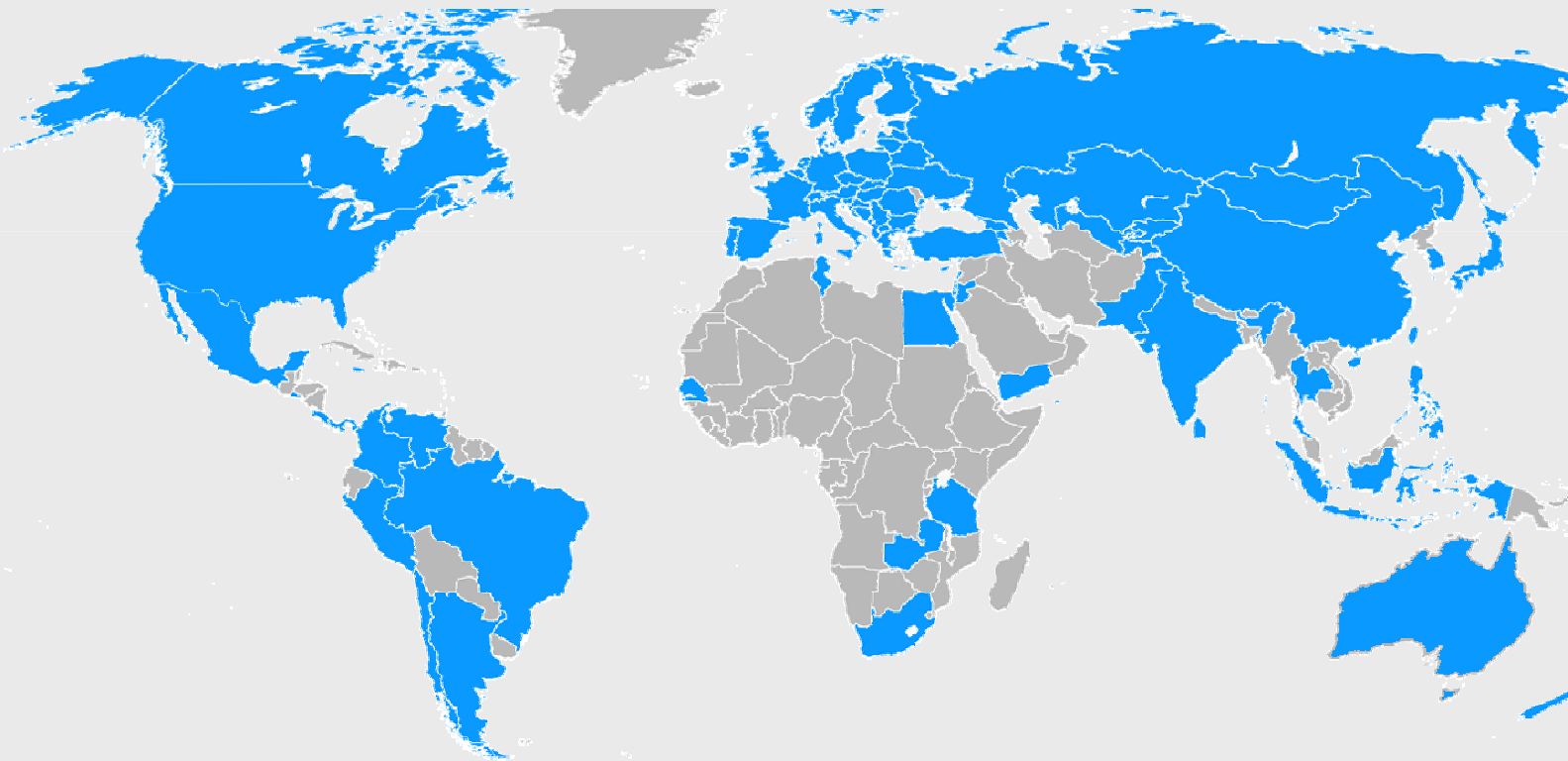
- **Mere Announcement of Grand Jury Investigation Triggers Scores of Class Action Lawsuits**
 - Lower burden of proof (“preponderance of the evidence”)
 - Civil Liability can frequency exceed criminal fines
 - Foreign civil damage claims increasing (Canada, Europe)
- **Challenges and Opportunities In Civil Cases**
 - Motions to Dismiss and Class Certification (case law moving in defendants’ favor)
 - DOJ access to civil discovery (grand jury subpoenas for law firms)
 - *See In re: Grand Jury Subpoenas Served on White & Case, et. al.*, 677 F.3d 1143 (9th Cir. 2010)
 - Adverse Inference from Employees’ Exercise of 5th Amendment Right to Remain Silence and Not Testify in a Civil Deposition

International Antitrust Enforcement

- Competition laws have been adopted around the world

Globalization of Cartel Enforcement

- Stringent competition laws in the US, EU, and throughout Asia – now enforced in over 100 countries!



Globalization of Antitrust Enforcement

- **Global nature of economy means that any cartel conduct will generate investigations in numerous countries**
 - Over 50 countries have immunity programs
 - Movement towards criminalization of cartel conduct (e.g. U.S. UK, Canada, Brazil, Japan, South Korea, Ireland, Australia, Israel)
 - E.g. (1) not uncommon for cartel case to result in immunity applications in six or more countries, (2) investigation of minor violations can result in investigations in multiple countries
- **Challenges**
 - Managing discovery around the world (e.g. preserving privilege)
 - Problems with inconsistent approaches (substantively and procedurally)
 - Threat of information leaking from one jurisdiction to the next

Areas of Greatest Risk for Cartel Conduct

- Common red flags to be aware of when investigating or trying to prevent cartel conduct

Areas of Risk for Cartel Conduct

- **Mergers** (inadequate due diligence)
- **Foreign Subsidiaries** (in countries without strong antitrust compliance cultures)
- **Revolving Door Among Competitors** (employees switch from one competitor to the next)
- **Inadequate Training**
 - E.g. Engineers moved to sales position without training
- **Cost Cutting Measures Reduce Compliance Training**
 - Economic downturn is period of highest risk for cartel conduct
- **Other Improper Conduct**
 - E.g. Foreign Corrupt Practices Act (FCPA) – Bridgestone (marine hose) and Panalpina (freight forwarding)
- **Any Competitor Contacts Should Raise Red Flags**

Questions & Answers

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