

Cartel & Criminal Practice COMMITTEE



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some of our Texas Committee experts/members. We are now nearing the finish line as we head towards sentencing for the antitrust offense. Please look for announcements about those programs in the coming months. We will cover sentencing matters for individuals and corporate entities, located here or abroad. Our fundamentals program has provided an opportunity for numerous Committee members to become involved in the work of the Committee. We thank our Vice Chairs and numerous Committee members who have participated in our various activities for their commitment and continuing work. As always, we welcome volunteers and are happy to hear your suggestions for programs, publications, and other projects.

Belinda A. Barnett, Co-Chair¹
James H. Mutchnik, Co-Chair
Cartel and Criminal Practice Committee
Section of Antitrust Law
American Bar Association

MESSAGE FROM THE CO-CHAIRS

by Belinda A. Barnett and James H. Mutchnik

The Cartel and Criminal Practice Committee is pleased to publish the second of two newsletters for the 2010-11 year. On behalf of the Committee, we extend warmest thanks and appreciation to our newsletter editors, Belinda Lee, Shimica Gaskins, Lisa Tenorio-Kutzkey, and Doug Tween. As they have always done, they have put together, along with the authors, an excellent newsletter with informative articles on the most relevant of topics.

This edition of the newsletter follows prior newsletters in highlighting international cartel topics from initial contact by the enforcement authorities to settling the eventual civil litigation. The articles take us from Argentina to Canada to Korea, and from "kindergarten" to high tech environments. Our very own Young Lawyer Representative Jennifer Dixon provides recent developments from the Antitrust Division's Criminal Enforcement Program. And, Bob Calo of Lane Powell, provides sage advice for that difficult period when your client knows it may have a problem that may require reporting, but it is still trying to figure out what to do. We would like to offer a special note of thanks to Steve Squeri. Steve has, for many years, helped make these newsletters timely and topical with his annual "Survey of Recent Non-Antitrust Cases of Interest." Steve's dedication to the newsletter and the work of our Committee is exemplary. Thank you, Steve.

We are also pleased to report that our Committee's audio program series on "*Cartel and Criminal Practice Fundamentals*" has continued over the year. We have made our way from the start of the cartel matter (for example, the raid or the subpoena) through the investigating, charging, and trial process. We learned quite a bit about the trial experience from seasoned prosecutors and defense counsel from Atlanta. Most recently, we were benefited by a discussion of legal issues from indictment to verdict by

¹The views expressed in this message by Co-Chair Barnett are made in her personal capacity and are not purported to reflect those of the Department of Justice.

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¹ Nothing contained in this newsletter is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. This newsletter is intended for educational and informational purposes only.

THE ANTITRUST DIVISION'S CRIMINAL ENFORCEMENT PROGRAM -- STATISTICS, SIGNIFICANT CASES, AND RECENT DEVELOPMENTS

By Jennifer M. Dixon¹

In 2010, the Antitrust Division continued its rigorous criminal enforcement efforts, which ended a decade of hefty criminal fines for corporations, foreign and domestic, and record jail sentences for culpable cartel participants. Indeed, last fiscal year (October 1, 2009 – September 30, 2010), the Division brought 60 cases on the criminal side, charging 84 defendants and obtaining over \$550 million in fines and \$24 million in restitution. The average prison sentence for this same period was 30 months, and a total jail time for all defendants in 2010 was over 71 years. The trend toward significant prison sentences for cartel participants continues in 2011, as one concrete executive was recently sentenced to serve 48 months for his role in regional conspiracies to fix prices and/or rig bids; this sentence ties for the longest jail sentence ever imposed on a defendant convicted solely of violating the antitrust laws.²

Over the past year, the Division's ongoing investigations into the air transportation and thin-film transistor liquid crystal display panel (TFT-LCD) industries continued to yield substantial criminal fines and penalties. To date, the air transportation investigation has resulted in over \$1.8 billion in criminal fines, four executives have been sentenced to serve prison time, and charges are pending against 15 other individuals. The Division's TFT-LCD investigation has resulted in more than \$890 million in criminal fines and several culpable executives have gone to jail.

Other recent investigations also have yielded large criminal fines in 2010 and 2011. These fines include the penalties obtained from six international freight forwarding companies that were charged with price fixing in September of last year. Similarly, the Division's ongoing refrigerant compressor investigation so far has resulted in two corporations receiving significant criminal fines for their participation in that international price-fixing conspiracy.

The Division also continued to investigate and prosecute anticompetitive and fraudulent conduct that affects our financial markets. The Division's municipal bond and real estate foreclosure auction investigations are two examples. This article will discuss in more detail below these and other recent investigations and developments in Division cases.

I. Enforcement Statistics: The Last Decade in Review

At the end of last year, the Antitrust Division published its criminal enforcement statistics for fiscal years

(FY) 2000 through 2010.³ The trend in criminal antitrust fines increased steadily from FY 2005 to FY 2009, with FY 2009 ending in a record total of \$1 billion in criminal fines collected during that fiscal year (October 1, 2008 to September 30, 2009). In 2010, the Division collected less in criminal fines than in the three fiscal years prior; however, the amount—\$555 million—was still significant. From 2000 through 2010, the courts imposed criminal fines of \$10 million or more against 52 corporate defendants; all but one of those fines were penalties for participation in an international antitrust conspiracy.⁴

During the latter part of the decade, antitrust defendants were also spending more time in jail. Fiscal Year 2007 topped the charts with antitrust defendants sentenced to 31,391 total days in jail. Fiscal year 2010 saw the second highest number of total jail days imposed on individuals who were sentenced to serve time in prison for their antitrust crimes and related offenses. Fiscal years 2010 and 2007 also had the highest number of average months that defendants were sentenced to serve in jail—31 months and 30 months respectively. Over the past six years, the percentage of defendants sentenced to jail also remained steady, with 2007 and 2009 yielding the highest percentages of 87% and 80% respectively.

With many of the Division's significant cartel investigations still ongoing, the trend toward hefty criminal fines and lengthy prison sentences is likely to remain constant in FY 2011 (October 1, 2010 to September 30, 2011). The Division has already collected several large criminal fines in FY 2011.⁵

II. An Update on Division Investigations

A. Air Transportation

As stated, the Division's ongoing air transportation investigation, covering air cargo and air passenger fares, has resulted in over \$1.8 billion in criminal fines. Indeed, collusion in the air cargo and air passenger industries has affected billions of dollars in U.S. commerce. Air cargo rates were fixed in connection with the shipment of a wide range of products regularly used by consumers, including produce, medicines, and electronics. Late last year, one airline and three executives were indicted for allegedly fixing peak season surcharges imposed before Valentine's Day and Mother's Day on shipments from Columbia to Miami, when imports of fresh-flowers increase.⁶

Notably, in connection with the air transportation investigation, airline carriers have paid some of the largest corporate fines ever collected by the Antitrust Division. Significantly, four airlines have been sentenced to pay over \$300 million in criminal fines: Société Air France and Koninklijke Luchtvaart Maatschappij N.V. (KLM) were sentenced to pay a total of \$350 million in 2008; British Airways and Korean Air were each sentenced to pay \$300 million in 2007.⁷ Several other carriers recently received large criminal fines in fiscal years 2010 and 2011.⁸

The Division has charged a total of 21 airlines and 19 executives to date. Twenty corporations have been sentenced to pay criminal fines and charges are pending against one other carrier. In addition, four executives have been sentenced to jail and charges are pending against the other 15 executives.⁹

B. Thin-Film Transistor Liquid Crystal Display Panels

Thin-film transistor liquid crystal display panels are used in a plethora of ubiquitous electronic devices such as computer and laptop monitors, iPods, and smartphones. The Division's investigation into this industry has uncovered multiple and far-reaching price-fixing conspiracies in the TFT-LCD market. Some of the largest computer and television manufacturers in the world have been affected by the illegal conduct, including Apple, Dell, and Hewlett Packard. As stated, the investigation has resulted in more than \$890 million in criminal fines; in 2009, one manufacturer was sentenced to pay a near record fine of \$400 million (LG Display).¹⁰ In addition, several executives have been sentenced to prison and have been required to pay criminal penalties.

In 2010, two companies and seven executives were indicted in connection with the TFT-LCD investigation.¹¹ In addition, several culpable executives pled guilty, and the Division continued to collect significant criminal fines. For example, in 2010, Chi Mei Optoelectronics Corporation, a Taiwanese corporation, was sentenced to pay a \$220 million fine; four of the company's executives agreed to serve jail time and pay a fine.¹² Another Taiwanese corporation, HannStar Display, was sentenced to pay a \$30 million fine and one of its former executives pled guilty and agreed to serve jail time.¹³

The Division's investigation is ongoing. A total of eight companies and 22 executives from multiple jurisdictions, including Korea, Japan, and Taiwan, have been charged to date.

C. Cathode Ray Tubes

In November 2010, a federal grand jury in San Francisco indicted three former executives from two color display tube (CDT) manufacturing companies for their role in a global conspiracy to fix the prices of CDTs. CDTs are a type of cathode ray tube used in computer monitors and similar devices. According to the Indictment, the conspirators met and colluded on the target price levels for CDTs, agreed to reduce output by periodically shutting down production lines, and agreed to allocate market shares for the product. They are charged with exchanging sales, production, and marketing information for the purpose of monitoring and enforcing their agreement. To date, six individuals have been indicted in connection with the Division's ongoing CDT investigation.¹⁴ Two of these executives have also been indicted in the Division's TFT-LCD investigation on price-fixing charges, and one of these

two individuals was also indicted in connection with the Division's color picture tube (CPT) investigation.¹⁵

D. Freight Forwarding

Freight forwarding companies manage the domestic and international delivery of cargo for customers by receiving, packaging, preparing, and warehousing cargo freight. They also arrange and prepare for the cargo's shipment through various carriers. The Division's freight forwarding investigation has uncovered multiple conspiracies harming businesses in the United States and abroad that use these services. The conspiracies involved price-fixing agreements concerning fees and surcharges for shipments to the United States from numerous foreign countries, including Germany, Switzerland, the United Kingdom, and China. Among the charges that were fixed, were peak season surcharges during the period before the Christmas holiday shopping season in the United States. The conspirators agreed on the approximate amount and timing of these peak season surcharges.

As a result of the Division's freight forwarding investigation, six international companies have been charged with price fixing and all six companies have agreed to plead and to pay criminal fines totaling \$50.27 million.¹⁶ The Division's investigation is ongoing.

E. Refrigerant Compressors

Refrigerant compressors are cooling mechanisms used in refrigerators and freezers in homes and businesses. To date, two companies, Panasonic Corporation and a Whirlpool Corporation subsidiary, Embraco North America Inc., have pled guilty to fixing the prices of these devices sold in the United States and abroad. The charged conspiracy involved coordinating the prices of household compressors and light commercial compressors, as well as monitoring and enforcing adherence to the agreed-upon prices for the devices. In FY 2011, Panasonic and Embraco were sentenced to pay a combined total of \$140.9 million in criminal fines for their anticompetitive conduct.¹⁷

These are the first charges brought by the Division in connection with the refrigerant compressor investigation.¹⁸

F. Financial Sector Cases

The Division is a part of the Financial Fraud Enforcement Task Force, established in November 2009, to coordinate efforts across federal, state, and local governments to investigate and prosecute financial crimes and recover proceeds for financial fraud victims. The Task Force includes representatives from federal agencies, regulatory authorities, inspectors general, and state and local law enforcement.¹⁹ The Division's municipal bond and real estate foreclosure auction investigations are two examples of the Division's efforts to combat

anticompetitive and fraudulent conduct in financial markets.

1. Municipal Bonds

The Division's ongoing investigation into the municipal bond industry has exposed bid rigging and other fraudulent conduct in connection with the marketing and sale of tax-exempt municipal bond reinvestment agreements and other municipal finance contracts throughout the United States. To date, 17 individuals and one broker have been charged with rigging bids in connection with the reinvestment of municipal bond proceeds and related investment contracts. Eight individuals have pled guilty to bid rigging or other fraudulent conduct and charges are pending against the broker and nine others.²⁰

Municipal bond issuers, such as state or local government entities, typically hire a broker to conduct a competitive bidding process in which providers of municipal bond reinvestment agreements and other municipal finance contracts compete to offer the best investment return to the municipality. The Division's investigation revealed anticompetitive conduct and fraud in connection with this process.

2. Real Estate Foreclosure Auctions

The Division also has uncovered bid rigging in connection with the resale of property at real estate foreclosure auctions. Such anticompetitive schemes have occurred in both Northern California and Eastern North Carolina.

Five individuals have pled guilty to rigging bids at real estate foreclosure actions in San Joaquin County, California.²¹ The conspiracy involved a group of real estate speculators who agreed not to bid against each other at certain public real estate foreclosure actions.²² Instead, the conspirators would designate the winning bidder and then hold a second private auction for the property where they would bid above the public action price.²³ The difference between the price of the property at public auction and the price obtained at private action was considered the group's profit and it was divided among the conspirators.²⁴ This anticompetitive conduct was exposed as a result of the joint efforts of the Antitrust Division, the U.S. Attorney's Office for the Eastern District of California, the FBI and the San Joaquin County's District Attorney's Office. The joint investigation is ongoing and expanding into other areas of Northern California.²⁵

Another real estate speculator pled guilty to engaging in similar conduct in multiple counties in Eastern North Carolina. In this conspiracy, the conspirators paid one another not to bid on foreclosed properties and profited from the rental and sale of real estate purchased through the rigged auctions. Similarly, this conspiracy eliminated competitive bidding on foreclosed real estate. The Division's investigation in North Carolina is ongoing.²⁶

III. Notable Opinions

A. The Power of the Grand Jury (*In re Grand Jury Subpoenas*)

To successfully prosecute cartel conduct, the Division relies in part on the power of the grand jury to obtain information. The Division's ability to obtain, through grand jury subpoena, documents originally stored abroad and brought into the United States was recently tested and affirmed by the Ninth Circuit in *In re Grand Jury Subpoenas*.²⁷

In December 2010, the Ninth Circuit reversed a district court's order quashing grand jury subpoenas directed to law firms who held once foreign-located documents. The law firms' clients provided these documents originating outside of the United States to their counsel in connection with civil discovery in a follow-on antitrust suit to the government's investigation. While the grand jury subpoenas did not call for privileged information, the law firms moved to quash the grand jury subpoenas. The district court granted the motion so that the Division could raise the issue on appeal of whether the power of the grand jury could be used to obtain these documents that were once located outside of the United States.

In considering the issue, the Ninth Circuit observed that "no collusion between the civil suitors and the government had been established" and "the government had not engaged in any bad faith tactics."²⁸ The court applied its "per se rule that a grand jury subpoena takes precedence over a civil protective order."²⁹ Moreover, the court held that when "documents have been moved from outside the grasp of the grand jury to within its grasp[,] [n]o authority forbids the government from closing its grip on what lies within the jurisdiction of the grand jury."³⁰

B. Restitution Under the Crime Victim's Rights Act (*In re Acker* and *In re McNulty*)

The Crime Victims Rights Act (CVRA)³¹ gives crime victims certain rights, such as the right to notice of public court proceedings involving the crime; the right not to be excluded from any public court proceedings; "[t]he right to be reasonably heard at any public proceeding in the district court involving the release, plea, sentencing, or any parole proceeding"; "[t]he reasonable right to confer with the attorney for the Government in the case"; and "[t]he right to full and timely restitution as provided in the law."³² The CVRA applies to antitrust crimes and requires the Division to use its best efforts to see that victims of antitrust crimes are notified of court proceedings so that they may exercise these rights.³³ A crime victim is "a person directly and proximately harmed as a result of the commission of [an offense]."³⁴

In *In re Acker*,³⁵ the Sixth Circuit denied a writ of mandamus under the CVRA³⁶ brought by indirect

purchasers of packaged ice sold by Arctic Glacier, which pled guilty to participating in a customer allocation conspiracy.³⁷ The indirect purchasers petitioned the Sixth Circuit for mandamus when the district court accepted a plea agreement that did not include restitution under the CVRA. The petitioners sought to vacate the plea agreement and reopen the sentencing proceedings so that they could participate in the renegotiation of a plea agreement that would include restitution.

The Sixth Circuit ruled that the district court considered all appropriate factors and did not abuse its discretion in accepting a plea agreement that did not include restitution, opining that “[t]he district court reasonably concluded that the difficulty of determining the losses claimed would so prolong and complicate the proceedings that any need for restitution would be outweighed by the burden on the sentencing process.”³⁸ The court observed that the petitioners were allowed “a full opportunity for participation,” including their appearance through counsel at the arraignment, plea hearing, and sentencing; the district court delayed acceptance of the guilty plea so that the petitioners could confer with the Government; and the petitioners admitted that “the district court had offered them every opportunity for participation.”³⁹ The court did not opine on whether the indirect purchasers were crime victims as defined by the CVRA because the district court afforded them the status of crime victims.⁴⁰

In *In re McNulty*,⁴¹ the Sixth Circuit denied another petition for writ of mandamus under the CVRA by an alleged victim of the same packaged-ice conspiracy. The petitioner claimed that he was entitled to restitution under the CVRA because he was fired by the corporate defendant and blackballed in the industry for refusing to participate in the conspiracy. The district court ruled that the petitioner was not a crime victim as defined by the Act and the Sixth Circuit agreed. The Sixth Circuit held that the alleged harm suffered by the petitioner was ancillary to the conspiracy and the district court did not abuse its discretion in concluding that the petitioner was not a crime victim.⁴²

IV. Conclusion

The Antitrust Division’s prosecution of cartel offenses continues to yield significant criminal fines and jail sentences for culpable companies and individuals. All of the Division’s recent statistics from its criminal enforcement program can be found on the Division’s website at <http://www.justice.gov/atr/public/criminal/index.html>.

¹ Jennifer M. Dixon is a Trial Attorney in the U.S. Department of Justice, Antitrust Division’s Chicago Field Office. The views expressed in this article are not purported to reflect those of the United States Department

of Justice. The author thanks Belinda Barnett for her comments on this article.

² See Press Release, Antitrust Div., Executives of Iowa-Ready Mix Concrete Companies Sentenced to Serve Prison Sentences for Price Fixing and Bid Rigging: Executive Sentenced to 48 Months for Violating Antitrust Laws (Feb. 8, 2011), http://www.justice.gov/atr/public/press_releases/2011/266996.pdf; cf., Press Release, Antitrust Div., Former Shipping Executive Sentenced to 48 Months in Jail for His Role in Antitrust Conspiracy (Jan. 30, 2009), http://www.justice.gov/atr/public/press_releases/2009/242030.pdf.

³ See U.S. Dep’t Justice, Antitrust Div., Criminal Enforcement, Fine and Jail Charts (2000-2010), <http://www.justice.gov/atr/public/criminal/264101.html>.

⁴ The Division’s latest corporate fines are reported as of February 8, 2011 at Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More (Feb. 8, 2011) [hereinafter, Corporate Fines of \$10 Million or More], <http://www.justice.gov/atr/public/criminal/sherman10.pdf>.

⁵ See Corporate Fines of \$10 Million or More, *supra* note 3.

⁶ Antitrust Div., Press Release, Florida West International Airways Inc., Three Executives Indicted in Conspiracy to Fix Rates on Air Cargo Shipments (Dec. 3, 2010), [hereinafter Florida West Press Release] http://www.justice.gov/atr/public/press_releases/2010/264754.pdf.

⁷ See Corporate Fines of \$10 Million or More, *supra* note 3.

⁸ Northwest Airlines, LLC was sentenced to pay \$38 million in 2010; All Nippon Airways Co., Ltd. was sentenced to \$73 million in 2011; Singapore Airlines Cargo Pte Ltd. was sentenced to pay \$48 in 2011; China Airlines Ltd. was sentenced to pay \$40 million in 2011; and Polar Air Cargo LLC was sentenced to pay \$17.4 million in 2011. See Corporate Fines of \$10 Million or More, *supra* note 4.

⁹ See Florida West Press Release, *supra* note 6.

¹⁰ See Corporate Fines of \$10 Million or More, *supra* note 3.

¹¹ Press Release, Antitrust Div., Largest Taiwanese LCD Producer, Houston-Based Subsidiary and Six Executives Indicted for Participating in LCD Price-Fixing Conspiracy (June 10, 2010), http://www.justice.gov/atr/public/press_releases/2010/259640.pdf; Press Release, Antitrust Div., Ninth Taiwan Executive Indicted for Participating in Global LCD Price-Fixing Conspiracy (Oct. 14, 2010), http://www.justice.gov/atr/public/press_releases/2010/263173.pdf.

¹² See Corporate Fines of \$10 Million or More, *supra* note 3; Press Release, Antitrust Div., Taiwan LCD Producer Agrees to Plead Guilty and Pay \$220 Million Fine for Participating in LCD Price-fixing Conspiracy (Dec. 9, 2009), http://www.justice.gov/atr/public/press_releases/2009/2529

36.pdf; Press Release, Antitrust Div., Fourth Chi Mei Executive Agrees To Plead Guilty And Serve Jail Time For Participating In Global LCD Price-Fixing Conspiracy (Aug. 4, 2010), http://www.justice.gov/atr/public/press_releases/2010/261080.pdf; Press Release, Antitrust Div., Third Chi Mei Executive Agrees To Plead Guilty And Serve Jail Time For Participating In Global LCD Price-Fixing Conspiracy (July 28, 2010), http://www.justice.gov/atr/public/press_releases/2010/260844.pdf; Press Release, Antitrust Div., Chi Mei Executive Agrees To Plead Guilty And Serve Jail Time For Participating In Global LCD Price-Fixing Conspiracy (Apr. 30, 2010), http://www.justice.gov/atr/public/press_releases/2010/258356.pdf.

¹³ See Corporate Fines of \$10 Million or More, *supra* note 3; Press Release, Antitrust Div., Former HannStar Executive Agrees to Plead Guilty and Serve Jail Time for Participating in Global LCD Price-Fixing Conspiracy (Oct. 27, 2010), http://www.justice.gov/atr/public/press_releases/2010/263532.pdf.

¹⁴ Press Release, Antitrust Div., Three Former Executives Indicted in Color Display Tube Price-Fixing Conspiracy: Global Price-fixing Scheme Involves Tubes Used in Computer Monitors (Nov. 9, 2010), http://www.justice.gov/atr/public/press_releases/2010/264069.pdf.

¹⁵ Press Release, Antitrust Div., Former Taiwanese Executive Indicted in Color Display Tube Price-fixing Conspiracy, (Aug. 19, 2009), http://www.justice.gov/atr/public/press_releases/2009/249156.pdf; Press Release, Antitrust Div., Former Executive Indicted for His Role in Two Cathode Ray Tube Price-fixing Conspiracies (Feb. 10, 2009), http://www.justice.gov/atr/public/press_releases/2009/242473.pdf.

¹⁶ Press Release, Antitrust Div., Six International Freight Forwarding Companies Agree to Plead Guilty to Criminal Price-fixing Charges (Sept. 30, 2010), http://www.justice.gov/atr/public/press_releases/2010/262791.pdf.

¹⁷ See Corporate Fines of \$10 Million or More, *supra* note 3.

¹⁸ Press Release, Antitrust Div., Panasonic Corp. and Whirlpool Corp. Subsidiary Agree to Plead Guilty for Role in Price-fixing Conspiracy Involving Refrigerant Compressors: Companies Agree to Pay a Total of \$140.9 Million in Criminal Fines (Sept. 30, 2010), http://www.justice.gov/atr/public/press_releases/2010/262783.pdf.

¹⁹ More information about the Financial Fraud Task Force can be found at www.StopFraud.gov.

²⁰ See *United States v. Rubin/Chambers, Dunhill Ins. Servs., Inc. et al.*, No. 09-cr-1058 (S.D.N.Y.); *United States*

v. Carollo, et al., No. 10-cr-654 (S.D.N.Y.); *United States v. Ghavami et al.*, No. 1:10-cr-01217 (S.D.N.Y.).

²¹ Press Release, Antitrust Div., California Real Estate Investor Pleads Guilty to Bid Rigging at Public Foreclosure Auctions (March 4, 2011), http://www.justice.gov/atr/public/press_releases/2011/267943.htm.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Press Release, Antitrust Div., North Carolina Real Estate Speculator Pleads Guilty to Bid Rigging in Real Estate Foreclosure Auctions (Sept. 10, 2010), http://www.justice.gov/atr/public/press_releases/2010/262303.pdf.

²⁷ 627 F.3d 1143 (9th Cir. 2010).

²⁸ 627 F.3d at 1144.

²⁹ *Id.*

³⁰ *Id.*

³¹ 18 U.S.C. § 3771.

³² 18 U.S.C. § 3771(a)(2)-(6).

³³ 18 U.S.C. § 3771(c)(1). For more information see U.S. Dep't Justice, Antitrust Div., Victim's Rights, <http://www.justice.gov/atr/victim/index.html>.

³⁴ 18 U.S.C. § 3771(e).

³⁵ 596 F.3d 370 (6th Cir. 2010); see also Answer of the United States of America to Petition for Writ of Mandamus, *In re Acker*, No. 10-3159 (6th Cir. 2010), available at <http://www.justice.gov/atr/cases/f257800/257841.pdf>.

³⁶ See 18 U.S.C. § 3771(d)(3).

³⁷ *United States v. Arctic Glacier Int'l Inc.*, No. 1:09-cr-00149 (S.D. Ohio); Press Release, Antitrust Div., Minneapolis Packaged-Ice Company Agrees to Plead Guilty and Three Former Executives Plead Guilty to Customer Allocation Conspiracy (Oct. 13, 2009), http://www.justice.gov/atr/public/press_releases/2009/250906.pdf.

³⁸ 596 F.3d at 373.

³⁹ 596 F.3d at 372-73.

⁴⁰ *Id.* at 372.

⁴¹ 597 F.3d 344 (6th Cir. 2010).

⁴² 597 F.3d at 352-53.

ALL I REALLY NEED TO KNOW ABOUT ANTITRUST SETTLEMENTS, I LEARNED IN KINDERGARTEN

By Megan Jones¹

Few cartel cases ever make it to the courthouse, much less the courthouse steps. The average time from filing of federal civil cases to trial has increased from around 16 months in 1993 to 25.3 months in 2009.² And in the past, it has been calculated that antitrust cases take, on average, about three times longer than other civil cases in federal courts.³ The Antitrust Criminal Penalty Enhancement and Reform Act, enacted in 2004 and reauthorized to 2020, reduces treble damages to single damages in exchange for the defendant's cooperation with preparing and pursuing civil plaintiffs' case. The number of jurisdictions with antitrust leniency programs has increased from 1 in 1990 to 50 in 2010.⁴ For these reasons and more, it is not surprising that the majority of antitrust civil cases that result from criminal cartel investigations -- that survive motions to dismiss -- are disposed of by settlement with civil plaintiffs. Thus, experienced antitrust attorneys must become well-versed in settlement negotiations. But it doesn't have to be complicated. All I really need to know about antitrust settlements, I learned in kindergarten.

1. **Share.** Never underestimate the value of having both sides' economic experts meet face to face to share their respective methodology. If either side is being unreasonable, vague, or just inscrutable, there is nothing like one economist questioning another directly about his or her methodology to shed light on what the issues really are. Put them in a room, not on a phone line. The travel costs, if any, will easily be saved by the weeks (if not months) of time counsel save in cutting to the chase. As the old adage goes, you cannot kid a kidder. Economists can easily confront one another with facts and theory. (If an adversary refuses to put forward their expert for a meeting, that decision itself speaks volumes.) Moreover, economists can often find more common ground than the lawyers and can reduce areas of disagreement based on commonly accepted economic approaches. For example, the economists can agree on the amount of class period sales, leaving the lawyers to debate what percentage should comprise the settlement.

2. **Cooperate.** In this world of where the application of *Twombly* and *Iqbal* varies widely from jurisdiction to jurisdiction, defendants who are willing to cooperate with civil plaintiffs early -- before a motion to dismiss is decided -- may be able to achieve favorable settlement results by approaching civil plaintiffs about a cooperation discounted settlement, or in appropriate circumstances, a cooperation only settlement. If a defendant can offer valuable assistance to a plaintiff at a timely stage in the case, there are advantages to be had by both sides. Plaintiffs get more certainty at the beginning of

the litigation as to the strength and plausibility of the merits of their claims, and the defendant can achieve a financial benefit for early cooperation. However, true cooperation must be valuable and complete. On the defendants' side, agreeing to cooperate to build a tree house, only to sullenly leave off the roof and ladder, doesn't count.⁵ On the plaintiffs' side, they cannot expect that a defendant's offer to cooperate to build a tree house also includes an infinity pool on the balcony.

Each side should strive to cooperate in a reasonable and efficient manner. If not, what's sought to be built may crumble.

3. **Explain The Rules of the Game.** If you are using annual overcharges, state so. If your transactional data is based on certain assumptions, declare so. If you want to settle for cost of defense only, declare so. If you expect to negotiate off of treble damages, say so. Don't offer a bottom number unless it really is. If the oak tree is your base, don't conveniently switch mid-game to the front porch. Experienced counsel will eventually get to the facts, and by hiding the ball or obfuscating your settlement goal, you are jeopardizing the probability of an agreement. Don't waste resources needlessly if there is a realistic probability of a settlement.

4. **No Bullying.** Settlement is a time for resolving professional differences. However, such differences do not mean that counsel themselves have to be "difficult." Entrenching your positions, strident behavior, or theatrics are not constructive. Non-sensible conduct damages your credibility or worse, elevates personality over the merits of the dispute. The object of resolution is not to declare victory by force or impose defeat by vanquishment. Since a settlement is an agreement that both parties voluntarily decide to enter, such tactics rarely succeed.

5. **Take A Recess.** If settlement negotiations are stalling, becoming cyclical, or are being thwarted by unrealistic expectations, take a break. Time plus intervening court decisions, cost of discovery, and other settlements (or lack thereof) can often overcome negotiation paralysis.

6. **Play Nice.** Often zealous advocacy can result in counsel negotiating for overly one-sided terms in a settlement agreement. In the class action context, if a settlement agreement is not fundamentally fair, however, a Court cannot approve it. If a settlement agreement is obtuse or one-sided, it provides an easy target for objections. Resist the urge to drive the hardest bargain by burying your adversary -- it could end up costing you the entire deal later.

7. **Give Homework A Due Date.** At each step of your settlement negotiations, clearly define what remains at issue, how those issues will be resolved and by whom, and when such resolutions are due. At the end of each meeting, clearly delineate what remains at issue and set a deadline for resolving those issues. Doing so forces

counsel on both sides to timely evaluate and complete each task. While a book might be read, a book report doesn't get done until a teacher assigns it.

8. Sometimes You Have To Get the Teacher Involved. When the parties are at a substantive sticking point in settlement negotiations, sometimes involving a third party (be it mediator, a magistrate, or the judge) is required. Former members of the judiciary can be quite effective in this role as mediators, educating both sides on how "they would rule" on the disputed issues. Clear and specific delineation of the disputed issues prior to the mediation can maximize effectiveness.

9. Heed Your Fables. If this isn't your last offer, don't cry wolf. Reliable preparation helps the ant at the settlement negotiation table, rather than the ill-prepared grasshopper. Like the crow and the pitcher, there is almost always a drafting solution to any settlement problem if both parties are willing to think creatively.

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² See FEDERAL COURT MANAGEMENT STATISTICS (2009) and (1997), available at <http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsd2009.pl> and <http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cms.pl>.

³ See Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 1009 (1986).

⁴ Scott Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division U.S. Department of Justice, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, Address Before the ABA Criminal Justice Section's 24th Annual National Institute on White Collar Crime (Feb. 25, 2010), available at <http://www.justice.gov/atr/public/speeches/255515.htm>.

⁵ For an amnesty defendant, ACPERA states that satisfactory cooperation "shall include ... a full account to the claimant of all facts known to the applicant ... that are potentially relevant to the civil action," as well as "all documents or other items potentially relevant." P.L. 108-237 § 213(b).

COMPETITION ENFORCEMENT IN CANADA GOES HIGH TECH

By Elisa Kearney and Mark Katz¹

Canada's Competition Bureau (the "Bureau") has extensive powers under the *Competition Act*² and the *Criminal Code*³ (Canada) to investigate allegedly anticompetitive conduct. Pursuant to these statutes, the Bureau is authorized to obtain court orders granting it the

right to search premises and seize documents⁴; tap phone lines⁵; require individuals to testify under oath⁶; oblige individuals or corporations to produce documents⁷; and require responses to written interrogatories.⁸

If proposed new legislation is enacted by Canada's Parliament, the Bureau's investigatory powers will be upgraded to enhance the efficacy of evidence gathering tools and enable access to more electronic evidence. In addition, if enacted, the new legislation will permit these new powers to be used to assist foreign enforcement agencies (such as U.S. antitrust agencies) with investigations involving Canada.

The proposed amendments are contained in three pieces of draft legislation that each address different aspects of a proposed "lawful access" regime: Bill C-50 (known as the "*Improving Access to Investigative Tools for Serious Crimes Act*")⁹; Bill C-51 (known as the "*Investigative Powers for the 21st Century Act*")¹⁰; and Bill C-52 (known as the "*Investigating and Preventing Criminal Electronic Communications Act*").¹¹

The government's objective in proposing Bills C-50, C-51 and C-52 is to facilitate and expand the ability of Canadian law enforcement agencies – including the Competition Bureau – to collect digital and electronic evidence. **Bill C-50**

Bill C-50 aims to facilitate the use of electronic surveillance techniques by law enforcement agencies by proposing to amend, in relevant part, various sections of the *Criminal Code* that apply to authorize the interception of private communications (wiretaps). In particular, the amendments would permit a judge who authorizes a wiretap to, at the same time, issue the authorities a related search warrant under section 487 of the *Criminal Code* (and other similar provisions).

Bill C-50 also amends section 187 of the *Criminal Code*, which requires that all documents relating to an application for an authorization to intercept private communications be kept confidential and sealed until trial, to also include all documents relating to the request for the related search warrant.

Bill C-51

If enacted, Bill C-51 would give law enforcement agencies enhanced powers such as the following:

1. **Preservation Orders:** Law enforcement agencies will be authorized to apply for a judicial order requiring a person, such as a telecommunications service provider ("TSP"), to preserve computer data (data that can be processed by computer) that is in its possession or control when the agency has "reasonable grounds to suspect" that an offence has been or will be committed. This is intended to be a short term expedient to preserve data until the authorities can obtain a production order or

search warrant for this type of data (as described below). The maximum length of a preservation order is 90 days.

2. Production Orders: Agencies will be authorized to obtain orders, issuance of which is based on a "reasonable grounds to suspect" standard, requiring persons (such as TSPs) to produce "transmission data" and "tracking data." Law enforcement agencies already have the power to seek orders for specific information such as telephone call logs¹² but Bill C-51 would expand that authority. "Transmission data" refers to data that includes the origin, destination, date, time, duration, type and volume of a telecommunication (e.g., a telephone call or Internet communication), but does not include the content of the telecommunication. "Tracking data" relates to the location of a thing or an individual.

3. Tracking Warrants: Agencies will be able to obtain warrants to secretly install: (1) "tracking devices" (such as a GPS) on an individual when there are reasonable grounds to believe that an offence has been or will be committed;¹³ and (ii) "transmission data readers", which collect data indicating the origin and destination of communications (such as Internet communications).¹⁴ Agencies also will be allowed to remotely activate devices such as cellular telephones or GPS devices.

The combination of production orders and warrants is designed to allow authorities to obtain both historical transmission/tracking data as well as "real time" tracking/transmission data.¹⁵

Of particular interest to non-Canadian parties, Bill C-51 also will permit Canadian courts to issue the types of production orders and tracking warrants described above to assist foreign enforcement authorities seeking evidence in Canada.

This will be accomplished via amendments to the *Mutual Legal Assistance in Criminal Matters Act* (the "MLAA").¹⁶ The MLAA was enacted in 1988 to facilitate cooperation between foreign states with which Canada has mutual legal assistance treaties governing criminal investigations/prosecutions ("MLATs").¹⁷ The MLAA establishes the various procedures pursuant to which this evidence is to be gathered (including authorizing Canadian courts to issue search warrants) and then provided to the foreign enforcement authority that requested assistance.¹⁸

Bill C-52

As a companion to the enhanced investigative powers contemplated by Bills C-50 and C-51, Bill C-52 would require TSPs to include interception capability in their networks. Thus, Bill C-52 does not provide law enforcement agencies with new interception powers but rather ensures that, if and when warrants are issued, TSPs have the technical ability required to intercept communications. According to the government, there are currently far too many instances where authorities cannot execute judicially authorized interceptions because of a

lack of intercept capability on Canadian telecommunications networks.¹⁹

Bill C-52 would require companies to pay for intercept capability in certain new equipment and software, while the government would provide reasonable compensation when retrofits to existing networks are needed. In addition:

- Certain entities (such as banks, private networks, and charities) are excluded from the Bill's requirements and would not be required to have intercept capability.
- A three year exemption would be granted to "small" service providers (those with less than 100,000 subscribers) from certain requirements deemed too costly for them at this time. Following the three year grace period, these companies would be expected to fully comply with the requirements of the Bill.
- Upon approval by the government, exemptions could be granted to service providers for two year periods, with conditions, to permit innovative technologies to be brought to the marketplace prior to being fully compliant with the Bill's requirements. This would allow service providers to remain competitive, while developing intercept solutions for these new technologies.
- Service providers also would be free to select the most cost effective intercept solutions available, and would not be tied to government-determined standards or equipment.

Bill C-52 also would compel TSPs to release basic subscriber information to enforcement agencies (including the Bureau), such as name, address, telephone number, IP address, e-mail address, telecommunication service provider ID and certain cell phone identifiers.

This change is intended to address the current situation in which there is no legal requirement for TSPs to provide information of this nature to enforcement authorities. Although TSPs often cooperate voluntarily with authorities in this regard, the government does not consider the situation satisfactory because "the practices of releasing this information vary across the country: some service providers release the information immediately upon request; others provide it at their convenience, often following considerable delays; others insist that authorities first obtain a warrant. This lack of consistency and clarity can delay or block investigations."²⁰ According to the government, enforcement authorities must have systematic access to these basic identifiers at the early stages of an investigation in order to obtain sufficient information to pursue an investigative lead or secure a warrant.²¹

Implications

As recognized by the International Competition Network, digital evidence gathering is becoming increasingly important for agencies in their fight against cartels.²² The proliferation of smart phones, cloud computing, social network sites and messenger services, amongst other services, as means of conducting business is making it more difficult for agencies to obtain the evidence needed to prove competition law infringements.

The Bureau already makes frequent use of technology in support of its investigative activities. The Bureau has a dedicated Electronic Evidence Unit; computer and email searches are a standard part of every Bureau search and seizure,²³ and wiretaps have been used to obtain evidence in recent investigations into price fixing in the retail gas industry.²⁴

It is easy to conceive how the new powers in Bills C-50, C-51 and C-52 could be of additional assistance to the Bureau in cartel investigations. For example, the ability to compel production of "transmission"/"tracking" data could be very useful to the Bureau in the early stages of cartel investigations, as would the ability to place a tracking device on suspected cartel participants. One must expect, therefore, that the Bureau will be eager to try out these new powers if and when the Bills are enacted.²⁵

The proposed "lawful access" regime, however, has come under attack, particularly from those concerned about its impact on personal privacy rights. For example, the Privacy Commissioner of Canada has stated that not all of the new investigatory tools represent a "necessary, effective and proportionate response" to the challenges faced by law enforcement agencies as a result of new technologies.²⁶ The Privacy Commissioner is particularly concerned with the "reasonable grounds to suspect" standard proposed in Bill C-51 for production orders. She notes that this is a lower threshold than the "reasonable grounds to believe" standard widely used to balance the needs of law enforcement officials with individual privacy interests.²⁷ On the other hand, the Department of Justice asserts that the "reasonable grounds to believe" standard "prevents important information from being gathered at an early investigation stage, even if there is a low expectation of privacy in relation to the information being sought".²⁸

Beyond privacy concerns, it also should be noted that if Bill C-50 is passed in its current form, it could have implications for the Bureau's current practices and procedures with respect to search warrants and the ability of defense counsel to access the Information to Obtain ("ITO") which provides the factual underpinnings for these warrants.

The typical pattern that has developed in Canada with respect to searches executed in the context of a cartel investigation is that the court file is sealed while the search warrant is being executed and only becomes accessible once the search is completed and the file is unsealed.²⁹ At that point, the target of the investigation is able to obtain a

copy of the redacted, public version of the ITO (indeed, the Bureau often provides the ITO to the target even before the court file is unsealed). However, this arrangement does not apply to ITOs used in applications for wiretaps, which the Bureau refuses to disclose at all in accordance with the stricter non-disclosure regime for wiretap applications imposed by Part VI of the *Criminal Code*. It now remains to be seen what will happen if the Bureau employs the streamlined approach proposed in Bill C-50, which will enable it to obtain a search warrant in conjunction with a wiretap order. Will the Bureau still agree to disclose the ITO underlying the search warrant or will it take the position that this is now part of the wiretap package and refuse to provide a copy to targets? If the latter, this would deprive parties of important insight into the case against them.

¹ Davies Ward Phillips & Vineberg LLP.

² *Competition Act* (Canada), R.S.C. 1985, c. C-34, as amended.

³ *Criminal Code* (Canada), R.S.C. 1985, c. C-46, as amended.

⁴ *Competition Act*, *supra* note 1, §15; *Criminal Code*, *supra* note 2, §487.

⁵ *Criminal Code*, *supra* note 2, Part VI.

⁶ *Competition Act*, *supra* note 1, §11(1)(a).

⁷ *Ibid*, §11(1)(b).

⁸ *Ibid*, §11(1)(c).

⁹ Bill C-50, An Act to Amend the *Criminal Code* (interception of private communications and related warrants and orders), 59 Eliz. II, 2010 (October 29, 2010).

¹⁰ Bill C-51, An Act to amend the *Criminal Code*, the *Competition Act* and the *Mutual Legal Assistance in Criminal Matters Act*, 59 Eliz. II, 2010 (November 1, 2010). This Bill was originally introduced by the government on June 18, 2009 but lapsed when Parliament was adjourned the day after. See Department of Justice Canada, *Government of Canada Introduces Legislation to Fight Crime in Today's High Tech World*, November 1, 2010, <http://www.justice.gc.ca>.

¹¹ Bill C-52, An Act regulating telecommunications facilities to support investigations, 59 Eliz. II, 2010 (November 1, 2010). This Bill also was originally introduced by the government on June 18, 2009 but lapsed when Parliament was adjourned the day after. See Department of Justice Canada, *Government of Canada Introduces Legislation to Fight Crime in Today's High Tech World*, November 1, 2010, <http://www.justice.gc.ca>.

¹² *Criminal Code*, *supra* note 2, §§ 487.013(1) and (4).

¹³ Agencies are already authorized under the *Criminal Code* to obtain warrants to install tracking devices on objects, such as vehicles, where they have reasonable grounds to suspect that an offence has been or will be committed. Bill C-51 would impose a higher standard (reasonable grounds

to believe) to obtain warrants to track individuals.

¹⁴ This is intended to supplement the existing authority under the *Criminal Code* to apply for a warrant to secretly install a number recorder on a telephone or telephone line.

¹⁵ Department of Justice Canada, *Background: Investigative Powers for the 21st Century Act* (November 1, 2010), <http://www.justice.gc.ca>.

¹⁶ R.S. 1985, c. 30 (4th Supp.).

¹⁷ For example, Canada has an MLAT with the United States (Treaty between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters, in force January 24, 1990).

¹⁸ The Bureau has responded to requests for assistance from the Antitrust Division of the U.S. Department of Justice under the U.S./Canada MLAT, e.g., by executing search and seizures and facilitating the production of documents and the conduct of interviews. In the *Falconbridge* case, the target of a search and seizure conducted by the Bureau pursuant to an MLAT request from the Antitrust Division was unsuccessful in its attempt to have the search quashed and to prevent the records seized from being sent to the United States. *Commissioner of Competition v. Falconbridge Ltd.* 2002 Carswell Ont 5103.

¹⁹ Department of Justice *Background*, *supra* note 14.

²⁰ Public Safety Canada News Release (November 1, 2010), *Background – Investigating and Preventing Criminal Electronic Communications Act*, <http://www.publicsafety.gc.ca>.

²¹ Department of Justice *Background*, *supra* note 14. Bill C-52 attempts to address privacy concerns by incorporating several safeguards such as (i) designating a maximum of five persons from any authority that can request subscriber data; (ii) imposing internal audit requirements and reporting obligations to the Privacy Commissioner of Canada; (iii) and granting the Privacy Commissioner the authority to conduct an audit, on reasonable notice, of the practices of law enforcement agencies. However, as noted below, Canada's Privacy Commissioner believes that the proposed regime does not adequately protect privacy interests.

²² International Competition Network, *Anti-Cartel Enforcement Manual*, Chapter 3 Digital Evidence Gathering (March 2010) at ¶ 3.1

²³ *Competition Act*, *supra* note 1, §16.

²⁴ Competition Bureau, *Competition Bureau Uncovers Gasoline Cartel in Quebec* (June 12, 2008), <http://www.competitionbureau.gc.ca>.

²⁵ It is important to note in this regard that Bill C-51 will enable the Bureau to utilize these new powers not only in connection with investigations of potential criminal offences under the *Competition Act* (e.g., price fixing and bid rigging) but also in respect of various deceptive marketing practices (e.g. misleading advertising) and civil "reviewable practices" (e.g. abuse of dominance and price

maintenance).

²⁶ Speech by Jennifer Stoddart, Privacy Commissioner of Canada, *A secure society: Meshing privacy and public safety*, Remarks at training session on national security held at the Federal Court of Canada (January 21, 2011), <http://www.priv.gc.ca>. See also Letter from the Privacy Commissioner of Canada, Jennifer Stoddart to the Standing Committee on Public Safety and National Security, regarding her initial analysis on the privacy implications on Bill C-51, the Investigative Powers for the 21st Century Act (IP21C), and C-47, the Technical Assistance for Law Enforcement in the 21st Century Act (TALEA), *available at* <http://www.priv.gc.ca/>

²⁷ For example, this is the threshold required to obtain search warrants under the *Competition Act*. See §15.

²⁸ Department of Justice Canada, Industry Canada, Solicitor General Canada, *Lawful Access – Consultation Document* (August 25, 2002).

²⁹ In some cases, the Bureau or targets of the search may seek an order to keep the court file under seal.

SURVEY OF RECENT NON-ANTITRUST CASES OF INTEREST

By Stephen J. Squeri¹

The purpose of this section is to advise committee members of case developments in criminal law and procedure, primarily in non-antitrust cases (and therefore generally not reported in the various antitrust reporters and publications), which could have relevance in antitrust prosecutions.

FRAUD

SUPREME COURT HOLDS THAT HONEST SERVICES FRAUD COVERS ONLY KICKBACKS AND BRIBES

United States v. Skilling was an appeal by Jeffrey Skilling of his conviction and sentencing for various crimes arising out of the Enron collapse. Among the issues raised on Skilling's appeal was the contention that the honest services fraud statute, 18 U.S.C. § 1346, was unconstitutionally vague and that his conviction, therefore, violated the Due Process Clause. The Supreme Court vacated and remanded the Fifth Circuit's ruling that had upheld Skilling's conviction for participating in a conspiracy to commit honest services fraud, but the Supreme Court determined that a construction of the honest services statute's scope that limited its application to bribes and kickbacks provided a constitutional reading of the statute that effectuated Congress's intent in passing the statute. *Skilling v. United States*, 130 S. Ct. 2896 (2010).

Among other charges, the jury found Skilling guilty of Count One of the indictment which alleged that

Skilling had conspired to ‘deprive Enron and its shareholders of the intangible right of his honest services’ (Internal brackets omitted) *Id.* at 2908, 2911. Skilling appealed on several issues including the honest services conviction. On this issue, the Fifth Circuit held that the jury was entitled to convict if the government proved two elements: “(1) a material breach of fiduciary duty...(2) that results in a detriment to the employer.” It did not address Skilling’s “void for vagueness” constitutional challenge. *Id.* at 2912 citing *U.S. v. Skilling*, 554 F. 3d 529, 547 (Cir. 5th 2009).

The Supreme Court, in determining Skilling’s constitutional challenge to his conviction, began by recounting the jurisprudential history that led to Congress passing the honest services fraud statute in 1988. The “honest services” doctrine was an outgrowth of case law which permitted recovery under the mail and wire services fraud for deprivations of “intangible rights.” This doctrine recognized “actionable harm” in “the denial of [a] party’s right to the offender’s ‘honest services,’” first in the public, and later in the private, sectors. 130 S. Ct. at 2904. Then, in *McNally v. United States*, 483 U.S. 350 (1987), the Supreme Court held that the mail and wire fraud statutes were “limited in scope to protection of property rights,” thus striking down the intangible rights doctrine. *Id.* at 360-61.

In response to *McNally*, Congress enacted 18 U.S.C. § 1346. Section 1346 defined “scheme or artifice to defraud” in the mail and wire fraud statutes, to include “a scheme or artifice to deprive another of the intangible right of honest services.” *Id.* at 2927.

Skilling contended that the language of § 1346 was unconstitutionally vague, arguing that the statute, did not “define the criminal offense (1) with sufficient definiteness that ordinary people can understand what conduct is prohibited, and (2) in a manner that does not encourage arbitrary and discriminatory enforcement” as required by *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). *Id.* at 2927-28.

The Court, however, did not subject the statute as written to a *Kolender* analysis. Rather, it chose instead, to conform to more recent precedent and attempt to find a limiting construction of the statutory language that presented no vagueness issues. *Id.* at 2928.

The Court surveyed the pre-*McNally* case law to determine the “core” of honest services doctrine, in order to more precisely articulate what Congress meant to reinstate by passing § 1346. It concluded that “there is no doubt Congress intended § 1346 to reach at least bribes and kickbacks.” *Id.* at 2905. The Court also concluded that a broader reading of the statute extending beyond the bribe and kickback “core” would present unconstitutional vagueness issues. It thus held, “that § 1346 criminalizes *only* the bribery and kickback core of pre-*McNally* case law.” *Id.* at 2931. (emphasis in original). In so holding, the Court also rejected the government’s proposed inclusion of

“undisclosed self-dealing by a public official or private employee” from the “core.” *Id.* at 2932.

Finally, the Court applied this limited construction of § 1346, and held that Skilling’s actions were outside the scope of the bribe and kickback core. For this reason, the Court vacated the Fifth Circuit’s order upholding Skilling’s conviction for conspiring to commit honest services fraud. The Court did not, however, reverse Skilling’s conviction on that count. Instead, the Court remanded the case for further proceedings and a determination of whether the error associated with Skilling’s conviction on that count was harmless given that the conspiracy to commit honest services fraud could have rested on an alternative securities fraud theory. The application of the harmless error rule was left for the Fifth Circuit to consider on remand. *Id.* at 2934.

FEDERAL WIRE FRAUD STATUTE DOES NOT REQUIRE PROOF OF VIOLATION OF SOME OTHER STATUTE OR REGULATION

In *United States v. Green*, the Ninth Circuit Court of Appeals held that the offense of wire fraud does not require that a defendant’s conduct violated a rule, regulation or other state or federal law. In so holding, the court addressed the question of “whether actions that are not otherwise expressly prohibited can nonetheless violate the federal fraud statutes.” The Court of Appeals concluded in the affirmative and thus affirmed the defendant’s conviction on eleven counts of wire fraud. 592 F.3d 1057, 1063 (9th Cir. 2010).

The defendant, Judy Green, was indicted on—among other things—eleven counts of wire fraud and a single count of conspiracy to commit wire fraud. As an educational consultant, Green worked with economically disadvantaged schools to obtain funding for telecommunications access under the FCC’s E-Rate program. In short, the E-Rate program subsidized the purchase and installation of certain telecommunications equipment in underserved schools. Green, once hired by her clients, would assist in the application process for schools. In filling out applications and in overseeing the submission of bids from contractors to install equipment, Green presented false information to the government regarding the use of funds, resources available to the schools, and the schools’ financial contributions to the projects. *Id.* at 1060-63.

Green challenged her wire fraud convictions, arguing that “her actions were not fraudulent because they were not prohibited by the rules and regulations that governed the E-Rate program.” *Id.* 1063. The Ninth Circuit rejected this argument, finding that wire fraud has only three elements: “(1) a scheme to defraud; (2) use of the wires in furtherance of the scheme; and (3) a specific intent to deceive or defraud.” Thus, a “defendant’s conduct need not otherwise be illegal in the sense that the government must also prove that the defendant’s conduct violated a specific statute or regulation.” *Id.* at 1064.

Green also sought to draw a parallel between the wire fraud statute, and the more controversial “honest services” fraud statute, and arguments regarding its breadth and vagueness. *Id.* at 1065. The court rejected this argument, noting that “where, as here, financial harm is an integral part of the offense, there has never been any suggestion that a further limitation on the fraud statutes is required.” *Id.*

SENTENCING

REQUIREMENT THAT SENTENCING MODIFICATIONS BASED ON AMENDMENTS TO THE GUIDELINES CANNOT BE LOWER THAN AMENDED GUIDELINES RANGE IS STILL BINDING POST-BOOKER

In *United States v. Dillon*, the Supreme Court held that the policy statement requiring that sentences modified as a result of certain specified amendments to the Sentencing Guidelines cannot be lower than the amended Guidelines require is binding. 130 S. Ct. 2683 (2010). The mandatory nature of the policy statement poses no constitutional issue even in the wake of *United States v. Booker*, 543 U.S. 220 (2005) which made the Sentencing Guidelines advisory rather than binding. The Court, further found that the statute permitting modification of sentences following certain amendments to the Guidelines, did not permit plenary resentencing, even to correct mistakes made in the initial sentencing. 130 S. Ct. 2683, 2693-94 (2010).

By statute, the Federal Sentencing Commission has the power to amend the Sentencing Guidelines to provide for shorter sentences. The Commission can also opt to make those amendments retroactive. The statutory provision contained in 18 U.S.C. § 3582(c)(2) authorizes district courts to reduce sentences that are otherwise final, if a retroactive amendment to the Guidelines would result in a lower sentence. *Id.* The Sentencing Reform Act, passed in 1987, created the Sentencing Commission, authorized the Guidelines and also permitted the Commission to issue policy statements regarding the Guidelines' application. *Id.* at 2687. The Policy Statement that the Commission issued for § 3582(c)(2) U.S.S.G. § 1B1.10(a)(1) allows courts to reduce a term of imprisonment where the Guidelines prison range applicable to an incarcerated defendant has been lowered by one of the amendments specified in U.S.S.G. § 1B1.10(c). U.S.S.G. § 1B1.10(b)(2) “instructs courts not to reduce a term of imprisonment below the minimum of an amended sentencing range except to the extent the original term of imprisonment was below the range then applicable.” *Id.* at 2687.

Dillon, appealing the limited reduction of his sentence, argued that § 1B1.10(b)(2) could no longer be binding on district courts following the Court's decision in *Booker*. Dillon was convicted in 1993 of a variety of offenses, including possession of a certain amount of crack cocaine. He was sentenced, based on the then-mandatory

guidelines, to 262 months in prison, followed by a mandatory 60-month sentence for a firearms charge. The district court at the time stated that Dillon's sentence was “entirely too high for the crime [that he] committed.” *Id.* at 2689.

In 2007, the Commission amended the Guidelines to reduce sentences for possession of crack cocaine, and in 2008, the amendment was made retroactive. *Id.* at 2688. Dillon filed a pro se motion to have his sentence modified according to § 3582(c)(2). He further sought to have his sentence reduced below the then current Guidelines level, arguing that, following *Booker*, the mandatory language of § 1B1.10 should also be considered advisory. The district court reduced his sentence pursuant to the crack-cocaine amendment, but it declined to reduce his sentence further, stating that it did not have the authority to do so under § 1B1.10. The Third Circuit affirmed. *Id.* at 2689-90.

The Supreme Court rejected Dillon's contention that *Booker* required § 1B1.10 should be only advisory. The Court looked to the language of § 3582(c)(2), and concluded that, rather than allowing for resentencing, the statute only “provides for the modification of a term of imprisonment” by giving courts the power to reduce an otherwise final sentence in circumstances specified by the Commission.” (internal quotations and brackets omitted.) Thus, “Congress intended to authorize only a limited adjustment to an otherwise final sentence and not [provide for] a plenary resentencing proceeding.” *Id.* at 2690-91.

The limited scope of § 3582(c)(2) meant that the Policy Statement requiring that modified sentences stay within the Guidelines did not implicate the same constitutional concerns that the mandatory nature of the Guidelines, at issue in *Booker*, did. *Id.* at 2692. Section 3581(c)(2) “represents a congressional act of lenity” that does not “implicate the Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt.” *Id.* at 2686. Given that no Sixth Amendment rights were implicated by § 3582(c)(2), no rights were violated by adhering to the directive in § 1B1.10. *Id.* at 2692.

In the alternative, Dillon argued that the remedial holding, if not the constitutional holding, of *Booker* requires that the Guidelines be treated as advisory in the § 3582 (c)(2) because it is advisory in other contexts. The Court also rejected this argument, reiterating that the narrow scope of § 3582(c)(2) distinguished its modifications from other sentencing and resentencing proceedings. *Id.* at 2693.

Dillon also argued that mistakes made in his original sentencing should have been corrected in his sentence modification. The Court disagreed. It again referred to the narrow language of § 3582(c)(2), and concluded that aspects of Dillon's sentence unrelated to the Guidelines amendment regarding crack cocaine “are outside the scope of the proceeding authorized by § 3582 (c)(2).” Thus, “the District Court properly declined to address them.” *Id.* at 2694.

FOURTH CIRCUIT ADDS TO SPLIT BY DETERMINING THAT AMENDMENTS TO SENTENCING GUIDELINES, REMAIN SUBJECT TO EX POST FACTO RESTRICTIONS

The Fourth Circuit contributed to a circuit split on whether amendments to the Sentencing Guidelines are subject to ex post facto restrictions in the post-*Booker* landscape. In *United States v. Lewis*, the Fourth Circuit joined the D.C. Circuit's decision in *United States v. Turner*, 548 F.3d 1094, 1100 (2008) holding that amendments to the now advisory guidelines are still subject to ex post facto considerations. 606 F.3d 193 (4th Cir. 2010). It also critiqued, and distinguished *Lewis* from, the Seventh Circuit's decision in *United States v. Demaree*, 459 F.3d 791, 795 (2006), which had held that, in light of *United States v. Booker*, 543 U.S. 220 (2005), any amendment to the guidelines did not create a significant risk of increased punishment subjecting them to ex post facto limitations. 606 F.3d 193, 199 (4th Cir. 2010).

The defendant in the case was convicted for being a felon in possession of a firearm. He was arrested for the offense in May of 2006 and sentenced in October of 2008. An amendment to the guidelines that took effect in November 2006 effectively doubled the sentence that the Guidelines would advise from 21 to 27 months up to 41 to 51 months. The District Court determined that the application of the sentence advised by the 2008 Sentencing Guidelines would contravene the Ex Post Facto Clause. It reasoned that applying the 2008 Guidelines "would result in a significant risk of an increased sentence," violating the Ex Post Facto Clause under the rules laid out by precedent. The District Court, therefore, sentenced the defendant to 27 months in prison. *Id.* at 197.

The Government appealed the District Court's conclusion that the Ex Post Facto Clause required application of the 2005 Guidelines. *Id.* The Fourth Circuit rejected the appeal, finding that applying the 2008 Guidelines in this case would contravene the Ex Post Facto Clause. *Id.*

The Fourth Circuit observed that the Guidelines "represent the crucial 'starting point,' as well as the 'initial benchmark,' for the regimented sentencing process employed" by sentencing courts. *Id.* at 199. It also noted that sentences within the Guidelines were accorded the "presumption of reasonableness" at the appellate level. *Id.* at 201. The court also took note of the fact that "81.9 percent of sentences imposed within [the Fourth Circuit] in fiscal year 2009 fell within the advisory Guidelines range or a Government sponsored departure below the Guidelines range." For the specific "felon in possession" offense, the average sentence remained the same after *Booker* as it was before *Booker*. *Id.* at 201-202. The Fourth Circuit also examined other aspects of the practical implication of the Guidelines in sentencing. "In sum," the court explained, "given the importance our precedent places on the proper calculation of the advisory Guidelines range, the retroactive application of an upwardly amended advisory sentencing

range poses a significant risk of an increased sentence," and therefore violates the Ex Post Facto Clause if applied in this case. *Id.* at 203.²

EVIDENCE

SECOND CIRCUIT MAKES IT EASIER FOR DEFENSE TO INTRODUCE EVIDENCE WITHOUT OPENING DOOR TO UNSUCCESSFUL PROFFER STATEMENTS

In *United States v. Oluwanisola*, the Second Circuit refined exactly when defense counsel triggers a partial waiver of defendant's rights in a proffer agreement. The Court found the defendant's opening argument that the government could not prove each element of its case, and a cross examination of a government witness did not constitute waiver of the defendant's rights in his proffer agreement. It also found that the District Court's rulings that each of these would be a waiver, stopped the defendant from presenting certain arguments that, in turn, violated the defendant's Sixth Amendment rights and was not harmless error. 605 F.3d 124, 132-134 (2nd Cir. 2009).

Prior to trial the defendant, hoping to obtain a cooperation agreement, executed a proffer agreement with the government. Under the agreement, if the case went to trial, the government could not use any of the defendant's statements against him as "substantive evidence," unless to "rebut directly or indirectly, any evidence offered or elicited, or factual assertions made, by or on behalf of [the defendant] at any stage of criminal prosecution." In two proffer sessions, the defendant admitted knowledge that envelopes shipped through the mail contained illegal drugs, and that he was part of a drug smuggling operation. The case, however, ultimately went to trial. *Id.* at 127 -28.

During the pretrial proceedings, defense counsel told the district court that he intended to argue in his opening statement that the government could not prove "each and every element to this crime." *Id.* at 128-129. Defense counsel also sought, on cross examination, to ask a government witness whether he had made a written report of some observations of the defendant's behavior that had indicated defendant's involvement in criminal activity. *Id.* at 129-130.

In not permitting the opening statement argument, the District Court drew a distinction between "generally telling the jury about the burden of proof and the necessity of the government proving all elements of the crime and arguing that specific elements of the crime have not been met." Under this distinction the first instance would not constitute a waiver but the second instance would. The Second Circuit rejected this distinction. Applying that distinction, the Court reasoned, would limit the defendant's ability to draw attention to the lack of evidence. "Interpreting the waiver provision to permit such a result," the Court concluded, "would leave the defendant, for all practical purposes, defenseless." *Id.* at 131-132.

The Court, likewise, held that the District Court erred in ruling that the cross examination question regarding a written report would constitute a waiver. The District Court reasoned that any challenge on cross would challenge a witness' credibility, therefore opening the door to proffer statements presenting facts in support of a witness' testimony. In rejecting the District Court's reasoning, the Court acknowledged that under Second Circuit precedent, an "implicit factual assertion" would trigger the waiver provision. *Id.* at 132. "[W]hen the defendant has not directly or indirectly contradicted the facts he admitted in his proffer," however, "the same inference does not apply." The Court held that a question on cross examination "that goes to the credibility of the government's witness, without a factual assertion contradicting the facts admitted in the proffer statement, is not sufficient to trigger the waiver provision here." *Id.* at 133.

Further, the Court concluded that the District Court's ruling on whether the opening statement argument and cross examination question constituted waiver violated the defendant's Sixth Amendment rights. These errors were also not harmless errors because they cut off avenues of defense and had effects beyond the specific statements or questions challenged. *Id.* at 134.

DISCOVERY

DEFENDANT ENTITLED TO DISCOVERY OF TEXT MESSAGES EXCHANGED BETWEEN GOVERNMENT AND GOVERNMENT WITNESSES, AND GOVERNMENT HAS DUTY TO PRESERVE MESSAGES

In *United States v. Suarez*, the U.S. District Court for the District of New Jersey held that text messages sent between three F.B.I. agents and a cooperating government witness were discoverable material under the Jencks Act, 18 U.S.C. §3500. It further held that the government had a duty to preserve the text messages in reasonable anticipation of future prosecution. No. 09-932, 2010 WL 4226524, at *5, 6 (D.N.J. Oct. 21, 2010). The court concluded that the proper remedy for the government's failure to preserve the text messages was to provide an adverse inference instruction to the jury instead of suppressing the evidence. *Id.* at *8.

As part of a public corruption investigation of the defendants, the FBI enlisted a cooperating witness, Solomon Dwek, to offer the defendants bribes in exchange for favors from the defendants' local government positions. Three F.B.I. agents directed Dwek's efforts and often communicated with Dwek during the investigation by exchanging text messages. After the government filed charges against the defendants, the defendants requested that the government produce all text messages exchanged between Dwek and the FBI agents. *Id.* at *1. The government acknowledged eventually that the majority of text messages that the defendants requested had been

deleted from the F.B.I. data back-up servers pursuant to the F.B.I.'s retention policy. *Id.* at *3. As a result of the government's failure to preserve these text messages, the defendants moved for sanctions against the government and requested that the court suppress all evidence relating to Dwek or, in the alternative, issue an adverse inference instruction.

The District Court first addressed the threshold question of whether text messages are discoverable material. Under the Jencks Act and Federal Rule of Criminal Procedure 26.2, the government is required to disclose prior recorded statements of its witnesses after they testify in order to provide defense counsel with necessary impeachment material. *Id.* at *5. A prior recorded "statement" includes any "written statement that the witness makes and signs, or otherwise adopts or approves." *Id.* (citing Fed. R. Crim. P. 26.2(f)(1)). The court determined that the text messages between Dwek and the F.B.I. agents qualified as "statements" under the Jencks Act. The court reasoned "that the agents and the cooperating witness each adopted and approved each message they sent when they affirmatively chose to transmit it." *Id.*

The court also held that the government "had a duty to preserve the Jencks materials contained in the text messages." *Id.* at *6. A duty existed because the F.B.I. had possession of the text messages at some point during the on-going investigation and knew that the investigation was aimed at prosecution. Under its own retention policy, "the F.B.I. appears to have been well-equipped to preserve documents relevant to this litigation had the United States Attorney's Office requested it to do so." *Id.* In fact, the government did not issue a litigation hold in the case until seven months after the investigation concluded, and three months after the F.B.I. began searching its server for the missing text messages. *Id.*

Finding that the text messages were discoverable material, the court still rejected the defendants' first request that it suppress all evidence relating to Dwek. Suppression was not required because the government did not lose or destroy the text messages in bad faith. *Id.* at *7.

The court determined, however, that an adverse inference instruction was warranted. The government's loss of the text messages had a significant prejudicial effect on the defendants because they were unable to conduct a more thorough cross-examination of a key government witness. *Id.* at *8. The court observed further that the text messages were within the government's control, and were intentionally deleted by the agents. Moreover, the U.S. Attorneys' Office was found to have failed to take steps to preserve the text messages, and those that were deleted or not preserved were relevant to claims or defenses. It was also reasonably foreseeable that the text messages would later have been discoverable. *Id.* Because of the importance of the evidence and the government's culpability in its loss, the government's actions amounted to "actual suppression or withholding of evidence." *Id.* at

*9. As a result, the court decided to instruct the jury with the “least harsh” spoliation charge and tell the jury that they could infer that the missing text messages were relevant and favorable to the defendants, but that they were not required to do so. *Id.*

FOURTH AMENDMENT

WARRANT REQUIRED TO OBTAIN PRIVATE E-MAILS FROM INTERNET SERVICE PROVIDER

In *United States v. v. Warshak*, The Sixth Circuit found that the Stored Communications Act (SCA) was unconstitutional to the extent that it allows the government to obtain private e-mails from an internet service provider without a warrant. --- F.3d ---, 2010 WL 5071766, at *1 (6th Cir. Dec. 14, 2010). The court drew on Supreme Court precedent that individuals have a reasonable expectation of privacy in their phone calls and mailed letters to conclude that a similar expectation existed for electronic mail. *Id.* at *11 (citing *Katz v. United States*, 389 U.S. 347, 352 (1967); *United States v. Jacobsen*, 466 U.S. 109, 114 (1984)).

The Stored Communications Act provides that government agents may obtain the contents of e-mails in “electronic storage” with a service provider by the simple issuance of a subpoena to the provider if the e-mails have been stored for more than 180 days. 18 U.S.C. § 2703(a), (b). In *Warshak*, government agents invoked the SCA to require one of the defendant’s service providers to archive the defendant’s e-mails and to produce them after 180 days of storage. These e-mails were then used to convict the defendant of a number of crimes including fraud and money laundering. *Id.*

The Sixth Circuit referred to the Supreme Court’s statement that evolving technology must not be permitted to “erode the privacy guaranteed by the Fourth Amendment.” *Id.* at *10 citing *Kyllo v. United States*, 533 U.S. 27, 34 (2001). E-mail, the court found, has become such a common form of communication that some persons may consider it a “necessary instrument for self-expression [or] even self-identification.” *Id.* at *20. It concluded that it would “defy common sense to afford e-mails lesser Fourth Amendment protection” than other forms of traditional communication. *Id.* at *11.

The court distinguished its conclusion from the Supreme Court’s holding in *United States v. Miller*, 425 U.S. 435 (1976). In *Miller* the Supreme Court held that a bank depositor does not have a reasonable expectation of privacy in the contents of bank records, checks, and deposit slips because the depositor was turning over this private information in the regular course of business to a third party. *Miller* did not apply in this case for two reasons. First, *Miller* involved simple business records as opposed to the potentially unlimited variety of “confidential communications” that can encompass a private e-mail. *Id.* at *13. Second, a bank depositor provides information to the bank so the bank can put the information to use in the

“ordinary course of business.” *Id.* E-mail storage was distinguishable as the internet service provider is merely an intermediary and not the intended recipient of the communication. *Id.*

The Sixth Circuit ultimately upheld the defendant’s conviction, however, holding that the exclusionary rule did not apply. The court looked to the history of the SCA and the dirth of Fourth Amendment challenges to the SCA, and the complexity of its own Fourth Amendment analysis to conclude that, the SCA was not so “conspicuously unconstitutional as to preclude good faith reliance.” *Id.* at *14. Warshak also argued that the government’s violations of the SCA’s provisions would not allow them to rely on the facial validity of the statute under the Supreme Court’s holding in *Illinois v. Krull*, 480 U.S. 340 (1987). The provisions violated, however, were not the ones relied on by the government in obtaining the e-mails. Thus, the exclusionary rule did not apply. *Id.* at *16-17. Further, the other constitutional evidence was sufficient to sustain the guilty verdict. *Id.* at *1.

PLAIN-VIEW DOCTRINE APPLIED TO COMPUTER SEARCH WHERE VIEW OF EACH FILE IS NEEDED TO PROPERLY EXECUTE WARRANT

In *United States v. Williams*, the Fourth Circuit upheld the conviction of a defendant charged with child pornography based on evidence of incriminating files found on his computer during a search for evidence pertaining to unrelated state crimes of computer harassment. 592 F.3d 511 (4th Cir. 2010). The Fourth Circuit concluded that a computer search was no different than a search of a file cabinet with a large number of documents. *Id.* at 523. If a warrant implies that at least a cursory review of each file on the computer is required to properly execute a search, the criteria for applying the plain-view exception is easily satisfied. *Id.* at 522.

The plain-view doctrine is an exception to the general rule that warrantless searches are per se unreasonable. Police may seize evidence in plain-view during a lawful search if (1) the seizing officer is lawfully present, (2) the seizing officer has a “lawful right of access to the object itself,” and (3) the object’s incriminating character is immediately apparent. *See Horton v. California*, 496 U.S. 128, 136-37 (1990).

The defendant in *Williams* relied on Tenth Circuit precedent in *United States v. Carey*, 172 F.3d 1268, 1273 (10th Cir. 1999) to argue that the plain-view exception does not apply to searches of computers when it is the officer’s subjective intention at the outset of the search to use the warrant to obtain unauthorized evidence as such evidence would not be uncovered “inadvertently.” *Id.* at 522. In *Carey*, the Tenth Circuit had concluded that, in the context of a computer search, the plain-view doctrine did not apply when an officer subjectively began to search for evidence beyond the scope of the warrant. *Id.* at 519.

The Fourth Circuit rejected this approach in *Williams*, noting that the Supreme Court had ruled that “the scope of a search conducted pursuant to a warrant is defined objectively by the terms of the warrant and the evidence sought, not by the *subjective* motivations of an officer.” *Id.* at 522 (emphasis in original) citing *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). The Fourth Circuit also quoted the Supreme Court, stating that “even though inadvertence is a characteristic of most legitimate ‘plain view’ seizures, it is not a necessary condition.” *Id.* at 523 (quoting *Horton*, 496 U.S. at 130).

Thus, the Fourth Circuit saw no reason to ignore basic plain-view jurisprudence despite the fact that the search was through electronic data on a computer. The court concluded that it has applied the plain-view rules successfully “in the context of warrants authorizing the search and seizure of non-electronic files,” and that it saw “no reason to depart from them in the context of electronic files.” *Williams*, 592 F.3d at 524.

PLAIN-VIEW DOCTRINE APPLIED TO FILES FOUND WHEN UTILIZING A FORENSIC TOOL FOR COMPUTER SEARCH

Also applying the plain-view doctrine, the Seventh Circuit sustained the conviction of another defendant charged with violating child pornography laws in *United States v. Mann*, 592 F.3d 779 (7th Cir. 2010). In *Mann*, law enforcement officers discovered images of child pornography on the defendant’s computer during a search for files pertaining to violations of state law for voyeurism. The officers used a forensic searching tool that flagged files thought to contain images of child pornography for the purpose of indexing and cataloging the files in a viewable format. *Id.* at 781.

The court ruled that the use of such a tool was appropriate even though the scope of the warrant was limited to the discovery of voyeurism videos because the nature of computer files is not immediately apparent. *Id.* at 782. It is easy for a criminal to disguise the nature of a file by changing its name or altering its location, according to the court, and thus a relevant file could be almost anywhere on a computer. *Id.* at 782-83.

The defendant in *Mann* also relied on the *Carey* case from the Tenth Circuit, but the Seventh Circuit felt that *Carey* was distinguishable on its facts. *Id.* at 783-85. The Seventh Circuit concluded that the officer in *Mann* did not subjectively alter the scope of his search so as to find child pornography, holding that the forensic search tool served a legitimate purpose for cataloging the files despite the fact that it also flagged certain files as containing child pornography. *Id.* The court did find that the officer exceeded the scope of the warrant by opening four files that were flagged for child pornography, but concluded that those four unconstitutional actions did not invalidate the entire search and the use of the forensic tool. *Id.* at 784.

The defendant also urged the Seventh Circuit to adopt the guidelines established by the Ninth Circuit’s en banc panel in *United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989, 999-1001, 1006 (9th Cir. 2009 (“*CDT*”). In that case, the Ninth Circuit created a set of restrictive guidelines for the issuance of search warrants for computers. The guidelines required, among other things, that the government waive reliance on the plain-view doctrine, that the government create a protocol for preventing agents from examining data other than that for which probable cause is shown, and the destruction of non-responsive data along with a report on what data was kept, destroyed, or returned. *Id.*

The Seventh Circuit rejected the Ninth Circuit’s attempt to “provide some guidance in a murky area” and instead was in agreement with the dissent in *CDT* that “jettisoning the plain view doctrine entirely in digital evidence cases is an efficient but overbroad approach.” *Mann*, 592 F.3d at 785 (internal quotations omitted). The Seventh Circuit reasoned that a better approach would be to allow the plain-view doctrine to develop through case-by-case factual adjudication. *Id.* The court’s advice to officers and others involved with searches of digital media was to “exercise caution to ensure that warrants describe with particularity the things to be seized and that searches are narrowly tailored to uncover only those things described.” *Id.* at 786. Although the court found the officer’s actions to be constitutional with the exception of four child pornography files, it emphasized that his failure to stop his search and request a separate warrant for child pornography was “troubling.” *Id.*

Notwithstanding its distaste for the officer’s conduct, the court noted that the forensic searching tool did help the officer actually find files supporting the charges of voyeurism in concluding that the search was reasonable and within the scope of the warrant. *Id.*

PRIVILEGE

EXECUTIVE CANNOT PROTECT AS PRIVILEGED STATEMENTS TO COMPANY’S OUTSIDE COUNSEL DURING INTERNAL INVESTIGATION

In *United States v. Ruehle*, the Ninth Circuit reversed the district court’s order excluding all statements between the defendant, the former chief financial officer (“CFO”) of Broadcom Corporation (“Broadcom”), and outside counsel hired to conduct an internal investigation concerning the company’s backdating of stock options. The court also held that the federal attorney-client privilege did not apply because the CFO’s statements made to company counsel were not made in confidence. 583 F.3d 600, 613 (9th Cir. 2009).

In 2006, Broadcom’s board of directors and company management hired outside counsel Irell & Mangella LLP (“Irell”) to conduct an internal Equity Review of the company’s stock option granting practices. William Ruehle, Broadcom’s CFO at the time, was

significantly involved in the investigation from the outset and participated in a meeting in which Irell and Broadcom's board of directors clearly explained that Irell would report any information obtained during its review to the company's outside independent auditor and that the company intended to cooperate with government regulators. *Id.* at 605. Irell attorneys later interviewed Ruehle about Broadcom's stock option granting practices and his role as CFO, the substance of which was disclosed to the company's outside auditor and later to government investigators. *Id.*

Ruehle was eventually charged with conspiracy and securities and wire fraud. He sought to preclude the government from using his communications with Irell attorneys against him. Ruehle claimed that his communications with the Irell attorneys were privileged. The Irell attorneys never issued an *Upjohn* warning to him during the internal investigation, and Ruehle contended that he reasonably believed that Irell personally represented him during his interviews. The district court agreed and granted his motion for suppression. The government filed an interlocutory appeal. *Id.* at 605-06.

The Ninth Circuit reversed. It first found that the district court erroneously applied California state law, not federal common law, on attorney-client privilege and incorrectly inverted the burden of proof by placing "the onus on the government to show what information was not privileged." *Id.* at 609. In the Ninth Circuit, the party asserting the privilege must establish the privileged nature of the communications and, if necessary, segregate the privileged information from non-privileged information. *Id.*

Second, the court concluded that Ruehle failed to meet his burden in establishing the existence of an individual attorney-client privilege. The court identified an eight part test to determine whether information is covered by the attorney-client privilege: (1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived. *Id.* at 607.

Applying this test, the court held that Ruehle did not satisfy the fourth element—his statements to the Irell attorneys were not "made in confidence but rather for the purpose of disclosure to the outside auditors." *Id.* at 609. Ruehle's claim of confidentiality supporting the privilege was undermined by his own admission that he was aware of "the broad nature of the planned third-party disclosure." He was also aware that Irell "was directed ... to freely share 'all factual information' gleaned through the Equity Review—whether 'good, bad, or ugly.'" *Id.* at 610.

Moreover, Ruehle failed to distinguish between those statements he made to Irell that were made "made in confidence" and those statements he anticipated would be

disclosed. Allowing all of these statements to be protected would "[run] squarely into the settled rule that *any* voluntary disclosure of information to a third party waives the attorney client privilege, regardless of whether such disclosure later turns out to be harmful." *Id.* at 612. Ruehle's subjective intent regarding whether statements were made in confidence could not sustain the privilege given his admission that the disclosure to the outside auditor was planned.

CORPORATE ATTORNEY-CLIENT PRIVILEGE APPLIES TO OUTSIDE CONSULTANTS FUNCTIONING AS EMPLOYEES

In *United States v. Graf*, the Ninth Circuit held that the corporate attorney-client privilege applied to communications between a company's attorneys and an outside consultant who functioned as an employee. The consultant, however, could not assert a personal privilege for his communications with the company's lawyers. 610 F.3d 1148, 1157 (9th Cir. 2010).

The defendant, James Graf, was the co-founder of, and an alleged consultant to, Employers Mutual LLC, a company which purported to provide health care coverage to thousands of plan members but which, in reality, was an elaborate scheme to defraud the plan members. Graf was convicted for his involvement in the scheme after the district court denied his motion to preclude the company's attorneys from testifying against him on the grounds that Graf did not have an individual attorney-client relationship with the company attorneys. *Id.* at 1152.

In upholding Graf's conviction, the Ninth Circuit held that Graf was a functional employee of the company such that the company's corporate-attorney client privilege extended to him. Applying *Upjohn Co. v. United States*, 449 U.S. 383 (1981) and *In re Bieter Co.*, 16 F.3d 929 (8th Cir. 1994), the court extended the corporate attorney-client privilege to cover communications between corporate counsel and outside consultants who function as employees. *Id.* at 1159.

Here, Graf acted as a functional employee because he communicated regularly with third parties on behalf of the company, marketed the company's insurance plans, managed its employees, and most importantly, was the "company's primary agent in communications with corporate counsel." *Id.* Therefore, the corporate privilege applied to communications between Graf and the company's attorneys. The company's appointed fiduciary properly waived the privilege, allowing the attorneys to testify against Graf. *Id.*

The Ninth Circuit further held that Graf did not hold a personal attorney-client privilege. The court adopted the test announced in *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120 (3d Cir. 1986) for determining whether a personal attorney-client privilege exists. *Id.* at 1159-60.

Under the *Bevill* test, individual corporate officers or employees seeking to assert a personal claim of attorney-client privilege must affirmatively prove the following five factors: (1) that they approached counsel for the purpose of seeking legal advice; (2) that when they approached counsel, they made it clear that they were seeking legal advice in their individual rather than their representative capacities; (3) that the counsel saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise; (4) that their conversations with counsel were confidential; and (5) that the substance of their conversations with counsel did not concern matters within the company or the general affairs of the company. *Id.*

With respect to Graf, the court found that Graf could not assert a personal attorney-client privilege because he failed to prove the second, third, and fifth factors as to the attorneys who testified against him. *Id.* at 1161.

PERJURY

“LITERAL TRUTH” DEFENSE INAPPLICABLE WHERE PERJURY DEFENSE IS BASED ON THE DEFENDANT’S PURPORTED UNDERSTANDING OF THE QUESTION

In *United States v. Thomas*, the Ninth Circuit held that, notwithstanding the “literal truth” defense to perjury set forth in *Bronston v. United States*, 409 U.S. 352 (1973), where allegedly perjured testimony is based on the “literal truth” of the defendant’s understanding of the question, the question of whether the defendant understood her answer was false was a question for the jury. 612 F.3d 1107, 1117 (9th Cir. 2010).

Tammy Thomas was a professional cyclist who took steroids provided by BALCO Labs. In the federal grand jury hearing seeking to indict principal players in BALCO Labs, Thomas responded “No” to the questions “did you get any other services from [the target of the investigation] or products?”, “Did you take anything that [the target of the investigation] gave you?” and “have you ever taken anabolic steroids?” *Id.* at 1114. At Thomas’s perjury trial arising out of her responses to the grand jury hearing, the government presented evidence that BALCO labs, the target of the original investigation, had provided a variety of performance-enhancing substances to Thomas and that Thomas had taken anabolic steroids. She was convicted on the counts of perjury arising out of the answers to these questions. *Id.* at 1112-13.

Thomas based her defense on the argument that the target of the original investigation never gave her performance enhancing supplements without Thomas providing some form of payment, and that “give” could mean to provide for free. She also argued that, at the time of the grand jury hearing, the substances she had taken had not yet been classified as “anabolic steroids” under federal statute. *Id.* at 1118-19. Thomas pointed to the Supreme

Court’s recognition of a “literal truth” defense in *Bronston* as the legal basis for her arguments. In *Bronston*, Samuel Bronston testified in a bankruptcy hearing. He was asked if he ever had any bank accounts at Swiss Banks. He responded: “The company had an account there for about six months, in Zurich.” It was later revealed that Bronston had a personal bank account at a Swiss bank. In his perjury trial, his defense was that his response was “literally truthful” despite being misleading and not responsive. The Supreme Court reversed Bronston’s perjury conviction because Bronston’s response was literally true and the perjury statute “does not make it a criminal act for a witness to willfully state any material matter that *implies* any material matter that he does not believe to be true.” *Id.* at 1115 citing *Bronston*, 409 U.S. at 357-58.

The Ninth Circuit found *Bronston* inapplicable to Thomas’s case. “Bronston’s allegedly perjurious statements were *undisputedly* literally true,” the court explained, “which is not the case here.” Rather, Thomas “assert[ed] that her answers were ‘literally true’ but the government contests that assertion.” This, under Ninth Circuit precedent, was a question for the jury. *Id.* at 1116.

The Ninth Circuit looked to two of its previous cases where a perjury defendant asserted that their statements were literally true provided a certain understanding of the question. These two cases provided a framework for evaluating a defense that “allegedly perjured testimony was literally true based on [a defendant’s] own purported understanding of the government’s question.” In these cases, “the issue is whether the jury could conclude beyond a reasonable doubt that the defendant understood the question as did the government and that, so understood, the defendant’s answer was false.” *Id.* at 1117 citing *United States v. Matthews*, 589 F.2d 442 (9th Cir. 1978), and *United States v. Sainz*, 7772 F.2d 559 (9th Cir. 1985).

The Ninth Circuit then evaluated the evidence presented at trial and concluded that “there was sufficient evidence for the jury reasonably to conclude that Thomas did not offer literally true answers” in her testimony to the grand jury. *Id.* at 1119.

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² Other notable cases include: *United States v. Lanham*, 2010 WL 3305937 (6th Cir. Aug. 24, 2010) (“the advisory nature of Guidelines does not completely eliminate Ex Post Facto concerns”). Other circuits have recognized an ex post facto problem in applying a higher guideline, but have suggested that a court can still consult the new, higher guideline without violating the Ex Post Facto Clause. *United States v. Rodriguez*, 2010 WL 5297173 (1st Cir. Dec. 28, 2010) (“Exercising their *Booker* discretion, judges mulling over the multiple criteria in § 3553(a) can turn to post-offense Guidelines revisions to help select reasonable sentences that (among other things) capture the seriousness

of the crimes and impose the right level of deterrence."); *United States v. Larkin*, 2010 WL 5022471 (3d Cir. Dec. 10, 2010), (courts can consider a subsequent change in the Guidelines range as part of their decision to sentence outside the range); *United States v. Gilmore*, 599 F.3d 160 (2d Cir. 2010) ("We see no colorable argument for the proposition that consultation of a later-established sentencing statute for these limited purposes violates the Ex Post Facto Clause."). See also *United States v. Ortiz*, 2010 WL 3419898 (Sept. 1, 2010) (Ex Post Facto Clause not implicated because the defendant's sentence was substantially lower than the bottom of either Guideline).

ARGENTINA

DRAFT MODIFICATION TO INCLUDE A LENIENCY PROGRAM FINALIZED BY THE ANTITRUST COMMISSION

By Alfredo M. O'Farrell & Miguel del Pino¹

Introduction

On December 15, 2010 the Argentine Antitrust Commission (the "Commission") finalized a draft bill to include a Leniency Program in the Antitrust Law (the "Bill"). On that day, it passed Resolution No. 157 through which it submitted the Bill for the consideration of the Secretary of Domestic Trade (the "SDT").

The Leniency Program is a very important tool for the control of cartels and, under the Commission's reasoning, only a few cartel cases have been sanctioned in Argentina due to the lack of real tools to investigate them.

It took about two years for the Investigation and Audit Department (the "IAD") of the Commission to put together the Bill now approved by Resolution No. 157. During that period, the IAD collected data and also gathered the international experience of those jurisdictions already enforcing Leniency Programs. As a result, the IAD drafted the preliminary version of the Bill, now under consideration of the SDT, which will be analyzed and eventually sent to the Congress for final approval.

Cartel prosecution experience in Argentina - The IAD considerations

The Commission has prohibited agreements between competitors that restrict competition by agreeing on prices, allocating markets or sharing sensitive competitive information such as sales and volumes of sales, with the same object or effect.²

Under the current drafting of the Antitrust Law, in the event that a cartel is proved, the termination of the infringing conduct will be ordered and a fine could be imposed on the perpetrators, which can range from AR\$ 10,000 (approximately USD 2,500) to AR\$ 150,000,000 (approximately USD 37,500,000).³ The amount of the fine is calculated considering the loss incurred by the affected parties, the benefit that was obtained by the members of the cartel and the value of the assets involved. The amount of the fine can be doubled in the event of a repeated offence.

During the process of drafting the preliminary version of the draft bill, considering its own domestic experience and having analyzed the data and the international experience collected, the IAD reached the already evident conclusion that, in the fight against cartelization, the Commission lacked the necessary tools to take effective measures in order to prevent and punish such behavior.

Proof of the aforementioned is the fact that when other antitrust agencies, favored by the leniency regimes, were dismantling cartels operating in the region and sanctioning its members, the Commission was beginning its investigation, as recalled and admitted by the IAD.

The IAD also took under consideration the different approaches carried out by different antitrust agencies enforcing the Leniency Program and the Commission: while the Commission sees the cartel as one single entity, sanctioning all its members indistinctly, other antitrust agencies consider the cartel as a sum of companies acting together but different from each other, encouraging the individual performance in order to create a mistrust atmosphere among its members.

Considering what was previously stated, the IAD defines the Leniency Program as "*a generic term setting the condonation or partial reduction of the fines to the companies and/or persons cooperating by admitting its own participation and informing on its partners with the antitrust authorities during a cartel investigation,*" suggesting that such condonation or reduction is really "*the lesser of two evils.*"⁴

The proposed amendment

The Bill sets out two different scenarios for infringing parties, namely an exemption scenario and a reduction scenario, both based on a "race-to-the-door" structure.

Infringing parties must comply with the following requirements in order to obtain an exemption of the sanctions set out by the Antitrust Law: (i) to be the first party, among the participants of the conduct, that provides the Commission with information and evidence, either in the event that the Commission has not initiated an investigation or if the Commission has initiated an investigation, but has not been able to gather sufficient evidence; (ii) must immediately cease the performance of

the infringing conduct, unless the Commission deems otherwise in order to preserve the investigation; (iii) must collaborate with the Commission until the end of the investigation; (iv) must not destroy, forge or hide evidence of the anticompetitive conduct, nor make public the fact that it has filed a leniency application, unless such communication is to another antitrust regulator and (v) must not be the leader of the anticompetitive conduct.

Those parties that would not be the first ones to qualify under the Leniency Program could request a reduction of the sanctions, if they are able to meet the remaining requirements and provide the Commission with useful information for the investigation. The Bill sets out that the reduction could be of 20%, 30% or 50% of the sanction. The reduction ratios are to be determined by the Commission by taking into account the chronological order of the filing, as well as the number of participants involved in the conduct.

The Bill also includes a “leniency plus” provision, by means of which those parties that would not be able to request an exemption regarding an anticompetitive conduct but that could provide information on a second anticompetitive conduct can obtain an exemption on the latter, while a 30% reduction in the former.

Additionally, the Bill specifically sets out that there cannot be a joint application by two parties of the Leniency Program, the sole exception being if a company and its directors or other members of its staff request the application of the program.

The Commission is also assessing the possibility of creating a Leniency Division. The function of this division would be to receive and analyze the applications for leniency and then inform the Commission whether the requirements are met in order to grant an exemption or a reduction.

The idea of this division is to guarantee the confidentiality of the information provided by the parties that apply for leniency. All members of the Leniency Division would treat the information filed by the requesting parties as confidential and may be held liable in the event of a leak of information.

Conclusion

There is still a long way to go before the Leniency Program can be enforced, namely the pending approval of the SDT and the elevation of the Bill to the Congress and the modifications that the Bill may incur when treated in the house of representatives.

In addition, the success of the Leniency Program would depend on the further implementation by the Commission of confidentiality mechanisms to protect the identity of the informer, given that those in position to collaborate with the Commission may be discouraged to do so if exposed. Therefore, the creation of the Leniency

Division is fundamental to achieve this goal.

Notwithstanding the aforementioned, the Bill constitutes a significant leap forward in the fight against cartelization in particular and antitrust aspects in general, evidencing that the Commission has taken notice of the requests of both the public and private sectors regarding the need for such program.

¹ The authors are partners of Marval, O’Farrell & Mairal and members of the antitrust department.

² Decision No. 513, issued by the Commission on July 25, 2005.

³ Considering an Exchange rate of AR\$ 4 for USD 1.

⁴ Considerations of the IAD in the report passed to the Commission.

KOREA

KFTC’S REFERRAL IS PREREQUISITE FOR CRIMINAL PROSECUTION

By Paul S. Rhee¹

On September 30, 2010, the Korean Supreme Court rendered a landmark decision holding that the Korea Fair Trade Commission (“KFTC”)’s referral of antitrust violators to the Prosecutor’s Office was a prerequisite for them to criminally prosecute such violators. This decision finally ended the debate on whether or not such referral is required for criminal prosecution of such violators under the Monopoly Regulation and Fair Trade Act (“MRFTA”).

History of the Case

With respect to the KFTC case concerning a cartel by 10 High Density Polyethylene (“HDPE”) manufacturers/sellers, following its investigation, the KFTC referred 5 HDPE companies to the Prosecutor’s Office for criminal prosecution. As a policy and practice under its Corporate Leniency Program, the KFTC did not refer Honam Petrochemical, the first-ranked leniency applicant in the above case, and Samsung Total Petrochemical (a joint venture between Samsung of Korea and Total of France), the second-ranked leniency applicant in the above case, as well as the respective executives of those two companies (collectively, the “Defendants”) to the Prosecutor’s Office. However, the Prosecutor’s Office unilaterally indicted the Defendants for violating Korean antitrust laws along with those who were referred to them by the KFTC.

In 2008, the trial court (the Seoul Central District Court) held that, since the prerequisite to criminally prosecute the Defendants required the KFTC to refer the

Defendants to the Prosecutor's Office and this was not satisfied, the indictment of the Defendants went against the MRFTA and was invalid. Accordingly, the court voided the indictment of the Defendants. Subsequently, the Prosecutor's Office appealed to the appellate court (the Seoul High Court), but such appeal was dismissed.

Korean Supreme Court Decision

The Prosecutor's Office appealed the present case to the Korean Supreme Court and argued that the "principle of indivisibility" applied to the KFTC's referral to the Prosecutor's Office and that the effect of referring the 5 HDPE companies to the Prosecutor's Office carried over to the Defendants as well based on an analogy with Article 233 (Indivisibility of Complaint) of the Criminal Procedure Act, which states that "[c]omplaints filed against one or more of the co-offenders in an offense subject to prosecution ... shall also take effect in respect to the other accomplices." The Korean Supreme Court noted that Article 71(1) of the MRFTA stipulated that an offense concerning cartels should be criminally prosecuted by the Prosecutor's Office only after a complaint is filed (referral is made) by the KFTC.

In dismissing the appeal by the Prosecutor's Office in its entirety, the Korean Supreme Court held that, there is no express provision under the law that would support the position of the Prosecutor's Office and also that, "[i]f we were to reason by analogy that the principle of indivisibility for a complaint under Article 233 of the Criminal Procedure Act were to also apply to the KFTC's referral," this would mean that the scope of criminal measures which [may be taken by the Prosecutor's Office] would be expanded to allow such criminal measures without the referral of the KFTC against an accused [regarding antitrust violations] and this cannot be permitted since it would go against the principle of legality by disadvantageously applying reasoning based on an analogy of the criminal law to the Defendants."

Implications

As a result of the Korean Supreme Court's landmark decision, several pending criminal actions filed by the Prosecutor's Office against cartelists that were not referred to them by the KFTC have been dropped. Moreover, such decision strengthened the efficacy of the KFTC's Corporate Leniency Program by conveying a clear message that those cartelists who voluntarily report their cartel activities first or second will be protected from criminal prosecution.

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GETTING CONTROL OF A SITUATION NOT IN YOUR CONTROL: STEPS YOU SHOULD TAKE IN THE INTERIM PERIOD BEFORE YOU GO TO THE FEDS OR THE FEDS COME TO YOU WITH EVIDENCE OF CARTEL ACTIVITY.

By Bob Calo¹

In a perfect world, you are sitting at your desk one day and a client's in-house counsel calls and tells you that, as a result of the "vigorous and robust" compliance program you helped put in place a few years ago, the company has uncovered a scheme where employees are engaged in collusion with one or more competitors in the sale of the company's products. Obviously, this would not be good news for the client. But, looking on the bright side, this sequence of events is proving to be good news for you because you can now control the timing of the actions you take, including — in all likelihood — when and in what manner you approach the Department of Justice Antitrust Division ("the Division") to take full advantage of incentives offered by the Division's Leniency Program.

Unfortunately, the world is not perfect. The news that the Division may have your client in its gun sites will come to you in other ways, which will not allow you to control the situation. For example, your client may have been the subject of a "dawn raid" in a foreign country (which begs the question of whether or not your client is being looked at by the Division here in the U.S.). Or, perhaps, your client's major competitor may have made an SEC filing revealing a subpoena issued by the Division (which could lead one to conclude there may be a widespread investigation being conducted in your client's industry). Another possibility could be that an employee of a competitor tips off one of your client's employees that the competitor's management had uncovered their cartel activity and is rumored to be "going to the feds with the information." In all of these situations, you are not in control; you are playing "catch up," and you have to react quickly. Obviously, the first priority is to determine whether your client's company was involved in the collusive activity, and if so, work through the strategic pro's and con's of going to the feds yourself. However, while you are conducting that investigation and/or your client is weighing those strategic moves, there are several "best practices" steps that you need to take immediately to assist your client.

Prepare for Search Warrants. Obviously, this is an issue that usually goes away once you contact the feds, attempt to get a marker and/or pledge cooperation (cooperation, which typically includes acceptance of a subpoena for any documents the government would seek by a search warrant). But, there may be situations where you can't or won't be in a position to contact the feds to alleviate any worries of a search warrant. For example, your client may want you to conduct an independent, "quick-turn-around investigation" to substantiate or get a sense of the scope of cartel activities before it agrees to expose the wrongdoing to the feds. The management of

your client's company also may want to delay any contact with the feds until it has vetted the issues (and the potential fall-out) with its major investors, business partners, vendors, or others who will be impacted by you going to the feds. The delay or inability to contact the feds can also be chalked up to just plain old logistics: your client may be headquartered in Asia or Europe, and its Board may want an in-person presentation from you before it decides whether or not to contact the feds. In any of these scenarios, there is an "interim" period where the feds can serve a search warrant to the company. You need to both: 1) warn the company that this is a possible consequence of any delay in contacting the feds; and 2) take steps to mitigate the harm caused by the execution of a search warrant.

To mitigate the harm, you need to institute a search warrant response plan for all of your client's facilities. Federal agencies use search warrants to obtain documentary evidence of crime, to obtain immediate access to those documents, and to obtain documents before they can be destroyed. However, you should be aware that, in connection with a search, agents often will also attempt to obtain interviews with employees who are at the location searched. These interviews can be disastrous for the company, as "off the cuff" statements and "admissions" that will harm the company may be made. A good search warrant response plan will establish a procedure for getting the agents the documents they are entitled to, but at the same time, get them out the door as soon and as efficiently as possible. Such tactics will minimize disruption to the client's work force, minimize rumors or bad publicity that can accompany the execution of the search warrant, and minimize employee interviews. For these reasons, a plan needs to be put in place immediately, while the client contemplates whether or not to go to the government.

Warn Employees: No Talking to Competitors.

The law enforcement tools of wiretaps and consensually recorded conversations — once used almost exclusively in narcotics trafficking and organized crime cases — are now increasingly being used in white collar cases, including cartel investigations. Thus, the government may be listening to your employees' phone calls or meetings weeks or months before you become aware of possible cartel activity by the client. Moreover, given the strong incentives offered by the Leniency Programs at the Division, all participants in a cartel scheme have an incentive to cooperate against the other participants if it appears that the scheme "is blown" and will become public. Thus, the other companies that participated in the cartel activity and their employees all have a strong incentive to gather evidence against your client. For these reasons, another landmine to avoid during this interim period is having one of your employees panic and call an employee of a competitor and make statements or admissions that may be used against the company at a later date. The solution here is to "circle the wagons." All employees who have had contact with cartel collaborators in other companies need to be told not to talk to the collaborators in the other companies. Such toxic communications need to

be shut off, as they pose a risk of additional criminal exposure to the company.

Institute Document Preservation Policies. In other words, all normal document destruction policies (for electronic and hard copy data) should be immediately suspended to allow you to gather all documents relevant to the allegations. Regardless of whether or not the client ultimately agrees to contact the government, or simply elects to wait for the feds to contact them, it is vital that your client institute immediate and sweeping document preservation policies so that you are able to get all documents (favorable or unfavorable) that you need to assess the client's exposure. The issuance of a strong and immediate preservation policy not only accomplishes this goal by preserving evidence, it also provides "insurance" for your client in the event an obstruction issue arises. Specifically, while your client, as an institution, may seek to "do the right thing" and preserve all relevant documents, one or more culpable employees may elect to destroy relevant documents. If and when such destruction is uncovered (and it is usually only a question of when), the harm and fall out to the company — in the form of an obstruction charge or an obstruction sentencing enhancement — may be mitigated or outright eliminated because of the document preservation plan you put in place at the outset of the case.

Disclosure Issues. If your client is a publicly traded company, you also need to bring in the services of disclosure counsel to see that the company adheres to the securities disclosure laws. The company will soon go to the feds with evidence of cartel activity or the feds will notify the company that it is under investigation. Under either scenario, the company will inevitably face the need to disclose a reportable event. The sooner you get the disclosure specialist in to take control of what is to be disclosed, the better they are able to control the timing and content of the message to Wall Street.

Get the Public Relations Machinery in Place.

Not only are formal disclosure issues in the securities arena looming during this interim period before you have had contact with the feds, there are also public relations issues that need to be addressed. Your client's competitors, vendors and others in the business community will soon hear some very unfavorable news about your client. It would be wise to use the time during the interim period to shape how the message will be delivered to the community.

Notify the Insurance Carriers. Defending criminal and regulatory antitrust actions is expensive and time-consuming. Defending the ancillary civil lawsuits that arise in conjunction with a government's antitrust investigation is usually exponentially more expensive and time-consuming. Therefore, it is in your client's best interest to promptly notify the appropriate insurance carriers or brokers of any wrongdoing because the defense of such conduct — and the fines levied for the conduct at issue — may be covered by one or more insurance policies. For example, the client may have Directors and Officers ("D&O") liability policies, Errors and Omissions policies

("E&O"), fiduciary liability policies and/or general commercial liability policies. While it is true that these policies will frequently exclude coverage for intentional misconduct related to cartel activity based on various "fraud-type exclusions," you should not assume that is the case. The time to make that analysis — as to whether the conduct is or is not covered — is after you give timely notice to the carrier. A failure to give "timely" notification when one becomes aware of the misconduct could result in denial of insurance funds that would have otherwise financed a defense, had notice been timely.

Tweak That Compliance Program. It is never too early in the investigation for you to determine if there are ways you can modify the compliance or training program in an effort to prevent the misconduct from occurring in the future or to better insure that it will be detected. In addition, such early efforts at "self-reform" — conducted even before the government is on the scene — can pay help play a part in demonstrating to government your client's

acceptance of responsibility and its commitment to being a good corporate citizen and cooperating with the government's investigation. If the client is ultimately charged and convicted, when the government seeks a fine at sentencing, such self-reform may help avoid a government recommendation to the court to also impose a term of probation or a court's *sua sponte* imposition of a term of probation. Conditions of probation can involve lengthy periods of reporting of reporting to the court or monitoring, or periodic records examinations and employee interrogations by the probation officer or a court appointed expert (paid for by the client).

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