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Violators Beware: Important Changes to Antitrust Laws

By LAWRENCE KILL AND JAMES M. ANDRIOLA

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 was signed into law by President Bush on June 22, 2004 (the "2004 Act"). The 2004 Act, which received bipartisan support, makes two noteworthy changes to U.S. antitrust law. First, the 2004 Act significantly raises the penalties for criminal antitrust violations. Second, the 2004 Act increases incentives for antitrust violators to come forward and cooperate with the Department of Justice.

Increased Penalties

The 2004 Act increases the penalties for violations of sections 1, 2 and 3 of the Sherman Antitrust Act as follows: the maximum prison term is increased from three to ten years; the maximum statutory fine for individuals is raised from $350,000 to $1,000,000; and the maximum statutory fine for corporations is raised from $10,000,000 to $100,000,000. The 2004 Act does not change the existing law which allows statutory fines to be increased to twice the pecuniary gain or loss as a result of a defendant's criminal conduct. The stated reason for these dramatic statutory increases was to bring penalties for violations of these antitrust laws more in line with other comparable white collar offenses. As stated by one of the 2004 Act's sponsors, Senator DeWine, "[a]ntitrust crimes such as bid rigging or cartel activity cheat consumers and distort the free market just as surely as any other type of commercial fraud, and should be strongly punished." By implementing these increased penalties, Congress hopes to dissuade would-be conspirators from participating in anti-competitive schemes.

At a minimum, the increased criminal penalties should motivate violators to seriously consider the possibility of participating in the Government's corporate leniency program under which a qualified applicant may be granted amnesty from criminal prosecution. Moreover, as discussed below, the benefits of the program have been significantly enhanced by the 2004 Act, which provides for the potential de-trebling of damages and elimination of joint liability in civil antitrust actions for qualified applicants.

Cooperation Incentives

The corporate leniency program of the Justice Department's Antitrust Division grants amnesty to corporations who are the first to report illegal activity so long as they have ceased their involvement in the illegal activity and fully cooperate in a truthful manner with the Justice Department's investigation. If a corporation qualifies for

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electronic discovery corner

Southern District of New York Judge Shira Scheindlin continues to guide the law regarding electronic discovery with her latest decision in *Zubulake*. The most recent *Zubulake* decision—the fifth so far—concerns the standards for awarding sanctions based on spoliation where there has been an alleged failure to locate and preserve electronic documents during discovery. The *Zubulake* decision is significant not only because of its comprehensive treatment of the issues, but also because it granted the motion for sanctions. In addition, the issues considered by *Zubulake* are part of the newly-proposed amendments to the Federal Rules of Civil Procedure, which were issued on August 9, 2004. *Zubulake v. UBS Warburg, LLC.*

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amnesty, all cooperating directors, officers and employees involved in the illegal activity are also protected from prosecution. Since its revision in 1993, the leniency program has motivated whistleblowers to step forward as quickly as possible. According to Deborah Platt Majoras, the U.S. Principal Deputy Assistant Attorney General, the Justice Department's leniency program has been "the most active generator of criminal investigations in recent years." Senator Hatch summed up the success of the program by stating that it "serves to destabilize cartels, and it causes the members of the cartel to turn against one another in a race to the Government."

Despite the success of the corporate leniency program, Congress was aware that there was still a major disincentive to self reporting—the threat of treble damage lawsuits with joint and several liability. Senator Hatch noted this problem: "before voluntarily disclosing its criminal conduct, a potential amnesty applicant [had to] weigh the potential ruinous consequences of subjecting itself to liability for three times the damages the entire conspiracy caused." The 2004 Act seeks to do away with this disincentive by limiting the damages a private plaintiff may recover from a corporation (or one of its executives) that has cooperated with the Department of Justice.

Section 213(a) of the 2004 Act provides that "in any civil action alleging a violation of section 1 or 3 of the Sherman Act, or alleging a violation of any similar state law, based on conduct covered by a currently effective antitrust leniency agreement, the amount of damages recovered by or on behalf of a claimant from an antitrust leniency applicant who satisfies the requirements of subsection (b) ... shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant…." The significance of these limitations should not be underestimated. First, treble damages are eliminated. Second, liability for the damages attributable to co-conspirators is eliminated.

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The importance of the Antitrust Division's leniency program is evidenced by recent antitrust criminal prosecutions that have resulted in substantial prison time for corporate executives, heavy criminal fines for corporations and significant payments in settlements of private civil actions, all of which exposure can be avoided or reduced if an applicant qualifies under the leniency program. For example, corporations dealing in vitamins, semiconductors and graphite electrodes have been fined upward of $100 million, while juries have awarded damages in the tens and hundreds of millions of dollars to compensate antitrust plaintiffs allegedly injured by anticompetitive acts of companies in such diverse fields as tobacco, lumber, healthcare, meat and poultry, paint and steel.

This limitation on damages in the 2004 Act is only available to corporations and their executives if they provide adequate cooperation to both the government and private plaintiffs bringing a civil suit based on the anti-competitive conduct. The court in which the civil action is brought determines whether the applicant or cooperating individual has provided satisfactory cooperation to the claimant. The power of the court is the same whether it is a state or federal court that is making the determination and whether the case involves violations of state or federal antitrust laws. Under section 213(b) of the 2004 Act, satisfactory cooperation shall include "providing a full account to the claimant of all facts known to the applicant or cooperating individual … that are potentially relevant to the civil

product liability corner

In a victory for asbestos defendants, Manhattan Supreme Court Justice Helen Freedman ruled that a previously executed release for an asbestos-related non-malignancy barred plaintiff from bringing a later lawsuit for a subsequently developed malignancy based upon the same exposure. The court determined that the language of the release clearly contemplated the possibility of developing a later injury and that plaintiff was aware of this possibility when he executed the release. By upholding the importance of the release, this decision ensures that defendants who bought peace with releases will not have to litigate the same case again for a new disease. *Consorti v. Aerofin Corp.*

action" and "furnishing all documents or other items that are potentially relevant to the civil action ... that are in the possession, custody, or control of the applicant or cooperating individual … wherever they are located." A cooperating individual must be available for interviews, depositions and, if necessary, trial. Of course, a cooperating individual must also provide truthful information to the claimant.

The 2004 Act, however, makes no provision as to the timing or mechanics of such a determination by the court. Since a court determination is required before an applicant receives the benefits of the 2004 Act (which typically will happen only at the conclusion of a case), a cooperating corporation or individual faces some uncertainty as to whether the de-trebling benefits of the 2004 Act will be available. These issues will have to be worked out by the courts and practitioners.

Putting the mechanics aside, assuming that the court in a particular civil action believes that the leniency applicant has satisfied the cooperation requirements of Section 213(b), what is the effect of such a ruling on non-cooperating conspirators? Non-cooperating conspirators will remain jointly and severally liable for three times the damages caused by the conspiracy, minus only the amount actually paid by the leniency applicant. While this will likely increase the total amount of damages to be paid by the non-cooperating defendants, it will not adversely affect the potential total recovery of parties who claim damages to their business or property caused by a violation of the Sherman Act, or similar state law. In addition, when a qualified applicant (who has already received amnesty from criminal prosecution) takes advantage of the 2004 Act in a civil case, the plaintiffs in that case will receive the added benefit of having a fully cooperating co-conspirator, which should in turn lead to reduced litigation costs for civil claimants and the likelihood of early settlements or resolution.

Notably, the portion of the 2004 Act limiting damages for a corporation that has participated in the antitrust division's leniency program (discussed above) has a five year sunset provision. Apparently, Congress wants to test the effectiveness of its incentive program in the short term. A corporation that has already entered into an antitrust leniency program on the fifth anniversary of the act's effectiveness is excepted from the sunset provision.

Conclusion

The program and the 2004 Act will not only be an important weapon in the government's ability to effectively enforce the antitrust laws by encouraging violators to end their illegal activity and to report such violations to the Government, but will together provide an opportunity for qualified applicants to avoid or limit their exposure to criminal prosecution and civil liability. Thus, it is now more important than ever that corporations faced with an antitrust investigation, potential or ongoing, move quickly to confer with counsel to determine if the corporation and/or its principals are eligible for the government's leniency program. ■


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securities litigation corner

Several courts have recently been grappling with the application of the "fraud-on-the-market" doctrine to research analyst reports. In one such case, United States District Court Judge Rakoff of the Southern District of New York held that the "fraud-on-the-market" doctrine applies in securities fraud cases founded upon false and fraudulent opinions or recommendations from a securities analyst, but only where the plaintiff "can make a showing that the analyst's statements materially impacted the market price in a reasonably quantifiable respect." In the case before him, Judge Rakoff ruled that the plaintiff had failed to do so, as his expert's testimony on this point was "so facially unreliable as to be inadmissible" and "so plainly irrelevant as to be inadmissible." *DeMarco v. Lehman Brothers Inc.*

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real estate corner

Owners of real property sometimes grant to others a "right of first refusal," i.e., the right to buy the property first at the same price and on the same terms that it would have been sold to the third party. In order to induce the potential buyer to follow through, and perhaps pay fees for appraisals, loans and the like, the owner may agree to pay a "break-up" fee if it turns out that the deal founders on the right of first refusal.

The holder of the right of first refusal does not have standing to challenge the amount of the break up fee, but may complain if the purchase price is artificially inflated as the result of collusion between the seller and the potential buyer. In a recent decision, the New York County Supreme Court held that a break-up fee was valid, found no evidence of collusion, stated that bankruptcy cases concerning break-up fees were not pertinent, and, even if they were, found that a break-up fee of 5.2% of the purchase price was not excessive. *Liberty Theaters, Inc. v. Local 91 Realty Corp.*

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