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Record-Breaking Fines in the Largest Ever Antitrust Investigation

In 2013, the U.S. Department of Justice, Antitrust Division obtained even more record-breaking fines in its ongoing antitrust investigation of the automobile parts industry. The investigation, which began in 2011, has uncovered more than a dozen separate conspiracies to fix the prices of, and rig bids on, over 30 different types of auto parts sold in the United States and abroad. To date, charges have been brought against 22 companies, all of whom have pled guilty, or have agreed to plead guilty, and will pay more than \$1.8 billion in criminal fines for their participation in the cartel. In addition, all but six of the 26 executives charged have been sentenced to jail or have entered into plea agreements with the DOJ. This is by far the largest ever global antitrust investigation involving authorities from Asia to North America to Europe. As the investigation continues to expand, U.S. Attorney General Eric Holder said the DOJ, "will continue to check under every hood and kick every tire to make sure we put an end to this illegal and destructive conduct." According to Holder, "Our work isn't done."

Robins, Kaplan, Miller & Ciresi, L.L.P. is one of three court appointed Co-Lead Counsel for a proposed class of end-payor plaintiffs in *In re Automotive Parts Antitrust Litigation*, a multidistrict litigation stemming from the DOJ's criminal investigation, and pending in the Eastern District of Michigan before Judge Marianne Battani.



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Meegan Hollywood prosecutes class actions involving price-fixing, unlawful monopolization and other anticompetitive practices. She has spent the last two years as a lead associate in *In re Air Cargo Shipping Services Antitrust Litigation*, in which a class of direct purchasers has already recovered nearly \$500 million in partial settlements for an alleged global conspiracy in the market for airfreight services. She has also defended clients in complex commercial litigation, with a focus on Director and Officer Liability, as well as in white collar and securities fraud investigations.



Where Does a Fresh Start End? The case for imposing joint and several liability on a reorganized debtor that continues to participate in an antitrust conspiracy post-discharge.

William V. Reiss

Introduction

It is well-recognized that one who joins an antitrust conspiracy is jointly and severally liable for all damages caused by the conspiracy, irrespective of when the conspirator first joined. It is equally well-recognized that, under Chapter 11 of the Bankruptcy Code, a reorganized debtor is generally entitled to a “fresh start” from all claims that could have been asserted against it prior to the Bankruptcy Court’s confirmation of the reorganized debtor’s bankruptcy plan.

In light of antitrust conspiracy principles of joint and several liability and the bankruptcy maxim that a reorganized debtor is entitled to a “fresh start,” an intriguing question emerges. What is the scope of antitrust liability for a reorganized debtor that has participated in an antitrust conspiracy both before and after its bankruptcy discharge? Or, as Judge Forrest recently framed the questions: (1) Can a reorganized debtor’s “post-effective date”¹ conduct cause discharged damages to ‘come alive again’ – or are discharged damages discharged forever?; and (2) where a reorganized debtor along with its co-conspirators engaged in post-effective date conduct constituting an antitrust violation, does the bankruptcy discharge preclude a court from holding the reorganized debtor jointly and severally liable for pre-effective date damages that relate only to the conduct of its co-conspirators?²

While a court has yet to directly resolve these questions, relevant case law and public policy dictate that the Bankruptcy Code’s

“fresh start” does not insulate a reorganized debtor from joint and several liability resulting from its continued participation in an antitrust conspiracy post-discharge.

The Bankruptcy Code’s Fresh Start for Reorganized Debtors Under Chapter 11

As a general matter, “the confirmation of a [Chapter 11 bankruptcy] plan discharges the debtor from any debt that arose before the date of such confirmation.”³ The Bankruptcy Code defines a “debt” as a liability on a “claim,”⁴ which in turn is defined as a “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secure or unsecured.”⁵

Congress intended to give the term “debt” the “broadest possible” scope to facilitate comprehensive proceedings dealing with all of a debtor’s legal obligations in a bankruptcy case.⁶ Accordingly, “[i]f a plaintiff asserts a claim that arose before the confirmation of the debtor’s reorganization plan, the claim will generally be dismissed as having been discharged.”⁷ Given the broad definition, a claim may have arisen for purposes of a bankruptcy discharge even if it could not yet be asserted as a viable claim in a non-bankruptcy proceeding.⁸ The broad discharge of claims afforded by the Bankruptcy Code is justified by the fundamental purpose of the bankruptcy law to give debtors a “fresh start.”⁹

The ability of the bankruptcy court to discharge all claims of a debtor, or in modern bankruptcy parlance, to provide the

reorganized debtor with a “fresh start,” is essential to an effective reorganization because it allows the reorganized debtor to attract fresh capital.¹⁰ Moreover, the discharge of less than all claims disadvantages those creditors who assert their claims in the bankruptcy proceeding.¹¹ It allows claimants who assert their claims subsequent to the bankruptcy proceedings to potentially recover their claims in full from the debtor while claimants who filed timely claims may have recovered pennies on the dollar. And those same creditors may now be the owners of the reorganized company so their recovery is further reduced to the extent the reorganized company remains liable for any pre-confirmation claims.¹²

Well-Established Principles of Antitrust Law Provide That One Who Joins An Antitrust Conspiracy is Jointly and Severally Liable for All Damages Caused by the Conspiracy from its Inception to its Conclusion

In the antitrust context, “any member of a conspiracy is liable for the acts of another co-conspirator if done in furtherance of the agreed upon conspiracy, even if acts may have been performed before the member joined the conspiracy.”¹³ Put another way, absent an affirmative concrete withdrawal from

the conspiracy, one who joins an antitrust conspiracy is jointly and severally liable for all damages caused by the conspiracy from its inception to its conclusion, irrespective of when the conspirator joined the conspiracy.¹⁴

The imposition of joint and several liability in the antitrust context maximizes deterrence by increasing the likelihood that “a violation [will] be detected and pursued.”¹⁵ Prospective antitrust conspirators know that parties damaged as a result of a conspiracy will more vigorously pursue antitrust actions under a joint and several liability system than under an individual

liability system.¹⁶ They also know that they may be held liable for treble the entire amount of damages sustained by a plaintiff. Accordingly, “joint and several liability is a strong *ex ante* deterrent to potential conspirators.”¹⁷

Additionally, joint and several liability promotes settlement in antitrust litigation, and it appropriately holds co-conspirators jointly responsible for their illegal actions. Joint and several liability also encourages defendants to provide critical information to plaintiffs in exchange for partial settlements. This information, which is often necessary to prove an antitrust case, increases the likelihood that co-conspirators will be punished and plaintiffs will be sufficiently compensated.

Perhaps most importantly, joint and several liability in the antitrust context encourages violators to admit their crimes, identify their co-conspirators, and effectively end the

conspiracy. In June of 2004, Congress enacted the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (“ACPERA”), which offers reduced civil damages exposure to a cartel participant who receives amnesty under the Department of Justice Antitrust Division’s (“DOJ”) Corporate Leniency Program.¹⁸ Under § 213(a) of ACPERA, the amnesty

In June of 2004, Congress enacted the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (“ACPERA”), which offers reduced civil damages exposure to a cartel participant who receives amnesty under the Department of Justice Antitrust Division’s (“DOJ”) Corporate Leniency Program.¹⁸

recipient can limit its civil liability to “the actual damages” sustained by civil plaintiffs which are “attributable [to the amnesty recipient’s] commerce . . . in the goods or services affected by the violation.”¹⁹ Thus, the admitted cartel participant avoids not only criminal responsibility, but also both treble damages and joint and several liability in civil litigation.

In light of ACPERA, the imposition of joint and several liability serves an important public policy. Joint and several liability encourages participation in the leniency program by vastly increasing the economic worth of a successful application.

Lower Lake Erie and Beyond

While no court to date has expressly determined the scope of antitrust liability for a reorganized debtor that has participated in an antitrust conspiracy both before and after its bankruptcy discharge, a 1989 opinion from the Eastern District of Pennsylvania, although in a slightly different context, is instructive.²⁰ In *Lower Lake Erie*, the defendant, Conrail, was a privately held company created by Congress pursuant to the Regional Reorganization Act of 1973 ("Rail Act").²¹

Plaintiffs sought to hold defendant Conrail liable for damages sustained as a result of an almost 22 year conspiracy (from 1958 to 1980) to monopolize the transportation of iron ore, based on Conrail's conduct after its assumption of ownership in 1976 of bankrupt northeastern railroads that allegedly had participated in the conspiracy. Conrail contended that: (1) it could not be held liable for damages occurring before 1976; and (2) subjecting it to liability for the entire period of the conspiracy would be contrary to Congress's intention in enacting the statute that Conrail "start with a 'clean slate.'"²²

The *Lower Lake Erie* court rejected both of Conrail's contentions and held that Conrail was potentially liable for the entirety of damages caused by the conspiracy. First, the court emphasized the well-established principle of joint and several liability imposed on antitrust conspirators:

Those who, with knowledge of the conspiracy, aid or assist in the carrying out of the purposes of the conspiracy, make themselves party thereto and are equally liable [for] or guilty with the original conspirators.²³

Second, the court noted that the while the "Rail Act does reflect a congressional intent to enable Conrail to start out, as of April 1, 1976, with a clean slate[,] there is plainly no basis for suggesting that Congress wished to enable Conrail to engage in an antitrust

conspiracy thereafter without incurring the same penalties as other antitrust violators."²⁴ Thus, if plaintiffs' allegations concerning Conrail's participation in the conspiracy post-1976 proved true, "Conrail would thereby be rendered liable for all of the damages caused by the conspiracy . . ."²⁵ In so holding, the *Lower Lake Erie* court looked closely at the statutory text and legislative history of the Rail Act and concluded that "there is no

basis for implying antitrust immunity, or reduction in antitrust liability, from any other provision of the statute, or the statute as a whole, or the policies which led to its enactment."²⁶ The *Lower Lake Erie* court noted that the Supreme Court has held that "[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between

the antitrust laws and the regulatory system."²⁷

Limiting the Antitrust Liability of a Reorganized Debtor for its Post-Discharge Conduct Would Create a Moral Hazard

While *Lower Lake Erie* did not involve application of the current Bankruptcy Code, the "clean slate" afforded to Conrail under the Rail Act would certainly appear analogous to the "fresh start" provided to a reorganized debtor under Chapter 11 of the Bankruptcy Code. Accordingly, the Eastern District of Pennsylvania's well-reasoned opinion in *Lower Lake Erie* should be applicable to a reorganized debtor under Chapter 11 of the Bankruptcy Code. Indeed, numerous courts have emphasized that "[a] 'fresh start' means only that; it does not mean a continuing licen[s]e to violate the law."²⁸

There can be no dispute that under well-established antitrust and conspiracy principles, a reorganized debtor that first joins a conspiracy after its bankruptcy discharge is liable for all of the damages caused by the conspiracy, including those which preceded its discharge. The result should not be any different with respect to a reorganized debtor that participated in an antitrust

In other words, a reorganized debtor should not be treated better than its co-conspirators simply because it elected to participate in a criminal antitrust conspiracy *before* its discharge as well as *after*.²⁹

conspiracy both before and after its bankruptcy discharge. In other words, a reorganized debtor should not be treated better than its co-conspirators simply because it elected to participate in a criminal antitrust conspiracy *before* its discharge as well as *after*.²⁹ To conclude otherwise would create the “moral hazard” of rewarding a reorganized debtor for its participation in an antitrust conspiracy prior to its discharge by limiting its liability for its conspiratorial conduct post-discharge.³⁰

Moreover, if a reorganized debtor were able to insulate itself from full liability in connection with its post-discharge conduct, the salutary purposes of ACPERA would be severely diminished for an antitrust violator who, by virtue of its pre-discharge conduct, could avoid the specter of joint and several liability for any damages caused by the conspiracy prior to its discharge. With a free pass for all of the damages caused by the conspiracy prior to its discharge, the reorganized debtor that chooses to continue its participation in the price-fixing conspiracy post-discharge would have little incentive to expose the conspiracy by filing an amnesty application with the DOJ, or concern itself with the risk of engaging in unlawful activities which damages others.

Conversely, limiting a reorganized debtor’s liability for its post-discharge unlawful conspiratorial conduct does not advance the purposes of the bankruptcy law nor any other public policy. As stated, above, a “fresh start” is essential to the effective reorganization of a debtor because it: (1) allows the reorganized debtor to attract fresh capital; and (2) ensures that the debtors’ creditors who participate in the bankruptcy proceedings and agree to forego their claims in return for what often amounts to pennies on the dollar are not further prejudiced by claimants seeking to recover the full value of their pre-discharge claims *post-hoc* from the reorganized debtor.

The imposition of joint and several liability (for damages arising from the conspiracy’s inception until its conclusion) on a reorganized debtor that continues to participate in a conspiracy after its bankruptcy discharge does not undermine any of the aforementioned bankruptcy policies. To the contrary, it merely confers the same liability on the reorganized debtor as that of its co-conspirators, or for that matter, the same liability as would be imposed on the reorganized debtor had it not participated in the conspiracy prior to its discharge.

Conclusion

The salutary purposes of antitrust law mandate the imposition of joint and several liability on price-fixers from the beginning of the conspiracy until the conspiracy’s conclusion. In the absence of a countervailing bankruptcy policy, a reorganized debtor should not be treated differently than any of its co-conspirators with respect to its post-discharge unlawful conduct. As the *Lower Lake Erie* court noted in an analogous context, “[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.”³¹

1. “Effective date” refers to the date in which the bankruptcy court entered an order confirming the bankruptcy plan and discharging the reorganized debtor from all preexisting debts.

2. *In re Lear Corp.*, 12 Civ. 2626 (KBF), 2012 U.S. Dist. LEXIS 161374, at *10 (S.D.N.Y. Nov. 5, 2012).

3. 11 U.S.C. § 1141(d) (1).

4. 11 U.S.C. § 101(5).

5. 11 U.S.C. § 101(12).

6. *Pa Dep’t of Pub. Welfare v. Davenport*, 495 U.S. 552, 558 (1990) (quoting H.R. Rep. No. 95-595, at 309 (1977)).

7. *DPN Holdings (USA), Inc. v. United Airlines, Inc.*, 871 F. Supp. 2d 143, 151 (S.D.N.Y. 2012) (collecting cases).

8. See *In re Rodriguez*, 629 F.3d 136, 139 (3d Cir. 2010), *cert denied*, 132 S. Ct. 573, 181 (2011).

9. *Browning v. MCI, Inc. (In re WorldCom, Inc.)*, 546 F.3d 211, 216 (2d Cir. 2008); see also *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363-64 (2006) (“Critical features of every bankruptcy proceeding [include] . . . the ultimate discharge that gives the debtor a ‘fresh start’ by releasing him, her, or it from further liability for old debts.”).

10. See *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989) (stating that the “paramount policy and goal of Chapter 11, to which all other bankruptcy policies are subordinated, is the rehabilitation of the debtor”); *In re Mercado*, 124 B.R. 799, 802-803 (Bankr. C.D. Cal. 1991) (noting that the discharge of all claims and liabilities against corporate debtors existing at the time of plan confirmation is absolute precisely because such clarity is necessary for the bankruptcy process to work; any alternative would “impose[] unwarranted limitations on debtors seeking to reorganize under Chapter 11”); *In re Barbour*, 77 B.R. 530, 532 (Bankr. E.D.N.C. 1987) (“There is nothing more essential to a bankruptcy case than the preservation of the integrity of the debtor’s discharge.”).

11. See J. Maxwell Tucker, *The Clash of Successor Liability Principles, Reorganization Law, and the Just Demand That Relief Be Afforded unknown and Unknowable Claimants*, 12 Bankr. Dev. J. 1, 76 (1995).

12. See, e.g., *Ind. State Police Pension Trust v. Chrysler LLC (In re Chrysler LLC)*, 576 F.3d 108, 126 (2d Cir. 2009) (“To allow the claimants to assert successor liability claims . . . while limiting other creditors’ recourse to the proceeds of the asset sale would be inconsistent with the Bankruptcy Code’s priority scheme.”) (internal quotation marks and citation omitted), *vacated and remanded with instructions to dismiss appeal as moot*, 130 S. Ct. 1015 (2009), *judgment vacated and appeal dismissed as moot*, 592 F.3d 370 (2d Cir. 2010).

13. *United States v. Castillo*, 814 F.2d 351, 355 (7th Cir. 1987); see also *Havaco of Am., Ltd. v. Shell Oil Co.*, 626 F.2d 549, 554 (7th Cir. 1980) (“It is well recognized that a co-conspirator who joins a conspiracy with knowledge of what has

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gone on before and with an intent to pursue the same objectives may, in the antitrust context, be charged with the preceding acts of its co-conspirators"); *United States v. Benson*, 79 Fed.Appx. 813, 822 (6th Cir. 2003) ("A co-conspirator can generally be held liable for actions done in furtherance of a conspiracy before [the particular co-conspirator] joined.") (quoting *United States v. Gravier*, 706 F.2d 174, 177-78 (6th Cir. 1983) (alteration in the original); *United States v. Gallerani*, 68 F.3d 611, 620 (2d Cir. 1995) ("Once a conspiracy has been established, the criminal liability of its members extends to all acts of wrong doing occurring during the course of and in furtherance of the conspiracy"); *Dextone Co. v. Bldg. Trades Council*, 60 F.2d 47, 48 (2d Cir. 1932) ("every person who participates in a conspiracy is liable for everything done during the period of its existence regardless of the exact time at which he becomes a member or the extent of his participation").

14. See *supra*, n.15.

15. See W. Stephon Cannon, *The Administration's Antitrust Remedies Reform Proposal: Its Derivation and Implications*, 55 Antitrust L.J. 103, 120 (1986); *Paper Sys. Inc. v. Nippon Paper Indus. Co.*, 281 F.3d 629, 633 (7th Cir. 2002) (Easterbrook, J.) (emphasizing that joint and several liability is a "vital instrument for maximizing deterrence"). In *Nippon*, Judge Easterbrook explained that improving deterrence has consistently been a goal of the Supreme Court's antitrust jurisprudence. *Id.* at 633; see also *Burlington Indus., Inc. v. Milliken & Co.*, 690 F.2d 380, 392-394 (4th Cir. 1982) (citing the deterrent effect of the rule against claim reduction as a basis for prohibiting defendants from using it as a defense in an antitrust suit).

16. Written Testimony of Michael Hausfeld for the Antitrust Modernization Committee Panel, "Civil Remedies: Joint & Several Liability, Contribution, and Claim Reduction" ("Hausfeld"), at 5, available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Hausfeld.pdf.

17. *Id.*

18. *ACPERA*, Pub. L. No. 108-237, 118 Stat. 661, 665, amended by Pub. L. No. 111-190, 124 Stat. 1275 (June 9, 2010).

19. *Id.* at § 213(a).

20. *Lower Lake Erie*, 710 F. Supp. 152 (E.D. Pa. 1989).

21. See Regional Rail Reorganization Act of 1973, Pub.L. 93-236, 87 Stat. 985, 45 U.S.C. § 701 *et seq.*

22. *Lower Lake Erie*, 710 F. Supp. at 154.

23. *Id.*

24. *Id.* at 155.

25. *Id.*

26. *Id.*

27. *Id.* (quoting *U.S. v. National Ass'n of Security Dealers*, 422 U.S. 694, 719-20 (1975)).

28. See *O'Loghlin v. County of Orange*, 229 F.3d 871, 875 (9th Cir. 2000). See also *In re Lear Corp.*, No. 09-14326 (ALG), 2012 Bankr. LEXIS 440, at *34-35 (Bankr. S.D.N.Y. Feb. 10, 2012) ("Bankruptcy policy affords debtors a fresh start, but a debtor is responsible for the consequences of its own actions after it emerges from chapter 11, and if bankruptcy law discharges a liability, but the debtor takes new action and incurs a similar liability after receiving its discharge, there may be no entitlement to an injunction against prosecution of the latter"); *In re Auto. Parts Antitrust Litig.*, 12-md-02311, 2013 U.S. Dist. LEXIS 80335, at *39 (E.D. Mich. June 6, 2013) ("Although a debtor 'gets a fresh start,' a debtor does not 'get a free pass to continue violating the law.'" (quoting *Tam Travel, Inc. v. Delta Airlines, Inc.* (*In re Travel Agent Comm'n Antitrust Litig.*), 583 F.3d 896, 902 (6th Cir. Ohio 2009)).

29. A number of courts have characterized a reorganized debtor that emerges from Chapter 11 bankruptcy as a "new entity." See, e.g., *Listecki v. Official Comm. of Unsecured Creditors (In re Archdiocese of Milwaukee)*, No. 13-C-179, 2013 U.S. Dist. LEXIS 106392, at *24 (E.D. Wis. July 29, 2013) ("The filing of a Chapter 11 petition causes a 'fundamental legal change in the entity.' The filing entity is legally different from what it was the moment before filing, as it now assumes the mantle of a new juridical entity, a debtor-in-possession.") (quoting *In re*

V. Savino Oil & Heating Co., Inc., 99 B.R. 518, 524 (Bankr. E.D.N.Y. 1989)); *In re Berry Good, LLC*, 400 B.R. 741, 746 (Bankr. D. Az. 2008) ("[T]he Bankruptcy Code provides a systematic approach to settling or reorganizing a company's pre-petition financial obligations by placing the assets under the supervision of the bankruptcy court, creating a new debtor entity and providing rules of priority and payment under a plan of reorganization."); *In re Multech Corp.*, 47 B.R. 747 (Bankr. N.D. Iowa 1985) ("[I]n Chapter 11 proceedings the prebankruptcy Debtor as a juridical entity ceases to operate the business and control is transferred to a distinct legal entity, usually the Debtor-in-Possession, who runs the business under supervision of the court.") (citation omitted).

30. See *In re Lear Corp.*, 12 Civ. 2626 (KBF), 2012 U.S. Dist. LEXIS 161374, at *10-11, n.1 (Nov. 5, 2012) (Recognizing that "[a] steep reduction in [antitrust] liability for recently discharged debtors could result in an unanticipated moral hazard.").

31. *Lower Lake Erie*, 710 F. Supp. at 155 (quoting *U.S. v. Nat'l Ass'n of Sec. Dealers*, 422 U.S. 694, 719-20 (1975)).



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Central District of California Holds that Criminal Amnesty Recipients not Entitled to ACPERA Benefits in Parallel Civil Action Where Cooperation in Civil Action Untimely

William V. Reiss

In a groundbreaking decision, the Central District of California became the first court to hold that antitrust violators who received amnesty from criminal prosecution were not entitled to the damages-limiting benefits of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004¹ (“ACPERA”) in a parallel civil litigation. *In re Aftermarket Automotive Products Antitrust Litigation*, 09 MDL 2007 (C.D. Cal. Aug. 26, 2013). Specifically, the court determined that, notwithstanding their status as criminal amnesty recipients under the Department of Justice’s Antitrust Division’s (“DOJ”) Corporate Leniency Program, civil defendants – a parent company and its subsidiary – were not entitled to receive a reduction in damages under ACPERA because they had failed to provide timely cooperation to plaintiffs in the civil litigation.

By way of background, Congress enacted ACPERA to increase the penalties for antitrust violators and to assist prosecutors and the victims of antitrust violations in pursuing the wrongdoers. Price-fixing conspiracies are notoriously difficult to detect without cooperation from at least one participant in the illegal scheme. In order to encourage cartel members to self-report illegal activity to the DOJ, the DOJ has long employed a corporate “leniency” policy, which provides amnesty to the first conspiracy participant that reports the criminal activity and cooperates with the DOJ.

As a further inducement to the cartel member to turn itself and its co-conspirators in, and to assist the victims in recovering their losses, ACPERA gives the leniency applicant the option of limiting its civil damages exposure by cooperating with the plaintiffs. Instead of being jointly and severally liable for three times the amount of all damages caused by all members of the conspiracy, as otherwise required by Section 4(a) of the Clayton Act (15 U.S.C. § 15(a)) and governing case law, a leniency applicant that has cooperated satisfactorily with the civil plaintiffs is liable only for actual – not treble – damages and, in addition, only for damages from its own product sales – not from the sales of its co-conspirators. ACPERA §213(A).

However, in order to qualify for these ACPERA benefits, the leniency applicant must show that it provided “satisfactory cooperation” to plaintiffs in the civil action, “which cooperation shall include:”

- (1) “providing a full account to the claimant of all facts known to the applicant . . . that are potentially relevant to the civil action;”
- (2) “furnishing all documents or other items potentially relevant to the civil action that are in the possession, custody or control of the applicant . . . wherever they are located;” and
- (3) “using its best efforts” to procure and facilitate cooperating individuals to be available for interviews, depositions or testimony and to respond “completely and truthfully, without making any attempt either falsely to protect or falsely to implicate any person or entity and without intentionally withholding any potentially relevant information.”

In *In re Aftermarket Automotive Products Antitrust Litigation*, the court emphasized that a critical factor in determining whether the ACPERA applicant’s cooperation is satisfactory is the “timeliness of the applicant’s initial cooperation with the claimant.” It further noted that mere compliance with discovery obligations under the federal rules was not tantamount to satisfactory cooperation under ACPERA. Ultimately, the court concluded that the amnesty applicants were not entitled to ACPERA benefits because, notwithstanding numerous proffers and the production of tens of thousands of pages of documents, they failed to timely provide plaintiffs with a “full account of facts potentially relevant to the conspiracy.”

1. Pub. L. No. 108-237, § 213(a)-(b), 118 Stat. 661, 666-669 (June 22, 2004), as amended by Pub. L. No. 111-190, 124 Stat. 1275 (June 9, 2010).



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Global Investigation of Manipulation of Benchmark Foreign Exchange Rates Focuses on Chat Group of Top Bank Traders

Elizabeth L. Friedman

Competition authorities around the world are investigating whether banks manipulated WM/Reuters rates, which are used as a benchmark for foreign exchange (“FX”) rates for trillions of dollars of investment transactions. Specifically, government authorities are reviewing whether bank dealers (1) used client transactions to move the WM/Reuters rates to a level that would benefit the banks’ own financial positions, and/or (2) colluded with their counterparts at other banks to manipulate these rates. News sources have reported that authorities have narrowed their focus on a group of top traders from various financial institutions including RBS, UBS, Citigroup and Barclays that took part in chat sessions. The group was known by various names including “The Cartel,” “The Bandits’ Club,” “The Mafia,” and “One Team, One Dream.” It is reported that members of the group would discuss their customers’ trades and agree on exactly when they planned to execute them to maximize their chances of moving the WM/Reuters rates. When the rates moved their way, they would allegedly send written slaps on the back for a job well done. Entry into the chat room was coveted by non-

members interviewed by Bloomberg News, who said they saw it as a golden ticket because of the influence it exerted. In total, it has been reported that at least 12 FX traders at global banks in London, New York and Tokyo have been suspended amid the regulatory and internal probes into potential FX manipulation. This investigation will likely remain in the headlines throughout 2014 as competition authorities uncover additional details regarding this potentially unlawful conduct among some of the nation’s largest financial institutions.



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