Antitrust, Vol. 26, No. 3, Summer 2012.

Getting Your Best Outcome Post-*AU Optronics*: Pay No Attention to That Case Behind The Curtain

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A COMPANY FACING POTENTIAL criminal antitrust charges under the Sherman Act must make a series of daunting decisions. In almost all cases, the company's first consideration is whether to seek leniency under the amnesty or amnesty-plus programs of the Department of Justice Antitrust Division. Where some form of amnesty is a possibility, the collective wisdom of corporate targets is that winning the race to the DOJ as an amnesty applicant is the best way to either avoid a guilty plea and fine altogether or substantially reduce the fine that would result from admitting guilt. Once an amnesty application is made, a company may quickly set about managing the collateral consequences that likely will flow from its decision, which may include reputational damage, shareholder actions, treble-damage lawsuits, and suspension or debarment under federal procurement regulations.

But when a company does not qualify for any form of amnesty, it faces the far more difficult initial choice between voluntarily producing evidence to the DOJ[1] and negotiating a criminal plea and fine, or defending itself in court and risking conviction and the imposition of a fine. For many such companies, the choice will be driven by an assessment of whether the court-imposed fine plus litigation costs is likely to be greater than the fine required by the DOJ under a negotiated plea agreement. If it appears that the DOJ's fine would be a material discount over the court-imposed fine, a company may be inclined to accept a negotiated plea agreement; if the opposite is true, the company may give serious consideration to defending itself in court, thus preserving the possibility of acquittal or a lower fine if convicted.

The choice appears simple, but to make it requires the company, its executives, and its counsel to consider a number of interdependent variables, all against the backdrop of an anxiety-producing criminal investigation. Merely to understand whether any DOJ fine offer is, in fact, a "bargain," the company must evaluate the potential strength of the DOJ's evidence, the DOJ's willingness to define the scope of the alleged misconduct in a way that limits the volume of commerce affected and thus the potential fine range under the U.S. Sentencing Guidelines, and the potential impact of any cooperation credits that the company may claim under the Sentencing Guidelines.[2]

The DOJ's recent conviction of AU Optronics Corp. and several of its employees in *United States v. AU Optronics Corp.* appears to substantially raise the stakes in this analysis. *AU Optronics* was the DOJ's first trial in its criminal price-fixing investigation of the thin-film transistor liquid crystal display (TFT-LCD) flat panel industry, and the first trial in which the DOJ sought fines in excess of the Sherman Act statutory maximum of $100 million. The jury verdict in favor of the DOJ could result in a criminal fine for AU Optronics of as much as $1 billion, which would be twice the amount of the largest previous corporate fine for an antitrust offense.[3]

Nevertheless, the DOJ victory may not be all that it appears. For a court to impose a fine over $100 million, the DOJ must prove that the alleged conspiracy resulted in a gain to the conspirators or a loss to others of at least half of the amount of the fine. In a pretrial ruling, the court in *AU Optronics* required that any facts supporting a finding of gain or loss be proved to the jury beyond a reasonable doubt, rather than to the court by a preponderance of the evidence.[4] Should the Supreme Court reach the same conclusion in *United States v. Southern Union Co.*,[5] in which a decision is expected this term, the DOJ's burden of proof on the question of gain or loss will be set at the highest possible level. The DOJ certainly will take this burden into account when determining how large a fine it will seek in contested cases. Even the task of proving gain or loss to a judge by a preponderance of the evidence may be difficult under certain circumstances, and at those times the DOJ may wish to eliminate uncertainty by avoiding the need to prove gain or loss altogether.

The discussion that follows illustrates how these developments might affect the considerations that a corporate target must weigh when deciding whether to accept a negotiated plea agreement or proceed to trial following a criminal antitrust investigation.

The Alternative Fine Statute, *Southern Union*, and *AU Optronics*

The DOJ has two options when seeking corporate fines for Sherman Act violations: (1) a fine under the Sherman Act,

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subject to the statutory maximum of $100 million per violation;[6] or (2) a potentially larger fine under the alternative fine statute, 18 U.S.C. § 3571(d), which provides:

> If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than a defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

If the DOJ seeks a fine under the Sherman Act statutory maximum level, the court, not a jury, will determine the facts underlying the fine using a preponderance of the evidence standard. The same was assumed to be true for fines sought under the alternative fine statute until the Supreme Court held otherwise in *Apprendi*,[7] *Blakely*,[8] and *Booker*.[9] But once those cases were decided, it was widely understood that the basis for a fine under the alternative fine statute must be proved to a jury beyond a reasonable doubt. The DOJ also appeared to concede this principle in public statements following the decisions.[10]

Nevertheless, in *AU Optronics* the DOJ filed a motion to bifurcate the trial into separate guilt and penalty phases. In its motion, the DOJ requested that the court instruct the jury to decide only guilt or innocence beyond a reasonable doubt and that the court decide the facts supporting the amount of gain or loss attributable to the alleged conspiracy using a preponderance of the evidence standard. The DOJ argued that the court should not apply the rule established by *Apprendi*,[11] but rather should follow the Supreme Court's 2009 ruling in *Oregon v. Ice*[12] and the First Circuit's subsequent ruling in *United States v. Southern Union Co.*[13] The DOJ argued that in *Southern Union*, a case involving the Resource Conservation and Recovery Act,[14] the circuit court ruled that the trial court had the authority to impose a criminal fine based on facts that were not proved to a jury beyond a reasonable doubt (in that case, the number of days to which the fine applied). The DOJ also argued that the amount of gain or loss attributable to the alleged conspiracy in *AU Optronics* was irrelevant to the question of guilt, and that proof of gain or loss would be too complex and confusing for the jury.

The court in *AU Optronics* denied the DOJ's motion to bifurcate the trial and ruled that, to seek a fine greater than the Sherman Act statutory maximum, the DOJ must prove the factual predicates for the additional fine to a jury beyond a reasonable doubt.[15] When the Supreme Court later granted certiorari on this issue in *Southern Union*,[16] the Court was aided by petitioner's brief citing the district court ruling in *AU Optronics*.[17]

The DOJ also may have sought to mitigate the uncertainty inherent in proving gain or loss to a jury beyond a reasonable doubt by taking a conservative approach to the amount of gain alleged. Specifically, the DOJ alleged in its superseding indictment at least $500 million in gross gains to the defendants and $500 million in gross losses to others. The DOJ's trial expert, however, testified that the $500 million figure was, at most, one-quarter of the gain that the DOJ believed was attributable to the conspiracy and that the actual gain figure was "certainly in excess of $2 billion."[18] This testimony suggests that the DOJ chose to prove only a gain level that the jury comfortably could accept beyond a reasonable doubt, while still allowing for a significant fine.

Although the prospect of criminal fines as large as $1 billion should be a serious concern for corporate targets, the court's pretrial ruling in *AU Optronics* was a victory for the criminal defense bar. Not only did the court apply the highest possible evidentiary standard for proving the factual predicates of fines in excess of the Sherman Act statutory maximum, it also lent substantial support to the petitioner's argument for application of that standard in *Southern Union*. The DOJ's trial strategy on proof of gain or loss also may signal that the DOJ will take a more conservative approach to fine demands at trial than when negotiating plea agreements. Thus, where economic evidence may be substantially inconclusive as to the gain or loss attributable to the alleged conspiracy, or where it is questionable that the alleged conspiracy affected market prices at all, corporate targets in criminal antitrust investigations may be able to leverage uncertain trial prospects to secure more favorable negotiated fines.

Potential Effect on Future Charging Decisions

It is also possible that the DOJ could mitigate the risks associated with having to prove gain or loss at trial by charging multiple smaller conspiracies in future cases, rather than one large, overarching conspiracy. This strategy has the potential to produce aggregate fines that would be in excess of the Sherman Act statutory maximum, but would not be subject to a heightened burden of proof under the alternative fine statute.

The DOJ did not use this strategy in *AU Optronics*, perhaps correctly believing that its alleged gain figure was sufficiently conservative to enable the jury to reach a verdict beyond a reasonable doubt. Use of this strategy in the future might be seen as a significant shift, given the DOJ's success in achieving fine levels for single conspiracies in excess of $100 million.[19] However, the fines in cases prior to *AU Optronics* were each the result of a plea agreement, where the characterization of the conspiracy also may have been the product of negotiation.

In future contested cases, the DOJ may consider charging multiple smaller conspiracies in order to achieve aggregate fines in excess of $100 million without facing the burden of proving gain or loss at trial. The DOJ may favor this approach where the gain or loss attributable to the alleged conspiracy will be difficult to prove, and where the structure of the alleged conspiracies is susceptible to multiple interpretations (i.e., the conduct of defendant companies is consistent among actors or products affected, but could be viewed as either a pattern of behavior involving multiple incidents or multiple independent agreements).[20]

The Antitrust Division Grand Jury Manual recognizes that the DOJ has flexibility in charging single versus multiple conspiracies and describes the basic factors affecting such decisions:

> Although such complicated fact patterns make the determination of single vs. multiple conspiracies difficult, the basic questions that must be answered remain the same: Were the defendants generally aware of the objectives and composition of the larger conspiracy, and was the success of the various parts of the conspiracy necessary to the success of the whole and vice versa? Mere knowledge of a broad conspiracy is not enough. But knowledge and a stake in the success of the broad conspiracy may be enough to be considered a part of the broad conspiracy. And, once the outer boundaries of an agreement have been determined, that becomes the conspiracy that must be charged; it may not be broken down into numerous lesser conspiracies because it embraced numerous lesser objectives.[21]

The Manual also notes, however, "Of course, the overall conspiracy may be broken down into numerous lesser conspiracies so long as no defendant is charged more than once,[22] since there would then be no ground on which to challenge the Government's actions."[23] Thus, the DOJ's internal operating guidelines appear to afford it the option of charging multiple smaller conspiracies rather than a single overarching conspiracy, even if facts discovered during the investigation show that the defendants had knowledge of and a stake in the success of a broader conspiracy.

A Scenario to Consider

The hypothetical scenario that follows illustrates the potential effects that DOJ charging decisions may have on a corporate target facing the decision of whether to proceed to trial.

Several rival suppliers fix prices for widgets. In Year 1, the rivals fix prices for Widget 1.0. In Year 2, following a series of advances in widget technology, the same rivals fix prices for Widget 2.0. In Year 4, following further advances, the same rivals fix prices for Widget 3.0. Company X has aggregate sales of $200 million for each of Widgets 1.0, 2.0, and 3.0. If Company X does not qualify for any form of amnesty, yet fully cooperates in the ensuing criminal price-fixing investigation and is accorded all possible sentencing benefits associated with its cooperation, Company X should face a fine range under the U.S. Sentencing Guidelines of $192 million to $384 million.[24] In negotiating a plea agreement, the DOJ likely would treat the activity as a single, overarching conspiracy, using the cumulative volume of commerce affected to determine a single, combined offense level.[25]

The fine calculation would change if Company X decides to proceed to trial. If the DOJ charges a single, overarching conspiracy and Company X receives no credit for cooperation and acceptance of responsibility, Company X should face a fine range of $240 million to $480 million.[26] At trial, the DOJ could achieve a fine at the bottom of this range only if it proves that the gain or loss attributable to the conspiracy as a whole is at least $120 million. If the DOJ charges separate conspiracies for Widgets 1.0, 2.0, and 3.0, the aggregate total minimum and maximum fines to Company X under the Sentencing Guidelines should be the same as for a single conspiracy encompassing the same three agreements. But by seeking only $100 million per conspiracy under the Sherman Act, the DOJ could receive up to $300 million in fines without having to prove gain or loss. Thus, the DOJ may find benefit in avoiding the risks associated with proving gain or loss by charging a separate conspiracy for each type of Widget rather than a single conspiracy encompassing all three types of Widgets.

As this hypothetical example illustrates, in evaluating whether to accept a plea agreement or proceed to trial in cases where the fine amount may exceed $100 million, the DOJ and corporate targets should consider not only the risks of proving the gain or loss attributable to an alleged conspiracy at trial, but also whether the DOJ may be able to avoid this burden by charging multiple smaller conspiracies rather than a single conspiracy.

A Silver Lining?

Tactical charging decisions such as those described above may benefit corporate targets in some cases, particularly where the scope of a single conspiracy may be greater than the sum of its parts. For example, smaller conspiracies each may be discrete in time, such that the aggregation of smaller conspiracies would result in a lesser overall volume of commerce affected than would be affected by a single conspiracy. Also, proving multiple smaller conspiracies to a jury or court may be more difficult and confusing than proving a single conspiracy, especially when substantially the same products or actors are involved with each smaller conspiracy.

A decision by the DOJ to charge multiple smaller conspiracies also may enhance the position of a corporate target in negotiating a plea agreement under certain circumstances. Consider again the example of Company X described above, where the DOJ determines that a total fine range of $240 million to $480 million will apply if it prevails at trial. The DOJ may propose a negotiated fine at the top of the range for a cooperating company—say $384 million—predicated on the DOJ's longstanding policy that it will not enter into a plea agreement with a company that wishes to litigate its fine.[27]

Company X, facing the normal uncertainties of a trial, may wish to negotiate a plea in order to avoid any collateral consequences that would accompany an adverse verdict. Company X also may rationally perceive that the DOJ would wish to avoid the risk of proving the factual predicates for a fine in excess of $100 million, and that the DOJ's greatest odds for a favorable fine amount would result from charging three separate conspiracies. This tactical decision would cap the maximum fine at $300 million—substantially less than the $384 million fine that the DOJ initially proposed, but still in the middle of the Sentencing Guidelines fine range assum-

ing Company X's cooperation in the investigation. Based on this assessment, Company X may counter with a proposal for a $300 million fine, arguing that it fairly represents the DOJ's best odds of success given the burden of proof the DOJ would face at trial.

Would the DOJ walk away from a negotiated $300 million fine in order to gamble on the possibility that it would be able to prove the facts supporting a $480 million fine at trial? Notwithstanding the favorable jury verdict in *AU Optronics*, the DOJ and corporate targets will be evaluating such trade-offs, and time will tell whether the risks of trials under the alternative fine statute will affect the fine levels resulting from plea negotiations. ■

[1] As a practical matter, any company within the territorial reach of a grand jury subpoena will be compelled to produce documents in its possession, custody, or control, regardless of whether it chooses to plea bargain or contest charges. However, foreign companies with some significant quantum of relevant documents overseas will want to consider a number of factors before deciding to voluntarily produce those documents, including the scope of foreign production called for by the grand jury subpoena, the likelihood that the DOJ would successfully reach that material through a mutual legal assistance treaty (MLAT), the scope of production potentially required in a contested criminal proceeding, and the extent of documentary material already in the United States.

[2] To the extent that the DOJ is inclined to bargain, cooperating companies may be able to secure lower fines by negotiating the number of products and time period covered by the charged conspiracy and possibly whether the charge covers foreign sales under the Federal Trade Antitrust Improvements Act (FTAIA). Nevertheless, a company that does not qualify for amnesty or amnesty-plus consideration may have very little (if anything) to offer the DOJ in exchange for sentencing concessions.

[3] The largest previous criminal antitrust fine of $500 million was paid in 1999 by F. Hoffman-La Roche, Ltd., pursuant to its plea agreement in the DOJ's enforcement actions against participants in the vitamin cartel. *See* Plea Agreement at 5, United States v. F. Hoffman-La Roche, Ltd., No. 99-CR-184-R (N.D. Tex. May 20, 1999), *available at* http://www.justice.gov/atr/cases/f2400/hoffman.pdf.

[4] Order Denying United States' Motion for Order Regarding Fact Finding for Sentencing Under 18 U.S.C. § 3571(d), United States v. AU Optronics Corp., No. 09-CR-110, 2011 WL 2837418 (N.D. Cal. July 18, 2011).

[5] S. Union Co. v. United States, 132 S. Ct. 756 (2011) (granting certiorari on Nov. 28, 2011).

[6] 15 U.S.C. § 1.

[7] Apprendi v. New Jersey, 530 U.S. 466 (2000).

[8] Blakely v. Washington, 542 U.S. 296 (2004).

[9] United States v. Booker, 543 U.S. 220 (2005).

[10] *See, e.g.*, Testimony of Scott D. Hammond, Dep. Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust Modernization Comm'n, Nov. 3, 2005, at 38 ("[I]f we seek a fine above $100 million . . . post-*Booker* . . . we are going to have to prove to a jury beyond a reasonable doubt . . . ."), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/051103_Criminal_Remedies_Transcript_reform%20.pdf.

[11] 530 U.S. at 490 ("[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

[12] 555 U.S. 160 (2009) (holding that a judge could impose consecutive sentences without any jury findings beyond guilt).

[13] 630 F.3d 17 (1st Cir. 2010), *cert. granted*, 132 S. Ct. 756 (2011).

[14] 42 U.S.C. §§ 6901–6992k.

[15] Order Denying United States' Motion for Order Regarding Fact Finding for Sentencing Under 18 U.S.C. § 3571(d), United States v. AU Optronics Corp., No. 09-CR-110, 2011 WL 2837418 (N.D. Cal. July 18, 2011).

[16] Specifically, the question presented by petitioner in *Southern Union* is, "Whether the Fifth and Sixth Amendment principles that this Court embraced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, apply to the imposition of criminal fines."

[17] Reply Brief of Petitioner at 3–4, Southern Union Co. v. United States, No. 11-94, 2011 U.S. Briefs 94 (LEXIS) (U.S. Oct. 31, 2011).

[18] Transcript of Proceedings at 3378:7–15, United States v. AU Optronics Corp., No. 09-CR110 (N.D. Cal. Feb. 9, 2012), ECF No. 766 (testimony of Dr. Keith Leffler).

[19] Scott D. Hammond, Dep. Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust Sentencing in the Post-*Booker* Era: Risks Remain High for Non-Cooperating Defendants, Speech Before the ABA Section of Antitrust Law Spring Meeting 10 (Mar. 30, 2005), *available at* http://www.justice.gov/atr/public/speeches/208354.htm ("[T]he Division's track record since Apprendi shows that it has had no trouble consistently negotiating plea agreements calling for fines well above the Sherman Act maximum pursuant to section 3751(d).").

[20] Recent plea agreements outline single-count conspiracies of considerable length and possibly encompassing numerous smaller agreements. For example, the recent agreement filed in *United States v. Yazaki* alleged, in part, a ten-year conspiracy in which "agreements were reached to allocate the supply of automotive wire harnesses and related products sold to certain automobile manufacturers on a model-by-model basis . . . ." Plea Agreement at 4–5, United States v. Yazaki Corp., CR No. 12-20064 (E.D. Mich. Mar. 1, 2012), *available at* http://www.justice.gov/atr/cases/f280600/280689.pdf. It appears possible that such an agreement could also be characterized as a series of smaller agreements to allocate supply on a model-by-model basis, rather than a series of actions taken pursuant to a single, ongoing conspiracy.

[21] Antitrust Division Grand Jury Manual at VII-55, *available at* http://www.justice.gov/atr/public/guidelines/207021.pdf.

[22] In context, this phrase would more clearly be read as "so long as no defendant is charged more than once *for the same offense* . . . ."

[23] Antitrust Division Grand Jury Manual, *supra* note 21, at VII-55 n.103.

[24] For the purposes of calculating fines under this hypothetical, the following assumptions were made (all code references are to the Sentencing Guidelines): (1) the offense level is 26 points, calculated by adding the base level of for antitrust offenses pursuant to § 2R1.1(a) (12 points) to the appropriate volume of commerce attributable to the defendant pursuant to § 2R1.1(b)(2) (14 points); (2) because applying the offense level to the table in § 8C2.4(d) would only result in a base fine of $3.7 million, the base fine would be equal to 20% of the volume of commerce attributable to Company X, or $120 million, pursuant to § 8C2.4(b) and § 2R1.1(d)(1); and (3) assuming a culpable organization of over 5,000 employees, no prior criminal history, no evidence of obstruction, no compliance program, and full cooperation, the culpability score attributable to Company X under § 8C2.5 would be 8 points, which would translate into a minimum multiplier of 1.6 and a maximum multiplier of 3.2 pursuant to § 8C2.6. Applying the base fine of $120 million to these multipliers results in a fine range of between $192 million and $384 million.

[25] This calculation method is encouraged by § 3D1.2(d) of the Sentencing Guidelines, which groups bid-rigging, price-fixing, and market allocation counts together because the offense level is determined largely on the basis of the total amount of harm or loss.

[26] In this case, Company X's culpability score under § 8C2.5 of the Sentencing Guidelines would be 10 points, instead of the 8 points it might have received had it cooperated fully. The 10 point culpability score would translate into a minimum multiplier of 2.0 and a maximum multiplier of 4.0 pursuant to § 8C2.6. Applying the base fine of $120 million to these multipliers results in a fine range of between $240 million and $480 million.

[27] Hammond, *supra* note 19 ("The [Antitrust] Division will not engage in plea negotiations with a company that desires to litigate gain or loss.").