LEGAL DEVELOPMENTS

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JUSTICE DEPARTMENT CHALLENGES INFORMATION EXCHANGE CONCERNING CONTRACT CLAUSES

The United States Department of Justice ("DOJ") recently sued to halt the exchange of information about clauses actuarial firms include in engagement contracts with clients. This DOJ action highlights the importance of having clear policies in place whenever any information is exchanged with competitors, whether through trade associations, joint ventures or similar groups – even where the exchange of information is not in furtherance of an agreement on price or output.

On June 24, 2005, actuarial consultants entered into a consent decree with the DOJ, agreeing to cease an alleged anticompetitive information exchange among the actuaries. According to the DOJ, the conduct led to a uniformity in Limitation of Liability ("LOL") clauses in the actuaries' client contracts. Interestingly, the DOJ's allegation was not that the actuaries conspired to set uniform contractual terms. Rather, the DOJ merely alleged that the actuaries agreed to exchange and actually exchanged competitively sensitive information, which, in turn, facilitated the increased use of LOL clauses by removing marketplace uncertainties that might have restrained the actuaries from insisting on including LOLs in their engagement agreements. The DOJ alleged that this conduct violated Section 1 of the Sherman Antitrust Act.

The DOJ reached the settlement with defendant Professional Consultants Insurance Company, Inc. ("PCIC"), a Vermont-based captive professional liability insurance company which insures its three member shareholders, each of which is a competing actuarial consulting firm. The member firms provide actuarial risk analysis and management services to clients engaged in financial services, including pension funds and other benefit plans.

According to the complaint, actuarial consulting firms historically served their clients without LOL clauses. However, dating back to 1999 and coinciding with an increased frequency of liability claims, PCIC's members began to consider requiring clients to accept LOL clauses in their engagement agreements. LOL clauses can contractually limit the amount of damages recoverable by clients in a variety of ways, including limiting liability to a set dollar amount, a multiple of fees, or limiting recovery to only certain types of damages. All other things being equal, a client would prefer not to have such a clause, and the DOJ alleged that the members recognized early on that insisting on such clauses without industry-wide implementation could put them at a competitive disadvantage.

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The government's complaint details five years' worth of communications among these competitors, liberally quoting from internal documents and emails obtained during the DOJ's investigation of the matter. In addition to communications among the members of PCIC, the complaint reveals profession-wide communications, which often occurred at industry and trade group meetings. Examples of the communications among competitors cited in the complaint include:

- Sharing sample LOL contract language among firms;
- Encouraging competitor firms to adopt LOL clauses;
- Expressing displeasure to a competitor that the competitor had offered a contract without LOL; and
- Labeling implementation of LOL as a "best practice" in a presentation at a profession-wide meeting.

Such communications, according to the DOJ, served to significantly reduce competition with regard to LOL clauses and also to substantially increase the implementation of such clauses, to the detriment of clients.

The proposed consent decree, which must be approved by the Court, seeks to prevent PCIC and its members from sharing LOL information among themselves, or with other providers of actuarial consulting services. The proposed decree prohibits PCIC and its members from:

- Communicating among themselves about LOL clauses, except for historical and aggregated information in narrowly defined circumstances;
- Entering into or participating in any agreement, among themselves or with any other providers of actuarial consulting services, regarding LOL clauses; and
- Communicating with other providers of actuarial consulting services as to any firm's current or future plans, policies, or practices regarding LOL clauses.

Additionally, while no monetary civil penalties were imposed, the proposed decree requires PCIC and its members to establish an antitrust compliance program and to allow the DOJ access to their books and records for the duration of the decree – ten years.

This case demonstrates the DOJ's interest in prosecuting "anticompetitive information exchange" cases, even in the absence of an express agreement as to price or output. When dealing with competitors in the context of joint ventures, trade associations, and the like, care must be taken to avoid competitively sensitive communications, which might lead to antitrust exposure. Businesses are well served to advise managers and employees to tread carefully when interacting with their counterparts at competitive firms, lest communications with competitors be one day discovered and woven into the fabric of a government complaint, even where no agreement on price, output, or market division was ever sought or reached. An effective antitrust compliance program can go a long way toward educating personnel as to the proper boundaries to observe when communicating with competitors. Moreover, it may be advisable for counsel to attend meetings with competitors, especially trade association meetings, in order to help ensure that the line between benign and illegal communications is not crossed.

The proposed consent decree will be published in the Federal Register, as required by the Tunney Act. The public may submit written comments on the decree during a 60-day comment period, after which the court may approve the settlement and enter the consent decree upon finding that the decree serves the public interest.

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