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LEGAL DEVELOPMENTS

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CONGRESS ALLOWS FEDERAL INVESTIGATORS TO WIRETAP SUSPECTED ANTITRUST OFFENDERS

The expanding scope of federal surveillance authority that has been the subject of much recent controversy extended further into the corporate realm this week, when suspected corporate price-fixers became subject to potential federal wiretapping of the type long applied to suspected drug dealers, gangsters and terrorists. On March 9, 2006, as part of the reauthorization of, and amendments to, the USA PATRIOT Act, President Bush signed into law an amendment to Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510, *et seq*., which makes a criminal violation of the Sherman Act a "predicate offense" for an order by a federal district court to authorize a wiretap, provided that all other requirements for such electronic surveillance are met.

Because the range of conduct that may be sufficiently suspicious to attract investigatory attention in the antitrust realm is broad enough to encompass many pricing and other competitive decisions that can as easily result from independent conduct as from unlawful conspiracy, the upshot of the new law may be that corporations and their employees in concentrated industries should now assume as a matter of course that government enforcers are listening in on their commercial communications.

Previously, in order to engage in electronic surveillance of suspected antitrust wrongdoers, federal investigators had to rely upon the participation of a cooperating witness in the monitored communications. Now that this requirement has been eliminated, the Antitrust Division has a new and powerful investigative tool. Democrat Senator Herb Kohl of Wisconsin, one of the amendment's co-sponsors, explained: "Because of their secret nature, antitrust conspiracies are extremely hard to uncover unless prosecutors can penetrate the inner workings of the conspiracies .... By giving prosecutors the necessary authority to obtain a wiretap in these cases, we will greatly enhance their ability to aggressively bust up these criminal enterprises."

One of the purposes of the new law is to reduce the government's current heavy reliance upon informants to infiltrate cartels. Up to now, the government's primary source for obtaining direct evidence of a conspiracy has been to enlist the participation of an informant, such as a coconspirator who has taken advantage of the leniency program and reported the conspiracy to the government in order to obtain amnesty. Conspiratorial meetings often are recorded by such cooperating witnesses wearing a wire or by resort to other electronic surveillance undertaken with the "consent" of the cooperating witness. While not an uncommon occurrence, wiring or otherwise enlisting the participation of a cooperating witness presents a number of logistical challenges and may provide a limited view of the conspiracy and, thus, a limited amount of evidence. The ability to conduct

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electronic surveillance without resort to a cooperating witness will likely lead to more robust and compelling evidence of conspiratorial communications.

To avail themselves of these new surveillance powers, prosecutors will have to demonstrate that there is probable cause to believe that communications about an antitrust violation will be obtained through the sought after electronic surveillance and that the use of the electronic surveillance is needed, given the potential difficulty of other traditional methods. Based upon experience in other areas of the law, these requirements are likely to establish only a very modest bar: According to a recent report by the Administrative Office of the United States Courts, over the past decade, 99.97% of the more than 14,000 applications for wiretaps were granted by federal judges, while only a mere four such applications were turned down.

Antitrust crimes differ from other substantive offenses giving rise to wiretapping powers because the line between lawful and unlawful conduct is murkier in antitrust than for drug trafficking or terrorism. A lawful case of a company acting as a "price follower" of its competitors, for example, may closely resemble unlawful price fixing from the external perspective of marketplace behavior. A critical question presented by the new law is, thus, the manner in which federal investigators may seek to engage in electronic surveillance of potential offenders based solely upon observed market information such as parallel price increases, in the absence of tips or other information from an insider to the suspected conspiracy.

Currently, the Antitrust Division monitors many industries for suspicious market activity through a program it calls "cartel profiling." The Division examines publicly available information as to pricing trends and the like, and also monitors markets and firms previously at the center of antitrust conspiracies. If the Division takes an expansive view of probable cause under the new law, the law could be construed to empower any federal investigators observing what they deem to be suspicious price activity in an industry to secure the ability to electronically monitor competitors in the industry or perhaps even trade association meetings. Whether market information will provide the probable cause necessary to warrant such surveillance remains to be seen. However, in the civil context, in *Twombly v. Bell Atlantic Corp.*, the Second Circuit recently confirmed that allegations of mere parallel conduct among competitors are sufficiently "plausible" to survive dismissal, such that most "any claim asserting parallel conduct will survive a motion to dismiss." Given the demonstrated reluctance of federal judges to reject wiretap applications, it would appear that observed parallel conduct or other market information which piques the interest of the Division, might pave the way for intrusive electronic surveillance. Firms in concentrated markets – where parallel pricing often is the norm – beware.

Of further interest is that the new law includes not only Section 1 of the Sherman Act as a predicate offense, but also, despite the objection of the American Bar Association's Antitrust Section, Section 2 of the Sherman Act, which concerns monopolization. For many years, criminal prosecutions have been confined to horizontal price fixing in violation of Section 1, while monopolization under Section 2 has been the subject of civil enforcement, despite the fact that a violation of Section 2 is – at least on the books – a felony. It remains to be seen whether despite the lack of recent historical criminal prosecution of monopolization, the government will nevertheless seek to electronically monitor the corporate offices of dominant firms suspected of exclusionary practices. Likewise, it bears watching whether the government will seek to use such techniques in merger investigations between firms in concentrated industries under a merger to monopoly theory. The prospect of such surveillance of dominant firms should give such firms – and their counsel – a great deal of pause.

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