

A Whistleblower Story (Hypothetical)

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I have been advocating for some time that antitrust cartel whistleblower legislation be passed. Whistleblower legislation has been phenomenally successful for the SEC and other agencies and there is no reason price fixing/bid rigging cartels shouldn't face the threat of a whistleblower. Kimberly Justice and I wrote a short article: It's a Crime There Isn't an Antitrust Whistleblower Statute, Wolters Kluwer, Antitrust Law Daily, April 8, 2018. We are working on a longer version of that article with cites to law review articles, business publications, prosecutors, defense attorneys, felons, statistics and all the usual ingredients of a "law review" style article. But, nothing makes an argument better than a good story so I'll get ahead of myself and share one now.

To illustrate why a cartel whistleblower statute is needed, consider Hypothetical Bill:

Hypothetical Bill is the US sales rep for a foreign manufacturer of Widget Company. There are five main players in the industry. Bill had heard whispers of a cartel. After a recent promotion, Bill has been assigned to attend "working group" meetings. The "top guys" set price targets, but the working group has the more hands-on task of implementing the prices by region, accounting for exchange rates, maintaining relative allocations, and host of other details that can derail a cartel. Bill understands that it is none too smart for him to be going to these meetings—especially as an American who may go to prison if caught. He confides in a friend of his who is a lawyer who knows about criminal law. The lawyer tells Bill he can hire an attorney to go to the government and he will likely be able to negotiate an immunity/cooperation agreement. But, negotiations time and likely

multiple trips by Bill and his lawyer to visit the prosecutors for interviews. Obviously Widget Company will not be paying for Bill's travel, lawyer fees, etc. The cooperation agreement lasts for the duration of the investigation—a slightly shorter version of the Hundred Years War. The Antitrust Division will ask Bill for documents to corroborate his story—travel records, emails, etc. Bill may be called upon by foreign competition commissions to appear for interviews. Besides the time and expense of cooperation, Bill's attorney friend tells him he will likely will be fired by the company when they learn of his cooperation (after all, he is a confessed criminal and they are shocked he was talking to competitors). Widget Company may also sue Bill for “stealing” documents from the company. Bottom line: “Bill, this will likely bankrupt you, make you forever non-employable in your industry and drag your family through hell. What would you like to do?”

Unless Bill is nuts (not a good quality in a witness), Bill will almost certainly not expose the cartel. He could go to the company's compliance counsel but since the CEO is involved in the illegal activity, he's guessing that he, not the CEO, will regret his internal reporting. At best, Bill will leave his job, get out the situation and keep quiet. But most likely, Bill will think of how his family needs the money the new promotion brought (kids/college etc.), stay in the job and hope for the best. After all, even if the cartel gets exposed, isn't there a chance he could get immunity then? And, if Bill is a bit delusion, he may think “The company will take care of me” if anything happens. Bottom line, Bill does not expose the cartel.

Now, imagine this scenario. Bill's lawyer friend tells him that he has the option of being a whistleblower. Many of the bad things that can happen to a whistleblower may happen anyway, but you have the potential of recovering perhaps millions of dollars if you cooperate with the government. You can get a great lawyer^[1] who will work on a contingency basis and get paid **only** if you get a whistleblower award. The government will likely grant immunity in return for your full cooperation, which may include even asking you to record conversations. But, the government will grant you a whistleblower reward of between 10-30% and the more you cooperate, the higher the likely award. There is, however no reward, unless guilty pleas and fines are imposed so you have an incentive to cooperate as much as you can. As a whistleblower under this new legislation, you are protected from retaliation. You still get fired (would you want to stay there anyway?), but being a protected whistleblower should deter the company from other forms of retaliation.

In this case, Bill decides to cooperate and become a whistleblower. He gives the Antitrust Division all they need to obtain a search warrant on Bill's company. Warrant in hand, the Antitrust Division asks for a meeting with Widget Company's US counsel. At the meeting, government lawyers explain that Widget Company has 48 hours to get a Leniency Marker in before the investigation goes public and search warrants (and perhaps dawn raids in other parts of the world) are executed. Widget Company folds and starts the leniency process. Bill's cooperation as a whistleblower is never known, except by his banker. He now becomes one of many witnesses under Widget Company's leniency coverage. A cartel that may never have been exposed, falls like dominos. The cost to the public is a whistleblower's share paid to Bill, who then pays his lawyer.

This hypothetical uses an international cartel, but think of the possible collusion taking place domestically in the wake of hurricanes and natural disasters across the United States. After Hurricanes Harvey, Irma and Maria, the Antitrust Division and Federal Trade Commission recognized that collusion could emerge on a wide scale as rebuilding efforts begin. In a joint statement, the agencies said, "While natural disasters often bring out the best in human compassion and spirit, they can also lead to unscrupulous individuals and organizations taking advantage of those in need."^[2] There may be a lot of "Bills" out there who don't like what they see but can't afford the risk/expense of being a whistleblower without whistleblower legislation.

Note: Where the government is a victim of fraud, a whistleblower can currently bring a suit under the False Claims Act, but whistleblower legislation would make the process much more attractive.

Thanks for reading.

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Because of my interest (obsession?) in price-fixing/bid rigging whistleblower legislation and False Claim Act cases, I started a new blog: [The Bid Rigging Whistleblower](#). This is a repost from that blog.

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1. If not obvious yet, let me be clear that I have a bias—a personal interest -in

seeing cartel whistleblower legislation passed. I have represented whistleblowers and would be particularly interested in representing cartel whistleblowers since I spent the bulk of my career investigating and prosecuting cartels for the Antitrust Division.

2. FTC Antitrust Division Joint Statement: *Antitrust Guidance: Hurricanes Harvey and Irma*, September 12, 2017, available at https://www.ftc.gov/system/files/documents/public_statements/1253313/hurricanes_harvey_and_irma_ftc_doj_statement.pdf.