AntitrustConnect Blog

It Is Time for an Antitrust Whistleblower Statute—Part I

Robert E. Connolly (Law Office of Robert Connolly) · Tuesday, October 31st, 2017

Kimberly Justice and I wrote an article published in Global Competition Review arguing that it is time for an "Antitrust Whistleblower Statute." [The article is behind a pay firewall (here).] Kimberly and I will be expanding on this idea in Cartel Capers blog posts over the next two weeks. Below is the first installment. We explain why cartels are a great pond to be fishing in for informants, but a little "whistleblower" bait is needed.

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Over the last several years, Senators Chuck Grassley and Patrick Leahy have introduced antitrust whistleblower legislation that has passed in the Senate but died in the House. Their proposed legislation would grant job protection to antitrust whistleblowers. The legislation that Ms. Justice and I are proposing would go further; besides retaliation protection, we would offer potential financial reward to a whistleblower who initiated a successful cartel prosecution.

The time is right for antitrust whistleblower legislation. In 1993, the Antitrust Division revised its Corporate Leniency policy, setting the stage for similar, successful, legislation/polices to be enacted around the world. Amnesty/Leniency rewards an entire company and its cooperating executives with non-prosecution for coming forward and reporting cartel behavior. But leniency applications are slowing down—at least that is the perception of many observers—as the cost of obtaining leniency in terms of corporate time and attorney fees, in an expanding universe of jurisdictions, has would-be applicants reassessing the cost/benefit analysis. A whistleblower statute would not replace, nor in our opinion undercut, leniency policies, but would add a new tool to uncover cartels that exist, and deter new cartels from forming.

There are two features of cartels that are key to understanding why an antitrust whistleblower statute would be a potent and needed weapon in the fight against cartels:

1) There are many potential whistleblowers in virtually every price-fixing/bid rigging conspiracy. The culpability level of the many players ranges from Masters (top-level) to Sherpas (working group guy). Offering a potential whistleblower reward to a single cartel member still leaves a target rich enforcement of culpable executives to focus on; but

2) It is costly for a potential whistleblower to come forward. Any member of a cartel, even the least culpable, faces the possibility of significant jail time. In order for a low-level cartel participant to come forward, he needs to engage a qualified attorney and negotiate a non-prosecution agreement with the Antitrust Division. This is an expensive, potentially life changing

decision. Long-term unemployment may well follow. Hefty attorney fees surely will. Even the most desirable whistleblower—one with no culpability at all, such as a secretary, or customer– will not ensnare herself in a cartel investigation without some means to cover significant attorney costs and reap some compensation for doing "the right [but very costly] thing."

Ms. Justice and I worked on two investigations which highlight these points. The first was an international cartel investigation involving both US and foreign companies. Within each company there were many executives—some retired—that had enough knowledge of the cartel that had they come forward, an investigation would have been opened. If a single whistleblower had come forward, there still would have been many culpable individuals and companies left to prosecute.

Another prosecution involved a typical bid rigging scheme on a government contract. This type of scheme is usually initiated by the owner/senior member of the company (who would not be eligible for whistleblower status). But, it is also typical that an estimator who knows the boss has schemed with a competitor(s) is told to bump up the prices to reflect the agreement. The estimator is liable as a participant in the cartel, but would make an excellent whistleblower.[1]

Given almost any cartel, international or local, a lower level employee could come forward and likely receive a non-prosecution/cooperation deal under the Antitrust Division's current Individual Leniency Policy. But the Individual Leniency Policy is almost never used because a rational person would likely prefer to lay low and hope the crime never gets uncovered than come forward, likely lose his job and have to pay an attorney to negotiate with the Antitrust Division for immunity. Being an Antitrust Division witness is a marriage that lasts longer than many real marriages. Criminal antitrust investigations take years, and if it is an international matter, a whistleblower will be called on to be interviewed by many jurisdictions around the globe. Without some incentive of a reward, an individual would almost certainly not "volunteer" to assist in a cartel investigation. Even a non-culpable witness/whistleblower such as a customer in whom a salesperson confided or a corporate administrative assistant who saw/heard incriminating information is not likely to come forward to the Antitrust Division on his/her own.

There are many potential antitrust whistleblowers. But the disincentives to come forward voluntarily are significant. Some "bait" is needed to entice a whistleblower: protection from job retaliation and a financial incentive that would cover the significant costs of cooperation and perhaps even provide an "informants'' bounty." The False Claims Act, the SEC and other whistleblower statutes are successful because individuals with knowledge can engage an attorney to guide them through the process in exchange for a possible award of attorney fees and a contingency fee. The whistleblower's attorney can develop the potential whistleblower's claim, negotiate with the government, and represent the potential whistleblower throughout the process, all without an upfront cost to the potential whistleblower. A former employee, for example, maybe one who has been fired or downsized—would have a way to report illegal conduct without assuming a tremendous legal bill—and even have a financial incentive to do so.

In the next blog post we will discuss some of the objections that have been raised to an antitrust whistleblower statute and why we think none of these concerns are serious enough to kill the whistleblower idea. But, first, we'll wrap this segment up by noting a couple of the benefits of a whistleblower statute which may be obvious:

- A whistleblower can start a criminal cartel investigation with an insider's view of the agreement and who is party to it. A single whistleblower does not preclude the Antitrust Division from also

offering leniency, as it is unlikely one witnesses can provide indictable evidence. But, whistleblower evidence/assistance should lead to an efficient investigation that preserves the most culpable cartel members for prosecution.

- Like leniency, as the whistleblower tool gets used and generates publicity, it will be effective in deterring cartels from even forming. This effect is not capable of measurement, but it is logical that if a single member of a cartel (particularly lower-level Sherpas who may not be crazy about carrying out the Master's scheme) has a means to report the cartel and be rewarded for actionable information, cartel members will have another reason to think twice before engaging in criminal antitrust behavior.

More to come. Thanks for reading.

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[1] Where the government is a victim of a fraud—and bid rigging is a fraud—a whistleblower case can currently be brought under the False Claims Act. There are occasional instances of bid rigging whistleblower case. But, it would be better to have these types of cases covered by a particular antitrust whistleblower statute and better publicized with an Antitrust Division Office Whistleblower Office.

This post originally appeared on the Cartel Capers blog.

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