AntitrustConnect Blog

Upcoming Sentencing of Former Bumble Bee CEO Christopher Lischewski

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US v. Lischewski, Case No. 3:18-cr-00203-EMC (N.D. Cal.)

Christopher Lischewski, the former CEO of Bumble Bee who was convicted of price fixing after a trial last December, is scheduled to be sentenced on June 16, 2020. The government has requested a guidelines sentence of eight to ten years in prison and a $1 million fine. The sentencing guidelines range is 97 to 121 months, but the Sherman Act has a ten year maximum. Lischewski has asked the Court for a sentence of one year of home detention and a $25,000 fine. Lischewski argued incarceration was wrong because at age [nearly] 60 he shouldn't be subjected to the high risk of contracting COVID-19.

There was a hearing [via Zoom] on June 3, 2020 wherein Judge Chen asked the parties for their views on the burden of proof the government bears to obtain a sentencing guidelines upward departure. The standards at issue are "clear and convincing evidence" or "preponderance of the evidence." I'm not sure it would make a difference (except possibly on appeal) as the defense claimed "Whatever the burden, the government hasn't met it" while the government argued it has met its burden under either standard.

The enhancements the government seeks in the guidelines calculation are: "Role in the Offense–Organizer or Leader +4; Obstruction +2; and Volume of Commerce +12. The Volume of Commerce adjustment is huge and, in my humble opinion bears very little relationship to culpability. In a Sherman Act criminal trial the jury is asked to find only whether the defendant at some point joined the charged conspiracy. Findings of fact on these enhancements are left to the sentencing judge.

Background.

The indictment in the case charged Lischewski with fixing the price of tuna from November 2010 and continuing until December 2013. His trial lasted four weeks. The jury heard from all the major players in the tuna industry. Chicken of the Sea and its executives, including former Chicken of the Sea CEO Shue Wing Chan who testified, received amnesty. StarKist pled guilty and was sentenced to pay a fine of $100

million. StarKist Vice President of Sales Stephen Hodge pled guilty and is awaiting sentence under a 5K1 cooperation downward departure deal. Bumble Bee pled guilty and was fined $25 million. Bumble Bee's former senior vice presidents Kenneth Worsham and Walter Scott Cameron, have also pled guilty and are also awaiting sentence pursuant to 5K1 downward departure plea agreements. Both testified that Lischewski had directed them during the conspiracy.

Lischewski is requesting a massive departure from the voluntary sentencing guidelines that place his recommend sentence at up to the ten year Sherman Act maximum. Lischewski has also raised and preserved for appeal his challenge to the per se rule.

A. Ten Years in Prison Under the Sentencing Guidelines

Mr. Lischewski, a first time offender, has a recommended sentencing guidelines term of custody of 97-120 months. The Guidelines imprisonment range is actually 97 to 121 months; however the Sherman Act maximum is ten years.

From the Government's sentencing Memo:

Defendant's Total Offense Level Is 30

Base Offense Level (§2R1.1(a))	12
Volume of Affected Commerce (§2R1.1(b)(2)(F))	+12
Total Adjusted Offense Level 24	
Role in the Offense Adjustment (§3B1.1.(b))	+4
Obstructing or Impeding the Administration of Justice (§3C1.1)	+2
Acceptance of Responsibility (§3E1.1)	_ 0
Total Offense Level	**30**

As the table illustrates, the main driver of the maximum guideline sentence is the volume of commerce. I have written before that, in my opinion, the volume of commerce is a poor proxy for culpability and should be greatly deemphasized, when sentencing antitrust offenders. In 2014, I wrote to the Sentencing Commission my opinion that the Sherman Act maximum should only be applied for the most egregious cases; perhaps recidivism; coercion of subordinates or other cartel members; or a particularly vulnerable victim. In short, some kind of "culpability Plus" factor other than volume of commerce should be needed to approach the 10 year Sherman Act maximum. Robert E. Connolly, *Comments and Proposed Revisions Submitted to U.S. Sentencing Commission Regarding USSG 2R1.1 (Antitrust Offenses)*, July 29, 2014, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474608.

Volume of commerce is an inappropriate measure of an individuals' culpability in that it is only based on an estimate of the harm done by a conspiracy. "The purpose of specifying a percent of the volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss." *USSG*

2R1.1 application note 3. The background notes to the antitrust guideline reads: "The offense levels are not based directly on damage caused or profit made by the defendants because damages are difficult and time consuming to establish." *Id.* But, before sentencing anyone to 10 years in jail, some time and expense should be made examining the motives for and effectiveness of the cartel. An individual's commitment to the goal of the conspiracy–fixed prices–should be relevant to sentencing. Interestingly, this volume of commerce short cut is not acceptable if the Government is relying on the alternative maximum fine provision of 18 U.S.C. § 3571(d) to impose a fine above the Sherman Act maximum of $100 million. See; *Southern Union Co. v. United States*, 132 S. Ct2344 (2012). In that situation the jury must make a gain or loss finding. Perhaps in order to get a volume of commerce enhancement, jurors should be asked to assess the impact of a cartel.

At least in this case, the defendant was the CEO of his company. The volume of commerce enhancement, which can push the guidelines sentence to the Sherman Act maximum, can apply equally to the lowest level employee of a company who may have had a role in the conspiracy. To the extent the volume of commerce has any relation to culpability, it is not the same for the CEO of a company and a lower level sales person who may have been directed to exchange prices with a competitor.

The relation between volume of commerce and culpability is further weakened by the fact that courts have taken an expansive view of what commerce should be included in the guidelines calculation. Courts have uniformly held that all sales made by a defendant during the price fixing conspiracy should be presumed affected by the conspiracy. See *United States v. Giordano*, 261 F.3d 1134, 1146(11th Cir. 2001)(presuming all sales within conspiracy period were affected unless the conspiracy was a 'non-?starter" or "ineffectual."); *United States v. Andreas*, 216 F.3d 645, 678 (7th Cir. 2000)(holding that "the presumption must be that all sales during the period of the conspiracy have been affected by the illegal agreement since few if any factors in the world of economics can be held in strict isolation; *United States v. Hayter Oil. Co*, 51 F.3d 1265, 1273 (6th Cir. 1995)(concluding that "the volume of commerce attributable to a particular defendants…includes all sales of the specific goods or services which were made by the defendant or his principal during the period of the conspiracy.). The Sherman Act is a prosecutor friendly tool in that the government can argue to the jury that they do not have to prove the conspiracy had any effect; cheating is no defense; the agreement is the crime, etc. But, at sentencing it is presumed the cartel affected all sales.

A prison sentence for Mr. Lischewski approaching ten years seems highly unlikely. Pursuant to 18 U.S.C. § 3553, a district court must strive to "impose a sentence sufficient, but not greater than necessary" to reflect the seriousness of the offense, promote respect for the law, and provide just punishment. Several years ago, the government requested a sentence of up to ten years after the conviction at trial of AU Optronics CEO's. Judge Illston imposed 36-month sentences on the defendants in the case the government described as "the largest, most egregious antitrust conspiracy that the Department of Justice has ever prosecuted." *United States v. AU Optronics Corp.*, No. 09-cr- 00110-SI, ECF 948 at 51 (N.D. Cal. Sept. 11, 2012).

Even though the guidelines are voluntary, there is another negative consequence from the draconian nature of the volume of commerce enhancement. The government uses

the Sentencing Guidelines when negotiating plea agreements. For the most part, the government can gain cooperation by avoiding the long recommended sentences the guidelines may call for by the volume of commerce enhancements by negotiating deals; amnesty, immunity, non-prosecution and 5K1 cooperation departures with conspirators. The government identified 16 co-conspirators in the tuna price fixing scheme but made deals in return for cooperation with them. But, Lischewski, as the "last man standing" so to speak–had no cooperation to offer. A defendant facing an 8-10 year recommended guidelines prison sentence has very little to lose by going to trial. In one sense, the trial can be viewed as a prolonged sentencing hearing, allowing the defendant to demonstrate how disproportionate his sentence is compared to other conspirators. Other trial evidence may "humanize" the defendant or mitigate the conduct and result in a shorter sentence. On the other hand, if the defendant testifies untruthfully, as the government alleges Mr. Lischewski did, the trial may not sway the court in the defendant's favor. The government has requested a two point "obstruction of justice" enhancement for Mr. Lischewski in this case.

B. JURY INSTRUCTION–PER SE RULE

Defendant Lischewski preserved an objection to the Court giving a "per se rule" jury charge. Over the defendant's objection, the Court gave the following standard instruction on the per se rule:

PER SE VIOLATION OF THE ANTITRUST LAWS

> *Section 1 of the Sherman Act makes unlawful certain agreements that, because of their harmful effect on competition and lack of any redeeming virtue, are unreasonable restraints of trade. Conspiracies to fix prices are deemed to be unreasonable restraints of trade and therefore illegal, without consideration of the precise harm they have caused or any business justification for their use.*
>
> *Therefore, if you find that the government has met its burden with respect to each of the elements of the charged offense, you need not be concerned with whether the agreement was reasonable or unreasonable, the justifications for the agreement, or the harm, if any, done by it. It is not a defense that the parties may have acted with good motives, or may have thought that what they were doing was legal, or that the conspiracy may have had some good results. If there was, in fact, a conspiracy to fix the prices for canned tuna as alleged, it was illegal.*

The Supreme Court recently denied cert. in a case challenging the constitutionality of the per se rule. See, http://cartelcapers.com/blog/first-per-se-rule-assault-turned-away-the-battle-will-go-on/. But the issue will continue to be raised until the high court does address the issue. Perhaps this will be the case; especially if the defendant receives a very long prison sentence.

I've addressed my view of the unconstitutionality of the per se rule in "*The End is Near*

For the Per Se Rule in Criminal Sherman Act Cases and more recently *in IN THE CLASH BETWEEN THE VENERABLE PER SE RULE AND THE CONSTITUTION, THE CONSTITUTION SHALL PREVAIL (IN TIME).”* In a nutshell, the argument is that the Sherman Act requires the government to prove, beyond a reasonable doubt, that the agreement in question restrained trade. In a price fixing case, the jury is instructed as it was here, that the agreement charged is illegal per se: “you need not be concerned with whether the agreement was reasonable or unreasonable.” The jury never answers the question of whether the agreement restrained trade.

This is a brief excerpt from the “In the Clash Between the Per Se Rule and Constitution…,” the most recent article I have written on the per se rule:

> *The first problem with the per se rule is that it cannot be found in Section One of the Sherman Act. Section One condemns agreements in “restraint of trade.” From a textualist point of view, the very same words cannot create the per se rule and the rule of reason. The Supreme Court has created, and later reversed, most per se violations while the operative language of the Sherman Act, “restraint of trade,” has not changed. The per se rule against horizontal price fixing is the last per se rule standing. The Antitrust Division argues that the per se rule is not an evidentiary presumption but an interpretation of the statute: “it is as if the Sherman Act reads price fixing and bid rigging are illegal.” But, it doesn’t. Textualism will prevail over the “it is as if the Sherman Act read” rule of statutory construction.*
>
> *The second problem with the per se rule is that it clashes with constitutional protections enjoyed by a defendant in a criminal case. The Sixth Amendment provides that those “accused” of a “crime” have the right to a trial “by an impartial jury.” This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt. Under the per se rule, however, once the court makes the factual determination that the per se rule applies, the jury is instructed that the government has proven a restraint of trade beyond a reasonable doubt because price fixing is per se illegal.*

One last thought: It is odd that the Volume of Commerce enhancement can so dramatically escalate the defendant’s potential sentence when the jury is charged: *It is not a defense that the parties may have acted with good motives, or may have thought that what they were doing was legal, or that the conspiracy may have had some good results.”*

We will find out what Judge Chen thinks on June 16, 2020. The sentencing hearing will be available for watching on ZOOM. I am glad I am not the judge. These are tough cases.

Thanks for reading.

This post originally appeared on the CartelCapers blog.

This entry was posted on Thursday, June 4th, 2020 at 7:41 pm and is filed under Department of Justice Antitrust Division, Price Fixing
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