AntitrustConnect Blog

Listen….

Robert E. Connolly (Law Office of Robert Connolly) · Thursday, November 3rd, 2022

Two items recently in the cartel news caught my eye because they have something in common: the chicken parts criminal price fixing prosecution failures and Donald C. Klawiter's article calling for *A Really New Leniency Program: A Positive, Cooperative, and Enthusiastic Partnership for Effective Antitrust Enforcement*, Antitrust, Vol. 36, No. 3, Summer 2022. What they have in common is a sharp and unfortunate turn by the Antitrust Division to not welcoming input from the antitrust criminal defense bar before making important decisions. The antitrust/cartel bar is a well-respected group of attorneys that are either former Antitrust Division prosecutors, seasoned antitrust trial veterans, experience white collar defense lawyers and often all of the above. As outlined below, the antitrust bar is clearly not always correct in their assessment of matters but listening to their opinions is well worth the time expended and can only assist the Antitrust Division in the analysis of potential cases/policy.

Allow Defense Counsel a Preindictment Meeting

The Antitrust Division's failures in the chicken parts criminal price fixing investigation was a thorough rout. Recently the Antitrust Division dropped the indictment against the last two remaining individual defendants. *Price-Fixing Charges Against Chicken-Industry Executives Are Dismissed,* Wall Street Journal, Dave Michaels, October 17, 2022. The investigation is now concluded with a scorecard of a total of 14 people charged with participating in the scheme without a single conviction. The Division obtained just one guilty plea from the companies it accused of being involved.

I believe the case(s) got off on the wrong foot when the Antitrust Division secured indictments against the individuals without first advising them that they were targets of the investigation. "No-notice indictments," as these have come to be called, preclude the opportunity for defense counsel to request a preindictment meeting with the prosecting staff. It is my understanding that the chicken parts case was not the only case where no-notice indictments were returned. Even in some of the no-poach criminal indictments, where the Division was brining first-of-their-kind case, defense counsel were not given the opportunity to argue to the Division why their case was not a viable prosecution. Preindictment meetings are critically important to give a prospective defendant an opportunity to present facts or law that may change the prosecutors' mind. Preindictment meetings can also be critically important to the prosecutors to get a preview of what the defense perceives as flaws in the case. I've written more about this in a previous blog post:

Don't Be Chicken to Meet: The Case For Preindictment Meetings, Cartel Capers, July 12, 2022.

There are, of course, times when a preindictment meeting would not be appropriate: “While under no obligation to notify a target prior to indictment, the government typically does so, only refraining in the rare case where, “notification…might jeopardize the investigation because of the likelihood of flight, destruction or fabrication of evidence, endangerment of other witnesses, undue delay or otherwise would be inconsistent with the end of justice.” JM 9-11.153-Notifcation of Targets. But thinking that you have nothing to learn by listening to defense counsel is not a good reason to shun a preindictment discussion.

Prosecutors don’t get to the point of seeking an indictment without believing in their case. But prosecutors should do best to avoid this trap: “Most people do not listen with the intent to understand; they listen with the intent to reply.” Stephen R. Covey. Listening to defense counsel’s pitch, should they choose to make one, with an open mind may prompt some thoughts among staff along the lines of, “Perhaps we’ve overlooked something,” “Or fell overly in love with our witnesses [documents]”, “Or we need another witness.” To be clear, listening to why you shouldn’t indict is **not** seeking permission. As Hubert Humphrey said, “The right to be heard does not automatically include the right to be taken seriously.”

Listening has its limits. During my years as Chief of the Antitrust Division’s Philadelphia Field Office, I never refused (as best as I can recall) a meeting with defense counsel. But that didn’t mean defense counsel automatically got a second meeting going up the chain with the front office in DC. I can only recall one instance where defense counsel persuaded us not to seek a criminal indictment (the case had a troublesome vertical aspect) but I can recall many instances where a meeting with defense counsel caused us to tighten up a loose end, call another grand jury witness or otherwise sharpen our focus at trial. I also recall preindictment meetings where the government spoke, defense counsel listened and a preindictment plea agreement resulted.

The Leniency Policy Updates

Another area where there is a frosty relationship between the defense bar and the Antitrust Division is the recent updates to the Corporate Leniency Policy. As mentioned, Donald Klawiter,[1] one of the most experienced and respected names in the antitrust bar, and someone who had several positions including management within the Antitrust Division during his career has written an outstanding article, *A Really New Leniency Program: A Positive, Cooperative, and Enthusiastic Partnership for Effective Antitrust Enforcement*, Antitrust, Vol. 36, No. 3, Summer 2022. Mr. Klawiter reports that, “There was an immediate outpouring of criticism from the Antitrust Criminal Defense Bar [to the April 4, 2022, “updates”], arguing that the Antitrust Division’s updated statements regarding promptness and restitution, as well as the rewritten FAQs, further complicated the leniency application and did not provide any sense of partnership or offer of collaboration.” *Id.* at 52. One of Klawiter’s recommendations going forward is for the Antitrust Division to consult with a diverse group of experienced members of the antitrust and white collar bar.

> **In all of the Antitrust Division’s explanations and commentary about the leniency “updates,” there is no reference to any consultation with the Antitrust Criminal Defense Bar, formally or informally. By contrast, there are several references to consultation with the Merger Defense Bar regarding revisions of the Merger Guidelines. This is a fundamental departure from the long history of cooperation and candid discussion between the Antitrust Division and the**

> **Antitrust Criminal Defense Bar. It is also a serious oversight, or snub, that is not at all helpful to future relationships between the Bar and the Antitrust Division.**
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> **There is a long and productive tradition of consultation between the Antitrust Division leadership and the leadership of the Antitrust Criminal Defense Bar. Unlike many other areas of practice, there has been an openness and trust between prosecutors and defense counsel that has developed over many, many years. This process is even more productive because a large percentage of today's Antitrust Criminal Defense Bar either began their careers or spent several years as lawyers in the Antitrust Division. *Id.* at 56.**

A Hope for the New DAAG (and anyone listening)

As the Antitrust Division selects a new Deputy Assistant Attorney General for Criminal Enforcement, my hope is that she/he will be an active listener and seek out a wide range of perspectives. Listening is an essential skill of an effective leader: "I remind myself every morning: Nothing I say this day will teach me anything. So if I'm going to learn, I must do it by listening." Larry King. The wealth of experience in the antitrust bar is well worth listening to. Antitrust lawyers (at least all that I know) believe in the antitrust laws—particularly criminal enforcement against cartels. The cartel bar wants the Antitrust Division to be successful—just not against their client!

So, if you're listening, I echo Mr. Klawiter's call for more engagement with defense counsel. Assistant Attorney General Jonathan Kanter has stated numerous times that enforcers will not shy away from difficult cases. That attitude is to be applauded but does not preclude first listening to defense counsel tell you why your case (or policy) actually stinks. Consider what you've heard and then make the call– as you see fit.

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[1] Donald C. Klawiter is a partner at Sterlington, PLLC and has practiced antitrust criminal law for 47 years. He began his career at the Antitrust Division of the U.S. Department of Justice where he served in several trial and leadership positions. In 2005-2006, Mr. Klawiter had the honor to serve as Chair of the American Bar Association (ABA) Section of Antitrust Law. Prior to that, he served as Co-Chair of the Section's Department of Justice (DOJ)/ABA Criminal Working Group, Co-Chair of the Section's International Cartel Task Force, as well as organizer, co-chair, and speaker at the Section's International Cartel Workshops from 1997 to 2018.

Thanks for reading. If you have any feedback, I'm listening.

This post originally was published on the CartelCapers blog.

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