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corpcounsel.com | June 6, 2018

Safeguarding Your Company: Obtaining Recovery for Antitrust Violations

There are circumstances where litigation may not necessarily be the optimal strategy for obtaining appropriate redress and recovering damages caused by collusion.

By Cindy Caranella Kelly and Sarah Gibbs Leivick

As we reported in our last article, anticompetitive conduct targeting a wide range of industries around the world continues to be a major problem. When a company discovers that it likely has been a victim of such conduct, the initiation of litigation against the companies engaged in collusion is often necessary to recover past damages and to deter future misconduct.

However, there are circumstances where litigation may not necessarily be the optimal strategy for obtaining appropriate redress and recovering damages caused by the collusion. For example, there are often important business considerations, which must be taken into account, especially where the anticompetitive conduct has been committed by a significant supplier, vendor or company that has provided—and may continue to provide—valuable products or services to the company.

Once a company learns about anticompetitive conduct that may have resulted in harm or damages to the company, in-house counsel should consult with experienced



antitrust counsel and begin an investigation. Such an investigation is typically handled by, or with the advice of, outside counsel, and, as an initial matter, should identify all relevant business employees and the location of their documents and data, to ensure that this information is collected and preserved.

In a price-fixing or bid-rigging case, the relevant employees are usually responsible for purchasing the product or service at issue, although finance or information technology employees typically also will have important documents and transactional data relevant to issues of both liability and damages. These

employees and documents may be located in more than one office, particularly if the conduct spans multiple states or countries. Even if there is no indication that the conduct was multi-jurisdictional or global in scope, the full nature of the collusion may take time to uncover, and it will nearly always be prudent to engage with all potentially knowledgeable employees at the outset of the investigation. Conducting interviews with key employees early in the process will aid in counsel's understanding of how the conduct may have impacted the company.

In cases where filing a lawsuit may not be the appropriate mechanism

to obtain recovery—for example, where the company has an ongoing business relationship with the wrongdoers and it is beneficial to preserve that relationship—it may be prudent to pursue alternative dispute resolution. Recovery for damages resulting from anticompetitive conduct may be achievable through negotiation, mediation and/or arbitration, at less expense and effort than litigation, particularly if the conduct is global in nature.

Although a thorough early investigation will undoubtedly aid a company's affirmative case, as the U.S. Supreme Court noted in the 1962 case of *Poller v. Columbia Broadcasting System*, in antitrust cases, the necessary "proof is largely in the hands of the alleged conspirators." An affected company therefore will need to obtain documents and data from the conspirators to properly assess the impact of the anticompetitive activity. The types of materials that could be efficiently produced should be one of the first topics of discussion with the conspirators, particularly if a company is contemplating alternative dispute resolution.

Negotiation is thus the first logical step to resolving the dispute, and it is often advisable to involve the business people in the negotiations as early as possible. While outside counsel plays an important role—for example in conducting the investigation, analyzing the strengths and weaknesses of the claims, and working with liability and damages experts—business leverage can be invaluable in achieving a fair and appropriate resolution.

It is therefore crucial to ensure that the right people are on both sides of the table during negotiations. On the impacted company's side of the table, this should include business people familiar with the business relationship and knowledgeable as to the nature of the anticompetitive conduct and the damages sustained by the company. On the opposing side, there should be senior decision makers who will appreciate the importance of the ongoing business relationship and the risk exposure, who will receive the message regarding the harm done to the affected company, and be able to act to resolve the dispute.

If possible, the business people should obtain, at the outset of negotiations, a commitment from the company suspected of collusion to resolve the dispute without resort to litigation, to preserve the relationship. This can be done by entering into a written agreement to mediate and arbitrate should negotiations prove unsuccessful. Outside counsel will likely play an important role in negotiating and drafting an appropriate binding agreement, anticipating various obstacles to resolution, as well as ensuring a process that adequately protects the company's interests, for example, by providing for ample discovery should arbitration become necessary. If negotiations are unsuccessful, a neutral mediator may be able to advance the parties towards resolution of the dispute. Again, it is important that the appropriate business people be required to attend the mediation, and this requirement should

be included in the written agreement. It will often be evident after one full mediation session whether binding arbitration will be necessary to reach resolution.

Once resolution is achieved, there are important steps that can be taken to restore the company's trust in the wrongdoer. These actions may include requiring ongoing anti-trust compliance, monitoring and reporting, for example, in the form of annual compliance reports from the wrongdoer. An impacted company may also want to ensure that all individuals involved in the anticompetitive conduct are removed from its account, if they are still employed by the conspirator.

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