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ANTITRUST

2011 Year-End U.S. Criminal Antitrust Review

By David Burns, Jeremy Robison, and Michael McGinnis

The Department of Justice obtained *more than $1 billion* in fiscal year 2011[1] from criminal antitrust offenders, the second-highest amount in its history. The total payments consist of an estimated $523 million in criminal fines and more than $500 million in restitution, penalties, and disgorgement paid to state and federal agencies. This staggering amount represents an increase of more than 78 percent from FY 2010 and sends a clear message to the corporate world that DOJ's zealous pursuit of large fines for collusive conduct continues unabated.

Another important measure of success for DOJ's Antitrust Division also significantly advanced in FY 2011; the number of criminal cases filed increased 50 percent from FY 2010 to 90 cases, which included 27 corporations and 82 individuals.

Despite these achievements for the Antitrust Division, other metrics revealed significant year-over-year declines in FY 2011. The number of individuals sentenced to prison decreased 28 percent to just 21 defendants, the length of the average prison sentence fell 44 percent to 17 months, and the total prison time imposed on defendants dropped 60 percent to 10,544 days. We explore potential reasons for these declines below.

Given the Antitrust Division's numerous ongoing investigations—a number of which involve large, complex, international cartel matters that have not yet been announced publicly—we expect 2012 to be another banner year in U.S. criminal antitrust enforcement.

Overview of 2011 Enforcement Trends

DOJ secured payments totaling more than $1 billion stemming from its criminal investigations in FY 2011. This is the second-highest amount in its history and is only the third year in which the department has surpassed the $1 billion mark. These payments represent a combination of criminal fines and other monetary assessments derived from the Antitrust Division's criminal investigations.

In past years, the vast majority of payments secured by DOJ resulted from criminal fines. For the first time, this historic pattern changed, due to DOJ's repeated use of nonprosecution agreements and its growing embrace of multi-agency investigations. Accordingly, the true impact of DOJ's work is best reflected by including consideration of these other monetary assessments stemming from its investigations.

The total criminal fines obtained or agreed upon by DOJ in FY 2011 decreased from the prior fiscal year by slightly more than $30 million, to $523 million.[2] How-

[1] DOJ's fiscal year runs from Oct. 1 through Sept. 30.

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[2] The total criminal fines for FY 2011 is an estimate based on our review of plea agreements announced by DOJ and other court-imposed criminal fines during the fiscal year. DOJ has not yet released its final statistics for the fiscal year, but our estimate is supported by acting Assistant Attorney General

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ever, the amount of monetary assessments secured from offenders for restitution, disgorgement, and various penalties exploded in FY 2011 to more than $500 million—driven by settlements in the municipal bond bid-rigging cartel cases.

Criminal Fines. More than 99 percent of DOJ's total criminal fines in FY 2011 resulted from 16 corporate plea agreements in excess of $1 million, including a $200 million criminal fine against Furukawa Electric Co.[3] Additionally, DOJ has already entered into two plea agreements in the first three months of FY 2012 providing for more than $17 million in criminal fines.

Other Monetary Assessments. DOJ's record-breaking monetary assessments stemmed almost entirely from its ongoing investigation into municipal bond bid-rigging. Settlements with three major financial institutions, JP Morgan Chase & Co., UBS Financial Services Inc., and Bank of America, resulted in total monetary assessments in excess of $500 million.

We expect this new trend to continue in FY 2012 because the Antitrust Division has already announced monetary assessments against two additional financial institutions, Wachovia Bank NA and GE Funding Capital Market Services Inc., totaling $218 million during the first three months of the fiscal year.

New Criminal Cases. DOJ filed 90 new criminal cases in FY 2011—more than any year since 1987. These new cases charged 27 corporations and 82 individuals. More than 20 of these cases relate to an ongoing, nationwide investigation into bid-rigging at real estate foreclosure auctions. Interestingly, for each of the past three fiscal years, the Antitrust Division's filed cases have comprised 25 percent corporate and 75 percent individual defendants. Given the volume of new charges against individuals, we believe there will be substantially more criminal antitrust trials in coming years.

Prison Sentences. The number and length of prison sentences dropped dramatically in FY 2011. The aggregate prison time for all individuals sentenced in antitrust proceedings fell precipitously, recording a 60 percent reduction from FY 2010. The average length of prison sentences dropped sharply to 17 months, the lowest level since 2006 and a 43 percent reduction from FY 2010. Possible explanations for this phenomenon include:

- fewer mixed Title 15 and Title 18 charges—such as wire and mail fraud—which historically yield harsher prison sentences than Sherman Act-only charges;
- a higher percentage of foreign-national defendants who typically negotiate shorter periods of incarceration; or
- a combination of these factors.

International Cooperation

DOJ has concentrated its resources on global cartel investigations for more than a decade. Indeed, 96 percent of the $6.1 billion in criminal fines obtained between FY 1997 and FY 2010 stemmed from prosecutions of international cartels. Additionally, 48 foreign defendants, from France, Germany, Japan, South Korea, Taiwan, the Netherlands, Norway, Sweden, Switzerland, and the United Kingdom, have served, or have been sentenced to serve, prison terms in the United States.

Despite these successes, DOJ recently reported to Congress about the difficulties these investigations entail. Specifically, it noted the cost and complexity of pursuing cartels with parties and evidence located abroad, along with the inherent language barriers.

DOJ has responded to these challenges by seeking greater cooperation with the other 117 competition authorities operating in 103 jurisdictions worldwide. In November, DOJ noted that it is ''working hard to establish 'pick-up-the-phone' relationships with an increasing number of agencies around the world, which have an interest in investigating . . . cartel activity along with us.'' The most notable effort has been DOJ's role in helping to found the International Competition Network (ICN) in October 2001, an increasingly active global forum for competition authorities. On March 29, 2011, DOJ co-hosted the first ICN roundtable on enforcement cooperation in Washington, D.C., to discuss how agencies can overcome hurdles to broader cooperation. This is just one recent example of the ICN's expanding role.

DOJ's efforts also have yielded significant benefits in the form of formal cooperation agreements with foreign competition authorities. In just a recent two-year period, DOJ executed agreements with three countries (Chile, China, and Russia) for the first time. DOJ expects to sign a similar pact in 2012 with the competition commission of India.

The Antitrust Division also established the Visiting International Enforcer Program to invite mid- and senior-level officials from foreign competition authorities to come to the Antitrust Division's Washington headquarters, while the Antitrust Division will send its own attorneys abroad. The first exchange occurred in November with the European Commission.

Developments In the Antitrust Division

New Acting Assistant Attorney General. The former assistant attorney general (AAG) for the Antitrust Division departed Aug. 5, and Attorney General Eric Holder appointed Sharis Pozen to serve as the acting assistant attorney general. Pozen, who joined the Antitrust Division in February 2009 and served as chief of staff to the AAG, announced that she plans to resign effective April 30. On February 3, President Obama nominated William Baer to be the next AAG for the Antitrust Division.[4]

Proposed Closure of Four Field Offices. In a controversial move, DOJ recently proposed closing four of the Antitrust Division's seven field offices: Atlanta, Cleveland, Dallas, and Philadelphia. The closings are expected to save nearly $8 million. However, Pozen emphasized not long ago that the ''primary purpose of the

Sharis Pozen's congressional testimony in December 2011, where she stated that DOJ ''obtained over $520 million in criminal fines'' during FY 2011.

[3] 06 WCR 826 (10/7/11).

[4] 07 WCR 129 (2/10/12).

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reorganization is to realign the Antitrust Division's field office structure to meet . . . its evolving workload'' and not simply to cut costs.

GAO Report on ACPERA. The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA) sought to increase self-reporting of anticompetitive behavior by:

- increasing the maximum fines and sentences available for Sherman Act violations, and
- protecting individuals and companies from treble damages and joint-and-several liability in private lawsuits when they self-report criminal antitrust violations.

In 2010, Congress extended ACPERA for an additional 10 years and directed the Government Accountability Office to analyze ACPERA's effectiveness and the propriety of allowing qui tam proceedings or creating whistleblower protections.

In July, the GAO concluded that although the number of leniency applicants did not increase following ACPERA, leniency applicants tended to report more conduct of which DOJ was unaware and that penalties increased in criminal cartel cases. Interestingly, DOJ disputed that ACPERA was the primary cause of these latter two developments.

Additionally, the GAO dismissed the idea of allowing qui tam proceedings because of concerns raised by DOJ and other stakeholders. As an alternative, the report considered a whistleblower reward program, which would pay a ''bounty'' for information leading to criminal antitrust convictions.

However, DOJ and other stakeholders recommended against such a program, fearing it could undermine the credibility of witnesses or increase the number of noncredible or fraudulent claims. These concerns caused the GAO to express hesitation about the potential benefits of such a program.

The GAO was, however, supportive of new antiretaliation provisions to protect whistleblowers who report criminal antitrust violations. These proposals enjoyed the unanimous support of the interviewed stakeholders, although senior Antitrust Division officials refused to take a position.

Developments in Significant Cartel Investigations

Municipal Bonds. DOJ's success in obtaining monetary assessments in its municipal bonds investigation was its crowning achievement during 2011. In December 2010, DOJ announced that Bank of America had been admitted to the division's Corporate Leniency Program for reporting its participation in manipulation of the bidding process within the municipal bond derivatives market. Although Bank of America received immunity from prosecution, it agreed to pay $137 million in restitution to various federal and state agencies.[5]

Additionally, in November 2010 DOJ announced the guilty plea of a former JPMorgan executive for his role in a bid-rigging conspiracy.[6] The department followed that with an announcement in December 2010 that three UBS executives were indicted for their alleged participation in the municipal bond conspiracy.[7]

Further investigative progress came on March 30, 2011, when DOJ announced that an employee of an unnamed bank headquartered in Charlotte, N.C., agreed to plead guilty to falsifying bank records to facilitate the payment of kickbacks to brokers in the municipal bond market.[8]

During the next nine months of 2011, DOJ announced a succession of NPAs with four major financial institutions in which the bank admitted to participating in the municipal bond conspiracy and agreed to pay restitution, disgorgement, and penalties totaling nearly $600 million to various federal and state agencies.

On May 4, UBS entered into the first NPA with DOJ and agreed to pay restitution, penalties, and disgorgement totaling $160 million.[9] On July 7, JPMorgan entered into a similar NPA and agreed to pay $211 million.[10] And on Dec. 8, Wells Fargo Bank entered a NPA and agreed to pay $148 million in restitution, disgorgement, and penalties for Wachovia Bank's[11] role in the municipal bonds bid-rigging cartel.[12] More recently, on Dec. 23, GE Funding entered into a NPA relating to the municipal bond cartel and agreed to pay $70 million.[13]

Since the initial settlement agreements reached between Bank of America and various state and federal agencies, DOJ's investigation has resulted in the payment of $727 million in restitution, penalties, and disgorgement from the five financial institutions.

Moreover, DOJ filed criminal charges against one corporation and 18 former executives of financial services companies; the corporation and 10 of the 18 executives pleaded guilty by the end of 2011.

The first charges against an entity came in October 2009 against Rubin/Chambers, Dunhill Insurance Services Inc., also known as CDR Financial Products.[14] CDR is also the sole corporate defendant charged to date. Public entities hired CDR to assist in the issuance of municipal bonds. DOJ charged that it conspired with financial institutions to rig the competitive bidding process for those bonds. CDR and David Rubin, the company's founder, pleaded guilty Dec. 30, 2011, to conspiracy and wire fraud charges.[15] Two other CDR executives—Zevi Wolmark and Evan Zarefsky—pleaded guilty Jan. 9, 2012.

Interestingly, DOJ relied on corporate NPAs in this investigation even though such agreements had rarely been used previously. In the press releases announcing the NPAs, DOJ articulated four reasons for their use:

- admission of conduct;
- cooperation with DOJ and other enforcement and regulatory agencies;
- monetary and nonmonetary commitments to other state and federal enforcement authorities; and
- remedial efforts to address the anticompetitive conduct.

[5] 05 WCR 898 (12/17/10).
[6] 05 WCR 846 (12/3/10).
[7] 05 WCR 880 (12/17/10).
[8] 06 WCR 285 (4/8/11).
[9] 06 WCR 377 (5/6/11).
[10] 06 WCR 581 (7/15/11).
[11] Wells Fargo acquired Wachovia on Dec. 31, 2008.
[12] 06 WCR 1072 (12/16/11).
[13] 07 WCR 12 (1/13/12).
[14] 04 WCR 775 (11/6/09).
[15] 07 WCR 11 (1/13/12).

It is not yet clear whether DOJ's use of NPAs in the municipal bonds investigation signals a broader policy change or how it will impact the Corporate Leniency Program.

Air Cargo. The multi-year, worldwide efforts to investigate and prosecute the fixing of fuel surcharges in the international air cargo industry continued into 2011. Since first publicly acknowledging the existence of its investigation in February 2006, DOJ has charged 22 airlines and 21 individuals in relation to this investigation, resulting in more than $1.8 billion in criminal fines. Six executives have been sentenced or have agreed to serve prison time.

During 2011, only one additional airline was implicated. EVA Airways Corp., a Taiwan-based airline, agreed in May to plead guilty and pay a $13.2 million criminal fine for participating in a conspiracy to fix fees charged for certain international air shipments.[16] Additionally, two executives of Air France, Jean Charles Foucault and Marc Boudier, were indicted by a federal grand jury in April.[17] Both defendants are foreign nationals, and bench warrants have been issued for their arrest.

DOJ also secured its first guilty pleas against executives since September 2009 when five individuals, all of whom were indicted in 2010, agreed to plead guilty. In September and November 2011, three of these executives—George Gonzalez, Guillermo ''Willy'' Cabeza, and Luis Juan Soto—accepted plea agreements that deferred sentencing to the court's discretion. Two other executives from Cargolux Airlines, Ulrich Ogiermann and Robert Van de Weg, agreed in December to plead guilty, serve 13 months in prison, and pay a $20,000 criminal fine.[18]

It is notable that these agreed-upon sentences are considerably longer than the six- or eight-month sentences DOJ agreed to in all four of its prior plea agreements with airline executives in 2008 and 2009.

Additionally, Rodrigo Hidalgo, an executive indicted in the air cargo investigation, recently secured the dismissal of the indictment against him in the U.S. District Court for the Southern District of Florida. In January 2009, DOJ and LAN Cargo entered into a plea agreement for antitrust violations that immunized LAN Cargo's employees and subsidiaries. Hidalgo successfully argued that he was, in part, an employee of LAN Cargo during the period covered by the plea agreement.

Another corporate defendant, Florida Air, relied on a similar argument but failed to secure the dismissal of its indictment. The court held that, because LAN Cargo owned only 25 percent of Florida Air, Florida Air was not a ''subsidiary'' of LAN Cargo and, therefore, it was not covered by the plea agreement. The court's opinion suggested that a majority share of voting control is necessary for a company to be considered a subsidiary under a plea agreement.

Freight Forwarding. For the second consecutive year, DOJ announced plea agreements with companies in the freight-forwarding industry. In September, seven Japanese corporations agreed to plead guilty and pay criminal fines totaling more than $46 million for their participation in a conspiracy to fix certain fees for freight-forwarding services for air cargo shipments from Japan to the United States.[19]

These agreements follow a similar series of plea agreements reached with six other international freight-forwarding companies in September 2010, resulting in criminal fines exceeding $50 million.

Coastal Water Freight Transportation. DOJ's ongoing investigation into collusive conduct in the coastal water freight transportation industry resulted in its first charges against corporations in 2011. Five executives from Horizon Lines LLC and Sea Star Line LLC agreed to plead guilty in 2008 for market-allocation, bid-rigging, and price-fixing activities. Collectively, the five were sentenced to more than 11 years in prison, including a 48-month sentence for Peter Baci, the longest prison sentence ever imposed for a single antitrust charge.[20]

In November 2011, Sea Star agreed to plead guilty and pay a $14.2 million criminal fine for its role in the conspiracy. DOJ also indicted Frank Peake, Sea Star's former president, for his alleged participation; he pleaded not guilty Dec. 15, 2011.

DOJ entered into a plea agreement with Horizon Lines in February requiring payment of a $45 million criminal fine. The plea agreement, however, caused a series of unexpected consequences over the subsequent four weeks that left Horizon Lines facing potential insolvency. The terms of Horizon Lines' outstanding debt deemed any judgment against the company in excess of $15 million to be a ''default'' that could trigger acceleration of its entire debt and a demand for immediate repayment. The government and Horizon Lines erroneously expected that lenders would waive this default provision. The subsequent issuance of a 10-K filing with the Securities and Exchange Commission about the potential acceleration of Horizon Lines's debt had ''a very negative impact'' on the shipping firm's business. Consequently, DOJ filed a motion April 26, which the court approved, to reduce the sentence to $15 million to avoid activation of the debt's default provisions.

Thin Film Transistor-Liquid Crystal Displays. DOJ's ongoing investigation into price-fixing in the TFT-LCD industry progressed with minimal fanfare during 2011. The sole expansion of the investigation during the year occurred in January with the indictment of Ding Hui Joe, then-president of HannStar Display Corp.[21]

Opening statements in the government's case against AU Optronics Corp., the sole corporation to be indicted to date in the investigation, and seven AU Optronics executives were heard on Jan. 10, 2012. The U.S. District Court for the District of Northern California rejected efforts to have the charges dismissed due to the extraterritorial nature of the alleged offenses, paving the way for a rare criminal antitrust trial.

The AU Optronics case presents several challenging issues with respect to sentencing considerations. In a ruling in July, Judge Susan Illston tackled the application of *Apprendi v. New Jersey*[22] to the alternative sentencing provision available for Sherman Act violations.

[16] 06 WCR 441 (6/3/11).
[17] 06 WCR 360 (5/6/11).
[18] 06 WCR 1077 (12/16/11).
[19] See 06 WCR 824 (10/7/11) and 06 WCR 876 (10/21/11).
[20] 04 WCR 98 (2/13/09).
[21] 06 WCR 44 (1/28/11).
[22] 530 U.S. 466 (2000).

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Federal law provides that a defendant can be liable for twice the pecuniary gain or loss suffered from its collusive conduct, even if that amount exceeds the $100 million maximum fine authorized by the Sherman Act. *Apprendi* requires that facts that can increase certain penalties beyond statutory maximums be submitted to a jury and proved beyond a reasonable doubt. Illston held that *Apprendi* requires a jury determination of the total gain or loss suffered from a defendant's conduct before a criminal fine in excess of $100 million can be obtained for a Sherman Act violation. This decision is believed to be the first to apply *Apprendi* in the antitrust context.

On Dec. 23, Illston adopted an inclusive approach to determining the pecuniary gain used in applying the alternative sentencing guidelines. While the court limited the ''gross gain'' calculation to the portions of the conspiracy with an effect on the United States, it ordered that the ''gross gain'' include the gain from the sales of the TFT-LCD panels *and the finished products* containing those panels. The court also agreed with the government's position that the total ''gross gain'' should include the gain flowing to all conspirators jointly, rather than solely the defendant's own gain. We believe Illston's ruling could significantly increase the defendants' exposure under the alternative sentencing provisions in criminal antitrust cases.

Cathode Ray Tubes. During 2011, DOJ secured its first corporate guilty plea and criminal fine as part of its investigation into price-fixing in the CRT industry. In March, Samsung SDI Co. agreed to plead guilty and pay a $32 million criminal fine for its participation in the CRT conspiracy.[23] Initially, DOJ encountered some unexpected difficulty in persuading Judge William Alsup, of the U.S. District Court for the Northern District of California, to accept the plea agreement. The court questioned, among other issues, the absence of restitution in the plea agreement and the use of a binding agreement under Fed. R. Crim. P. 11(c)(1)(C) in light of the defendant's cooperation obligations. Judge Alsup ultimately agreed that restitution was better deferred to a civil proceeding and that he would accept the binding form of the plea agreement, but he said he would not do so again.

In addition, DOJ indicted six executives in 2009 and 2010 for their roles in the CRT conspiracy, including the former chairman and chief executive officer of Chunghwa Picture Tubes Ltd. None of the defendants—all of whom are residents of Taiwan or Korea—has yet made an appearance.

Optical Disk Drives. Another high-tech industry cartel came to light when DOJ filed charges against Hitachi-LG Data Storage Inc., a joint venture of Hitachi Ltd. and LG Electronics Inc., and three Hitachi-LG executives for price-fixing and bid-rigging in the optical disk drive market. The conspirators sought to rig bids or fix prices offered to Dell Inc., Hewlett-Packard Co., and Microsoft Corp. for various types of optical disk drives. Optical disk drives include CD-ROMs, CD-RWs, DVD-ROMs, and DVD-RWs.

In September, Hitachi-LG agreed to plead guilty and pay a criminal fine of $21.2 million. The three executives subsequently agreed in December to plead guilty and to serve prison sentences ranging from seven to eight months.[24]

Auto Parts. In what may be the largest antitrust investigations ever conducted, numerous competition authorities—including DOJ, the European Commission, and the Japan Fair Trade Commission—are conducting investigations regarding collusion among auto parts suppliers to fix prices on sales to auto manufacturers. DOJ reportedly launched the investigation in February 2010 and, with the assistance of the FBI, has carried out searches of 20 suppliers across multiple auto industry sectors. Already in 2012, DOJ has announced criminal fines totaling $548 million in its investigation, including a fine of $470 million against the Yazaki Corp. and a fine of $78 million against the DENSO Corp.[25] Yazaki's fine represents the second-largest criminal fine ever obtained for a Sherman Act antitrust violation. Additionally, four former Yazaki Corp. executives face prison terms ranging from 15 months to two years.

As part of this investigation, DOJ announced Sept. 29, 2011, that Furukawa and three of its foreign-national executives had agreed to plead guilty in connection with a price-fixing and bid-rigging conspiracy involving the sale of automotive wire harnesses to automobile manufacturers. The executives—Junichi Funo, Hirotsugu Nagata, and Tetsuya Ukai—agreed to prison sentences of 12 months, 15 months, and 18 months, respectively.

Meanwhile, Furukawa's $200 million was the single largest criminal fine secured by DOJ in FY 2011 and one of the 10 largest criminal fines in the Antitrust Division's history. It is also the largest fine against a Japanese defendant.

Moreover, two corporations in the after-market auto lights sector and their respective executives pleaded guilty during 2011. Polo Shu-Sheng Hsu, the president and CEO of Maxzone Vehicle Lighting Corp., pleaded guilty in February and agreed to serve a 180-day prison sentence.[26] In September, Maxzone agreed to enter its own guilty plea and pay a $43 million criminal fine. In June, Chien Chung Chen, executive vice president of Sabry Lee (U.S.A.) Inc., entered into a plea agreement recommending no more than a 12-month prison sentence. Sabry Lee pleaded guilty in August and agreed to pay a $200,000 criminal fine.

DOJ also pursued charges against two additional corporations and their executives in dramatic fashion, beginning with the arrest of an executive at Los Angeles International Airport. Homy Hong-Ming Hsu, the vice chairman of Eagle Eyes Traffic Industrial Co., was intercepted at LAX on July 12 and indicted one week later. In November, DOJ secured a superseding indictment adding charges against Eagle Eyes, E-Lite Automotive Inc. (Eagle Eyes's U.S.-based subsidiary), and Yu-Chu Lin, the chairman of Eagle Eyes. Hsu and both corporate entities pleaded not guilty Dec. 20. The trial is scheduled for June 2012.

Ready-Mix Concrete. During 2010, DOJ secured guilty pleas from three executives involved in a conspiracy to fix prices and rig bids for ready-mix concrete in northwest Iowa—an increasingly rare investigation into any

[23] 06 WCR 235 (3/25/11).

[24] 06 WCR 1078 (12/16/11).
[25] 07 WCR 109 (2/10/12).
[26] 06 WCR 141 (2/25/11).

sort of entirely domestic cartel. In 2011, DOJ shifted its focus to the corporate entities and secured guilty pleas from four of the involved ready-mix companies.

When DOJ sought court approval of its earlier plea agreements with two of the individual defendants, it was surprised to encounter difficulties that resulted in significant departures from its sentencing recommendations.

Judge Mark W. Bennett, of the U.S. District Court for the Northern District of Iowa, gave early indications of his displeasure with DOJ's proposed plea agreement with Steven K. VandeBrake. DOJ originally agreed to a binding Rule 11(c)(1)(C) plea agreement that called for a 19-month prison sentence and a $100,000 criminal fine. When the judge indicated he was likely to reject the agreement, VandeBrake chose to convert to a nonbinding Rule 11(c)(1)(B) plea agreement.

Bennett took advantage of that change and rejected the recommended sentence in a 108-page memorandum. The court found the proposed sentence and fine inadequate for numerous reasons, including VandeBrake's considerable personal wealth, lack of public service, and the inexplicably ''more lenient treatment of antitrust offenses than fraud crimes'' under the U.S. Sentencing Guidelines. Bennett ultimately sentenced VandeBrake to a 48-month prison term and a criminal fine of $829,715.[27] VandeBrake appealed his sentence to the U.S. Court of Appeals for the Eighth Circuit, which heard oral arguments Nov. 17.

Bennett also disregarded the government's recommended eight-month prison sentence for Chad Van Zee, although with a more pleasant outcome for Van Zee.

After a lengthy sentencing hearing, the court decided that a 45-day sentence was appropriate. In addition to the strong showing of support from the community at the sentencing hearing, Bennett took note of numerous other factors, including Van Zee's:

- long history of community service;
- willingness to settle the civil case for $1.2 million in an effort to accept responsibility;
- humble lifestyle; and
- cooperation with the government in the later phases of its investigation.

Marine Hose. DOJ obtained another corporate guilty plea in its long-running investigation into the marine hose industry, which produces a specialized hose used to transfer oil to tankers. In September, the Bridgestone Corp. agreed to plead guilty to violations of the Sherman Act and the Foreign Corrupt Practices Act and pay a $28 million criminal fine for its role in conspiring to rig bids, fix prices, and allocate market share in the marine hose market in the United States and abroad.[28] The FCPA charge involved a conspiracy to make corrupt payments to government officials in various Latin American countries to obtain and retain business.

Since the initial arrests in March 2007, the marine hose investigation has resulted in convictions of five corporations and nine executives.

Bridgestone is the first successful joint FCPA-antitrust case brought by DOJ against a corporate entity and required unprecedented cooperation between DOJ's Antitrust Division and its Criminal Division.[29]

Despite its apparent novelty, these types of joint prosecutions were anticipated more than a decade ago in a speech by Gary Spratling, then-deputy assistant attorney general of the Antitrust Division and current Gibson Dunn partner. During his speech at an FCPA conference in December 1999, Spratling argued that there is a ''recurring intersection of conduct that violates both the Sherman Antitrust Act and the Foreign Corrupt Practices Act.'' As one example of this overlap, he noted that ''corrupt payments to foreign government officials are often made to facilitate international bid-rigging conspiracies.'' With a successful model for cooperation now in place, we expect to see more of these joint investigations in the future.

Real Estate Auctions. DOJ's ongoing investigation into bid-rigging at real estate foreclosure auctions expanded exponentially in 2011. The investigation now includes suspected conspiracies in multiple geographic areas, including Northern California, central California, New Jersey, and Alabama. The government alleges that the co-conspirators in each of the geographic areas agreed not to bid against each other in order to secure foreclosed properties at favorable prices and split the proceeds from subsequent market-rate resales.

During FY 2011, DOJ secured guilty pleas from 21 individuals. In the first three months of FY 2012, the department secured guilty pleas from an additional nine individuals and indicted five others. The real estate auction defendants represented more than 25 percent of the individuals charged by the Antitrust Division during FY 2011. None of these defendants has been sentenced.

Refrigerant Compressors. The United States and Canada secured criminal fines of more than $140 million from Panasonic Corp. and Embraco North America Inc. in late 2010 after reaching the first plea agreements in a new investigation into the refrigerant compressor industry. The plea agreements revealed a conspiracy to coordinate a price increase among manufacturers of refrigerant compressors used in refrigerators and freezers.

In 2011, the Antitrust Division shifted its efforts in this investigation to new cartel members and individual executives. On Sept. 27, the Antitrust Division announced the indictment of three former senior executives who are alleged to have participated in the conspiracy.[30] Additionally, the Antitrust Division entered into a plea agreement with Danfoss Flensburg GmbH (formerly Danfoss Compressors GmbH) in October 2011 that imposed a $3 million criminal fine for its participation in the conspiracy.

[27] 06 WCR 142 (2/25/11).
[28] 06 WCR 778 (9/23/11).
[29] The 2008 conviction of a Bridgestone executive for similar violations of the Sherman Act and FCPA was the first joint FCPA-antitrust prosecution of an individual.
[30] 06 WCR 821 (10/7/11).

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