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CLIENT ALERT

Eighth Circuit Approves Use of Fraud Guidelines for Antitrust Crimes

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In a landmark decision that could have a significant impact on sentencing in antitrust cases, the Eighth Circuit affirmed a lower court's use of U.S. Sentencing Guidelines ("Sentencing Guidelines") for fraud, rather than the applicable guidelines for antitrust violations. *U.S. v. VandeBrake*, No. 11-1390, 2012 WL 1448486 (Apr. 27, 2012). Because the fraud sentencing guidelines allow for more severe penalties in many cases, the Eighth Circuit's decision is likely to affect some antitrust defendants' decisions about whether to plea and, if so, what sentence to accept. In addition, DOJ will likely rely upon this decision during plea negotiations to advocate for stiffer sentences.

District Court Opinion

In February 2011, Steven VandeBrake pled guilty to three antitrust conspiracies for price fixing and bid-rigging related to his family's business, which sold concrete products throughout northwest Iowa. The conspiracies took place between January 2006 and August 2009, and impacted approximately $5.6 million in commerce. The defendant first sought to enter a guilty plea pursuant to a binding Rule 11(c)(1)(C) plea agreement, which called for 19 months in jail and a $100,000 fine. After the court expressed its dissatisfaction with the terms of the plea, VandeBrake elected to enter a non-binding Rule 11(c)(1)(B) plea agreement. Following a three-day sentencing hearing, the court turned the proposed sentence on its head – applying the fraud guidelines to VandeBrake's conduct and imposing 48 months of imprisonment, followed by three years of supervised release and a $829,715.85 fine. The sentence far exceeded VandeBrake's 21 – 27 month antitrust guidelines range, and equaled the longest term of imprisonment ever imposed for an antitrust violation.

The district court's rejection of the antitrust guidelines was predicated on two grounds: the court's policy disagreement with the antitrust guidelines and the defendant's lack of remorse. The court's policy disagreement focused on the disparity between sentencing in antitrust offenses and fraud offenses – because both create similar societal harm, the court found that it was unsound policy to punish them differently. In particular, the court was troubled because while the antitrust guidelines call for a higher base offense level than the fraud guidelines, the antitrust guidelines make it much more difficult to increase the offense level. The district court found no principled reason to apply the built-in sentencing discount of the antitrust guidelines. Instead, the district court applied the fraud guidelines, estimated loss at 10% of the $5.6 million in affected volume of commerce and increased the offense level by 14 levels, rather than the "meager two point increase" called for by the antitrust guidelines. *VandeBrake*, at *3.

The district court also justified its variance on VandeBrake's lack of remorse, including his self-serving statement at sentencing where he minimized the impact of his conduct. The court found "'most disquieting'" that the defendant was already independently wealthy at the time of the offenses, and also noted that the pre-sentence report contained no record of a "'single good deed done'" by VandeBrake. *Id*.

Eighth Circuit Opinion

In upholding the district court's decision, the Eighth Circuit held that both grounds for varying upward from the antitrust guidelines range were permissible. It held that the district court's use of the fraud guidelines was reasonable, stating that the "court considered appropriate factors in varying from the guidelines, and adequately explained its sentence." *Id*. at 9. The Eighth Circuit stated that the court's policy disagreement with the antirust guidelines was "based in large part upon case-specific circumstances, and the end result was an antitrust sentence more comparable to a fraud sentence based upon a similar amount of loss." *Id*. The court applied the substantive reasonableness standard, and explicitly rejected the dissent's call for a "closer review" based on *Kimbrough v. U.S.*, 552 U.S. 85 (2007).

While the underlying district court opinion has only been cited in a single reported decision (by the same district court), the Eighth Circuit's approval will likely change that. More importantly, practitioners should expect that DOJ will use the Eighth Circuit's decision in *VandeBrake* as leverage in its negotiations with defendants over the terms of any Rule 11(c)(1)(C) plea agreements involving antitrust violations. However, the case would appear to be a candidate for rehearing en banc so the court's recent decision may not be the last word.

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