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DOJ Stays Are Often Unfair To Private Antitrust Plaintiffs


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Law360, New York (March 03, 2014, 4:37 PM ET) -- In recent years, the U.S. Department of Justice has increasingly sought and successfully obtained full or partial discovery stays of private litigation during the pendency of its criminal proceedings. While this growing trend does offer some additional safeguards to the secrecy and integrity of grand jury proceedings, it can also unduly interfere with the just and efficient adjudication of private antitrust claims.

These claims are often the primary, if not only, means for victims of anti-competitive conduct to obtain restitution. To be sure, when the government pursues criminal penalties, it frequently elects not to pursue restitution in deference to the "treble damages actions filed by the victims."[1] Consequently, while discovery stays may serve to protect the integrity of grand jury investigations, they should be invoked more sparingly so that private litigants can effectively and expediently pursue their own claims.

Background

Up until the past decade, the Antitrust Division of the Department of Justice did not traditionally seek discovery stays in parallel civil litigation. Instead, it was more common for antitrust defendants to request stays of discovery pending the resolution of parallel criminal proceedings — and these requests were frequently rejected by the courts.[2] In fact, the Antitrust Division, on occasion, would decline to take any position on a defendant's requested discovery stay because it was satisfied that the secrecy of its criminal proceedings was preserved through the use of a protective order.[3]

In the past decade, however, the DOJ has begun to aggressively seek and obtain discovery stays in parallel civil actions to protect grand jury proceedings.[4] According to the Antitrust Division Manual, Fifth Edition, the DOJ generally considers the following factors when determining whether to seek a stay: whether civil discovery will lead to the disclosure of secret grand jury information or covert aspects of an investigation including spinoff investigations; whether civil discovery will expose the identities of government cooperators and lead to witness intimidation; whether civil discovery will give noncooperating subjects of a grand jury investigation a roadmap to the investigation, revealing its scope and direction; whether civil discovery will allow grand jury subjects or defendants to use civil tools improperly to circumvent the limited discovery rules of the Federal Rules of Criminal Procedure to

obtain material in defense of a grand jury investigation or criminal case; and whether potential Government witnesses will be deposed before the witness has been interviewed by the division or testified before the grand jury or at trial.

Invoking these concerns, the division has successfully obtained discovery stays in civil proceedings in a wave of antitrust cases filed throughout the country.

The Proper Balancing Test

In addressing the court's authority to stay proceedings, Justice Benjamin Cardozo once wrote:

[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.[5]

While there is no uniform balancing test to assess the propriety of a requested stay, courts generally consider the following five factors:

1. the interest of the plaintiffs in proceeding expeditiously with th[e] litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay;

2. the burden which any particular aspect of the proceedings may impose on defendants;

3. the convenience of the court in the management of its cases, and the efficient use of judicial resources;

4. the interests of persons not parties to the civil litigation; and

5. the interest of the public in the pending civil and criminal litigation.[6]

Many courts have ultimately weighed these factors in favor of the DOJ's requested discovery stay.[7] However, the better course may be to give greater deference to the interests of civil plaintiffs by more narrowly tailoring a discovery stay to promote the efficient adjudication of private claims. Importantly, by giving greater weight to the prosecution of private claims, courts will avoid the prejudice associated with further prolonging the civil litigation.

Discovery Stays Prejudice Private Plaintiffs By Delaying Their "Day In Court"

Protracted stays of parallel civil litigation can greatly disadvantage private plaintiffs. While a discovery stay is in place, memories fade, and witnesses and records become unavailable. And in the particular context of antitrust litigation, justice delayed may in fact be justice denied because a price-fixing cartel can exist for years (or even decades) before it is detected by antitrust enforcers. Thus, antitrust litigation is typically brought many years after relevant evidence is generated and witnesses have participated in key events.

In In re Scrap Metal Antitrust Litigation, these precise concerns ultimately persuaded the court to deny a requested discovery stay in favor of the interests of private plaintiffs. Emphasizing the U.S. Supreme Court's "longstanding policy of encouraging vigorous private enforcement of the antitrust laws,"[8] the

court expressly rejected the DOJ's argument that a stay was necessary to preserve the integrity of its criminal investigation. Indeed, the court found that these concerns could be alleviated through the implementation of certain procedural safeguards.

Prolonged stays of civil litigation may also affect a plaintiff's ability to seek relief for unknown violations that it would have uncovered during the limitations period if discovery had been progressing at a normal pace. This theoretical problem became very real for the parties in In re: Aftermarket Auto. Lighting Prod. Antitrust Litig., where an employee of defendant TYC Brother Industrial Co. Ltd told government prosecutors that the conspiracy began in 1999, but failed to disclose the same information to the civil litigants.

TYC's failure to provide the information to civil plaintiffs limited the scope of their case and significantly reduced their potential recovery because the limitations period had expired. The court, therefore, refused to de-treble TYC's damages under the Antitrust Criminal Penalty Enhancement and Reform Act.[9] Although TYC's delay in producing relevant information was not directly caused by a government stay, the case illustrates the extreme consequences of delaying discovery, especially discovery produced to government enforcers, in private litigation.

Appropriate Limitations on Discovery Can Promote the Interests of Both Government and Private Plaintiffs

There are a number of narrow limitations that can be placed on discovery to both preserve the integrity of a government investigation while allowing private plaintiffs to effectively prosecute their cases.

First, the court can act as an intermediary to ensure that discovery in the private action does not jeopardize the government's investigation. In Scrap Metal, for example, the DOJ was required to submit to the court a list of witnesses whose depositions would materially affect the integrity of the government's investigation. Plaintiffs were similarly required to submit a list of prospective deponents to the court before they noticed any depositions. The court would then review both lists and notify the parties when a deposition could (or could not) proceed.[10]

Second, the court can limit discovery to information that is not expressly tied to the government's investigation. In fact, the government has withdrawn motions for protective orders when the parties have agreed to broaden the discovery beyond any specific exchange of information with the government.

For example, in In re Plastics Additives Antitrust Litigation the DOJ sought to limit defendant Rohm and Haas Corporation's request for any discovery "relating to any proffer, presentation, or application for conditional amnesty involving any Plastics Additives products made to the United States Department of Justice or any foreign competition authority on behalf of [co-defendant] Crompton Corporation."[11] However, the DOJ withdrew its motion when the defendant agreed to withdraw its request so long as it was still permitted to seek "the factual information underlying any communication to the Government by Crompton."[12]

Finally, the court can permit any discovery that is related to class certification or damages, such as transactional data, which has no bearing whatsoever on the government's investigation. This discovery is particularly necessary in the wake of the Supreme Court's recent decisions on class certification, which arguably require plaintiffs to satisfy a higher burden in meeting the prerequisites of Rule 23 of the Federal Rules of Civil Procedure.[13]

Thus, by purposefully focusing discovery away from the DOJ's criminal investigation, plaintiffs may gather relevant material in a timely fashion while greatly reducing the likelihood that such discovery will compromise the government's criminal investigation.

Conclusion

The Supreme Court once noted that a rule "that the civil suit must await the trial of the criminal action might result in injustice."[14] Over a hundred years later, these cautionary words are particularly relevant given the potential implications of staying private antitrust lawsuits in deference to criminal proceedings. While courts should take every care to protect the integrity of criminal investigations, a more narrow approach to discovery stays is the preferable course to prevent any injustice to victims of antitrust violations.

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[1] See U.S. Dep't of Justice, Antitrust Division Workload Statistics FY 2003-2012, 11 n.15, http://www.justice.gov/atr/public/workload-statistics.html ("[F]requently restitution is not sought in criminal antitrust cases, as damages are obtained through treble damage actions filed by the victims.").

[2] See e.g., In re Mid-Atlantic Toyota Antitrust Litig., 92 F.R.D. 358 (D. Md. 1981); Golden Quality Ice Cream v. Deerfield Specialty Papers, Inc., 87 F.R.D. 53(E.D. Pa. 1980).

[3] See Golden Quality Ice Cream, 87 F.R.D. at 59.

[4] See, e.g.,Order granting United States' Motion to Stay Discovery, In re TFT-LCD (Flat Panel) Antitrust Litig., No. 07-1827 (N.D. Cal. Sept. 25, 2007) ECF No. 306; Order granting Stipulation to Stay all Deposition and Interrogatory Discovery, In re Static Random Access Memory (SRAM) Antitrust Litig., Case No. 4:07-md-01819-CW (N.D. Cal. June 12, 2007) ECF No. 208; In Re Dynamic Random Access Memory (DRAM) Antitrust Litig., No. 02-1486 (N.D. Cal. Mar. 26, 2003) ECF No. 62 (minute entry for motion hearing at which DOJ's stay request granted); see also Order, In re Municipal Derivatives Antitrust Litig., Case No. 08-cv-02516-VM-GWG (S.D.N.Y. May 27, 2010) ECF No. 755 (granting in part and denying in part DOJ's application to stay discovery); Order, In re Elec. Carbon Prods. Antitrust Litig., Case No. 03-2182 (D.N.J. Oct. 19, 2004) ECF No. 166 (granting in part DOJ's motion for a limited stay of discovery).

[5] Landis v. N. Am. Co., 299 U.S. 248, 254-55 (1936).

[6] See, e.g., Federal Sav. & Loan Ins. Corp. v. Molinaro, 889 F.2d 899, 903 (9th Cir. 1989).

[7] See supra note iv.

[8] In re Scrap Metal Antitrust Litig., Case No. 1:02CV0844, 2002 U.S. Dist. LEXIS 28690, at *24 (N.D. Ohio Nov. 7, 2002) (quotation marks and citation omitted).

[9] In re Aftermarket Auto. Lighting Prods. Antitrust Litig., Case No. 09 MDL 2007-GW(PJWx), 2013 U.S. Dist. LEXIS 125287, at *17-18 (C.D. Cal. Aug. 26, 2013).

[10] Scrap Metal, 2002 U.S. Dist. LEXIS 28690, at *26.

[11] Motion for Protective Order filed by United States, In re Plastics Additives Antitrust Litig., Case No.

2:03-cv-02038-LDD (E.D. Pa. July 6, 2005) ECF No. 187.

[12] Exhibit 1 to Notice to Withdraw Motion for Protective Order filed by United States at 2, In re Plastics Additives Antitrust Litig., Case No. 2:03-cv-02038-LDD (E.D. Pa. July 19, 2005) ECF No. 202.

[13] See, e.g., Comcast Corp. v. Behrend, 133 S.Ct. 1426 (2013); Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011).

[14] Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 52 (1977).