Navigating Criminal Antitrust Inability-To-Pay Claims With DOJ

By **Jeffrey Martino, Sonny Carpenter and Kayley Sullivan** (January 22, 2020)

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On Oct. 8, 2019, the U.S. Department of Justice's Criminal Division announced a new policy giving defense counsel a clearer framework for building a successful argument that a criminally charged company is unable to pay the proposed monetary fine.

Despite this, other department components have not followed suit or indicated they will or do take into account similar considerations. One area in which these types of claims often arise is in the criminal antitrust context. In these cases, corporate defendants that face crippling monetary penalties may lack sufficient clarity on how to engage with the Antitrust Division in making these claims.

Background

Corporate entities facing criminal charges (and the associated monetary penalties) have long had the ability under the U.S. Sentencing Guidelines to argue that they are financially unable to pay the associated fine sought by the DOJ if the fine threatens the continued viability of the organization.[1]

Likewise, companies seeking to make this argument have long lacked clarity and transparency from both the department and courts on what is considered and found to be persuasive in making these determinations. Corporate defendants received relief from the Criminal Division when it announced a new policy that provides a clearer framework for what the government considers in evaluating these claims.

The Criminal Division update brought clarity and specificity to provisions of the sentencing guidelines, giving criminally charged companies a framework for how inability-to-pay claims will be evaluated.[2] Companies are asked to fill out a questionnaire and provide documentation relating to several factors, such as recent cash flow projections, restructuring plans, and operating budgets and projections of future profitability.

Following this announcement, the division had no response until Nov. 21, 2019, more than one month after the release of the Criminal Division memorandum. On Nov. 21, the division stated that it is unlikely the division will follow suit and that the already-employed practices regarding corporate inability-to-pay arguments are not likely to be affected.

The division noted that placing the burden on companies to establish an inability to pay and requiring companies to cooperate fully are already division practices. However, this statement fails to address the substance of the memorandum most applicable to companies struggling to make effective inability-to-pay arguments — a working framework for what the department considers in making these determinations.

Recently, StarKist Co. and Bumble Bee Foods – household names in the tuna industry — made headlines after being charged in a price-fixing conspiracy. Both companies made

inability-to-pay arguments. StarKist's argument that it was not able to pay the proposed fine was not accepted by the DOJ or the court, with the division's citing StarKist's "faulty conclusions" and methods in reaching such determination as reasons not to accept that the company had a true inability to pay.

StarKist was ordered to pay the full $100 million fine.[3] These faulty conclusions include StarKist portraying a decline in the sale of canned tuna without including any information as to the sale of pouched tuna. Prosecutors argued that "[i]f future events threaten StarKist's ability to make restitution or remain financially viable, the government can petition the court to modify StarKist's fine."

Bumble Bee, on the other hand, was able to successfully argue that it was unable to pay the fine, significantly reducing the applicable penalty from $136.2 million to $25 million. Despite this, Bumble Bee was forced to file for bankruptcy, perhaps an indication of the dire financial situation the Division seeks in agreeing to these claims.

Muddy Waters — Issues Faced by Corporate Criminal Antitrust Defendants

There are many issues that a corporate antitrust defendant faces in making these arguments. First, the burden is on the defendant to prove the inability to pay.[4] This is often difficult without a good sense of what is going to be considered in that determination.

Plea agreements, court cases and the like typically provide few, if any, details about how an inability-to-pay determination was or was not granted. The disclosures tend to be bare-bones and conclusory.[5] On top of that, courts often give deference to the prosecutor's determination. The Antitrust Division manual states that "[p]robation officers and courts tend to rely heavily on recommendations of our analysts in these situations."[6]

Additional confounding factors for companies trying to navigate through making these claims include whether expenses related to civil antitrust treble damages or foreign jurisdiction fines should be taken into account. Explicit guidance from the DOJ on how and when these factors are considered would be a tremendous boost to defendants.

Victims of criminal conduct, including antitrust criminal conduct, are entitled to restitution by federal statute. The DOJ rarely seeks restitution in price-fixing cases. Companies convicted of federal crimes in general are three times more likely to be ordered restitution than are companies convicted of antitrust violations.[7]

Restitution statutes do not provide for treble damages as antitrust civil statutes do. Therefore, restitution sought by the government for victims serves as an inadequate substitute for civil suits.[8] The issue specific to antitrust defendants becomes whether and how much the possibility of parallel or future civil suits with associated treble damages should be taken into account when evaluating a company's inability to pay.

In determining the fine that a company is able to pay, the division must also take into account (as do others, such as the Criminal Division) already accrued or potential fines related to prosecutions in other jurisdictions.

The DOJ's no-piling-on policy instructs department divisions to "coordinate with and consider the amount of fines, penalties, and/or forfeiture paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct."[9] This makes the calculus of what the government will consider in a particular case even more difficult.

Mixed Incentives

One area that may make some prosecutors or officials in the DOJ hesitant to credit inability-to-pay arguments is the potential de-incentivization of cooperation. Components of the DOJ often credit cooperation by companies through a reduction in the applicable fine.

If the fine were to end up at the same place whether through cooperation or through an inability-to-pay argument, companies may be less inclined to work with the government. This would be a huge blow to prosecutors.

Acknowledging this, the DOJ has recently agreed to offer a discount in addition to the fine reduction based on a company's inability to pay.[10] Nevertheless, a cooperation discount may not be e appropriate for every corporate defendant. Defense counsel should weigh the significant financial and time burden on the company of cooperation.[11]

If the company does decide to cooperate, defense counsel must effectively argue that the DOJ's longstanding policy of encouraging and rewarding cooperation should apply and that the company deserves an additional reduction.

Additionally, as Mary Kreiner Ramirez suggests: "If caught and convicted, a corporation that does not maintain large cash reserves might even assert that it cannot pay the fine, thereby rendering superfluous the discount that the company might have received based upon a corporate compliance program."[12]

Prosecutors criticized StarKist's attempt to compare itself to Bumble Bee, which did receive a criminal fine reduction:

- "Bumble Bee's fine reflected a downward departure of over $50 million for substantial assistance [to prosecutors] – a reduction that StarKist did not earn or receive."[13]

- "A USD 50 million fine would not afford adequate deterrence to criminal conduct. Instead, it would demonstrate to other corporate defendants that they can escape just punishment for their crime by spending money on anything and everything else … other than the penalty for that crime."[14]

Case Studies

With all of these confounding factors and a lack of clear guidance, it is extremely difficult for companies to bring these claims. The muddle is often not aided by looking at how the Division has handled certain cases. There are some cases in which the company's inability to pay is corroborated by obvious tangible financial distress, such as a bankruptcy.

However, when this is not the case, it is difficult to sort out on a case-by-case basis what will lead to a successful claim. For example, in both Hynix Semiconductor Inc. and AU Optronics Corp. America, the companies indicated to investors that the fine (absent the inability-to-pay reduction) would not substantially jeopardize the continued viability of the company. However, in one case, the inability-to-pay claim was denied, with the government

making special note of this statement, while in the other, the inability-to-pay claim was accepted.

In 2005, the department secured a $185 million violation against Hynix Semiconductor Inc. for antitrust violations, granting the defendant's inability-to-pay claim despite the fact that Hynix reported operating profit for the fourth quarter of 2004 of roughly $420 million and capital surplus of $500 million.

Analysis reports indicated that Hynix was aggressively expanding its capital expenditures, including a new factory in China. Hynix also assured investors in public statements that the $185 million fine would not threaten its existence (the goal of the inability-to-pay discount) or even hurt its bottom line.

On the other hand, AU Optronics' president, Paul Peng, testified that AUO had set aside cash reserves for its criminal fine, had been informed of the possible highest amount for the fine and had run financial simulations to confirm "how we should manage our cash flow so that [the criminal fine] would not affect our company's operation."[15] The court did not grant AUO's inability-to-pay argument, imposing a $500 million fine, well above the $100 million Sherman Act maximum.

What Defense Counsel Can Do/Takeaways

Some of the best insights that experienced counsel can glean about how to successfully make these arguments can be found in the declarations of the government's financial experts and outside auditors. These experts will tend to review recent years' financial performance and forecasts of future performance. They will often ask companies for the past five years of audit reports, tax returns, debt agreements and covenants, statements of cash flow, and earnings releases.

Counsel looking to make these arguments must take the time and care to review their clients' financial statements, loan covenants and future projections of cash flow. They must understand that a successful claim will involve substantial in-depth financial disclosures to the government.

Courts and probation officers are often deferential to the DOJ's analysis of what constitutes a legitimate inability to pay. Therefore, it is extremely important that defense counsel take proactive and effective steps in persuasively arguing to the department why the company's financial situation truly represents an inability to pay.

Counsel should also ensure that they present the company's full financial picture, as the division will be quick to point out when they do not and thereby eroding counsel's credibility and creating quick grounds for a dismissal of its argument.

Amid little public information and a lack of clarity, consistency and transparency, successful inability-to-pay claims are difficult to make but best effectuated by defense counsel familiar with balancing the many issues at play and experienced at working and negotiating with the division on these types of cases.

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[1] Section 8C3.3 of the U.S. Sentencing Guidelines allows for a reduction in fines based on a company's inability to pay, "but not more than necessary to avoid substantially jeopardizing the continued viability of the company." U.S.S.G. § 8C3.3.

[2] Brian A. Benczkowski, Assistant Attorney General for the U.S. Dep't of Justice, Memorandum on Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty (Oct. 8, 2019), available at https://www.justice.gov/opa/speech/file/1207576/download.

[3] Cliff White, Judge Demands StarKist Explore Sale of TechPack to Pay Price-Fixing Fine, SeafoodSource (June 17, 2019), https://www.seafoodsource.com/news/supply-trade/judge-demands-starkist-explore-sale-of-techpack-to-pay-price-fixing-fine.

[4] United States v. Bradley, 644 F.3d 1213 (11th Cir. 2011). (Corporate defendant "offered nothing to demonstrate that it lacks sufficient assets to pay the fine it owes, much less that it would be unable to pay restitution to victims.").

[5] See, e.g., Plea Agreement, United States v. Elna Co. Ltd. (Oct. 12, 2017). "The United States and defendant further agree that a reduction to the Guidelines fine range is appropriate pursuant to U.S.S.G. § 8C3.3(b) due to the inability of the defendant to pay a fine greater than an amount that includes this recommended reduction without substantially jeopardizing its continued viability."

[6] Antitrust Division Manual, Fifth Ed. U.S. Department of Justice. Additionally, in larger cases, the Division often employs an outside consultant to evaluate the company rather than use its own financial analysts.

[7] Jay L. Himes, No Rest(itution) for the Weary: Crime Victims and Treble Damages in Antitrust Cases, Antitrust Trade & Regulation Report (Nov. 18, 2011).

[8] Id.

[9] Letter from Rod J. Rosenstein, Deputy Attorney General, to Heads of Department Components, United States Attorneys (May 9, 2018), Policy on Coordination of Corporate Resolution Penalties.

[10] Farber, Seth C., et. Al., Criminal Antitrust Fines and Penalties: Reductions Based on Ability to Pay, 31 Antitrust 94, 97 (2017).

[11] Brent Snyder, Deputy Assistant Attorney General, Department of Justice, Remarks at the Sixth Annual Chicago Forum on International Antitrust (June 8, 2015).

[12] Mary Kreiner Ramirez, The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty, 47 Ariz. L. Rev. 933 (2008).

[13] White, supra note 3.

[14] Id.

[15] Id.