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A peek behind the record Frank Peake jail sentence

Robert Connolly, Brian Boyle and Mark Kasten look at the trend of below-guidelines sentences, even after a defendant going to trial against the Antitrust Division is convicted

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A PEEK BEHIND THE RECORD FRANK PEAKE JAIL SENTENCE

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Frank Peake, the former CEO and President of Sea Star Line, was sentenced on December 6, 2013 for his role in a conspiracy to fix prices and surcharges on cargo shipped by water between the United States and Puerto Rico. The 60-month sentence was a record term of imprisonment for a Sherman Act conviction.[1]

The Antitrust Division was undoubtedly pleased with the record sentence, and hopes that "it will get the attention of companies and executives around the world." But Peake also had reason to be relieved. While record-breaking, the sentence was substantially below the minimum sentence of 87 months called for by the sentencing guidelines, which the prosecutors had pressed the court to impose. Attorneys for Peake released this statement: "We are pleased that the judge rejected the gross sentence asked for by the prosecutor and also let Frank remain on bond."[2]

The Peake case, along with other recent Antitrust Division cases, illustrates two truths for an individual who has participated in a price-fixing conspiracy. First, it is almost always advisable to cooperate early in exchange for amnesty, or at least a downward departure from the guidelines based on substantial assistance. Second, if you cannot obtain a substantial assistance departure because you are the "last man standing" and the government no longer needs your cooperation (and every case will have a "last man standing"), going to trial can be your best option.[3]

The Peake case – background

Peake was charged with participation in a price-fixing conspiracy that began in 2002 and affected billions of dollars of goods shipped by coastal water freight transportation between the US and Puerto Rico. The conspiracy involved Sea Star, Horizon Lines and Crowley Liner Services. Sea Star transports a variety of cargo, such as heavy equipment, perishable food items, medicines and consumer goods, on scheduled ocean voyages between the continental United States and Puerto Rico. During the trial the government proved that Peake and his co-conspirators agreed – through meetings, hundreds of e-mails and phone calls – to fix, stabilize and maintain rates and surcharges for Puerto Rico freight services, to allocate customers of Puerto Rico freight services between and among the conspirators, and to rig bids submitted to customers of Puerto Rico freight services. The indictment charged Peake with involvement in the conspiracy from at least late 2005 until at least April 2008, although the evidence at trial showed his involvement began in 2003 shortly after he joined Sea Star. Subordinates – pricing directors – at each company carried out the conspiracy on a day-to-day basis.

The Peake trial came several years after subordinates of his and co-conspirators from other companies had pled guilty and cooperated with the government. Peak's direct subordinate at Sea Star, Peter Baci, was sentenced to 48 months in prison and fined $20,000. Peake's counterpart at Horizon, Gabriel Serra, was sentenced to 34 months in prison. Other executives at Sea Star and Horizon had pled guilty, and received prison terms ranging from seven months to 29 months.[4]

Peake sentencing issues

Peake was convicted in January 2013 after a two-week trial based on the testimony of former colleagues, conspirators at competitor shipping companies, e-mails and tapes made by a cooperating government witness. The evidence showed that the

conspiracy began before Peake joined Sea Star and was carried out principally by Baci, who had ordered disposable cell phones and created private Gmail accounts to execute the scheme. But Peake was aware of the collusion and was brought in when conspiracy problems needed to be solved at the highest level. The sentencing in this case posed several interesting factors for consideration by the court. Peake had a total offense level of 29 under the Sentencing Guidelines for Antitrust Offenses §2R1.1. The base offense level for antitrust crimes is 12. The conspiracy involved rigging bids to certain customers; a 1-point enhancement. The government argued that Peake should also get a 4-point upward enhancement for his role in the offense as president of Sea Star, the senior member of the conspiracy from that company. Finally, Peake's most significant upward enhancement came from the volume of commerce: a 12-point bump for commerce the prosecutors pegged at $500,000 for Peake. This translated to a guideline range of 87 to 108 months in prison; the prosecutors sought a sentence of 87 months.[5]

Attorneys for Peake challenged the government's volume of commerce calculation, but focused their principal ire on the recommendation of a guidelines sentence. "The government is requesting that Mr. Peake receive not only the highest sentence in this case, but the highest sentence ever in the history of antitrust cases by almost double. Such a jaw-dropping request should be rejected not only based on the jury's recommendation and basic proportionality, but also for a number of 'sound, case-specific reasons…' "[6] The jury foreman in the case had written a note to the court asking that Peake not receive an equal or higher sentence than the government's cooperating witnesses, stating that "there was a general consensus that Mr. Peake's involvement in the scheme was that of an occasional problem-solver and not one of the main participants."[7] Besides echoing that theme, Peake's attorneys also focused on the fact that the conspiracy had started before Peake joined Sea Star, that the jury had twice indicated that they were deadlocked before ultimately convicting, and that Peake had no prior record and was of high character. In short, Peake's counsel argued that the antitrust sentencing guidelines should be departed from and the court should rely on the sentencing factors under 18 USC § 3553(a) in sentencing Peake.

The court gave Peake a sentence of 60 months – the longest jail sentence in the case and in history for a Sherman Act conviction

By imposing a sentence of 60 months, the court did in fact give Peake the longest jail sentence in the case – and in history. Given Peake's position as president of the company, it is not surprising that the 48-month sentence imposed on Peake's subordinate Peter Baci – who had pled guilty, accepted responsibility and cooperated – set a floor for the court. But, the court also allowed Peake to reduce his prison time by one year if he participates in the Bureau of Prisons' residential drug and alcohol program. It can safely be assumed that Peake will avail himself of this sentence-reduction opportunity. Thus, the headline "record-setting sentence" is true, but the time served will not match the headline. Peake's sentence in fact will be no greater than the 48-month sentence imposed on Peter Baci.[8] Peake's attorneys stated "We are confident on appeal but even if we lose, Frank will end up doing three years at a camp."[9]

The Antitrust Guidelines fail to measure culpability and have been ignored by courts, even after a jury trial conviction

Perhaps the most effective argument Peake's lawyers made in achieving a below-guidelines sentence, even after a conviction at trial, was that the Antitrust Guidelines should be departed from because they did not relate to Peake's actual culpability. Instead, Peake urged the court to depart relying on the factors set forth in 18 USC § 3553(a). As an example, Peake pointed to the dramatically below-guidelines sentences in the AU Optronics case – a case the Antitrust Division called "the most serious price-fixing cartel ever prosecuted by the United States."[10] In the AU Optronics case, after conviction at trial, the prosecutors had sought prison sentences of 10 years each for defendants H.B. Chen and Hui Hsiung, the president and vice-president of AU Optronics. The sentencing-guidelines range actually exceeded the Sherman Act maximum; the defendants each had an offense level of 121-151 months, based on the huge volume of commerce in the global liquid crystal display conspiracy. The court soundly rejected the government's recommendation and sentenced each defendant to three years in prison. A third, lower-level AU Optronics executive, Steven Leung, was also convicted after a second trial (the jury having deadlocked in his first). The top end of Leung's guidelines range of 108 to 135 months also exceeded the 10-year Sherman Act maximum. The government, however, recognized that the 36-month sentence on Chen and Hsiung set a ceiling for Leung, who had a lesser role in the offense. The government recommended 30 months. Leung was sentenced to 24 months in prison.

In the Peake case the government said: "Peake no doubt will argue that he does not deserve the longest prison term ever imposed on an antitrust offender. That argument is not germane to the court's analysis. The government is not recommending an 87-month sentence because it would be the longest ever imposed. Instead, the government recommends that sentence because it is justified under the Sentencing Guidelines."[11] But the Peake sentence, and other well-below-guidelines sentences imposed after conviction at trial, show that courts are rejecting

the government's view that the guidelines are an appropriate measure for imprisonment for an individual defendant. The antitrust sentencing guidelines, largely driven by volume of commerce, might subject even a minor participant in a price-fixing cartel involving a large volume of commerce to the 10-year Sherman Act maximum. Courts are discounting the volume of commerce as such a decisive a measure of culpability, and instead focusing on traditional sentencing factors set forth in 18 USC §3553(a).

The Antitrust Division itself seems to implicitly recognize that Antitrust Sentencing Guidelines can be draconian. During an investigation, the government and defendant can avoid the effect of the sentencing guidelines by entering into a plea agreement that provides for a downward departure from the guidelines based on substantial assistance (cooperation) in the investigation. These departures are not minor – they are dramatic, and are freely offered to those willing to plead. For example, in the AU Optronics case, the longest prison sentence in a plea agreement was 14 months, far below the guidelines range. But, at some point the government no longer needs "substantial assistance" and will seek to enforce the full sentence called for by the guidelines. In the AU Optronics case that was 10 years, in the Peake case that was 87 months.

The string of below-guidelines sentences raises the question of whether the guidelines are in serious need of reform

There are powerful incentives for cooperating early with the Antitrust Division. The first company in, and its cooperating executives, can qualify for amnesty. Others that come in and cooperate, as shown above, can receive dramatic departures from the sentences called for under the guidelines. Some defendants will, as Peake did, go to trial believing they are not guilty of the charge. But, once the government stops offering downward departures, even a guilty defendant might reasonably decide that going to trial is his best option.[12] Of course, by going to trial a defendant always runs the risk the court will impose a more severe sentence on the defendant than might have occurred with a plea. That being said, recent cases have shown the defendant has "three chances to win" by electing to go to trial.

Taking a case to trial – three chances to win

A. Acquittal

Of course, the most powerful reason for going to trial is that the defendant feels he is not guilty, or at least the government will not be able to prove his guilt beyond a reasonable doubt. In the AU Optronics case, the government indicted six AU Optronics executives. In March 2012, a jury convicted AU Optronics, its US subsidiary[13] and two top executives, H.B. Chen and Hui Hsiung. That same jury acquitted two others, L.J. Chen and Hubert Lee. Another AU Optronics defendant, Borlong "Richard" Bai, was also recently acquitted in a separate trial. Three of the six individual defendants have won an outright acquittal by the jury and of course face no sentence at all.

B. Conviction – but reversal on appeal

Antitrust cases can raise a host of difficult legal issues: jurisdiction, evidentiary issues, and statute of limitations, to name a few. Every convicted defendant has a chance on appeal to overturn the conviction. The three AU Optronics executives who were convicted after trial recently won short-term victories in the Ninth Circuit Court of Appeals. The Court of Appeals ordered the defendants released on bond, after finding that their appeals raised a substantial question of law and fact.

The Antitrust Division had a string of successes, both with pleas and at trial for bid-rigging in its Munibonds investigation. The Antitrust Division charged the collusion under various fraud statutes, not the Sherman Act, at least in part because of a more generous statute of limitations. Even the longer statute of limitations, however, did not save the government from reversal. On November 26, 2013, the Second Circuit Court of Appeals reversed the convictions of defendants Goldberg, Grimm and Carollo in time for their release for Thanksgiving. The court issued a 2-1 opinion on December 6, 2013, holding that the charges were barred by the statute of limitations.

C. Below-Guidelines sentence

A final reason for going to trial, and perhaps the most significant factor in recent antitrust trials, is that going to trial not only gives the defendant a shot at acquittal, but also provides the defendant with a prolonged sentencing hearing. As noted, the AU Optronics defendants all received sentences dramatically below the sentencing guidelines range and the government's recommendation. When rejecting the government's 10-year guideline recommendation and departing down to three years, the court said "The defendants thought they were doing the right thing vis-à-vis their industry and their companies. They weren't, but that's what they thought at the time."[14] It is difficult to convey that story to a court without a trial and solely in a presentence memorandum. In two Munibonds bid-rigging trials, while not charged as an antitrust violation, the defendants convicted after trial in both cases also received sentences dramatically below the guidelines sentences requested by the government.[15] And Peake himself, while receiving a substantial

sentence, also fared far better than the guidelines sentence requested by the government. In Peake's case, it is unlikely that he could have received a lower sentence by simply pleading guilty, since his subordinate had agreed to 48 months in prison on a plea.

By going to trial, however, he was able to cross-examine government witnesses, present his story and develop a record that demonstrated that the antitrust guidelines were an inappropriate basis for the court to impose an 87-month sentence. Peake did not win an acquittal. It remains to be seen if he will win on appeal. But Peake clearly persuaded the court to reject the government's recommendation, and won a substantially below-guidelines sentence.

Conclusion

While the subject for another day, the string of below-guidelines sentences discussed above raises the question of whether the guidelines are in serious need of reform. The Antitrust Division departs dramatically from the guidelines in plea agreements and courts depart drastically from them, even when the defendant goes to trial and is found guilty. ■

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Footnotes

1 See Leah Nylen, *Former Sea Star president sentenced to record 60 months in prison*, Dec. 6, 2013. http://www.mlex.com/US/Content.aspx?ID=481020. The Antitrust Division has also charged certain cases involving "corruption of the bidding process" as frauds. Some of these fraud convictions, usually those involving the payment/receipt of kickbacks, have resulted in sentences substantially greater than 60 months. For example, John L. Cockerham, a major in the US Army, was sentenced to 210 months in prison for his role in accepting bribes and steering contracts to deliver services in Iraq. See Joel Millman, *Major Gets 17½ Years in Iraq Contract Case*, The Wall Street Journal, Dec. 4, 2009). http://online.wsj.com/news/articles/SB125980636539574013. When the Antitrust Division provides statistics on "average jail time," the numbers can be inflated by the inclusion of fraud convictions, in addition to Sherman Act cases.

2 See http://www.mlex.com/US/Content.aspx?ID=481020. Peake is represented by David Markus and A. Margot Moss of Markus & Markus, PLLC.

3 In most investigations, the "last man standing" is a foreign defendant who simply declines the Division's invitation to come to the US and stand trial. There are many foreign fugitives from antitrust indictments.

4 See United States v. Baci, 08-cr-350 (M.D. Fla. 2009); United States v. Serra, 08-cr-349 (M.D. Fla. 2009); United States v. Gill, 08-cr-351 (M.D. Fla. 2009) (29 month jail term); United States v. Glova, 08-cr-3252 (M.D. Fla. 2009) (20 months in prison); United States v. Chisholm, 08-cr-353 (M.D. Fla. 2009) (seven months in prison for obstruction).

5 The prosecutors also noted that the conspiracy was very successful, that Peake received bonuses of more than $400,000 during the term of the conspiracy and that the customers who were overcharged were captive and had no alternative way to ship to and from Puerto Rico.

6 Frank Peake's Sentencing Memorandum, United States v. Peake, Crim. No-11-CR-512 (D. PR.), reprinted at http://www.mlex.com/US/Content.aspx?ID=442815.

7 Leah Nylen, *Juror presses judge for lenient sentence for shipping executive as lawyers press for new trial*, April 19 2013 at http://www.mlex.com/US/Content.aspx?ID=368776.

8 Baci's sentence was also based on the fact that Baci instructed a subordinate to destroy evidence when the investigation first started.

9 This statement reflects the year off that Peake may get for undergoing alcohol-treatment counseling. Peake will also likely get some time off for good behavior and spend part of his sentence in a halfway house.

10 See Don Clark and Brent Kendall, *AU Optronics Fined $500 Million in Price-Fixing Case*, The Wall Street Journal, Sept. 20, 2012. http://online.wsj.com/news/articles/SB10000872396390444032404578008420937555176.

11 United States Sentencing Memorandum, Crim. No 3:11-cr-00512 (DPR), reprinted at http://www.mlex.com/US/Content.aspx?ID=442807.

12 Under the guidelines, a defendant who goes to trial and is convicted will ordinarily be penalized by being ineligible for a two-level offense level reduction for acceptance of responsibility. This penalty is usually a matter of months, depending on where the defendant falls on the guidelines range. But the Antitrust Division typically requests a sentence many times greater than that of pleading defendants for a defendant who goes to trial and loses.

13 The corporate defendants also received a sentence well below the guidelines range as calculated by the government. In the AU Optronics case, the government sought a fine of $1 billion. The court halved that, imposing a fine of $500 million.

14 United States v. AU Optronics Corporation, CR-09-0110 (N.D. Cal. Sept 20, 2012).

15 The Division has had two successful Municipal bond bid-rigging trials in which it convicted all of the defendants. In the first trial, the prosecutors recommended a term of 10 years in prison for Dominick Carollo (he got 36 months); jail time ranging from 14 to 17.5 years for Steven Goldberg (he got 48 months); and 10-12 years for Peter Grimm (he got 36 months). After the second successful trial, the government recommended 262 months for Peter Ghavami (he was sentenced to 18 months; 293 months for Gary Heinz (he was sentenced to 27 months); and 168 months for Michael Welty (he was sentenced to 16 months).