Cracking Cartels

A proposed criminal antitrust whistleblower program may not provide the right incentives to report.

BY MELISSA MALESKE

QUICK READ

- Senators propose antitrust whistleblower protections
- Proposal based on GAO recommendations
- Effects may be limited absent a financial incentive

Martin McNulty was a top salesman in the packaged-ice industry. In late 2004, McNulty alleges, he learned that his employer, Arctic Glacier International Inc., had an agreement with competitors not to compete for certain customers, allowing them to keep their prices up. McNulty alleges that when he refused to participate in the scheme, the company fired him. Later, he says, Arctic Glacier offered him more than twice his previous salary to return to work, participate in the conspiracy and not cooperate with authorities. McNulty refused and went on to aid in an FBI investigation. In 2010, Arctic Glacier and three of its executives pleaded guilty to violating the Sherman Act. The company agreed to pay a $9 million criminal fine.

But after 14 years as a packaged-ice salesman, McNulty says he was blackballed from the industry. Unable to find work, he lost his home.

McNulty's lawyer, Daniel Low of Kotchen & Low, says when his firm began looking into potential relief for McNulty, Low realized there was no anti-retaliation protection for antitrust whistleblowers.

Future whistleblowers who report criminal antitrust activity will have more options if Congress passes the Criminal Antitrust Anti-Retaliation Act. Introduced July 31 by Sens. Patrick Leahy and Chuck Grassley, chairman and ranking member of the Senate Judiciary Committee, respectively, the legislation would for the first time prohibit any retaliation or discrimination against such whistleblowers. The act would apply to reported violations of criminal cartel activity such as price-fixing, market allocation and bid-rigging.

But some observers say the program as proposed will have little impact on criminal antitrust enforcement.

No Bounty

If whistleblowers face retaliation, the bill would allow them to file a complaint with the Secretary of Labor—and, if there is no final decision by the secretary within 180 days, to file *de novo* in federal district court—seeking reinstatement, back pay and damages to cover litigation and attorney fees.

The bill does not propose to provide a reward to whistleblowers. In fact, in Sen. Leahy's statement on the bill's introduction, he specifically noted that it has been "carefully drafted to ensure that whistleblowers have no economic incentive to bring forth false claims."

Low says the Leahy-Grassley proposal is helpful but fails to provide incentives for whistleblowers to come forward.

"If I had another client who came to me and wondered whether he should blow the whistle on an antitrust cartel, I would tell him it's the right thing to do, but I would be hard-pressed to tell him that it was in his self-interest," Low says.

False Claims Model

Gordon Schnell, a Constantine

PHOTOGRAPHY BY ISTOCKPHOTO

Cannon partner who represents companies before the Department of Justice (DOJ) and Federal Trade Commission in antitrust matters, agrees that the bill will have "nominal, if any," effectiveness in encouraging whistleblowers to step forward.

"The only whistleblower laws that have really seemed to have an incremental impact in encouraging whistleblowers to come forward are those that have financial incentives," Schnell says. "The False Claims Act, which is really the linchpin of the American whistleblower system, is a statute that has been around since the 1860s, but nothing came of it until the mid-1980s, when it was amended to strengthen the financial incentive toward whistleblowers."

In the fiscal year ending Sept. 30, 2011, the DOJ reported that it recovered $3 billion under the False Claims Act—$2.8 billion of which was brought in under the act's whistleblower provisions. (Under the False Claims Act, private citizen whistleblowers can bring *qui tam* lawsuits on behalf of the government and receive up to 30 percent of the government's recovery. Low had lobbied for years for an analogous whistleblower program in the criminal antitrust area.)

The Leahy-Grassley legislation is based on recommendations outlined in a July 2011 Government Accountability Office (GAO) report that was mandated in 2010 upon re-enactment of the Antitrust Criminal Penalty Enhancement and Reform Act, a DOJ program that offers leniency to individuals and companies that self-report criminal cartel activity. To compile the report, the GAO interviewed key stakeholders including the legal director of the GAO, members of the Securities and Exchange Commission's rulemaking team, officials from the Occupational Safety & Health Administration's Office of the Whistleblower Protection Program, and officials who handle the IRS's and DOJ Civil Division's whistleblower rewards programs.

All key stakeholders who had a position supported civil anti-retaliatory provisions to cover employees who report criminal antitrust violations.

Pyrrhic Victory

However, 11 of the 21 key stakeholders and DOJ officials, did not support financial rewards for such whistleblowers.

The main concern voiced by the DOJ Antitrust Division's deputy assistant attorney general for criminal enforcement was that giving whistleblowers a financial incentive would undermine their credibility before a jury.

Eight stakeholders said a reward could result in claims that do not lead to criminal prosecution because of whistleblowers who lack sufficient information or who make fraudulent claims.

A defense attorney the GAO interviewed said a reward could undermine internal compliance programs. Recently, this has been a central concern for companies evaluating the impact of the Dodd-Frank Act's whistleblower provision.

Several key stakeholders also said administering such a rewards program would require additional resources.

Because DOJ officials said in the report that around 90 percent of criminal antitrust prosecutions settle without going to trial, Schnell says witness credibility before a jury doesn't seem to be a big issue. He says there are ways to discourage false tips—in other whistleblower regimes, whistleblowers who reported false tips were prosecuted. Schnell also points to studies such as a 2011 Ethics Resource Center whistleblower study that found only 18 percent of whistleblowers reported externally, and 84 percent of those whistleblowers first tried to report to their employers.

Both Schnell and Low concede that without the support of the GAO and the relevant DOJ officials, a financial bounty provision would be hard to pass in Congress.

"From a political standpoint, this is a good first step, but it's really kind of a Pyrrhic victory in that I don't think it's going to accomplish much as drafted," Schnell says. "But maybe it will get us that much closer to the next go-around where they make this a true whistleblower provision." ■

Standard Procedure

MARY PIVEC IS CO-CHAIR OF WILLIAMS MULLEN'S WHISTLEBLOWER defense practice, which the firm launched in May in response to an increase in retaliation claims from whistleblowers.

From the employment perspective, Pivec says the Criminal Antitrust Anti-Retaliation Act would create a procedural program similar to those that many other whistleblower anti-retaliation provisions create—one for which many companies, accustomed to dealing with burdens and standards of proof under the Equal Employment Opportunity (EEO) laws, are unprepared. EEO laws require complainants to establish a claim that a violation of a protected status was a motivating factor behind an adverse employment decision.

"Under the whistleblower laws, the authority is given to the labor secretary, and the complainant only has to demonstrate that he or she reasonably believed that there were acts going on within the employer's organization or policies and procedures that violated a particular statute in which the whistleblower protection statute is found ... and that this protected report contributed to an adverse employment decision," Pivec says.