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Optimizing Antitrust Coverage in Private Company D&O Policies

Antitrust exposures for private companies and their management teams can raise complex issues. Various parties, including federal, state, and foreign government regulators and private plaintiffs, can bring actions alleging violations of antitrust law, presenting significant risk exposure and potential costs for companies and their leaders alike. Directors and officers (D&O) liability insurance can help mitigate the expenses associated with investigations and settlements for antitrust claims, but policyholders should work closely with their insurance advisors to ensure their policies provide appropriate coverage.

Recent Developments in Antitrust Regulation and Litigation

Allegations of anticompetitive conduct or other violations of antitrust laws can take the form of a government investigation, enforcement action in court, and/or private litigation. The reach of antitrust laws is broad. For example, Section 1 of the Sherman Antitrust Act prohibits contracts, combinations, or conspiracies in restraint of trade, which generally includes price-fixing, group boycotts, and other cartel behavior. Likewise, Section 5 of the Federal Trade Commission Act and state unfair/deceptive acts and practices (UDAP) statutes prohibit methods of "unfair competition," which can cover allegations ranging from deceptive business practices to false advertising.

Federal and state regulators are increasingly focusing on antitrust investigations and specifically targeting individuals. In 2015, Deputy Attorney General Sally Yates issued a consequential memorandum, "Individual Accountability for Corporate Wrongdoing," which became known as the Yates Memo.[1] Rather than only pursuing corporate actors in investigations, the Yates Memo urged law enforcement to "seek accountability from the *individuals* who perpetrated the wrongdoing."

Such investigations raise the prospect of potential civil and/or criminal liabilities. Although most matters are settled, defense

costs present a significant exposure to not only companies but their directors, officers, and other executives and employees as well. And the monetary risk of civil antitrust litigation is substantial, as successful plaintiffs are entitled to treble damages by statute.

Although the policy of seeking individual accountability was not new, the Yates Memo added a new importance to investigating both organizations and individuals in corporate cases. While Yates is no longer with the Department of Justice (DOJ), the memo remains relevant, applying to both criminal and civil investigations and affecting various programs that the DOJ offers to encourage cooperation with investigations.

The memo limits eligibility for "cooperation credit" to parties who provide *all* relevant facts — including identifying "all individuals involved in, or responsible for, the misconduct at issue, regardless of their position, status, or seniority." Although not explicitly referenced in the memo, the DOJ's

[1] Memorandum from Sally Q. Yates, Deputy Attorney General, Department of Justice, "Individual Accountability for Corporate Wrongdoing" (Sept. 9, 2015).

Antitrust Division has applied this mandate to its cartel leniency program, under which the DOJ waives criminal charges against the first corporation or individual that reports its cartel behavior. Companies that seek to avail themselves of the DOJ amnesty program must be first in time to notify the DOJ about the alleged anticompetitive conduct and prepared to fully disclose any and all information they may have about the alleged anticompetitive conduct.

The memo also makes clear that the resolution into an investigation of a corporation does not necessarily resolve the investigation of that corporation's current or former employees. Thus, there is a real possibility of a protracted investigation — and accrual of legal fees — even after the investigation into the corporation has concluded.

Although the Yates Memo was directed at DOJ staff, we have seen examples in which the Federal Trade Commission (FTC) has sought settlement from both companies and their directors and officers. These settlements can be in the hundreds of thousands of dollars or higher, and often occur within the consumer protection mission of the FTC.

In addition, the costs associated with private litigation in the antitrust space can be high. For example, in class action cases involving allegations of price-fixing of retail or consumer products — or the components or ingredients used to make those products — defendants commonly face multiple class action challenges simultaneously. Often, cases involving allegations of harm by a class of direct purchasers from alleged price-fixers are brought as separate cases from those brought by indirect purchasers. Competitors and/or shareholders may also bring suits relating to the underlying alleged conduct.

Insurance Considerations

A key issue for insurance buyers is determining when D&O coverage may begin to apply for an antitrust matter. Since antitrust cases often involve allegations against both the company and its directors and officers, the question of when coverage attaches for one party versus another can be unclear.

Private company D&O policies should be carefully reviewed before purchase to ensure that they do not limit coverage applicable to antitrust matters. For example, absent revision, some D&O policy forms may not include coverage for investigations against the company even when they include coverage for individuals.

Exclusionary language — including fraud or personal profit exclusions that seek to exclude coverage for acts that lead to monetary gains for individuals or companies — also deserve scrutiny. And buyers must consider potential overlaps and gaps between coverage under D&O policies and general liability or other insurance policies.

Policy wording can dictate whether, and to what extent, coverage will apply to specific wrongful acts alleged against individual directors and officers. For example, in the event of criminal cartel investigations, having the corporate entity and that entity's executives represented by separate counsel is very common. To the extent the company or its directors and officers decide there is a need for separate counsel, insurers may seek a showing of an actual conflict of interest in order to approve the retention of multiple counsel. In addition, insured companies should consider reviewing the list of proposed panel counsel (if included in their D&O policies) to ensure that preferred counsel are included.

To optimize D&O insurance coverage and effectively manage antitrust risk, insurance buyers should work with their risk advisors to review D&O policy language and obtain the optimal antitrust coverage where appropriate. Buyers should also study, and seek to limit, fraud or personal profit exclusions and pay close attention to policy definitions of "claim," "loss," and "wrongful act," among others, to ensure they are constructed in a way that does not limit coverage.

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