Commercial Litigation Report

A Quarterly Newsletter
of the Commercial Litigation Practice Group of Pepper Hamilton LLP

Pepper Hamilton LLP
Attorneys at Law

May 2004

New Sentencing Guidelines for Organizations Seek Balance Between Corporate and Public Interests

On April 8, 2004, the U.S. Sentencing Commission voted unanimously to amend the existing guidelines for sentencing organizations. Two amendments are of particular interest to organizations. First, waiver of the attorney-client privilege and work-product protections is not a prerequisite for an organization to receive a reduced penalty, but might be required in certain circumstances. Second, to qualify for reduced penalties, an organization must have in place an effective program to prevent and detect violations of law.

The waiver of attorney-client privilege and of work product protections is a hot topic. In theory, the amended guidelines will encourage the government to seek a waiver only when necessary, rather than as a matter of course. When a waiver is sought, however, organizations will still be required to calculate whether the benefits of cooperating with the government outweigh the risks of waiving the attorney-client privilege and work-product protections, and potentially exposing the company to third-party lawsuits. Likewise, organizations recognize that Department of Justice policy allows prosecutors in any case to consider waiver of attorney-client privilege and of work-

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Plaintiffs Increasingly Bring Securities Claims in ERISA Class Actions

A new form of ERISA class action lawsuit is emerging, with increased focus on the potential liability of a company's officers and directors for failure to make adequate disclosures regarding the financial condition of the company. These claims look very similar to claims under federal securities laws.

The plaintiffs in these cases want to bring their claims under ERISA to avoid the hurdles that confront plaintiffs under the Private Securities Litigation Reform Act of 1995, including the heightened pleading standard, an automatic stay on discovery and a heavily structured lead plaintiff appointment process. As long as some courts permit plaintiffs to bring alleged securities violations under ERISA, those who administer ERISA-qualified plans can expect an increase in this type of claim.

In one recent, high-profile case, *Tittle v. Enron Corp.,* 284 F. Supp. 2d 511 (S.D. Tx. 2003), a class of Enron employees alleged that defendants breached ERISA

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fiduciary duties by affirmatively and materially misleading them about Enron's financial condition, its performance and its accounting manipulations, while inducing them to hold and purchase more Enron stock. Defendants argued that they could not selectively disclose non-public information without running afoul of federal securities insider-trading laws.

In an *amicus curiae* brief, the U.S. Secretary of Labor rejected the defendants' argument, asserting that "while [the defendants'] Securities Act and ERISA duties may conflict in some respects, they are congruent in others, and there are certain steps they could have taken that would have satisfied both duties to the benefit of the plans." Relying on the secretary's position, the *Enron* court rejected the conflict argument and stated that the officers and directors could have fulfilled their ERISA fiduciary duties and complied with federal insider-trading regulations.

Courts are split on whether to permit ERISA breach of fiduciary duty claims in similar circumstances. Some, like the *Enron* court, have rejected the existence of a conflict and refused to dismiss ERISA breach of fiduciary duty claims. *See In re: WorldCom, Inc. ERISA Litig.,* 263 F. Supp. 2d 745 (S.D.N.Y. 2003); *In re: Williams Co. ERISA Litig.,* 271

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Sixth Circuit Rejects UCC Bad-Faith Pricing Claim

In recent years, merchant sellers that sell with open-price terms under the Uniform Commercial Code (UCC) have been subject to claims alleging bad-faith pricing. Bucking an alarming trend to allow these types of claims to proceed to trial, the Sixth Circuit recently rejected this theory and affirmed summary judgment in the seller's favor. *See Tom-Lin Enters., Inc. v. Sunoco, Inc. (R&M)*, 349 F.3d 277 (6th Cir. 2003).

Plaintiffs were 12 Sunoco gasoline service station franchises in and around Columbus, Ohio. The dealer franchise agreements required the plaintiffs to purchase Sunoco brand gasoline at Sunoco's "price in effect" at the time of delivery. This is known as an "open-price term," which the UCC recognizes as an enforceable term of a contract even though the price is not settled at the time of contracting.

UCC 2-305 imposes two obligations in this context. First, the price must be a reasonable price at the time of delivery. Second, if the seller is to fix the price under the contract, the price must be fixed in "good faith." Plaintiffs alleged that, between 1995 and 2000, the price they paid for Sunoco gasoline was not set in good faith, in violation of Ohio Rev. Code Ann. § 1302.18, Ohio's version of UCC 2-305, because it was unreasonably high. Plaintiffs sought to change the price on hundreds of sale transactions to the "good-faith" price, requiring Sunoco to refund the difference.

The Sixth Circuit expressly rejected the Fifth Circuit's recent decision in *Mathis v. Exxon Corp.,* 302 F.3d 448 (5th Cir. 2002), which affirmed a jury verdict against Exxon under Texas law on a theory that "good faith" is judged by the merchant seller's *subjective* intent, as well as by an objective evaluation of the reasonableness of the price. Instead, the Sixth Circuit held that to prevail on such a claim, the plaintiffs must establish that: (1) the price was not fixed in a commercially reasonable manner; and (2) the price was commercially unjustifiable. Each issue involves an *objective* analysis of the merchant-seller's conduct. Summary judgment was granted for Sunoco because the plaintiffs relied merely on their own subjective assessment of what the "good-faith" prices should have been.

The Sixth Circuit's ruling bucks an alarming trend to allow similar claims to proceed to trial.

Since 1999, many of these "open-price term" or "bad-faith pricing" cases have been commenced against merchant sellers in the petroleum marketing industry, and several lawsuits have been brought by plaintiffs on behalf of themselves and a regional or nationwide class of merchant buyers. To date, no class has been certified. Although it was not an issue in this case, the Sixth Circuit's decision supports a key argument against the certification of class actions in open-price term cases: common questions of law do not exist simply because the plaintiffs' claims are brought under state laws based on a uniform statute.

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Pepper Adds Power

New Partners Strengthen Firm's Commercial Litigation Practice

In recent months, Pepper Hamilton has strengthened its commercial litigation practice with the addition of several new partners.

Francis P. Devine, III joined the firm's Philadelphia office as a partner in January 2004. Frank, head of the commercial litigation practice at White and Williams before joining Pepper, is a senior trial lawyer and former chancellor of the Philadelphia Bar Association. He is a member of the American College of Trial Lawyers. Joining Pepper with Frank was **Charles S. Marion**, another White and Williams commercial litigation partner, and two associates. Frank and Chuck bring a wealth of litigation experience to Pepper in all types of complex business disputes, including products liability, insurance coverage, professional liability and malpractice, directors and officers liability, and intellectual property disputes.

Thomas M. Gallagher joined the Philadelphia office as a partner in November 2003. Formerly the assistant U.S. attorney in charge of health care prosecutions in the Eastern District of Pennsylvania, Tom bolsters the firm's white collar criminal defense, corporate investigations, health effects, commercial litigation and health care practices.

Ivan B. Knauer joined the Washington, D.C. office as a partner in December 2003. Formerly a senior counsel in the Securities and Exchange Commission's Enforcement Division, Ivan joined Pepper from Kirkpatrick & Lockhart, where he focused his practice on securities litigation and securities enforcement issues.

Frank P. Spada, Jr. joined the Princeton office in March 2004 as a partner. He has represented employers in numerous cases through trial and appeal in the employment discrimination area. He also represents employers before the Equal Employment Opportunity Commission and state agencies throughout the country, and has handled many matters in the enforcement or defense of non-competition clauses.

In addition to these lawyers, Pepper elected two senior commercial litigation associates to the partnership, effective January 1, 2004. **Jeremy Heep** has a broad commercial litigation practice, with particular emphasis on antitrust, securities and international matters. **Albert Manwaring IV** concentrates his practice in commercial litigation, including bankruptcy, corporate fiduciary, products liability, toxic tort, consumer financial services and non-competition/trade secret litigation. Jeremy joined Pepper in 2000 after serving as director of the International Foundation for Election Systems in Congo and as a trial attorney for the U.S. Department of Justice. Albert joined the firm in 1997 after serving in private practice, as a lawyer for the city of Boston and as a field artillery officer in the U.S. Army.

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F. Supp. 2d 1328 (N.D. Ok. 2003); *Rankin v. Rots*, 278 F. Supp. 2d 853 (E.D. Mi. 2003). Others have dismissed ERISA claims based on a recognized conflict between federal securities law and ERISA fiduciary duties. *See Hull v. Policy Mgmt. Sys. Corp.*, No. 3:00-778-17, 2001 U.S. Dist. LEXIS 22343, at *1 (D.S.C. 2001) and *In re: McKesson HBOC, Inc. ERISA Litig.*, No. C00-20030 RMW, 2002 U.S. Dist. LEXIS 19473, at *1 (N.D. Ca. 2002).

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Supreme Court Considers Whether Foreign Antitrust Plaintiffs With Injuries Suffered Abroad May Pursue Claim in U.S. Courts

On April 26, 2004, the Supreme Court heard oral argument in *Empagram S.A. v. F. Hoffman La Roche Ltd.*, 315 F.3d 338 (D.C. Cir. 2003), to settle the question of whether foreign plaintiffs with injuries suffered abroad may assert an antitrust claim in U.S. courts. The Court will decide the meaning and proper application of the Foreign Trade Antitrust Improvements Act (FTAIA), which limits the subject matter jurisdiction of federal courts. It provides that the Sherman Act does not apply to trade or commerce with foreign nations unless (1) the conduct has a "direct, substantial and reasonably foreseeable effect" on domestic or export commerce of the United States and (2) "such effect gives rise to a claim" under the Sherman Act.

The Supreme Court's decision in *Empagran* should answer an important question about the availability of U.S. courts to foreign plaintiffs with antitrust claims. The decision may increase the possibility of foreign corporations being held liable under U.S. antitrust law. For this reason, several members of the international community (England, Ireland, the Netherlands, and Japan) filed *amicus* briefs arguing that the Court should not permit U.S. law to extend beyond its borders into matters that are purely foreign.

The federal circuits have taken three views on the meaning of the "gives rise to a claim" language found in Section 2 of the FTAIA. The Fifth Circuit in *Den Norske Stats Oljeselskap As v. Heeremac Vof*, 241 F.3d 420 (5th Cir. 2001), interpreted the language to mean that the antitrust laws of the United States will not apply to non-import foreign conduct unless the defendant's action has a "direct, substantial and reasonably foreseeable" effect on U.S. commerce and such effect "gives rise to" the plaintiff's own antitrust claim. The Second Circuit in *Kruman v. Christie's Int'l plc*, 284 F.3d 384 (2d Cir. 2002), held that the language requires only that the effect of the defendant's conduct on domestic commerce violate the Sherman Act, and that it need not be the basis for the plaintiff's injury. Under the Second Circuit's decision, a foreign plaintiff only needs to establish that any party, including the U.S. government, could assert an antitrust claim based on the defendant's conduct.

The D.C. Circuit in *Empagran* set forth a third approach. Under it, the foreign plaintiff must establish that the anticompetitive conduct itself violates the Sherman Act and the conduct's adverse domestic effects must give rise to a claim by someone other than the government, but not necessarily the foreign plaintiffs themselves.

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Federal Circuits Split Over Arbitrator Power To Compel Pre-Hearing Discovery

On March 12, 2004, the Third Circuit held that an arbitrator has no power to compel the production of documents from non-parties before an arbitration hearing. An arbitrator can only compel non-parties to appear before the panel at the hearing, and to bring documents with them at that time. *See Hay Group, Inc. v. E.B.S. Acquisition Corp.,* No. 03-1161/1162, 2004 U.S. Dist. LEXIS 4715, *2 (3d Cir. Mar. 12, 2004).

The Third Circuit's ruling takes on an issue that has split the Fourth and Eighth Circuits. The Eighth Circuit held that the Federal Arbitration Act (FAA) grants an arbitration panel the power to order the production of documents for review by a non-party before a hearing. *See In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865 (8th Cir. 2000). In contrast, the Fourth Circuit held that the FAA does not grant an arbitrator that authority, unless a party can make a showing of "special need or hardship." *See COMSAT Corp. v. Nat'l Sci. Found.,* 190 F.3d 269 (4th Cir. 1999).

The Third Circuit's approach differs from the Fourth and Eighth Circuits by prohibiting parties from obtaining any pre-hearing discovery from non-parties. The court based its ruling on the language of Section 7 of the FAA and upon interpretations of Federal Rule of Civil Procedure 45, before and after its 1991 amendment. Given the importance of discovery in arbitration, litigants and their counsel need to know that pre-trial discovery may not be available in arbitration.

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Non-Compete and Trade Secrets Update

Pennsylvania Adopts Uniform Trade Secrets Act

Pennsylvania recently became the 45th state to adopt a version of the Uniform Trade Secrets Act (UTSA). 12 Pa. C.S. §§ 5301-5308 (2004). Originally drafted over 25 years ago, the UTSA provides a consistent approach to the protection of various types of confidential business information.

Under the Act, a plaintiff may seek injunctive relief and monetary damages for the misappropriation of a trade secret, including punitive damages for willful and malicious conduct. A prevailing party also may be entitled to attorneys' fees and costs. The UTSA took effect in Pennsylvania on April 19, 2004.

Any "information" that meets two requirements may qualify as a trade secret under the Act. First, the information must derive independent economic value from not being readily known or ascertainable. Second, a party claiming trade secret protection must have taken adequate steps to keep the information secret. While the definition of trade secrets under the UTSA includes things such as formulas (such as the recipe for Coca Cola®) and drawings, it also includes compilations, including customer lists, as long as the two requirements are satisfied. This clears up a murky issue in common law.

Only five states do not follow any version of the UTSA. The legislatures of New York and Massachusetts are considering versions of the UTSA, while New Jersey, Texas and Wyoming have rejected it.

Despite the new-found consistency trade secret plaintiffs will find in Pennsylvania, it remains to be seen whether they will still face a rather difficult battle against a defendant claiming independent development as a defense.

Despite the new-found consistency trade secret plaintiffs will find in Pennsylvania, it remains to be seen whether they will still face a rather difficult battle against a defendant claiming independent development as a defense.

In February 2003, the Third Circuit held in *Moore v. Kulicke & Soffa Indus., Inc.*, 318 F.3d 561 (3d. Cir. 2003), that under Pennsylvania law, a defendant does not bear the burden of persuasion when claiming the defense of independent development. Rather, the burden remains with the plaintiff to show that the defendant did not derive the information through its own independent development, essentially requiring the plaintiff to prove a negative.

Continued Employment in Ohio Is Consideration for Non-Compete Agreement

On March 10, 2004, the Ohio Supreme Court held that an employee who signs a non-compete agreement after the inception of employment is subject to enforcement of that agreement even if the employee received no new consideration for signing it. *Lake Land Emp. Group of Akron, LLC v. Columber*, 101 Ohio St. 3d 242 (Ohio 2004).

The continuation of employment provides consideration sufficient to make the agreement legally binding. According to the court,

the "presentation of a noncompetition agreement by an employer to an at-will employee is, in effect, a proposal to renegotiate the terms of the parties' at-will employment." When the employee assents to it by signing the agreement, "consideration supporting the noncompetition agreement exists."

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Insider-Trading Conundrum: Can a Company Sell Data Without Violating Federal Securities Laws?

This is a true story. The names have been changed to protect client confidentiality.

Company X is in the business of collecting data regarding physicians' drug-prescribing tendencies. It typically packages the data provided by the physicians and sells it to the drug manufacturers, who find it helpful in their sales and marketing campaigns. Company X would like to solicit stock market analysts as buyers of this data. The analysts would find this information useful in providing investment advice to their clients. This raises the question of whether this practice violates Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated under that statute.

In *United States v. O'Hagan*, 521 U.S. 642 (1997), the Supreme Court first recognized the misappropriation theory of insider-trading liability. Before *O'Hagan*, the Court had only recognized the "classical theory" of insider trading. Under this theory, one could only be liable for insider trading if he traded in the stock of the company to whom he owed a duty of confidentiality. So, someone who learned about a pending acquisition from the acquiring company could – at least in theory – trade with impunity in the stock of the target company. In *O'Hagan*, the Court held that an outsider who misappropriates material, nonpublic information for the purpose of trading securities, in breach of a duty owed to the source of the information, can be found liable under Section 10(b) and Rule 10b-5, even if he does not owe a duty of confidentiality to the company in whose stock he trades.

Assuming that Company X's packaged data is material and nonpublic, the issue is whether Company X owed a duty to the source of the information. It is clear from past cases that this duty exists within the traditional fiduciary relationships, such as employer/employee, attorney/client and principal/agent, among others. It is less

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Important Developments in International Trade

Imagine finding your company suddenly embroiled in a U.S. Commerce Department antidumping investigation, simply because of whom you buy your inputs from or whom you invest in abroad. This scenario has become ever more likely under the criteria for "affiliated parties" and "affiliated transactions" that govern such investigations.

In antidumping duty investigations conducted by the Commerce Department, company relationships govern a range of issues, from who is subject to investigation and required to provide requested information, to what price will be used and who will receive the antidumping duty rate assigned to a particular entity. The criteria for determining "affiliated parties" and "affiliated transactions" currently is the subject of debate at the World Trade Organization (WTO) and in the U.S. courts.

A group of WTO member states, calling itself "Friends of Antidumping Negotiations," issued a joint proposal on March 11, 2004, seeking stricter rules on the treatment of affiliated parties and affiliated transactions. While the changes sought would affect the rules applied by all members, the United States is the focus of the initiative. The clear import of the Friends' proposal is to limit the power of the Commerce Department to hold companies liable for the dumping activities of related companies. The debate on what "affiliated" should mean in the context of the WTO antidumping rules likely will carry forward into future WTO rules negotiations.

But what the rest of the world thinks is not as legally relevant as what U.S. courts are saying. Two recent decisions from the U.S. Court of International Trade (CIT) that highlight the ongoing debate on affiliated parties and affiliated transactions are *NTN Corp. v. United States*, Court

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clear in other areas. The Securities and Exchange Commission has attempted to clarify some of the other relationships in which this duty exists in Rule 10b-5-2.

Regarding Company X, what *is* the source of the information? It is fairly certain that the physicians are not truly the source of the information in the context of the materiality requirement of Section 10(b). It is Company X's compilation of the data that makes the information material for trading purposes.

If Company X is acting as the agent of the drug manufacturer, and co-owns the data with the drug manufacturer, then Company X would owe a duty to the drug manufacturer not to sell this information to market analysts, or any other third parties, without the drug manufacturer's consent. If, for example, Company X and the drug manufacturer had an express agreement by which Company X promised only to sell compiled data about the drug manufacturer's products directly to the drug manufacturer, that could create a duty of confidentiality sufficient to create liability under *O'Hagan*. On the other hand, absent such agreement, Company X could presumably sell the data it compiled to the highest bidder, which would include stock market analysts. Of course, this may not be the best way to keep the drug manufacturer as a significant customer, but that is a concern for another day.

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No. 00-09-00443, 2004 Ct. Intl. Trade LEXIS 11, Slip Op. 2004-11 (Feb. 3, 2004) and *Slater Steels Corp. v. United States*, Consol. Ct. No. 02-005512004, 2004 Ct. Intl. Trade LEXIS 21, Slip Op. 2004-22 (Mar. 8, 2004).

In *NTN*, the CIT upheld a determination by the Commerce Department to draw an adverse inference against the respondent with respect to the margins for their U.S. sales, a key benchmark in any antidumping case. The Commerce Department drew this inference because the respondent failed to report resale information for their home-market affiliates. The Department rejected the respondent's position that it was unable to obtain this information from its affiliated resellers. The CIT affirmed the Department's conclusions, finding that Commerce reasonably determined that the respondent had not acted to the best of its ability in responding to the Department's requests for information on sales by affiliated resellers.

In *Slater Steels*, the Commerce Department "collapsed" three companies into a single entity to calculate the dumping margin in an administrative review of the antidumping duty order on stainless steel bar from India. The Department decided to collapse these three companies into one because the companies shared two directors who had significant ownership of each company and oversaw all aspects of production, pricing and sales. The case has taken two trips to the CIT and is presently on remand before the Commerce Department. It demonstrates that the government will aggressively pursue antidumping investigations and seek to collapse related companies for calculating antidumping margins. Where the line on the Commerce Department's ability to collapse companies ultimately will be drawn will be decided when the CIT or perhaps the Court of Appeals for the Federal Circuit rules on the Department's next remand results.

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product protections when assessing "the adequacy of a corporation's cooperation." Although far from a perfect solution, the compromise in the amended guidelines may be a step toward implementing a standard that helps eliminate corporate malfeasance quickly and efficiently, while protecting the corporate entity and its shareholders from delivering to the plaintiffs' bar the means to attack the corporation.

The amended guidelines heighten the requirements for corporate compliance and ethics programs. The original sentencing guidelines, promulgated in 1991, rewarded organizations with reduced penalties for implementing a compliance program that prevented and detected criminal activity. The amended guidelines raise the bar, requiring organizations to encourage an ethical organizational culture and to prevent and detect violations of *any* law or regulation for which the organization might be liable. To ensure that organizations embrace a culture of compliance, the amended guidelines require an organization's board of directors, officers, and other managers to be involved with the program and that the organization properly fund and support the program. In light of these changes, all organizations should critically review their current compliance programs and adjust them as needed to meet the rigorous standards of the amended guidelines.

Unless disapproved or changed by Congress during a six-month review period, the new amendments will take effect on November 1, 2004.

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The lesson here for businesses is simple: beware of those with whom you and others work. On the flip side, petitioning companies need to consider carefully both their own relationships and those of their competitors and customers before filing an action. Knowing who is related to whom will help you better understand who may be friend or foe as the antidumping investigation unfolds.

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