

Look Who's Listening Now

New statutory authority means the Antitrust Division may be using wiretaps.

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Watch your words: The federal government and others may be listening—and recording. Federal law now allows prosecutors to obtain wiretaps and make surreptitious recordings of conversations in antitrust investigations.

Until last year, federal law enforcement officers could not obtain a wiretap to investigate antitrust offenses. But one of the amendments to

Antitrust

A Practice Focus

the USA Patriot Act adopted in 2006 expanded federal wiretap authority, lumping antitrust offenses in

with terrorism, drug trafficking, and exploitation of children.

The lawyers of the Justice Department's Antitrust Division may now use wiretaps and other means of electronic surveillance to investigate suspected criminal violations of the Sherman Act. These are illegal restraints of trade (Section 1), illegal monopolization (Section 2), and illegal restraints of trade in the District of Columbia (Section 3).

This expansion of electronic surveillance creates additional challenges for businesses. The miniaturization of audiovisual equipment and digital storage media has put tiny, easily concealed recording devices within the means of almost everyone. As a result, it is no longer enough to watch what we write in letters or e-mails to avoid misunderstandings that sometimes result from careless or casual phrasing and poor word choice. Now, we must also watch what we say virtually everywhere.

FOR CIVIL CASES?

Although the antitrust wiretap and surveillance provision appears to be limited to criminal violations of the Sherman Act, it is likely that recordings obtained will be used in civil investigations and trials.

The intent to affect civil cases seems apparent from the text of the provision: Many decades have passed since the last criminal monopolization prosecutions, and the most recent of those were not successful. Therefore, if Congress and the Justice Department really intended to limit the provision to criminal cases, they would not have included the reference to Section 2 in the amendment. But surveillance evidence is

likely to be used in civil prosecutions under Section 1 as well.

Antitrust crimes are simply hard-core versions of civil antitrust offenses. Early in an investigation, antitrust enforcers may have difficulty distinguishing probable cause to believe that someone may be committing an antitrust crime from reason to believe that someone may be committing a civil violation.

Consider a case involving a concentrated industry with publicly available pricing data. This might describe goods and services as varied as commercial air transportation and specialty chemicals, where prices and other terms are readily available through the Internet and other means.

The prices for these goods and services might well move in parallel. Indeed, economic theory, especially modern oligopoly theory, tells us that prices will probably move that way.

Such "conscious parallelism" is not an offense against the antitrust laws unless "plus factors" are present. For example, conscious parallelism can give rise to a civil violation of the Sherman Act with evidence that the parties took actions that made sense only if they all agreed to act in the same way. Similarly, communicating by signaling future price changes or using special codes for special rates might help prove such a violation.

Such parallel conduct might also be evidence of an explicit scheme among competitors to fix prices or allocate markets. This is the worst kind of antitrust offense, the kind of hard-core violation that is prosecuted as a criminal violation.

Evidence of the civil violation, then, could be probable cause to believe that a criminal violation could exist. Thus, with its new wiretap authority, the Antitrust Division could obtain a wiretap to investigate whether apparently parallel prices amount to a criminal violation of the antitrust laws.

Armed with a warrant to wiretap, the Antitrust Division then may proceed to collect evidence for a possible criminal case. It can use the evidence it collects, however, in any way it deems appropriate. If the division finds evidence of a violation, but concludes that the violation is civil and not criminal, the law is clear that the evidence obtained from the original, lawful wiretap may be shared with other lawyers and investigators, including those in the Antitrust Division. It may also be disclosed in any proceeding in federal or state court.

Thus, because evidence of antitrust offenses is often ambiguous and because of the low standard for finding probable cause for a wiretap, the Antitrust Division's new authority for wiretaps in criminal cases, in practice, grants authority for wiretaps in many civil investigations as well.

AMNESTY COMPLICATIONS

Wiretapping authority may change the cooperation that the Antitrust Division expects from corporations in its amnesty program, a program that has proved successful at detecting conspiracies and obtaining criminal convictions. Under the amnesty program, a corporation that learns it has committed a criminal violation of the antitrust laws may report its illegal conduct to the government. Depending upon the facts, the company can then receive either complete amnesty from prosecution for itself and its employees or a guarantee of lenient treatment (that is, significantly reduced fines and limited or no jail time for its employees).

One of the amnesty program's requirements is that the company immediately withdraw from the illegal conspiracy that it has reported. As European competition enforcers have noticed, however, immediate withdrawal from a conspiracy can tip off the other conspirators to the existence of an investigation. The European Commission, therefore, sometimes allows the leniency applicant to continue in the conspiracy while the investigation begins.

In the United States, the need to limit liability in civil class actions is a strong incentive to withdraw from a conspiracy immediately, as the leniency program formally requires. With wiretap authority, however, the Antitrust Division may find it useful to encourage a self-reporting corporation to continue in the conspiracy at least for a short time in order to record incriminating statements of other conspirators.

There will be a strong incentive for companies to comply with demands for recording, not just because of the need to satisfy the government under the amnesty program but also to limit damages to civil plaintiffs. Under the civil leniency statute adopted in 2004, recipients of leniency from the Antitrust Division can limit civil damages to single rather than treble damages in exchange for cooperation with the civil plaintiffs (who, like the government, may want tape-recorded evidence to use against the other conspirators).

This creates some tension for the company. On the one hand, a corporation may owe a duty to its shareholders to mitigate damages by withdrawing from a conspiracy as soon as possible. On the other hand, the Antitrust Division and civil plaintiffs may request continuation in the conspiracy for a short time to ensure that the juiciest evidence is captured on tape.

NOT JUST POLICE

Surreptitious recording is no longer solely a tool of law enforcement authorities. Any person seeking to make such recordings may easily obtain devices even smaller and more easily concealed than cell phones, which themselves can sometimes be used for unobtrusive video recordings.

It is becoming common for private parties to make recordings to improve their position in antitrust matters.

In a recent reported case, an antitrust plaintiff suing a competing retailer for price fixing taped allegedly incriminating conversations with representatives of the defendant.

Another example involves a relator in a *qui tam* action arising from

bid rigging who attempted to record incriminating statements before filing his action and while his action was under seal.

In another case, an employee recorded allegedly illegal communications to gain leverage when he negotiated a severance package to accompany the termination he was expecting. The same recordings could be used to improve a conspirator's position negotiating a plea with the government.

In a fourth case, a plaintiff persuaded a colleague to secretly record a meeting that the plaintiff expected would produce evidence helpful to his antitrust action against some of the attendees.

WHO'S LISTENING?

Federal law does not prohibit private persons from secretly recording oral or electronic communications in which they are involved. Some states are equally permissive, but others require the consent of all parties concerned. (The Reporters Committee for Freedom of the Press discusses the various state laws on its Web site at www.rcfp.org/taping.)

Surreptitious recording is not limited to audio. The government's wiretap and surveillance authority includes video recording. Some states restrict secret video recordings, but these restrictions are often limited to recordings of nudity or apply only to hidden devices not accompanying a person. Thus, in many states, a private person with a concealed video camera may legally record his business conversations with others, including people he intends to sue.

Remember: Whistle-blowers, private litigants, and government enforcement agencies all have ready access to sophisticated surveillance equipment.

Wiretap authority significantly increases the investigative power of the Antitrust Division. The Antitrust Division will use increasingly sophisticated tools—the kind of tools the Justice Department uses in its investigations of the most serious crimes—to find evidence of price fixing and, quite likely, less serious antitrust violations.

It may be prudent to assume that private parties are secretly recording conversations in the hope of creating evidence that can improve their chances in litigation or negotiations.

The best advice to clients is, of course, "Don't talk to competitors about prices!" But sometimes individuals act in ways the corporation as a whole would not approve of, exposing the corporation to massive liability.

Explaining how to avoid criminal antitrust violations is usually straightforward. Explaining civil antitrust violations, however, often requires more sophisticated instruction and more subtle consideration of the relevant facts. Compliance programs traditionally include explanations of what constitutes an antitrust violation and instructions on how to avoid situations where one might be drawn into illegal discussions. Modern compliance programs also warn of the dangers of communicating by e-mail, where informal language and jokes can give the impression (and sometimes reveal the reality) of improper behavior.

Such programs now need also to include warnings that telephones, boardrooms, living rooms, a table at a local bar, and even one's boss or co-workers may be bugged.

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