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Volume of Commerce in Criminal Antitrust Cases

In criminal antitrust cases, the U.S. Sentencing Guidelines, while no longer binding on judges, nevertheless provide for draconian enhancements based on the so-called "volume of commerce" involved in the scheme. Over the past few years, the Department of Justice Antitrust Division has increasingly focused its enforcement actions on industry-wide cartels and global market conspiracies where literally hundreds of millions (if not billions) of dollars in commerce may be at issue. The vast scale of these cases leads directly to the possibility of lengthy prison sentences and hefty fines, even absent any other aggravating factors. Unfortunately, those federal appellate courts that have interpreted the scope of volume of commerce do not fully agree on the proper methodology to calculate this crucial metric.

By **Evan T. Barr**

Guidelines Language

Sentencing Guideline §2R1.1 establishes a base offense level of 12 for cases involving a violation of the Sherman Antitrust Act. The table found at §2R1.1(b)(2) provides for upward adjustments, ranging in two-point increments, from a minimum of 2 to a maximum of 16 levels, if the "volume of commerce attributable to the defendant was more than $1,000,000." An antitrust offense involving more than $40,000,000 but less than $100,000,000 in volume of commerce, for example, would yield a 6-level adjustment. Such an enhancement could add years of potential jail time to the applicable Guidelines range.

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According to the Guideline Commentary, the offense levels for antitrust crimes are not based directly on the damage caused or the profit made by the defendant because damages are difficult and time consuming to establish. The Sentencing Commission instead determined that the "volume of commerce" would be "an acceptable and more readily measurable substitute."

In conspiracies, the "volume of commerce" attributable to an individual participant is defined in the Guideline as "the volume of commerce done by him or his principal in *goods or services that were affected by the violation*." It is worth noting that unlike the concept of "relevant conduct" applicable to many other offenses, this provision does not hold one person accountable under the Guidelines for the commerce engaged in by a co-conspirator. The Guidelines offer no further insight into how the phrase

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"affected by the violation" should be interpreted.

'Hayter Oil'

The Sixth Circuit became the first court of appeals to interpret the phrase "volume of commerce … affected by the violation" in *United States v. Hayter Oil Company*, 51 F.3d 1265 (6th Circuit 1995). The Sixth Circuit assigned a broad meaning to the phrase, holding that affected commerce includes all of the defendant's sales during the existence of the conspiracy without regard to whether individual sales were made at the target price.

In *Hayter Oil*, defendants were convicted for a long-running conspiracy to control the retail price of gasoline in Greensville, Tenn. between 1984 and 1989. The conspirators met periodically to agree upon prices. But the scheme had limited success. Although gasoline prices initially went up as agreed following the meetings, they gradually decreased thereafter (over the course of days or sometimes weeks) as a result of station owners cheating or reducing their prices in response to another market participant.

At sentencing, the district court found that the price-fixing activities were actually successful for only 40 weeks over the entire conspiracy period of 234 weeks, or roughly 17 percent of the time. Thus the district court concluded that the affected volume of commerce for the defendant should be 17 percent of the total dollar amount of gasoline it sold during the overall conspiracy period. The Government appealed, asserting the district court erred in limiting volume of commerce to include only sales made when the conspirators succeeded in achieving their target prices.

On appeal, the Sixth Circuit reversed, holding that all gasoline sold by the defendant during the duration of the conspiracy should be deemed to have been "affected by the violation" regardless of whether the conspiracy had any specific influence on the price.

The Sixth Circuit relied on two main arguments. First, the court noted there was nothing in the language of the Guidelines that suggested that the Sentencing Commission intended that a sentencing court exclude sales made at something less than the agreed-upon price. Second, the court noted that as a policy matter it would be anomalous to declare price fixing illegal per se, relieving the government of a significant burden at trial, only to have it bear that same burden in order to obtain a fine.

The Sixth Circuit thus concluded that the affected volume of commerce included *all* of the defendant's sales made during the entire 234-week conspiracy period without regard to whether individual sales were made at the target agreed-upon price.

The Second Circuit's Approach

Four years later, in *United States v. SKW Metals & Alloys*, 195 F.3d 83 (2d Cir. 1999), the Second Circuit was next to analyze the phrase. In *SKW Metals*, the Second Circuit, disagreeing with the Sixth Circuit's automatic inclusion of all sales, instead held that only those sales that were "affected" in any way by the conspiracy should be counted.

In *SKW Metals,* defendants conspired to set floor prices in the ferrosilicon industry between 1989 and 1991. The conspirators did not always honor their agreement, and sales often fell below the targeted price floor. At sentencing, the district court construed volume of commerce narrowly to include only those sales by SKW that were made at or above the target price during two specific periods in which the conspiracy was in effect.

On appeal, the Second Circuit rejected the district court's formulation. The court concluded that a price fixing conspiracy can affect prices even when it falls short of achieving the conspirators' target price. Sales can be "affected" by a conspiracy, the court opined, when the conspiracy merely acts upon or influences negotiations, sales prices, the volume of goods sold, or other transactional terms.

According to the court, determining the volume of affected commerce did not require a sale-by-sale accounting, an econometric analysis, or expert testimony. Rather, following a multi-factor test, a sentencing court should consider "the goals of the conspiracy and the steps taken to implement it, the market share of the conspirators, and the perceptions of the conspirators

and the persons with whom they transacted business, and may otherwise deduce the effect on commerce from the pressures brought to bear on it."

The Second Circuit noted that while it had lightened the government's burden by allowing a rough approximation in lieu of establishing damages caused by the criminal scheme, that did not excuse the government's need to prove that the prices charged were still somehow "affected by" the conspiracy. The court concluded: "If the conspiracy was a non-starter, or if during the course of the conspiracy there were intervals when the illegal agreement was ineffectual and had no effect or influence on prices, then sales in those intervals are not 'affected by' the illegal agreement, and should be excluded from the volume of commerce calculation."

Judge Newman's Concurrence And the Majority Rule

In a concurring opinion, Judge Jon O. Newman criticized the majority's four-factor test for determining which sales were "affected" as irrelevant and unclear. Judge Newman opined that a sentencing court instead should utilize a rebuttable presumption that all sales within the conspiracy are "affected" by the price-fixing agreement (consistent with *Hayter Oil*), but with the defendant then free to prove, or at least come forward with evidence, that one or more particular sales were not so influenced.

Under Judge Newman's analysis, any sale in which the seller had a fixed price in mind would meet the test, even if the seller ultimately departed from such price. Judge Newman made clear that the standard for exempting a sale should be difficult to satisfy given that it would be unusual for a sale not to be impacted.

According to Judge Newman, a rare instance might arise when, under unusual circumstances, a seller quotes or agrees to a price without any reference to the fixed price. He gave an illustration: "For example, a defendant's brother-in-law might call one day and ask for a product at a bargain price in order to make a quick and urgently needed resale, and the seller agrees to the bargain price motivated solely by concern to help his relative, with no thought whatever about the fixed price which he quoted to all other customers. Since a rare circumstance of that sort would be peculiarly within the knowledge of the defendant, it is entirely appropriate to oblige him to prove it, or at least come forward with evidence of it." Judge Newman favorably compared his proposed rebuttable presumption to other provisions in the criminal law, such as certain affirmative defenses and downward departures under the Guidelines, for which the defendant carries the burden of proof.

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Several other circuits have subsequently adopted Judge Newman's approach. *See United States v Peake,* 804 F.3d 81 (1st Cir. 2015); *United States v. Giordano*, 261 F.3d 1134 (11th Cir. 2001) and *United States v. Andreas*, 216 F.3d 645 (7th Cir. 2000). So for now, Judge Newman's methodology is the majority rule.

Conclusion

Critics of the Guidelines continue to question whether a dollar-driven volume of commerce calculation makes sense in measuring an individual's relative culpability. Perhaps the Commission will consider meaningful changes to §2R1.1 at some point in the future, reducing the distorted emphasis on volume of commerce and focusing instead on factors such as whether the defendant was motivated by personal gain in committing the offense. In the meantime, however, at least outside the Sixth Circuit, lawyers negotiating or litigating the volume of commerce issue should try to invoke Judge Newman's rebuttable presumption approach in advocating for the most favorable outcome for their clients, and then be prepared to present highly specific evidence to DOJ or the court in support of their position.