

Search Warrants and Dawn Raids – How to Respond To A Visit From Government Agents

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April 17, 2012



haynesboone
Setting precedent.



Take-aways

- International enforcement priorities & tools
- Amnesty and leniency policies
- Necessary immediate responses
 - Dealing with government
 - Dealing with documents
 - Issues of initial factual investigation
 - Conditioning the client



How Do Investigations Start? Investigative Tools in US

- Leniency Program
 - Corporate & Individual Leniency Policies
 - Unique within DOJ
- Other domestic investigative tools:
 - Electronic surveillance (wiretaps)
 - Search/seizure/subpoenas
 - Interviews



Int'l Investigative Tools

- Amnesty/Leniency Policies
- Significant international cooperation
 - Cooperation Agreements, MLATs
 - Coordinated investigations
 - International Competition Network (“ICN”)
- Detention: Interpol’s “Red Notice” list, border watches, extradition



International Antitrust Enforcement: Then and Now

	1990	2012
Jurisdictions with Leniency Programs	1	50+
Total U.S. Corporate Criminal Fines to Date	Less than \$250M	More than \$6B
Foreign Defendants Served (or Serving) Jail Time in U.S.	0	40+



International Antitrust Enforcement: Criminalization of Cartel Offenses*

Australia	Mexico
Brazil	Norway
Canada	Romania
Cyprus	Russia
Czech Republic	Slovenia
Greece	South Africa
Ireland	South Korea
Israel	United Kingdom
Japan	United States
Macedonia	

*Countries that have legislation criminalizing cartel offenses and punishable by incarceration



International Cooperation

- Marine Hose
 - 2007: 8 executives from the U.K., France, Italy, and Japan were arrested in Houston and San Francisco; US, OFT & EC raids
- Air Cargo
- Freight Forwarding
 - 2007: US, OFT & EC raids
- Auto Parts



Considering Amnesty

U.S. DOJ Amnesty Program

- First company “in the door” receives complete immunity from prosecution for company and employees
- Race to amnesty: time is of the essence
- Must disclose all illegal activity (“amnesty plus” and “penalty plus”)
- Significant cooperation requirements
- Benefits in civil litigation: eligible for de-trebling and protected from joint and several liability



Considering Amnesty

- Once a search/raid has occurred, the race to amnesty is in all likelihood lost.
- Advising the Board about benefits of early settlement when amnesty is not available
 - Higher cooperation discount (30-35%); fixed in some jurisdictions
 - Fewer “carve-outs” (and possibly better treatment)
 - Opportunity to negotiate reduced volume of commerce
 - Greater chance to qualify for “amnesty plus”



Rule 41 Search and Seizure

- “Property” – all inclusive
- “Daytime” – 6:00 am to 10:00 pm
- Evidence of a crime, fruits of crime or property used in committing a crime
- Agent or prosecutor prepares affidavit, Magistrate signs warrant, and within 10 days, search begins
- No effective recourse
- Internationally, “dawn raids”



Drop-in Interviews – Prosecutor Goals

- Background
- False exculpatories
- Not trying to elicit privileged information
- Prosecutor must not lie – ethical rules apply



Responding to Drop-In Interviews

- Request to have counsel present
- Obtain contact information from agents
- Tell the truth
- Debrief in follow up interview with counsel
- Do not discuss contents of interview with other employees



Responding to a Search

- Ideally, plan is in place – “What to do in the event of a search”
- Some level of chaos inevitable
- Plan would include:
 - Who to call – Inside and outside counsel for each facility
 - On-site point of contact



Responding to a Search

- When agents arrive:
 - Contact counsel; request delay until counsel arrives
 - Request copy of warrant and read it
 - Attempt to shadow and document
 - Cooperate, but do not “consent”



Responding to a Search

- When agents arrive:
 - Contain scope if possible
 - Identify privileged documents
 - With management, arrange to dismiss non-essential personnel
 - Take notes
 - Request inventory



Responding to a Search

- Employee Interviews
 - Not within scope of warrant
 - Do not instruct employees to refuse, but inform them they have no obligation to consent
 - Let employees know that company will make counsel available



Internal Investigation

- Partner with IT and/or outside IT consultant
- Preserve broadly ASAP, including home and personal devices
- Centralize responses to media/customer inquiries
- Do not assume you are hearing the full story during preliminary interviews



Internal Investigation

- Quickly form a preliminary assessment of whether there has been a violation
- Identify key personnel (sales, marketing, etc), competitors, and customers
- Prioritize collection of key documents (calendars, expense reports, meeting minutes, notes, emails regarding competitor contacts, price announcements, strategic plans)



Internal Investigation

- Do not ignore ethical pitfalls:
 - Privilege: Know the rules in relevant jurisdictions (EU, Japan, etc.)
 - Conflicts: Balance the need for thorough investigation with ethical obligations when dealing with unrepresented employees
 - Privacy: Understand limitations on what data can be searched in relevant jurisdictions
 - Documents: Avoid bringing foreign documents within the range of DOJ and civil plaintiffs
- Do not forget to be on the lookout for other antitrust violations (related products)



Internal Investigation: Witness Warnings

- Deliver and create a clear record of all warnings given
- Be clear about representation
 - Counsel represents company, not the individual
- Identify purpose of interview
 - Gather information
 - Respond to inquiries in connection with pending investigations



Internal Investigation: Witness Warnings

- Explain privilege
 - Privilege belongs to company, not individual
 - Company controls the information and can choose to disclose content of the conversation to others (including prosecutors)
 - Witness will not have to be consulted and will not have ability to object to disclosure
- Confidentiality: Ask witness not to disclose the contents of the conversation to any other person
- Do not ignore potential conflicts



Other Concerns

- What if employee asks if he needs his own lawyer?
- Examples:
 - El Paso case in Houston
 - Indictment for obstruction based on interviews with company counsel
 - Broadcom case in 9th Circuit (Ruehle)
 - Officer indicted in backdating case raised disclosures by company counsel, who had answered on his behalf in derivative case



Initial Discussion with Senior Management

- Establish reporting lines
- Dealing with employees
 - Separate counsel
 - Refusals to cooperate
- Conditioning regarding length, cost, disruption
- Caution regarding “cooperation”
- Prepare for potential consequences



Explaining the Consequences

- Higher corporate penalties
 - Policy of no “no jail” pleas
 - Up to greater of (a) \$100 million or (b) twice the gain or loss from the illegal conduct
 - Continued use of alternative fines provision to obtain fines greater than \$100 million



Explaining the Consequences

- Higher individual penalties
 - Up to 10 years in prison and \$1 million fine
 - Average jail sentence – 30 months
 - Average jail sentence for foreign nationals – 10 months



Explaining the Consequences

- Obstruction

- Statutes

- **18 U.S.C. § 1503:** ... unlawful to “corruptly ... endeavor to influence, obstruct, or impede, the due administration of justice.”
 - **18 U.S.C. § 1512(b):** It is unlawful to “engage in misleading conduct toward another person, with intent to ... cause or induce any person” to “withhold” testimony or documents.



Explaining the Consequences

- Obstruction
 - Grand jury subpoenas typically broad
 - Companies must exercise extreme care and diligence when responding
 - Document preservation is key (hard copy and electronic)
 - Errors can have severe ramifications in government and civil cases

Explaining the Consequences: Obstruction

Example: *United States v. Censullo*

- Employee of amnesty applicant – otherwise immune from prosecution
- Charged with obstruction under 18 U.S.C. § 1503
- Up to 10 years in jail

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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 UNITED STATES OF AMERICA)
17 v.) Cr.
18 ALFRED P. CENSULLO,) Fil.
19 Defendant.)
20
21 PLEA AGREEMENT
22 The United States of America and the defendant
23 the following Plea Agreement pursuant to Rule 11(c)(1)
24 Procedure (Fed. R. Crim. P.):
25 RIGHTS OF DEFENSE
26 1. The defendant understands his rights:
27 (a) to be represented by an attorney;
28 (b) to be charged by indictment;
(c) to plead not guilty to any criminal offense;
(d) to have a trial by jury, at which he will be found
guilty of the charge and the United States would be
the charged offense beyond a reasonable doubt if he is
(e) to confront and cross-examine witnesses and
subpoena witnesses in his defense at trial;
PLEA AGREEMENT – Page 1

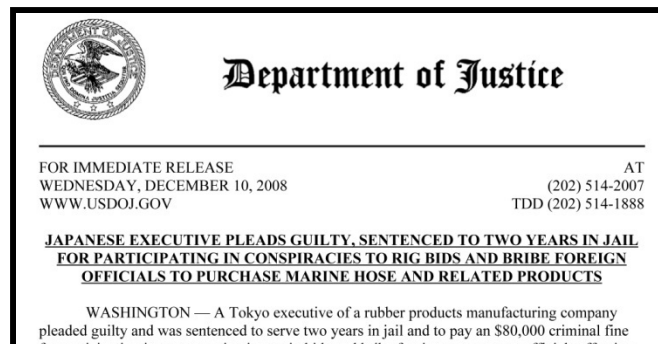
Explaining the Consequences: Obstruction

After learning of the investigation, Mr. Censullo:

- Altered handwritten notes by inserting additional words, phrases, and symbols
- Attempted to materially change meaning of notes (incl. notes relating to competitor pricing information)
- Removed and withheld 14 pages of notes containing competitor pricing information
- Alterations were “material” to the investigation and “an attempt to disguise the nature, source and accuracy” of responsive information

1 responsible for major computer ori
2 known as core accounts. During the
3 recommendations for DRAM sales
4 prices at which competing DRAM s
5 upcoming price negotiations. Durin
6 defendant from time to time record
7 concerning competing DRAM supp
8 telephone conferences.
9 (c) Sometime shortly afte
10 Micron notified many of its employ
11 investigation into criminal antitrust
12 notified of the grand jury investigat
13 influence, obstruct, and impede the
14 notations in his notebooks by insert
15 notebooks in an effort to materiall
16 the entries that were altered by the
17 responsive to the subpoena. Additi
18 14 pages from his notebooks that co
19 alterations that could be detected by
20 alerted the United States that these
21 (d) The alterations to the
22 the grand jury investigation. The al
23 the nature, source, and accuracy of
24 concerning contacts and communic
25 pricing and sale of DRAM, evidenc
26 POSSIBLE M
27 5. The defendant understands t
28 against him upon conviction for a violation
PLEA AGREEMENT – Page 3

Explaining the Consequences: Prosecution of Related Offenses



Example: *United States v. Hioki*

- Charged with antitrust and FCPA violations
- 24 months in jail
- \$80,000 fine

of around January 2004 through or around May 2007. The Department charged that during the conspiracy Hioki and his co-conspirators:

Explaining the Consequences: Prosecution of Related Offenses



Department of Justice

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FOUR INDIVIDUALS AND THREE CORPORATIONS INDICTED FOR ROLES IN
MAIL AND WIRE FRAUD CONSPIRACIES AT A NEW YORK CITY HOSPITAL

Example: *United States v. Yaron*

- 4 individuals and 2 companies charged with mail and wire fraud conspiracies
- Up to 20 years in prison and \$1 million fine (or 2x gain/loss)



Explaining the Consequences: U.S. Civil Lawsuits

- Triple damages + attorneys fees
- Joint and several liability
- No contribution
- Liberal discovery
- Multiple plaintiffs (direct, indirect, foreign, states)
- Lengthy and protracted litigation

Explaining the Consequences: Foreign Civil Lawsuits

Example: *Air France/KLM/Martinair*

- Largest ever private cartel damages claim filed in EU (more than €500m)
- Funded and organized by a claims-funding group
- Plaintiffs include corporate customers



WORLD'S LARGEST EVER
DAMAGES CLAIM

Filed with Court Proceedings in Air Cargo
Initiated in the Netherlands

History today with the start of the largest
without the support of a litigation funder,
to sue most of the world's major airlines.

CFI has signed up companies in its group from 11 EU member states to pursue extensive damages claims. These claims arising from the Air Cargo cartel cover major names in the pharmaceutical, automotive, electronics, food and fashion industries.

Explaining the Consequences: Foreign Civil Lawsuits



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Class Claims Stay Grounded In BA Cartel Case

By Ben James

An appeals court in London upheld a decision Thursday rebuffing two flower importers who sued British Airways PLC over an alleged price-fixing scheme in the air freight services industry from pursuing their claims on behalf of a class of freight-services customers.

A three-judge panel for the Court of Appeal dismissed Emerald Supplies Ltd. and Southern Glass House Produce Ltd.'s appeal of an April 2009 decision that granted BA's bid to strike the representative element of Emerald's claim.

not equally beneficial to all members.



Aggressive Investigation and Prosecution of Foreign Nationals

- Extradition
 - Typically requires treaty and dual criminality
 - Lengthy and complicated, but DOJ has been successful in cartel cases
 - Example: Ian Norris, U.K. national, extradited on obstruction charges and convicted summer 2010



Aggressive Investigation and Prosecution of Foreign Nationals

- Travel Restrictions
 - Even if extradition from home country is not possible, Interpol red notices and border watches limit travel
 - DOJ will seek passport surrender for foreign defendants traveling to the U.S. for pre-trial proceedings (AU Optronics)



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