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What Judges Think Of Binding Corporate Plea Agreements

Law360, New York (December 06, 2013, 1:41 PM ET) -- Binding plea agreements are a favored method for corporations seeking to resolve a criminal investigation through a corporate plea. Under such agreements, which are permitted under Fed. R. Crim. P. 11(c)(1)(C), the parties agree to a resolution and the district judge must either accept or reject the plea, but does not have the ability to alter the disposition to which the parties have agreed.

For large corporations, which must seek approval to resolve a case from upper management as well as the board of directors, the certainty afforded by a so-called "(C)" plea can be extremely helpful to the process. In the last couple of years, however, certain judges have attacked the notion of resolutions that do not permit judges to determine a sentence.

Judge William G. Young of the U.S. District Court for the District of Massachusetts has been particularly outspoken on this issue. In December 2012, after multiple hearings, Judge Young rejected a (C) plea tendered by Orthofix Inc., a medical device manufacturer, despite being presented with substantial evidence supporting the rationale for the plea agreement.

In rejecting the plea, Judge Young stated that, "in all but the most extraordinary case it is improvident for a judge to accede to an 11(c)(1)(C) plea in cases of corporate liability." Similarly, in May 2013, Judge Young rejected the (C) plea of APTx Vehicle Systems Limited. Judge Young later wrote an opinion explaining his rationale for both these rulings, expressing concern about such agreements invading the province of "the judge whose role it is zealously to protect the public interest."

Judge Young analogized his concerns to those Judge Jed Rakoff of the Southern District of New York had expressed in connection with previous U.S. Securities and Exchange Commission settlements. Much has been written about Judge Rakoff's decisions rejecting consent agreements between the SEC and corporate defendants. Judge Rakoff 's concerns in these cases were twofold.

First, he was hesitant for the court to use its considerable judicial power to determine cases where the defendant had not admitted to liability thus depriving the court of the ability to exercise independent judgment regarding the proper result. Second, he worried that consent agreements were being used to benefit the parties and not the real victims of the financial fraud. He stressed that it was a judge's responsibility to protect the public interest in these situations.

Whether Judge Young's and Judge Rakoff's rulings will lead to a trend toward rejecting (C) pleas remains to be seen. The reality is that judges continue to accept most (C) pleas where the settlements seem fair and reasonable. For example, around the same time that Orthofix first attempted to plead guilty in Judge Young's courtroom,GlaxoSmithKline LLC appeared before Judge Rya Zobel, also of the District of

Massachusetts, to plead guilty under Rule 11(c)(1)(C) to multiple violations of the Food, Drug and Cosmetic Act.

During the sentencing hearing, prosecutors informed the court that GSK had reworked its compliance programs and had agreed that it would no longer provide incentives to its sales representatives based upon the volume of their sales. The plea agreement in this case did not include probation or a nondisparagement clause. In fact, GSK's attorney stated during the hearing that the company did not agree to "each and every factual allegation set forth in the information." Without much comment, Judge Zobel accepted the plea; GSK was sentenced to pay a criminal fine of $956.8 million and forfeit assets of $43.2 million.

In May 2013, ISTA Pharmaceuticals also pled guilty under Rule 11(c)(1)(C) to conspiracy to introduce a misbranded drug into the marketplace. During the plea colloquy, Judge Richard Arcara of the Western District of New York noted his obligation to consider the public's interest when deciding whether to accept ISTA's plea. The parties explained that Bausch & Lomb, which had purchased ISTA, had agreed to pay significant penalties, had cooperated with the government during the investigation, and had agreed to comply with an extensive compliance agreement. Judge Arcara acknowledged the amount of work that had gone into preparing the plea agreement and expressed his view that there was no "downside" for either party or the public. He accepted the plea and sentenced ISTA to $18.5 million in criminal fines.

Acceptance of corporate (C) pleas has extended outside the realm of health care fraud. On Sept. 19, 2013, Judge Jane Triche Milazzo of the Eastern District of Louisiana accepted Halliburton Energy Services Inc.'s guilty plea for deleting records after an explosion onboard Deepwater Horizon in the Gulf of Mexico. Prior to making her decision, Judge Milazzo requested a pre-sentence investigation report from the probation office and a joint memorandum from the parties explaining why the plea agreement adequately reflected the seriousness of the charges and why the agreed upon punishment satisfied the statutory purposes of sentencing.

In the joint motion, the parties explained that the sentence was fair and in the public's best interest because it balanced the harm Halliburton caused by destroying evidence with the company's prompt and voluntary disclosure of the offensive conduct, its helpful cooperation in the continuing Deepwater Horizon investigation, and the remedial measures that the company had already put in place to ensure that legal holds are more diligently observed in the future. Earlier in 2013, judges in the Eastern District of Louisiana accept two additional (C) pleas in connection with the Deepwater Horizon investigation.

Most recently, on Nov. 7, 2013, Janssen Pharmaceuticals Inc. appeared before U.S. District Judge Timothy Savage of the Eastern District of Pennsylvania to plead guilty to one count of introducing a misbranded drug into interstate commerce. Janssen also waived its right to a presentence investigation report. Following the plea hearing during which the company admitted to wrongdoing, Judge Savage accepted Janssen's (C) plea and sentenced the company to pay a fine of $334 million with a special assessment of $66 million.

The next major pronouncement reflecting current judicial thinking regarding (C) pleas will likely come from the Southern District of New York, where District Judge Laura Taylor Swain must decide whether to accept or reject SAC Capital Advisors' (C) plea. SAC pled guilty on Nov. 8, 2013, to wire and securities fraud. After a hearing, Judge Swain requested a pre-sentence investigative report and informed the parties that she would reserve judgment on the plea until March 2014.

It would be unwarranted to sound the death knell for corporate (C) pleas. However, the fact that certain

prominent judges have rejected negotiated resolutions between corporations and the government means that companies negotiating plea agreements should be more prepared than ever to answer questions about why the binding sentence they are proposing is not only fair for the parties but for the general public as well. Evidence of new and comprehensive compliance programs, cooperation with ongoing investigations, and payment of fair and reasonable settlement amounts are important pieces of evidence in convincing a federal judge that a (C) plea should be accepted.

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