Abbreviated Rule of Reason Inquiry: A Place Between Per Se Rule and the Full-Blown Rule?

By Maria Del Monaco

For many years, practitioners have analyzed antitrust agreements by categorizing them in terms of either the rule of reason or the per se rule. Beginning in the mid-1980s, however, courts began applying more of an intermediate standard, which came to be known as an “abbreviated,” “truncated,” or “quick look” rule-of-reason inquiry. This standard was further validated in 1999 in California Dental Ass’n v. FTC, when the U.S. Supreme Court explicitly granted certiorari to “resolve conflicts among the Circuits...over...the occasions for abbreviated rule-of-reason analysis.” Accordingly, practitioners must consider the possibility of a court or an administrative tribunal evaluating an antitrust dispute using this third mode of analysis. This article discusses when and how courts and other adjudicative bodies have used an abbreviated or “quick look” rule-of-reason analysis.

Increased DOJ Intervention to Stay Discovery in Civil Antitrust Litigation

Grand jury investigations by the Antitrust Division of the Department of Justice (DOJ) are inevitably followed by multiple civil class action lawsuits. The parallel civil lawsuits can interfere with the government’s investigation when discovery prematurely reveals its witnesses or documents. The complications of parallel civil and criminal litigation also pose significant challenges to the defense bar. As a result, in the last five years, the division’s San Francisco Field Office has sought discovery stays in the Rambus, the SRAM, and the TFT-LCD litigation. It has intervened in numerous others in the last year, including Flash Memory and the Graphics Processing Units antitrust litigation, and even in at least two cases outside the Northern District of California.

While this approach may herald a greater emphasis by the division on protecting its grand jury proceedings, its repeated success in convincing courts to put the brakes on civil discovery has benefited antitrust defendants.

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A Change in Practices
Until the recent string of Northern District of California cases, the Antitrust Division was seen as much less aggressive in seeking discovery stays than, say, the Securities Exchange Commission (SEC) or the DOJ’s Criminal Division in securities actions, which actively seek (and are regularly granted) discovery stays to protect grand jury materials6 and criminal investigations in litigation.7 The San Francisco Field Office’s pattern of intervention in private lawsuits appears to be a new approach by the Antitrust Division, which, in the past, only intermittently sought stays in parallel civil suits.8 An example of its earlier indifference is the 1980 Golden Quality Ice Cream litigation, in which the Eastern District of Pennsylvania denied defendants’ request to stay all civil proceedings (including discovery) pending the conclusion of the DOJ’s parallel criminal investigation. In that case, the Antitrust Division stated that it took no position on the motion, satisfied with preserving the confidentiality of its grand jury documents through the protective order.9 This early position contrasts with the statement the division made in the same court 20 years later in the Graphite Electrodes litigation, in which it agreed “with the position set forth by [the defendant] that the Government shall not obtain by civil discovery that to which it is not entitled to through the Rules of Criminal Procedure. . . .”10 The division’s intent in civil proceedings was often to make sure it was not dragged into those proceedings. For example, in the In re Flat Glass Antitrust Litigation in 1998, the division opposed plaintiffs’ third-party subpoena issued to the DOJ to produce grand jury documents in the parallel civil matter.11

Similarly, courts have often denied requests by the government12 and defendants13 alike to stay civil antitrust discovery made on the basis of parallel criminal proceedings and often granted plaintiffs access to grand jury materials. Courts have noted that they will not necessarily protect a defendant, asserting that “materials unearthed during civil discovery may eventually inure to the benefit of the Government in the prosecution of the criminal action” because “this concern is of doubtful relevance to the civil proceedings.”14 When courts refused to grant stays, they did so to protect the interests of parties—usually plaintiffs,15 but sometimes defendants16—in having their civil cases litigated efficiently and expeditiously.

The change in attitude by the courts has been demonstrated by the San Francisco Field Office’s success in obtaining stays since the 2002 DRAM stay as well as decisions of courts nationwide. The division was granted stays by the Southern District of New York in 2000,17 the Central District of California in 2000,18 the Eastern District of Pennsylvania in 2000,19 and 2003,20 the Eastern District of New York in 2002,21 the District of Columbia in 2003,22 and twice by the District of New Jersey in 2004.23 As a possible spillover effect, it is also becoming commonplace to see courts grant requests for stays by defendants for other reasons, such as a pending motion to dismiss,24 Twombly grounds,25 or pending the filing of a consolidated complaint.26

Defendants’ and plaintiffs’ positions on government-requested discovery stays in private antitrust actions also appear to have evolved. It was typical to see plaintiffs or defendants object to stay requests by the government. However, in the recent series of Northern District of California antitrust complex class actions, all parties supported the government’s stay motions and agreed to joint stipulations. The SRAM, DRAM, and TFT-LCD matters are examples. In the TFT-LCD matter, all parties and the government had agreed to a discovery stay, leaving Judge Illston to decide only one peripheral dispute about whether access to grand jury materials should be allowed.27

The evolution to a position of consistent support by the government, parties, and judges alike for requests to stay civil discovery pending the conclusion of parallel criminal antitrust proceedings has made discovery stays an appropriate procedural step and a critical case management tool.

A Stay as an Appropriate and Beneficial Procedural Step
The government has established authority to intervene in a civil action for the purpose of limiting discovery when there is a parallel criminal proceeding involving a common question of law or fact.28 The courts, however, recognize that they must “hesitate before granting a blanket stay of discovery in a civil proceeding, based on conclusory allegations of prejudice and on the mere possibility that a non-party witness may be called to testify before the Grand Jury.”29 Although not an automatic right30 and sometimes described as “an extraordinary remedy,”31 a civil stay of discovery is often the most appropriate result. In deciding whether to stay civil litigation, courts examine the interests of all interested parties and consider the “particular circumstances and competing interests involved in the case.”32

When the same individual faces simultaneous civil and criminal proceedings, a civil stay serves a valuable purpose for all interested parties. It is efficient for the court: The prior resolution of particular issues as part of the criminal matter may eliminate duplication in the civil process.33 Judges appear inclined to grant government motions to stay discovery, likely because the government, charged with justice, is the more appropriate party to lead the investigation than plaintiffs whose goal is to conduct a shakedown. Plaintiffs

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benefit because the government will have laid out the road map of the case, reducing their work.

A discovery stay also typically benefits defendants. The civil matter may be resolved through alternative means while a stay is in place or may be dismissed before defendants ever need to embark on the expensive process of locating, collecting, sorting, and producing documents and electronic data. A stay protects defendants from plaintiffs attempting to use the discovery process to add substance to otherwise superficial complaints, as noted in Twombly. It also protects innocent players that are not the subject of the government investigation but have been dragged into the case because they are industry players. Letting the government investigation take its course avoids unfairly involving parties that do not belong in the case.

Defendants also may require a discovery stay to protect their constitutional rights; it avoids potential exposure to double jeopardy from simultaneous proceedings. And a stay helps defendants avoid the dilemma of invoking Fifth Amendment rights during civil depositions proceedings, which may diminish their chances of success at trial. The criminal rules also offer defendants procedural protections that could be undermined through the more lenient civil discovery rules, and courts have criticized the government when it has, in a securities context, engaged in an “abuse of process” and attempted to expand the scope of its discovery by filing parallel civil suits.

The government often seeks a stay to prevent the defendant or the plaintiff from obtaining testimony or evidence in the civil proceeding to show their innocence or learn more about how much the government actually knows. The San Francisco Field Office intervened in civil proceedings in the Eastern District of Pennsylvania in 2005, arguing that it sought “to intervene . . . to prevent [the] defendant from using civil discovery to circumvent the much narrower rules of criminal discovery,” noting that it was “an unprecedented effort to use the more liberal civil discovery rules to pierce the secrecy of an active antitrust criminal grand jury investigation.”

In the Northern District of California cases mentioned earlier, the government’s primary argument in support of its motions for a stay was that it did not want to reveal its theories prematurely. In the TFT-LCD litigation, the court acknowledged that a stay helps the government preserve the secrecy and confidentiality of its grand jury proceedings and not “reveal the nature, scope and direction of the ongoing criminal investigation, as well as the identities of others who may be providing evidence to the grand jury or the government, and the identities of potential witnesses and targets.” The government is not the only party concerned about protecting the government’s theories. Defendants have objected to the stays on these grounds. For example in the Rambus civil litigation, the defendant objected because the target of the DRAM criminal investigation was a plaintiff in separate civil litigation.

Comparison of Recent Stays
Not all stays obtained by the San Francisco Field Office have been in the same format, perhaps demonstrating the division’s growing experience in crafting its stays and negotiating with them with parties. The first Northern District of California stay order in an antitrust class action was the DRAM Antitrust Litigation order granted by Judge Hamilton in 2003 in the format agreed and stipulated by the plaintiffs and defendants in that matter and by the division. The DRAM stay was open-ended, with a status conference scheduled nine months from the order. It stayed deposition, interrogatory, and documentary discovery but allowed for the production of documents submitted to the grand jury and non-substantive documents, such as sales data and other data that plaintiffs could use to identify damages. It also allowed for third-party depositions (other than of former employees of defendants). In DRAM, the government filed a joint stipulation with the plaintiffs and defendants in that matter and by the division.

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The DRAM stay did not cover documentary discovery. Judge Wilken agreed to stay all deposition and interrogatory discovery ordered in the DRAM litigation for nearly a full year. The TFT-LCD stay granted by Judge Illston was broader than both the DRAM and SRAM stays as it did not allow discovery of the documents produced to the grand jury. It covered deposition, interrogatory, and documentary discovery. The government continues to take an active interest in discovery in the TFT-LCD matter and recently requested an extension of a partial version of the existing stay until January 9, 2009. The government proposed that discovery be allowed to move forward except for communications with the government regarding its grand jury investigation.

The Northern District’s evolution in accepting that stays are appropriate in the complex antitrust litigation matters has developed to the point that in January 2008, Judge Armstrong granted a stay requested by defendants in Flash Memory, rather than by the division. The division intervened in Flash Memory, stating that it was “for the purpose of limiting certain discovery during an ongoing criminal grand jury investigation.” The division filed a statement that had no position on the application of Twombly to the litigation.

Impact of the Recent Pattern of Intervention
The new apparent pattern of intervening to stay discovery in complex private civil litigation by the San Francisco Field Office has garnered consistent support from the courts and from plaintiffs and defendants alike. The courts and parties have recognized the benefits of avoiding the duplication of grand jury proceedings in parallel criminal and civil proceedings will bring. Other field offices of the Antitrust Division have started, and are likely, to adopt a similar strategy and policy.

Endnotes
2. In re Dynamic Random Access Memory (DRAM) Antitrust Litig., No. 02-1486 (N.D. Cal.).
6. Federal Rule of Criminal Procedure 6(e) governs disclosure of grand jury materials by the government (as opposed to disclosure by defendants).

7. SEC v. Chestman, 861 F.2d 49, 50 (2d Cir. 1988) (The government, not the defendant, has a "discernible interest in [preventing criminal discovery] from being used to circumvent the more limited scope of [criminal discovery]").


15. Connecticut ex rel. Blumenthal v. BPS Petroleum Distributors, Inc., No. 91-173 (D. Conn. July 16, 1991) ("stay in proceedings may result in prejudice . . . because witnesses relocate, memories fade, and persons . . . are unable to seek vindication or redress for indefinite periods of time on end"); citation omitted. See also Hoffman v. Hakim, No. 92 6233 (S.D.N.Y. Nov. 18, 1993).

16. United States v. Hugo Key & Son, Inc., 672 F. Supp. 656, 658 (D.R.I. 1987) ("Certainly, it cannot be controverted that every defendant has a strong interest in the expeditious determination of his civil liberties").


20. SEC v. Dresser Indus., 628 F.2d 1366 (D.C. Cir. 1980) (The courts also consider the origin of the conflict between the parallel civil and criminal proceedings.


22. SEC v. Chestman, 861 F.2d 49, 50 (2d Cir. 1988) (The government has a distinct and "discernible interest in intervening in order to prevent discovery in the civil case from being used to circumvent the more limited scope of discovery in the criminal matter"); see also, Bd. of Governors of Fed. Reserve Sys. v. Pharran, 140 F.R.D. 634, 639 (S.D.N.Y. 1991) ("A litigant should not be allowed to make use of the liberal [civil] discovery procedures . . . to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled").


27. 38. SEC v. Chestman, 861 F.2d 49, 50 (2d Cir. 1988) (The government has a distinct and "discernible interest in intervening in order to prevent discovery in the civil case from being used to circumvent the more limited scope of discovery in the criminal matter").


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