



U.S. JUSTICE DEPARTMENT OBTAINS RECORD JAIL SENTENCE FOR ANTITRUST CONSPIRACY: THE VALUE OF COOPERATION AND JUDICIAL DISCRETION

Earlier this year, the U.S. Department of Justice obtained the longest term ever imposed for a single antitrust violation. It wanted more. Peter Baci, former executive of a U.S. shipping company, was sentenced by a Florida federal district court to serve four years in jail and pay a \$20,000 criminal fine for his role in an antitrust conspiracy.¹ This is a new record, but it is equally interesting for the fact that the DOJ recommended and expected the court to impose an even longer sentence.

The court shaved nine months off the sentence to which Baci and the DOJ had agreed in his “Type C” plea, a form of plea agreement in which the prosecutor and defendant jointly present the court with a “take it or leave it” sentencing recommendation. This

reduction can be attributed to the court’s unhappiness with Type C plea agreements and its perception that the DOJ had not given Baci the same credit for cooperating with the DOJ’s investigation as it had given to other defendants in this and other cases.

The outcome here highlights the importance of cooperating with the government for a defendant that seeks a plea agreement. It also illustrates the issues that may arise in plea agreements that deviate from the DOJ’s “model,” specifically those that arise from the interplay between Type C plea agreements and the discretion a judge has to impose a sentence lower than that prescribed by the Federal Sentencing Guidelines. The *Baci* court has put the government on notice that, even in the context of a “take or leave

1. The DOJ’s press release announcing Baci’s sentence and plea agreement can be found at http://www.usdoj.gov/atr/public/press_releases/2009/242030.htm. (press release) and <http://www.usdoj.gov/atr/cases/f238800/238829.htm>. (plea agreement).

it” plea agreement, courts retain considerable discretion in meting out punishment—and not always in the manner the prosecutor desires.

THE CONSPIRACY

The defendant is the former Senior Vice President of Yield Management at Sea Star, which provides freight and cargo transportation services between the continental United States and Puerto Rico. Sea Star ships heavy equipment, medicines, and consumer goods for commercial and government customers, such as Wal-Mart and the U.S. Postal Service.

Baci pleaded guilty in October 2008 for his role in a conspiracy to suppress and eliminate competition involving coastal water freight transportation services between the continental United States and Puerto Rico in violation of Section 1 of the Sherman Act. According to the plea agreement, Baci participated in a conspiracy with one or more competitors to allocate customers, rig bids submitted to government and commercial buyers, and fix rates, surcharges, and other fees charged to customers from as early as May 2002 and until as late as April 2008.²

TYPE C PLEA AGREEMENTS AND THE “ADVISORY” SENTENCING GUIDELINES

Defendants and the DOJ typically enter one of two types of plea agreements to resolve charges that they violated the Sherman Act. Baci made a Type C plea, which presents the court with a “take it or leave it” joint recommendation by the prosecutor and the defendant that a specific sentence or sentencing range under the Guidelines is appropriate. If the Court rejects the parties’ recommendation, the agreement is void and the defendant is free to withdraw his guilty plea. By

contrast, under a “Type B” agreement, the court is not bound by the sentence recommended by the prosecutor or the defendant. And even if the court rejects the government’s recommended sentence, the defendant cannot withdraw his guilty plea.

According to Scott Hammond, the DOJ’s head of criminal enforcement, a defendant typically prefers a Type C agreement because “the defendant can have confidence that the Division will be a strong advocate for the negotiated disposition and that the court is highly likely to go along with the recommendation of the parties.”³ In a 2006 speech, Hammond noted that “[t]he Division has achieved a near-perfect track record in persuading courts to accept negotiated ‘C’ agreements.” In the 10 years prior, there had only been one instance in which a judge rejected the sentence recommended in a Type C agreement.⁴

The Division’s near-perfect record may be nearing an end. In recent years, in multiple cases beginning with *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court has emphasized that the Sentencing Guidelines are just guidelines and not rules of law. This principle creates some flexibility for district courts, which sometimes have chafed at Type C plea agreements that limit their discretion in sentencing.

THE COURT’S PRE-SENTENCING RULING

In a pre-sentencing order on January 21, 2009, the court begrudgingly accepted Baci’s Type C plea agreement but also broadly interpreted plea agreement language that controlled how Baci and the court could respond to the government’s motion for a downward departure from the Guidelines pursuant to U.S.S.G. § 5K1.1.⁵

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2. Baci is the first executive to be sentenced as a result of the government’s investigation into the coastal water freight transportation services conspiracy. Several other executives are awaiting court sentences after submitting guilty pleas on or about the same date as Baci. To date, no companies have been charged.
 3. Scott D. Hammond, “The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits For All,” Presented at the OECD Competition Committee Working Party No. 3, Paris, France (Oct. 17, 2006), available at <http://www.usdoj.gov/atr/public/speeches/219332.htm>.
 4. *Id.* at note 26.
 5. *United States v. Baci*, Order, Case No. 3:08-cr-350-J-32TEM (M.D. Fl. Jan. 21, 2009). The order applies to Baci and four other defendants who have not yet been sentenced.

The court accepted Baci's plea agreement, but the judge made his views on Type C pleas very clear: "Nothing in the discussions [during status conferences] nor in the Court's study of the matter has caused the Court to alter its view that plea agreements pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure should be disfavored." The court's January 21 order specifically provided that "[t]he Court's decision to accept the [Type C] plea agreements in this case should not be used as precedent for future cases."

The court then interpreted the plea agreement in a way that opened the door for Baci's counsel to argue that his cooperation entitled him to more credit—and a lower sentence—than the government had been willing to provide. The government had recommended a downward departure from the sentence prescribed by the Guidelines (a "§ 5K1" motion) based on Baci's cooperation with its investigation. And the plea agreement bound Baci to "the departure level recommended by the United States." The court interpreted this to mean that Baci could not argue—on the basis that he had cooperated—that he deserved a more favorable sentence than the government was willing to recommend. Nevertheless, the court did permit Baci to "supplement[] the government's substantial assistance presentation" and to emphasize "how [his] assistance meets the factors listed in [the Guidelines for downward departures]." Finally, the court noted that the plea agreement explicitly acknowledged that "the sentence to be imposed on the defendant remains within the sole discretion of the Court." Interestingly, this provision vesting the court with discretion as part of a § 5K1 motion is uncommon in Type C pleas,⁶ and its inclusion here presumably reflects a compromise reached between the prosecutor and defendant during plea negotiations.

BACI'S SENTENCING AGREEMENT WITH THE DOJ

The plea agreement outlined the parties' agreed-upon calculation of a "culpability score" under the Sentencing Guidelines.⁷ Baci and the DOJ agreed that, under the Guidelines, Baci's conduct would warrant a sentence of 121–151 months. This was based on four aggravating factors: conduct that affected commerce of more than \$1 billion; Baci's role as a manager of the criminal enterprise; obstruction of justice by taking actions to destroy documents relating to the investigation; and the bid-rigging offense itself. The parties also agreed that, under the Guidelines, mitigating credit for entering an early plea agreement and cooperating with the government's investigation would reduce Baci's sentence to 57–71 months.

The government ultimately recommended that Baci serve 57 months, at the bottom of the applicable Guidelines range.⁸ So under a "take it or leave it" Type C plea agreement, why did the court sentence Baci to only 48 months?

THE SENTENCING HEARING: PUSHING THE § 5K1 ENVELOPE AND APPLYING "ADVISORY" GUIDELINES

Following the court's January 21 order, Baci's counsel submitted a sentencing memorandum that argued Baci had been given too little cooperation credit relative to his co-conspirators and similarly situated defendants in other antitrust cases.⁹

6. The DOJ's model individual plea agreement includes this language, but only for "[t]he typical freefall B agreement." DOJ, Model Annotated Individual Plea Agreement, n. 30 (Dec. 18, 2008), available at http://www.usdoj.gov/atr/public/guidelines/indl_plea_agree.htm.

7. Under the Guidelines, a court should assess a sentence by (1) determining the culpability score for an offense (which may include a minimum number of points assigned to the particular type of offense, add points to account for aggravating factors, and subtract points for mitigating circumstances); (2) evaluating any past criminal history; and (3) applying the combination of (1) and (2) to the sentencing table in effect at the time the offense occurred. See generally U.S.S.G. § 1B1.1 (Application instructions).

8. *United States v. Baci*, Memorandum of the United States in Aid of Sentencing and Motion for Downward Departures Pursuant to U.S.S.G. §§ 3E1.1(b) and 5K1.1, Case No. 3:08-cr-350-J-32TEM, at 7 (M.D. Fl. Jan. 23, 2009).

9. *United States v. Baci*, Peter Baci's Sentencing Memorandum, Case No. 3:08-cr-350-J-32TEM (M.D. Fl. Jan. 26, 2009), at 9-12.

Counsel for the government asserted that Baci's co-conspirators received different treatment because they provided more prompt and substantive cooperation than Baci, and that other antitrust cases were not analogous. But the government's main complaint came from its perception that Baci was making a back-door effort to revisit the parties' sentencing agreement. Citing the court's January 21 order, the DOJ asserted that the plea agreement prohibited Baci from arguing that his cooperation entitled him to a more favorable sentence than the government was prepared to recommend.¹⁰

The court imposed a sentence on Baci of 48 months of imprisonment—nine fewer months than the parties had agreed and the government had recommended. The court acknowledged the government's "qualms" about Baci's sentencing memorandum, noting that some of Baci's arguments "were not able to be argued under the terms of the plea agreement."¹¹ Although the court explicitly stated that its decision to depart from the government's recommendation was based solely on the § 5K1 motion, the court appeared equally motivated by distaste for a Type C plea that otherwise limited its sentencing discretion.¹²

TAKEAWAYS FROM *BACI*

Antitrust criminal defendants that may make a plea agreement can serve themselves well by cooperating with the government's investigation. The value of that cooperation may not be limited to the specific "cooperation discount" recommended by the government, even when part of a Type C plea agreement.

This case illustrates how the government's willingness to deviate from its model plea agreement may have unintended consequences for the government. The typical Type C plea does not contain the language that proved critical in Baci's case, namely, that in considering the government's § 5K1 motion, "the sentence to be imposed on the defendant remains within the sole discretion of the Court." Indeed, but for that language, the *Baci* court might have simply rejected the plea agreement as provided in the plea agreement itself and Federal Rule of Criminal Procedure 11.

The DOJ's near-perfect track record of persuading courts to accept negotiated "C" agreements may be tested in the future. In a post-*Booker* world, courts will continue to exercise discretion over the sentences they impose. Defendants would be wise to look for opportunities to preserve that discretion, although the DOJ may be less willing to risk straying from its tested model pleas in the future.

Even though Baci received a more lenient sentence than he may have bargained for, his four-year jail term still is the longest ever imposed for a single antitrust violation. Whether the sentence in this case represents an outlier or a preview of things to come from the DOJ remains to be seen. The DOJ consistently cites the prosecution of cartel offenses as its single highest priority, and this case provides further evidence that the government will aggressively pursue individuals who have engaged in cartel conduct.

10. See generally *United States v. Baci*, Sentencing Hearing (Transcript), Case No. 3:08-cr-350-J-32TEM (Jan. 30, 2009).

11. *Id.* 76.

12. *Id.* (Court: "And so I am not considering the matters in the addenda. I'm not considering the matters in the sentencing memoranda filed by the defendant that don't bear upon the issue of the 5K1, because I'm not permitted to do so, nor am I doing so."); see also *id.* at 78 (Court: commenting upon the sentence, "And it's not—it's not an easy matter, for the reasons Mr. Terzaken [government counsel] and I discussed, Mr. Houlihan [defense counsel] and I discussed.").

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