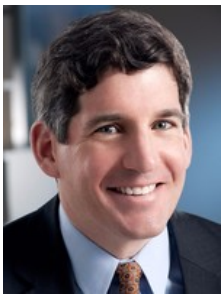
DOJ Corporate Plea Deals Face Increased Judicial Resistance

By **Joshua Levy and Elizabeth Douglas** (January 8, 2020)



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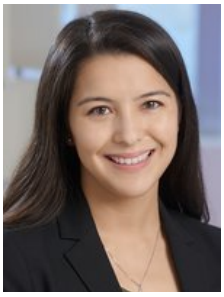

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There is an emerging threat to corporate settlements with the U.S. Department of Justice: federal judges rejecting the sentence agreed to by the parties in heavily negotiated, binding plea agreements. Such pleas — commonly known as C pleas — are a critical mechanism for resolving a federal criminal investigation into corporate misconduct. The possibility that such complex resolutions may be derailed by a court is a critical obstacle for defense counsel to anticipate and navigate.

This is exactly what happened to Aegerion Pharmaceuticals Inc. The DOJ investigation into the company began in late 2013, and a global resolution between the corporation, the DOJ, the Office of Inspector General of the U.S. Department of Health and Human Services, the U.S. Food and Drug Administration and the Securities and Exchange Commission was announced three years later.[1]

Part of this resolution was a C plea to two misdemeanors. The multiple-agency, global resolution ground to a halt, however, when Judge William Young of the U.S. District Court for the District of Massachusetts rejected this plea agreement in a sharply worded opinion, creating an unexpected roadblock to finalizing the corporate settlement. While the parties eventually got their deal back on track, the episode is a word to the wise.

The Benefits of a C Plea

Federal Rule of Criminal Procedure 11(c)(1) provides for three types of pleas. Rule 11(c)(1)(A) is utilized when the government promises to dismiss existing charges or to not bring additional charges. B and C pleas are structured around a defendant's sentence. Under Rule 11(c)(1)(B), the parties reach an agreement about what sentence the government will recommend. Crucially, in a B plea, a court is not bound by the parties' sentencing recommendations and the court may impose any sentence up to the statutory maximum.

Unlike B pleas, C pleas provide certainty regarding the exact sentence the court will impose. The rules are explicit that under a C plea any agreement with respect to the defendant's sentence is binding on the court if it accepts the plea: "The plea agreement may specify that an attorney for the government will ... agree that a specific sentence or sentencing range is the appropriate disposition of the case," and this "binds the court" once it accepts the plea.[2]

The advantages of a C plea are significant. For the government, its potential willingness to enter into a C plea is another bargaining chip. For the corporate defendant, a C plea allows it to make an informed decision about pleading guilty because it can provide the securities market and other stakeholders with certainty about its financial exposure. This is especially important for publicly traded companies.

Judicial Rejection of Aegerion's C Plea

Aegerion, a Massachusetts-based orphan biotechnology company, marketed a drug used to

treat homozygous familial hypercholesterolemia. In late 2013, the DOJ and SEC began parallel investigations into Aegerion's marketing practices; Health Insurance Portability and Accountability Act compliance; adherence to the FDA's Risk Evaluation and Mitigation Strategy program and public statements regarding the product's sales potential. In response, Aegerion undertook a comprehensive internal investigation, eventually acknowledged certain misconduct and fully cooperated with the government.

In May 2016, Aegerion announced a global resolution of the investigations, which was comprised of six separate settlement documents with various agencies, including a C plea on two misdemeanor misbranding charges. Aegerion's C plea was the culmination of several months of arms-length negotiations with the DOJ. Under the agreement, Aegerion would plead guilty to two FDCA misdemeanor violations, pay a $6.2 million criminal fine and forfeit $1 million.[3]

Then the case was drawn by Judge Young. After several hearings, Judge Young issued a scathing rejection of the binding plea agreement remarking: "Oh, Aegerion amended 'C' plea — How do I dislike thee? Let me count the ways." [4] His rejection was premised on both criticisms of the specific terms of the agreement and of the broader proposition that the government and corporate defendants are resolving criminal investigations via C pleas.

While Judge Young was displeased that the specific agreement did not provide for restitution for nongovernment victims,[5] his focus was a broader critique of the criminal justice system. The court expressed its deep concern with the number of corporate defendants who enter C pleas — especially in comparison to individual defendants.[6]

Judge Young also lamented that plea negotiations occur outside of the courtroom, with no adversarial proceeding before a judge thus limiting the ability of the court to scrutinize the agreement.[7] Finally, Judge Young emphasized the importance of trials as "public morality plays" — a mechanism that is short-circuited with a plea agreement.[8]

Many of Judge Young's criticisms were grounded in concerns about plea agreements in general and not just C pleas. Nevertheless, Judge Young ultimately accepted Aegerion's guilty plea when the parties submitted a nonbinding B plea.[9] Under the terms of the B plea, the parties jointly recommended a criminal fine and forfeiture of $7.2 million.[10]

In taking this step, Aegerion assumed significant risk that the court could impose a much higher sentence. Ultimately, the court accepted the sentence recommended in this plea agreement but, instead of imposing a $7.2 million criminal fine, it chose to order Aegerion to pay $7.2 million in restitution.[11]

An Emerging Trend

Aegerion's experience with this last-minute obstacle to its global resolution of a years' long, multipronged investigation is part of an emerging trend of skepticism of C pleas among some federal judges. Judge Young has repeatedly expressed his disdain with C pleas and has rejected other corporate C pleas.[12] He has consistently raised the same concerns that motivated his decision in Aegerion: C pleas are more readily negotiated by corporate defendants, as compared to individual defendants, and such plea agreements receive minimal judicial scrutiny.[13]

Judge Young is not alone. U.S. District Judge James Donato of the U.S. District Court for the Northern District of California expressed the same doubt about C pleas in the summer of 2017 and rejected three such pleas from corporate defendants who were prosecuted as part

of the same antitrust investigation.[14]

Similar policy concerns were evident in decisions by U.S. District Judge Richard Leon of the U.S. District Court for the District of Columbia and U.S. District Judge Jed Rakoff of the U.S. District Court for the Southern District of New York in recent years rejecting deferred prosecution agreements and proposed consent judgments as part of corporate settlements, although these decisions have not always survived appellate scrutiny.[15]

The presence of alleged victims can also complicate judicial acceptance of C pleas. In Aegerion, Judge Young expressed concern about the lack of restitution for alleged victims and, in his ultimate judgment, imposed only restitution and no criminal fine.[16] U.S. District Judge Donovan Frank of the U.S. District Court for the District of Minnesota likewise rejected a C plea from a corporate defendant in a case in which the defendant's alleged victims actively opposed the agreement.[17]

Even if opposition by victims does not ultimately persuade the court to reject a corporation's C plea, it may significantly slow the resolution of the case. For example, in October 2007, BP Products North America Inc. pleaded guilty pursuant to a C plea to a felony violation of the Clean Air Act arising out of a factory explosion. U.S. District Judge Lee Rosenthal of the U.S. District Court for the Southern District of Texas did not accept the C plea until March 2009, following extensive opposition from the explosion's victims.[18]

Similarly, opposition by alleged victims is currently delaying U.S. District Judge Nicholas Garaufis of the U.S. District Court for the Eastern District of New York's acceptance of OZ Africa Management LLC's C plea agreement for violations of the FCPA.[19]

This kind of delay, even if the plea is ultimately accepted, undermines one of the key benefits of a C plea: its certainty. For example, in December 2018, three South Korean oil companies sought to plead guilty to criminal antitrust violations pursuant to a C plea. U.S. District Judge Edmund Sargus of the U.S. District Court for the Southern District of Ohio accepted the companies' guilty pleas, but deferred acceptance of the binding plea agreement. In explaining his delay, Judge Sargus recalled his experience as a prosecutor before a district judge who categorically refused to accept C pleas because they took away a judge's sentencing discretion.

Although Judge Sargus reassured the parties that he did not wish to "blow up" their agreement, he said he wanted to undertake an independent review of the agreement.[20] The defendants then had to wait until their sentencing hearing in late April 2019 for the court's ultimate acceptance of their binding plea agreements.[21]

Not every judge has prior experience with C pleas and so may not have preestablished biases against them. For example, ev3 Inc. pleaded guilty pursuant to a C plea in January 2019, and the judge overseeing the case, U.S. Magistrate Judge Judith Dein of the U.S. District Court for the District of Massachusetts said it was the first time she had taken the plea of a corporation in her nearly twenty years as a judge.[22] This may be because the number of federal criminal prosecutions of corporations tends to vary over time, depending on the priorities of the current administration.[23]

Implications for Practitioners

Faced with this threat, what can corporate defense counsel do?

First, know your judge. There are some judges who have a record of philosophical

objections to negotiated resolutions of criminal charges against corporate defendants.[24] Thus, while negotiating a settlement, you want to be aware of whether a judge who may ultimately be assigned to your client's case is known to disfavor C pleas. If so, the parties need to be prepared to modify their agreement.

Second, you can attempt to negotiate for alternate forms of settlements such as a deferred prosecution agreement that does not carry the risk of C plea. The scope of the district court's power to accept or reject such agreements is much more limited.[25]

If an investigation into a corporate defendant cannot be resolved without a guilty plea of some kind and the presiding judge disfavors C pleas, you can negotiate with the government over how to measure the "gain or loss" from the offense which will provide some certainty to your client about the maximum possible sentence that could be imposed under the Alternative Fines Act.[26]

Finally, if a judge does reject a C plea and the case cannot be resolved via a B plea, as a last resort one could pursue a costly and time-consuming appellate challenge. For example, in the Ninth Circuit, a judge generally cannot categorically reject C pleas and any such rejection can be challenged via mandamus.[27]

Conclusion

Binding plea agreements are an attractive option in corporate settlements because of the certainty they provide with respect to the outcome at sentencing. With rejections of C pleas becoming more common, however, counsel needs to make sure they have a contingency plan.

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Disclosure: Ropes & Gray represented Aegerion Pharmaceuticals and ev3 Inc. in the matters discussed in this article.

[1] Jeff Overley, Aegerion to Admit Guilt, Pay $40M Over Drug Marketing, Law360 (May 12, 2016), https://www.law360.com/articles/795557/.

[2] Fed. R. Civ. P. 11(c)(1)(C).

[3] Plea Agreement, United States v. Aegerion Pharmaceuticals, Inc., No. 17-cr-10288 (D. Mass. Nov. 11, 2017), ECF No. 16; Civil Settlement Agreement, Aegerion Pharmaceuticals, Inc., No. 17-cr-10288 (D. Mass. Nov. 11, 2017), ECF No. 16-3.

[4] Aegerion Pharmaceuticals, Inc., 280 F. Supp. 3d at 219.

[5] Id. at 220.

[6] Id. at 225.

[7] Id. at 221–23, 227.

[8] Id. at 227.

[9] Alison Noon, Aegerion Sentenced to Pay Patients in Twist on $36M Plea, Law 360 (Jan. 30, 2018), https://www.law360.com/articles/1007094/aegerion-sentenced-to-pay-patients-in-twist-on-36m-plea.

[10] Plea Agreement, Aegerion Pharmaceuticals, Inc., No. 17-cr-10288 (D. Mass. Jan. 12, 2017), ECF No. 29.

[11] Judgment, Aegerion Pharmaceuticals, Inc., No. 17-cr-10288 (D. Mass. Jan. 12, 2017), ECF No. 38.

[12] Diana K. Lloyd & Jacqueline K. Mantica, What Judges Think of Binding Corporate Plea Agreements, Law 360 (Dec. 6, 2013), https://www.law360.com/articles/493834/what-judges-think-of-binding-corporate-plea-agreements.

[13] United States v. Orthofix, Inc.  , 956 F. Supp. 2d 316 (D. Mass. 2014); United States v. Wright  , 285 F. Supp. 3d 443, 464 (D. Mass. 2018).

[14] Minute Order, United States v. Holy Stone Holdings Co., CR-16-366-JD (N.D. Cal. Aug 9, 2017), ECF No. 21; Minute Order, United States v. Elna Co., CR-16-00365-JD (N.D. Cal. Jun 14, 2017), ECF No. 23; Minute Order, United States v. Matsuo Elec. Co., CR-17-00073-JD (N.D. Cal. May 24, 2017), ECF No. 21.

[15] United States v. Fokker Servs. B.V.  , 79 F. Supp. 3d 160 (D.D.C. 2015), vacated and remanded by, 818 F.3d 733 (D.C. Cir. 2016); SEC v. Citigroup Glob. Mkts. Inc.  , 827 F. Supp. 2d 328 (S.D.N.Y. 2011), vacated and remanded by, 752 F.3d 285 (2d Cir. 2014); SEC v. Bank of Am. Corp.  , 653 F. Supp. 2d 507 (S.D.N.Y. 2009).

[16] In the end, only two individuals made claims for restitution. The magistrate judge overseeing the distribution of restitution found one of two claims to be valid. Apr. 23, 2019 Hr'g Tr., Aegerion Pharmaceuticals, Inc., No. 17-cr-10288 (D. Mass. Jan. 12, 2017), ECF No. 79. Aegerion, therefore, ultimately paid only $338.70 in restitution and the balance of the $7.2 million was treated as a criminal fine. Order of Payment, Aegerion Pharmaceuticals, Inc., No. 17-cr-10288 (D. Mass. Jan. 12, 2017), ECF No. 87.

[17] United States v. Guidant LLC  , 708 F. Supp. 2d 903 (D. Minn. 2010).

[18] BP Products to Pay Nearly $180 Million to Settle Clean Air Violations at Texas City Refinery, Dep't of Justice (Feb. 19, 2009), https://www.justice.gov/opa/pr/bp-products-pay-nearly-180-million-settle-clean-air-violations-texas-city-refinery; United States v. BP Prod. N. Am. Inc.  , 610 F. Supp. 2d 655 (S.D. Tex. 2009).

[19] United States v. OZ Africa Mgmt. GP, LLC, No. 16-CR-515, 2019 WL 4249631 (E.D.N.Y. Aug. 29, 2019); see also Stewart Bishop, Mining Investors Threaten Och-Ziff's $413M FCPA Deal, Law360 (Apr. 5, 2018), https://www.law360.com/articles/1030375/mining-investors-threaten-och-ziff-s-413m-fcpa-deal.

[20] Transcript, United States v.SK Energy Co. Ltd, et al., 18-cr-239, 18-ct-240, 18-cr-249

(S.D. Ohio Dec. 12, 2018), ECF No. 23.

[21] Transcript, United States v.SK Energy Co. Ltd, et al., 18-cr-239, 18-ct-240, 18-cr-249 (S.D. Ohio Apr. 24, 2019), ECF No. 26.

[22] Aaron Leibowitz, Device Maker Ev3 Cops to Improper Sales, Pays $18M, Law360 (Jan. 25, 2019), https://www.law360.com/articles/1122348/device-maker-ev3-cops-to-improper-sales-pays-18m.

[23] Brandon L. Garrett, Declining Corporate Prosecutions 1, 6-9, Am. Crim. L. Rev. (forthcoming), https://ssrn.com/abstract=3360456.

[24] There are also judges who have policy objections to plea agreements for individuals as well. For example, Judge Joseph Goodwin (Southern District of West Virginia) has recently rejected three individual guilty pleas, in part because he believes that plea agreements foreclose the morality play of trials—a consideration Judge Young also highlighted in his Aegerion decision. United States v. Stevenson, No. 2:17-cr-00047, 2018 WL 1769371 (S.D. W. Va. Apr. 12, 2018); United States v. Wilmore, 282 F. Supp. 3d 937 (S.D. W. Va. 2017); United States v. Walker, No. 2:17-cr-00010, 2017 WL 2766452 (S.D. W. Va. June 26, 2017).

[25] See Fokker Servs. B.V., 818 F.3d at 741.

[26] 18 U.S.C. §3571(d).

[27] In re Morgan, 506 F.3d 705, 712 (9th Cir. 2007). There is, however, a circuit split on this particular issue. See United States v. Anderson, 467 F. App’x 474, 476 (6th Cir. 2012) (recognizing circuit split).