VENABLE® LLP

Antitrust Alert

**January 15, 2013**

# Lesson from *Smith*: Withdrawal from a Criminal Antitrust Conspiracy Must Be Affirmative


**AUTHORS**

William H. Devaney
Lisa Jose Fales
Paul Feinstein
Leonard L. Gordon


**RELATED PRACTICES**

Antitrust


**ARCHIVES**

2013 2009 2005
2012 2008 2004
2011 2007 2003
2010 2006


In a narcotics case surprisingly relevant to the antitrust world, the United States Supreme Court recently addressed withdrawal from a criminal conspiracy. In *Smith v. United States*,[1] a unanimous Court held that the burden rests with the defendant to prove withdrawal from a criminal conspiracy. Although, as noted, the decision involved a drug and racketeering conspiracy, it will certainly affect future criminal antitrust cases in which individuals or corporations seek to argue that they withdrew from an alleged anticompetitive agreement—a not uncommon defense. This alert summarizes the *Smith* decision and offers crucial practical advice in order to prove withdrawal from a criminal conspiracy.

Calvin Smith was indicted for crimes involving narcotics and racketeering conspiracies that were alleged to have existed in the Washington, D.C. area from the late 1980s to 2000. At trial, Smith raised a statute-of-limitations defense based on the five-year statute of limitations, arguing that he had spent the last six years of the charged conspiracies in prison. Over the defense's objection, the judge instructed the jury that once the government proved that Smith was a member of the conspiracy, the burden was on the defense to prove by a preponderance of the evidence that Smith withdrew, rather than on the government to prove that he did not. The judge defined withdrawal as "affirmative acts inconsistent with the goals of the conspiracy" that "were communicated to the defendant's co-conspirators in a manner reasonably calculated to reach those conspirators." As evidence of withdrawal, Smith introduced a stipulation of his dates spent incarcerated, in addition to testimonial evidence showing that he was no longer a member of the conspiracies during his incarceration. Applying the aforementioned standard, the jury found that Smith had not met his burden of proving withdrawal. Smith was subsequently convicted and given a life sentence .

On appeal, the United States Court of Appeals for the D.C. Circuit affirmed Smith's conspiracy convictions and the Supreme Court granted certiorari to resolve a circuit split as to which party bears the burden of proof regarding withdrawal from a conspiracy prior to a limitations period. In a short, unanimous opinion delivered by Justice Scalia, the Supreme Court held that a defendant bears the burden of proving the defense of withdrawal. According to the Court, unless an affirmative defense negates an element of the crime, the government has no constitutional duty to overcome the defense beyond a reasonable doubt. Withdrawal does not negate an element of conspiracy. Withdrawal—which must consist of "affirmative action...to disavow or defeat the purpose" of the conspiracy[2]—presupposes that the defendant was at one time part of the conspiracy and only relieves the defendant of liability for the post-withdrawal activities of his or her co-conspirators. Similarly, it relieves the defendant from all liability if the withdrawal occurred outside the statute of limitations. The Court also noted that it is well within the powers of Congress to assign the government the burden of proving the non-existence of withdrawal. Since Congress did not assign such a burden, the common-law rule that affirmative defenses are for the defendant to prove is preserved.

### Practical Implications

So what does *Smith* mean for antitrust? Obviously, from a trial practice perspective, it clarifies any doubt as to whether withdrawal from a conspiracy is an affirmative defense. There is, however, a much more practical application. If you discover a potential antitrust conspiracy in your company, it is not enough to merely stop the conduct. Rather, in consultation with counsel, you should immediately take "affirmative action…to disavow or defeat the purpose of the conspiracy." At the very least, this should consist of exiting the conspiracy in a manner that is unambiguous and memorable, informing the potential co-conspirators at the competition that your company will no longer participate in the questionable meetings or information exchanges. As the trial judge in Smith stated, "withdrawal must be unequivocal," and communicated in a manner reasonably calculated to reach any alleged conspirators. Also in consultation with counsel, the company must determine whether voluntary withdrawal is enough, or if more action is appropriate. Almost certainly an internal investigation will be

warranted, and counsel will want to determine whether to seek amnesty from DOJ.

*Smith* also serves as a reminder of what to do if an employee unexpectedly finds himself or herself in a questionable conversation with competitors in order to avoid allegations that the company ever entered into a conspiracy in the first place. At the first sign of trouble, such as discussions of pricing, market allocations, etc., walk away, making it clear that you do not wish to receive or provide such information. Immediately report the conversation to your in-house counsel. In consultation with counsel, prepare a memo to the file, laying out the details of the encounter and, most importantly, that you immediately removed yourself from and did not receive or provide any information. This protocol should be part of any company's antitrust compliance training.

Venable LLP welcomes the opportunity to assist you with this and other antitrust-related issues. Please contact the authors of this alert or any member of Venable's **Antitrust Group**.

---

1 See No. 11-8976 (U.S. Jan. 9, 2013).

2 Id. (quoting *Hyde v. United States*, 225 U.S. 347, 369 (1912)).