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## BROKEN PROMISES

*An inside look at the Justice Department's troubled amnesty deal with Stolt-Nielsen.*

*By Sue Reisinger*

**O**N APRIL 8, 2003, JOHN NANNES, a Washington, D.C.-based partner at Skadden, Arps, Slate, Meagher & Flom and a lawyer for the Stolt-Nielsen Transportation Group Ltd., received an extraordinary phone call. The caller, an attorney at the U.S. Department of Justice, said that the department was "suspending Stolt's obligation to cooperate" with the antitrust amnesty agreement that the company had forged with Justice just four months earlier. It was the first time in the 30-year history of the corporate leniency program that the department had apparently reneged on a deal.

That was just the beginning. The call sparked five years of court battles for the shipping company, its parent, Stolt-Nielsen S.A., headquartered in London and Rotterdam, and the Justice Department. Stolt eventually sued the department for breach of contract, and the legal battle was waged in several civil and criminal courts. The imbroglio finally ended late last year in a landmark decision for the corporation.

In 41 years of practicing law, James Hurlock says he never saw anything like the Stolt case. The lawyer, who retired in 2000 after serving as managing partner for two decades at White & Case, was a Stolt director and chief of legal affairs on its board until he resigned May 21. Hurlock played a central role in convincing the shipper, whose U.S. operations are based in Norwalk, Connecticut, to do the unthinkable—to sue the Justice Department. Hurlock calls the Stolt case "extraordinary and unique" and believes the government made a terrible mistake in breaking its promise to Stolt.

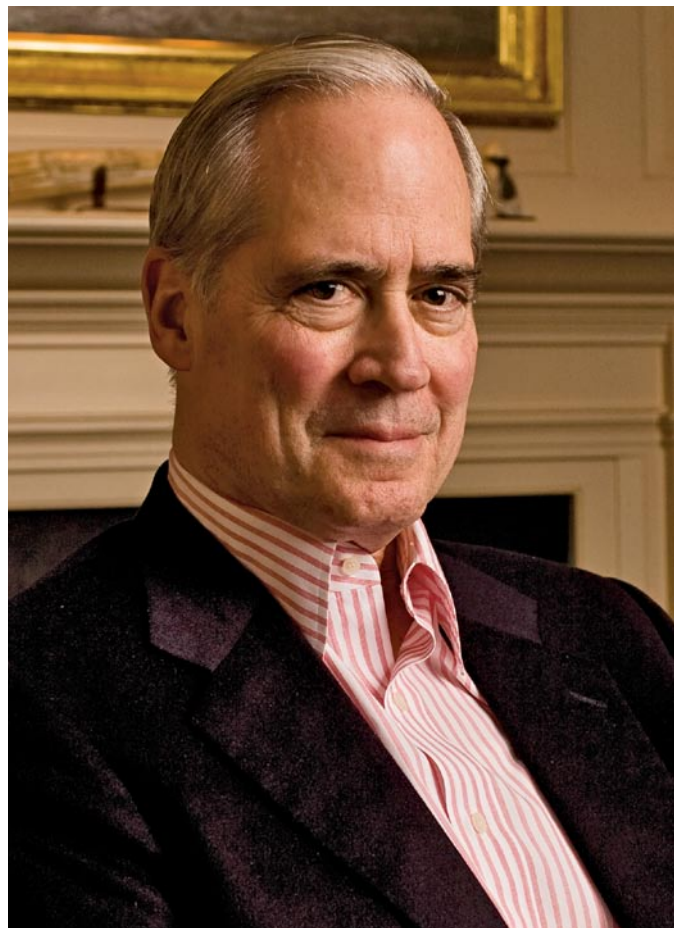
The case is also significant, says Gary Roberts, dean of the Indiana University School of Law at Indianapolis and an antitrust law professor, because it sets a unique precedent: No company has ever sued to enforce any type of nonprosecution agreement with the Justice Department. "When there is no precedent, many judges are reluctant to create one, especially involving the Justice Department," Roberts says. Of the outcome, he says, "That's good news for companies."

## BUSINESS LITIGATION

Why did the amnesty deal fall apart? Answers to this question lie in the more than six weeks of testimony and in thousands of pages of state and federal court documents. These resources, coupled with interviews with key lawyers on both sides of the case, offer the deepest look yet into the Stolt deal, the government's action, and the legal strategies that eventually won the day for the company.

The antitrust conspiracy began in 1998, Stolt admitted to the government. That's when the U.S.-based transportation group's chairman, Samuel Cooperman, met with representatives of two of its primary shipping competitors, Odfjell ASA of Norway and Jo Tankers B.V. of the Netherlands. The three shippers operate parcel tankers, large vessels with up to 50 separate compartments that can carry different commodities, such as chemicals and vegetable oil.

The three companies agreed to refrain from competing for customers on deep-sea trade routes. The conspiracy was exposed in



FORMER WHITE & CASE MANAGING PARTNER JAMES HURLOCK SAYS THAT HE'S NEVER SEEN ANYTHING QUITE LIKE THE STOLT CASE.

January of 2002 when then-Stolt senior vice president and general counsel Paul O'Brien found a strange memo that was anonymously left on his desk. The memo was a fax from one Stolt executive overseas to another in Connecticut, recommending that the giant shipping company continue its cooperative agreement with a competitor rather than "go to war" and compete against them.

Not knowing that Cooperman, the company chairman, was involved in the conspiracy, O'Brien reported his antitrust concerns to him and urged him to order an independent investigation. According to court documents, Cooperman took charge of an internal investigation and refused to conduct an independent one. O'Brien resigned March 1 and later sued Stolt, saying he was forced to quit because of "ongoing criminal conduct" that violated antitrust laws. Stolt, a public company that reported revenue of \$1.8 billion last year, didn't immediately approach the government. But it did institute a corporate antitrust compliance program that March, based on O'Brien's recommendations. The company maintained that this was the beginning of its internal reforms. But the government contended in court that, in reality, the program was actually a "head fake" and that Stolt's antitrust violations continued even after the reform efforts began.

Regardless, later that year a customer told the company that he was approached by a class action lawyer who planned to sue the shipper over antitrust violations. This time, Stolt asked its outside counsel to bring in an antitrust expert. In mid-November company executives met with Nannes, a former deputy assistant attorney general for the antitrust division and a Skadden partner.

Nannes recalls reading *The Wall Street Journal* during the taxi ride to the New York office of Stolt's outside counsel, Gary Sesser of Carter Ledyard & Milburn. Sesser had been a law school classmate of Nannes at the University of Michigan. As Nannes read the paper, he saw a story in that day's *Journal* about O'Brien's suit against Stolt. Before the meeting began, Nannes already knew what would top the agenda.

Attending the November 22 meeting were Nannes, Sesser, Cooperman, and current Stolt GC Alan Winsor. (Despite repeated requests, Winsor declined to comment.) After spending most of the day talking about the company's antitrust issues, Nannes explained the Justice Department's Corporate Leniency Program—all it required, he said, was "baring their competitive soul to the government." By the end of the session, Stolt authorized him to contact the antitrust division to seek amnesty under the program. Nannes called Justice that same afternoon.

Antitrust gave Nannes the go-ahead

to conduct his own internal investigation of Stolt's behavior. Following his probe, Nannes described to the government what evidence he could proffer, including a customer allocation list. The division signed the "conditional" amnesty agreement with Stolt on January 15, 2003. This letter of agreement promised that there would be no prosecution of the company, its directors, officers, or employees for conduct prior to that date.

But the letter included two vague conditions. Stolt had to vow that it "took prompt and effective action to terminate its part in the anticompetitive activity upon discovery of the activity." And it had to promise "to provide full, continuing, and complete cooperation" to the antitrust division as it prosecuted the two other

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shipping companies. Nannes didn't see any problem with the conditions.

There *were* some, however. Despite granting amnesty, it now appears that Justice lawyers were still wrestling with some aspects of the case. Scott Hammond, who helped put the amnesty deal together, was then an assistant but is now deputy assistant attorney general in the division and is in charge of criminal enforcement. Hammond lists what he says are three troubling facts: the O'Brien allegations; the company's failure to fire, suspend, or discipline Stolt executives involved in the wrongdoing; and the company initially putting Samuel Cooperman in charge of its internal investigation. "This publicly traded company put the person at Stolt with the most to lose if the cartel was ever exposed in charge of its internal investigation," Hammond says. "If you were truly committed to putting an end to criminal conduct, would you put one of the [coconspirators] in charge of the investigation?"

With the amnesty agreement in hand, Stolt hired another law firm, White & Case, to handle any shareholder or customer civil suits that might result from the antitrust revelations. Stolt's executives were cooperating with Justice fully, recalls White & Case partner J. Mark Gidley. In fact, Stolt provided the division with more than 20,000 documents that contained what the court later called "highly incriminating evidence,"

detailing each company's role—including its own—in the conspiracy.

On the basis of this information, the division successfully prosecuted coconspirators Odfjell and Jo Tankers. Odfjell was fined \$42.5 million, and two of its executives served prison terms and were personally fined. Jo Tankers was fined \$19.5 million, and one of its executives served a prison term and was fined.

But while prosecuting the other two companies, division lawyers were troubled by newly uncovered facts. For example, before O'Brien's discovery, Richard Wingfield, Stolt's managing director of tanker trading, had managed Stolt's day-to-day participation in the cartel. Between O'Brien's March discovery and the November meeting at the Carter Ledyard offices, Wingfield met at least three times with the same coconspirators. The Odfjell and Jo Tankers executives were willing to testify that Wingfield informed them of ex-GC O'Brien's catching on and advised them that they would need to be more careful, and that contacts would have to be more limited. Otherwise it would be business as usual for the cartel, Wingfield allegedly told them.

This led some division lawyers to have second thoughts about the deal that spring. The agreement was reached with the understanding that Stolt had revealed all wrongdoing—and Justice believed that all illegal acts ceased after March 2002. Now division lawyers believed Stolt had violated both conditions of its amnesty agreement—it had not promptly stopped the wrongful conduct in March, and it had provided incomplete and misleading information about its role. Stolt would later argue in court that Wingfield met with other shipping companies to withdraw from the conspiracy and to discuss other legal business, such as subcontracting. Justice's Hammond doesn't accept that version of the facts. As he puts it: "I find it hard to believe that any attorney representing a company or its board of directors would send a coconspirator, who has been regularly meeting with competitors for the purpose of fixing prices, to meet again ostensibly to withdraw from the conspiracy, with no involvement by counsel and no record and no witness to verify what was discussed."

Stolt's lawyers say they never sensed that the antitrust division was having second thoughts. But they found out April 8, when Nannes received that startling phone call suspending Stolt's "obligation to cooperate." In a follow-up letter, the government said it acted "because it had obtained evidence that the company had continued its activities until at least as late as the second half of 2002." Still, the amnesty deal forgave all behavior before January 15, 2003. Now it was Stolt's turn to be outraged. "This will

not stand,” White & Case’s Gidley boldly told Stolt’s board of directors.

Court documents show that the suspension was triggered by the government’s interview of Hugo Finlay, an executive at Jo Tankers. Finlay, according to trial testimony, claimed that Wingfield had met for dinner with executives from the other two conspiring companies in March 2002—after the O’Brien discovery but before Nannes began his internal probe. Wingfield allegedly told them not to worry about O’Brien’s lawsuit or the company’s internal crackdown on antitrust abuses, because Stolt’s cooperation in the conspiracy would continue. Unfortunately for the government, trial testimony would later show that Finlay wasn’t even at the table when Wingfield was talking.

Nevertheless, Stolt’s amnesty deal began to unravel. Just two months after Justice suspended the deal, Gidley recalls coming into his office on June 24, expecting an easy day of it, having just finished a trial. Then the phone rang. It was Nannes and a government lawyer, who said Wingfield was being arrested. The government gave Nannes a choice: take Wingfield’s passport and surrender him to a local Federal Bureau of Investigation field office, or else waiting FBI agents would storm Stolt headquarters, put Wingfield in cuffs, and remove him. Nannes contacted Carter Ledyard’s Sesser, who turned over Wingfield and his passport.

“It was sort of breathless,” Gidley recalls of the phone call. “And it was ridiculous. This was a contract dispute, and they were going to arrest a senior guy who had been cooperating?” Gidley says he asked the government, “What about the company?” But there was no answer.

Suddenly Gidley’s role switched from preparing for civil suits to preparing for a possible criminal defense of the company. Stolt and the lawyers agreed that Nannes, as negotiator of the amnesty deal, might be called to testify at any trial. So Gidley and Christopher Curran, another White & Case partner, now took the lead in the criminal case. Gidley urged taking the offensive. He wanted to take the unprecedented step of suing the antitrust division in civil court to enforce the contract. Others were reluctant. After all, at that point, the government still had not formally revoked the amnesty agreement with the company itself.

To find out where the company stood, Gidley, Curran, and Hurlock went to Washington to talk with the division on July 9. Among those in the meeting were R. Hewitt Pate, then assistant attorney general in charge of the entire antitrust division and now in private practice at Hunton & Williams in Washington; James Griffin, then deputy assistant attorney general and now a partner at King & Spalding in Washington; and assistant attorney general Hammond.

The government lawyers said they had evidence that the conspiracy continued until November 2002—eight months after the internal reform program began—and that Stolt had withheld that information. They pulled out some of Wingfield’s e-mails as evidence. They asked Stolt to waive attorney-client privilege so that they could talk with ex-GC O’Brien. Curran said Stolt would consider a waiver, but it later refused.

For their part, Curran and Gidley gave a slide presentation outlining Stolt’s new compliance program and emphasizing the company’s cooperation. Just because a compliance program starts in March doesn’t mean all the bad behavior ended in March, they explained. And besides, the amnesty letter forgives all behavior before January 15, 2003. Their arguments fell flat.

**S**tolt had not been truthful about its continued participation in the cartel,” insists Justice’s Scott Hammond.

White & Case’s Curran says the division lawyers weren’t open to any “civil discussion” and wouldn’t give them specific allegations so they could refute them. At that point, Curran cited potential harm to the amnesty program if the division revoked the deal, because a majority of cartel cases are prosecuted with the help of companies that are granted amnesty. “What company would turn itself in if there’s a meaningful chance for the government to turn around and use that incriminating information against it?” Curran asked.

The argument only angered some of the Justice lawyers. Gidley recalls, “They went ballistic. They were shouting. Scott Hammond’s face was beet-red, and he kept gesturing his finger at me and yelling, ‘I don’t want to hear another word out of you.’” Hammond declined to talk about the meeting except to say, yes, telling someone they are likely to be indicted can make one sound hostile.

Stolt’s Hurlock says, “If I had any doubt about whether to fight them before, I had none when I got out of that meeting. I knew what we wanted to do.” And that meant sue. Curran was against suing at first. But he became convinced that more dialogue with the government was useless. “It was gradually becoming apparent that we had nothing to fear in terms of offending the antitrust division, because they were too far gone,” he says.

Gidley, Curran, and Hurlock began developing a legal strategy they code-named “Crazy Ivan II.” The term “Crazy Ivan,” made popular in the Tom Clancy thriller *The Hunt for Red October*, refers to a submarine maneuver involving sharp, sudden turns to expose an enemy pursuer following so close that sonar won’t detect it. In this scenario, the antitrust division was the enemy. Hurlock, an accomplished yachtsman, explained Crazy Ivan II to Stolt’s board of directors, successfully convincing them to sign off on a suit.

Ten months after the suspension letter, the government still had not revoked Stolt’s amnesty. Gidley thought the division was in the awkward position of having arrested one executive but not having decided what to do next. So Stolt made the next move, executing its Crazy Ivan maneuver. In February 2004, after lawyers pulled what Gidley calls “a classic all-nighter,” Stolt and Wingfield filed a civil action in federal district court in Philadelphia. The suit, initially filed under seal, asked for declaratory and injunctive relief to bar the division from prosecuting the company and its executives.

The government responded a few days later by officially revoking Stolt’s leniency. Hammond says the division revoked the deal because Stolt had failed to live up to its conditions. “Stolt had failed to take prompt and effective action to terminate the conduct, making them ineligible for leniency, and the company had not been truthful about its continued participation in the cartel,” he explains.

U.S. district court judge Timothy Savage held a two-day hearing that April. In key testimony, deputy assistant attorney general Griffin admitted that Nannes never said the wrongdoing specifically ended in March 2002. Judge Savage, in a January 14, 2005, opinion, ruled for Stolt, saying the company had not breached the agreement. He enjoined the antitrust division from revoking Stolt’s amnesty.

The government quickly appealed to the U.S. Court of Appeals for the Third Circuit in Philadelphia. Among other things, it argued that federal courts lack jurisdiction to enjoin the executive branch from filing an indictment. The suit made for some odd alliances, such as the National Association of Criminal Defense Lawyers siding with business groups like the National Association of Manufacturers and the Association of Corporate Counsel to file amicus briefs on Stolt’s behalf.

Without considering the merits of the case, the appeals court overturned Savage’s ruling. The appellate judges said that, except under narrow circumstances not present in the Stolt case, “the district court lacked the authority” under the separation of powers doctrine to keep the Justice Department

from filing an indictment. Stolt appealed to the U.S. Supreme Court, which refused to hear the case.

In footnote 7 to its ruling, the Third Circuit set the guidelines for a final showdown. The government could indict, and then Stolt could file a motion to dismiss in criminal court. The criminal court “must consider the agreement anew” in deciding whether Stolt violated its terms, according to the footnote.

Within 48 hours of this decision, Wingfield, knowing he would soon be indicted, suffered the first of three heart attacks. His passport returned, he went home to New Zealand to recuperate. His attorney, Roberta “Bobbi” Liebenberg, of Philadelphia’s Fine, Kaplan and Black, says his illness “put a public face” on the hardship of being indicted.

Following footnote 7’s script, the government indicted the company and two executives, Cooperman and Wingfield, on September 6, 2006, for antitrust violations of the Sherman Act. On November 22, exactly four years after Nannes’s first phone call seeking amnesty for Stolt, the defendants moved to dismiss the indictment, citing the amnesty agreement as a defense to prosecution.

Nearly everyone involved in the ensuing six-week hearing calls it “the trial.” White & Case’s Gidley explains: The hearing for all intents was a bench trial, because if the indictment weren’t dismissed, there would be no defense to present at a subsequent trial. Stolt had already confessed its guilt and handed over the evidence. “The antitrust division doesn’t let companies that are not guilty into its amnesty program,” he notes wryly.

For the trial, White & Case’s Curran decided to pull another Crazy Ivan. Usually in a criminal trial, the prosecutors present their evidence first. But Curran argued that this was really a contract case, and that Stolt, as the one claiming breach, should go first. The federal district court judge, Bruce Kauffman, reluctantly agreed. “We think that was a really important trial strategy,” Gidley says. “The government was going to have five or six witnesses gang up on Wingfield. We wanted to set the stage for the allegations” by giving Wingfield’s version first.

The trial was full of unusual situations. For example, Wingfield, too ill to fly back to America, testified and was cross-examined via a live video satellite feed from New Zealand. For another, Stolt used documents copied by hand from a related Korean Fair Trade Commission antitrust investigation—because the Koreans wouldn’t allow them to be mechanically copied, or even retyped using a laptop computer. These documents showed inconsistencies in government witness accounts.

But what it all came down to was Judge Kauffman’s sense of fairness. His opinion shows that, in his eyes, the antitrust division acted unjustly. Kauffman found there was no material breach of the agreement because the government received what it had bargained for—enough evidence to prosecute two companies for antitrust violations. And it wouldn’t have obtained that evidence were it not for Stolt coming forward. The judge said it didn’t matter if wrongful conduct continued until November 2002, because the contract, which the government drafted, clearly applied the amnesty to all acts before January 15, 2003.

But perhaps most significantly, Kauffman didn’t believe the government’s witnesses. He questioned why the prosecutors relied

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on the testimony of “the very conspirators whom defendants had reported to the division.” He noted their lenient sentences, which ranged from no jail time to four months, compared to the average sentence of 30 months for antitrust violations. And he spent eight pages of his 35-page ruling detailing his problem with each witness. Some attacked or contradicted each other; some contradicted previous statements they had given to the grand jury or other agencies; and some just changed their stories.

In the end, Kauffman concluded there was “no credible evidence” that Stolt had violated the conditions of its agreement. “Not only was the division’s conduct inconsistent with what was reasonably understood by the defendants when they entered into the agreement, it was fundamentally unfair,” he wrote. “Since the division had no reasonable basis upon which to revoke the agreement, and because fundamental fairness demands it, the indictment will be dismissed.”

Because determining witness credibility is up to the trial judge, the Justice Department had little grounds for appeal. On December 21, 2007, the division announced that it was dropping the case. “While the division is disappointed with the ruling, it respects the role of the court,” according to Justice’s press release. But it added that the division would continue to administer the amnesty program in a “manner that ensures that those conditionally admitted to

the program adhere to all requirements to obtain leniency.”

The impact of the Stolt case is still being played out. It remains to be seen what effect the ruling will have on the man who started it all, the former GC O’Brien, and his case. Jury selection on his wrongful discharge suit is scheduled to begin in August. Neither O’Brien nor his lawyer would comment for this story; and Stolt lawyers would not comment on the O’Brien case. Stolt’s chairman, Cooperman, was moved to another Stolt division.

Some are cautious about the Stolt affair’s impact, because the case involved a peculiar set of facts that they believe aren’t likely to be replicated. That’s the view of Gary Spratling, a partner in Gibson, Dunn & Crutcher’s San Francisco office and former deputy assistant attorney general in the antitrust division. “For those of us who regularly represent companies and individuals in international cartel investigations,” Spratling says, “the lessons learned from *Stolt* are relatively minor. . . . The last thing I’m worried about is the division playing gotcha. If anything, the amnesty program tilts in favor of companies.”

But Indiana professor Roberts believes that corporations won an important victory in Stolt: “There are now some minimal standards that the government has to live up to, some expectation of due process and fairness.”

Liebenberg, Wingfield’s attorney, says the case sends a clear message to prosecutors. “By recognizing major contract and due process rights for any corporation that signs a deal,” Liebenberg says, “this decision restores certainty to the program. It makes the government live up to the bargain that it strikes.”

Hammond, however, remains convinced that the government was right. “We have never seen before or since this case an applicant behave the way Stolt did after it discovered the wrongdoing,” he says. But, Hammond adds, the division will “tighten up some of the language” in its amnesty agreement letters.

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