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LAW JOURNAL Apple E-Books Case Shines Light on Compliance Monitors

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By CHRISTOPHER M. MATTHEWS CONNECT Jan. 20, 2014 6:11 p.m. ET



Apple has been at loggerheads with the court-appointed monitor for its e-book pricing case. Reuters

The fiery tit-for-tat that erupted in court last week between Apple Inc. [AAPL -2.45%] and a court-appointed lawyer overseeing the company's e-book pricing shined a light on something that has annoyed corporations for years: compliance monitors.

"The external compliance monitor appointed by the court...is conducting a nonjudicial, inquisitorial, roaming investigation that is interfering with Apple's business operations," Apple's lawyer, Theodore Boutros, said during a hearing Monday.

Such monitors, usually outside attorneys, have become a common feature in corporate settlements and plea agreements. To some observers, monitors are an effective guard against repeat offenses. To others, they are multimillion-dollar thorns in companies' sides.

The monitors, who came onto the scene in the last decade, used to be largely confined to overseas-bribery cases brought by the Justice Department. But recently, monitors have been installed in settlements involving other conduct.

Six independent monitors were installed in the 27 criminal settlements between the Justice Department and companies last year, according to law firm Gibson Dunn & Crutcher LLP, where Mr. Boutros is a partner.

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U.S. District Judge Denise Cote, who ruled last year in a civil antitrust case that Apple colluded with five U.S. publishers to drive up e-book prices, said last week that it was in the public's interest to ensure that the company's antitrust policies are overhauled. She had appointed attorney Michael Bromwich for two years to review and evaluate Apple's antitrust-compliance policies, procedures and training program.

But Apple and Mr. Bromwich have been at loggerheads for months, arguing about everything from the scope of his authority to cost, one of the company's chief complaints.

Apple says Mr. Bromwich is overcharging the company, citing a bill of \$138,432.40 for his first two weeks of work. Mr. Bromwich, a partner at Goodwin Procter LLP and a former Justice Department inspector general, is charging \$1,100 an hour for his time and \$1,025 an hour for other lawyers on his team.

A lawyer for Apple and a spokesman for Mr. Bromwich declined to comment for this article.

"The lightning-rod issue is the fees," said Kevin Abikoff, a partner at Hughes Hubbard & Reed LLP who has served as a monitor of several companies and isn't involved in the Apple case.

Monitors routinely cost companies millions of dollars as thousands of hours billed by top-tier lawyers and their associates add up. Critics of the practice say monitors have an incentive to drag out and expand the scope of their work to bill more hours, which can lead to distractions for the company's business.

A Government Accountability Office study on monitors in 2009 said half the companies it spoke to "raised concerns about the monitor's cost, scope, and amount of work completed."

U.S. District Judge Ellen Segal Huvelle raised concerns in 2010 in a plea agreement for specialty-chemical manufacturer [Innospec Inc.](#) IOSP -1.47% The company pleaded guilty to violating trade sanctions against Cuba and the U.S. Foreign Corrupt Practices Act, a bribery law.

"It's an outrage that people get \$50 million to be a monitor," Judge Huvelle said during a hearing in Washington, D.C. "I'm not comfortable, frankly, signing off on something that becomes a vehicle for someone to make lots of money." Innospec, the Justice Department and Judge Huvelle ultimately approved Mr. Abikoff to serve as monitor.

Mr. Abikoff said he works for a fixed fee to establish the total cost from the start and take his hours off the table.

The Justice Department said in 2010 that if a monitor's recommendations are impractical or burdensome, companies can propose alternatives to prosecutors.

Still, issues continue to stir.

Selection of a monitor stalled in [HSBC Holdings](#) HSBA.LN +0.28% PLC's \$1.9 billion settlement last year with the Justice Department as prosecutors required the appointment of someone who had no past engagements with HSBC. The two sides ultimately settled on Michael Cherkasky, a former prosecutor in the Manhattan district attorney's office, to monitor the bank's sanctions and money-laundering controls.

Apple's feud with its monitor may run deeper than typical disputes. Most monitors in Justice Department settlements are agreed to by companies and the government. In Apple's case, Judge Cote ordered the company to have a monitor and then picked Mr. Bromwich, one of two candidates selected by the Justice Department over Apple's objections.

It is unclear how often judges have imposed monitors on companies. But Keith Hylton,

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a professor at Boston University School of Law, said Judge Cote's decision could set a precedent. Apple has said it will appeal Judge Cote's finding in the antitrust case as well as her appointment of the monitor. If her ruling is upheld by an appeals court, which could hear the case this year, it could open the door for more court-appointed monitors, particularly in antitrust cases, Mr. Hylton said.

For now, Apple will have to grit its teeth and work with its monitor. Judge Cote last Monday directed the company to "reset" its relations with Mr. Bromwich and arranged for a magistrate judge to resolve any fee disputes between the two parties.

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