

Shkreli's Sentence Shows Risks Of Open Defiance

By **Stewart Bishop**

Law360 (March 13, 2018, 10:08 PM EDT) -- The seven-year prison term handed down to former biotech executive Martin Shkreli for his interrelated securities fraud schemes is a warning to criminal defendants about the consequences of speaking out about their cases, experts said Tuesday, and a demonstration of how problematic the sentencing guidelines have become in white collar cases.

Shkreli was sentenced Friday on his conviction for defrauding investors in his ailing MSMB hedge funds and conspiring to game biotech company Retrophin Inc.'s stock price to pay off his debts.

While the normally defiant Shkreli made a late pitch that he was remorseful in a letter to U.S. District Judge Kiyo Matsumoto at his sentencing hearing, the judge made clear that other statements Shkreli made in emails and elsewhere that minimized his conduct warranted a stiff prison term.

White collar attorney Ross Kramer of Winston & Strawn LLP said although Shkreli was represented by one of the best lawyers in New York, Benjamin Brafman — who went to great lengths at sentencing to humanize his often publicly antagonistic client to the judge — it wasn't enough to get anywhere near Shkreli's requested sentence of 18 months or less.

"It was an insurmountable obstacle for defense counsel to face here, the fact that the defendant himself had put himself at odds with any show of remorse, or contrition, or acceptance of responsibility until the eleventh hour," Kramer told Law360.

Shkreli has long cultivated a controversial public image. He inspired public outrage in 2015 when he raised the price of a Turing Pharmaceuticals drug used by HIV patients by 5,000 percent. In September, Shkreli had his bail revoked after making a bizarre offer to pay his Facebook followers to "try to grab a hair" from Hillary Clinton during her book tour and directing vulgar comments toward female media personalities.

Former Boston federal prosecutor Sarah Walters, now a partner at McDermott Will & Emery LLP, said that prosecutors did a good job of focusing on Shkreli's statements from jail after his conviction, in which he disputed that there was any loss to his victims and claimed he was headed to "Club Fed." In emails, Shkreli also said "fuck the feds," "all the lack of remorse in the world doesn't change the numbers," and that "if you believe you are innocent, it is a bit of a shame to ask someone to show remorse isn't it?"

“Making fun of the prosecutors, making fun of the process, I do think that led to an increased sentence for him,” Walters said.

Prosecutors had sought a 15-year prison term for Shkreli, painting him as a remorseless liar driven by greed and the desire to cultivate his image as a successful businessman and wunderkind entrepreneur. That requested term was notably still far below the advisory sentencing guidelines of 27 to nearly 34 years in prison, later revised by Judge Matsumoto to a range of roughly 22 to 27 years.

The disparity between the guidelines and the seven years Shkreli actually received shows how the guidelines are becoming less and less relevant to judges’ ultimate decisions in sentencings, according to white collar attorney Glen Kopp of Mayer Brown LLP, a former Manhattan federal prosecutor.

“Those numbers are way out of whack relative to the conduct at issue,” Kopp told Law360. “If even prosecutors are recognizing that they are unrealistic and unrepresentative to the underlying conduct and the other factors at play, then they become sort of irrelevant and in need of adjustment.”

Experts told Law360 that a major issue with the guidelines is the the calculated loss amount and its dramatically escalating effect on the proposed sentencing range. Kramer said that the advisory prison term in this case demonstrates that the guidelines in white collar cases are called “broken,” noting that they have not taken the increasing loss amounts in white collar cases over the years into account.

“The bottom line is they’re supposed to be advisory guidelines, but they’re not providing any meaningful advice,” Kramer said. “Courts, defendants and prosecutors have to start from scratch. They can’t even start where they’re supposed to start, which is with the advisory guidelines.”

Judge Matsumoto herself took issue with the guidelines in sentencing Shkreli, citing noted guidelines critic U.S. District Judge Jed Rakoff’s less than glowing views of the guidelines in her sentencing decision.

Walters said while the loss factor does not play much of a role anymore in the way judges are sentencing securities fraud cases, other guidelines factors like enhancements for obstruction of justice or being an investment adviser are more useful to judges in informing them about the defendant and the crime.

Brafman, Shkreli’s lead attorney, had called the guidelines for his client “draconian and offensive” in his quest for a short prison term for Shkreli. While he may not have gotten Shkreli off with 18 months, Walters said she thinks Brafman did an excellent job with a difficult client.

The well-known founder of the Brafman & Associates boutique firm had advised his client to keep quiet about the case until it was resolved, but Shkreli disregarded his advice multiple times.

Midtrial, Judge Matsumoto ordered Shkreli not to speak about the case in and around the Brooklyn courthouse after he wandered into a room full of reporters and disparaged Eastern District of New York prosecutors as “junior varsity” and said he was being blamed for “capitalism.” After the verdict, Shkreli on his Facebook page denied lying to investors, saying he was “proud of what we achieved at MSMB” and later said, “Fuck the government. I will never kiss their ring or snitch.”

Daniel E. Wenner of Day Pitney LLP, a former Eastern District prosecutor, said it’s really challenging to have a client who disregards your advice, especially so publicly, noting Brafman’s quip at sentencing that sometimes he wants to comfort Shkreli, “and there are times that I want to punch him in the face.”

“It’s almost an innate quality of people that they think the way to avoid getting into trouble is a denial of responsibility,” Wenner told Law360.

Wenner said that kind of belief, that a way to avoid a repercussion is to dispute misbehavior, is very hard to overcome with certain individuals.

“It’s just really hard. I would commend Mr. Brafman for not having punched [Shkreli] in the nose,” Wenner said. “His out-of-court conduct while he was on pretrial release and even in the wake of his conviction was an extraordinary challenge, I’m sure.”

When faced with a defiant client like Shkreli, Walters said you do exactly what Brafman did.

“You just soldier through and put on your absolute best case and then you do what he did in his sentencing memo, which is you say we acknowledge that our client has made statements that were inappropriate, we acknowledge that he’s said outrageous things at times, but let me tell you about the real Shkreli,” Walters said. “He did a good job in humanizing Shkreli, envisioning him in a way that I don’t think anyone has done before.”

Brafman declined to comment Tuesday, referring to his remarks to reporters after Shkreli’s sentencing on Friday, in which he said he was disappointed, but that his client will be fine, and it could have been a lot worse.

A spokesman for the U.S. Attorney’s Office for the Eastern District of New York declined to comment on the case.

--Editing by Brian Baresch and Breda Lund.