

ABA
SECTION OF

ANTITRUST
LAW

Promoting Competition
Protecting Consumers

ABA Section of Antitrust Law

Corporate Counseling Committee
Monthly Antitrust Update Program

October 2015

November 9, 2015

CAHILL
CAHILL GORDON & REINDEL LLP

Today's Presenters



David Januszewski
djanuszewski@cahill.com
212-701-3352

David is a partner in Cahill's Litigation practice group. David is serving as lead counsel for defendants in the credit default swap, foreign exchange, ISDAFIX, and U.S. Treasuries antitrust actions in the U.S. District Court for the Southern District of New York.



Elai Katz
ekatz@cahill.com
212-701-3039

Elai leads Cahill's Antitrust & Trade Regulation practice group. Elai's practice focuses on a wide range of antitrust law matters, including litigation, mergers and acquisitions, counseling and government investigations.



Richard Kelly
rkelly@cahill.com
44.20.7920.9818

Richard is a partner in the Litigation and Corporate Governance & Investigations practice groups resident in the firm's London office. Richard has represented some of the world's leading financial institutions and companies in complex litigation, investigations and risk management matters.



Lauren Rackow
lrackow@cahill.com
212-701-3725

Lauren is an associate in Cahill's Antitrust & Trade Regulation practice group. Lauren's practice focuses principally on mergers and acquisitions, counseling and government investigations.

Today's Topics:

- Litigation Update
- Investigations / Government
- Merger Review
- International Update

ABA
SECTION OF

**ANTITRUST
LAW**

Promoting Competition
Protecting Consumers

LITIGATION UPDATE

Presented by David Januszewski

Litigation Update

Agreements Among Competitors

9th Circuit dismisses market allocation claims for tin mill products on summary judgment, ruling plaintiffs failed to “show specific evidence” of a market allocation agreement. *Stanislaus Food Products Co. v. USS-POSCO Indus.* (9th Cir.)

- Tomato cannery alleged that tin producers agreed not to compete on price in contracts with tin can manufacturers.
- Emails between executives at competing tin producers about pricing agreements with can manufacturers did not constitute evidence of agreement where plaintiff showed no link between communication and subsequent change on price.
 - Tin Producer 1 sent another Tin Producer 2 the terms of its contract with Tin Can Manufacturer.
 - Exchange of price information irrelevant because Tin Producer 2 and Tin Can Manufacturer had a long-term contract and no price increases resulted.

Litigation Update

Tying

An Oklahoma federal jury found Cox Communications Inc. violated antitrust laws by tying premium cable services to set-top box rentals. *In re: Cox Enterprises, Inc. Set-Top Cable Television Box Antitrust Litigation* (W.D. Ok.)

- The jury found that Cox had sufficient market power in the Oklahoma City subsystem in the relevant product market for “Premium Cable” to restrain trade in the market for set-top boxes.
- The jury found that Cox tied the provision of Premium Cable to leasing or coercing plaintiff into leasing a Cox set-top box.
- The jury set damages at \$6.313 million, which can be trebled.

Litigation Update

Bundling

A Texas federal court denied a major medical equipment manufacturer's motion to dismiss monopolization claims. *Universal Health Services, Inc. v. Hill-Rom Holdings, et al.* (W.D. Tx.)

- The manufacturer—Hill-Rom Holdings—manufactures medical equipment, and its competitor—Universal Hospital Services, Inc.—sufficiently alleged that Hill-Rom used its monopoly in the Standard Hospital Bed market to attempt to monopolize two other markets through predatory pricing and exclusionary bundling.
 - Hill-Rom offers national group purchasing organizations and hospital networks steep discounts and rebates on Standard Hospital Beds if they agree to rent other types of medical equipment exclusively from Hill-Rom.
- The court found plaintiffs' exclusionary bundling claims under Section 3 of the Clayton Act and Section 1 of the Sherman Act could proceed.
 - Section 3 of the Clayton Act prohibits sales or contracts conditioned on the buyer agreeing not to buy the goods of a competitor where the effect is to “substantially lessen competition or tend to create a monopoly.”
 - Section 3 complements prohibitions on tying and exclusive dealing under the Sherman Act.

Litigation Update

Statute of Limitations – Price Fixing

Precision Associates v. Panalpina World Transport (E.D.N.Y.)

Case alleges conspiracy to fix prices for U.S. forwarding services beginning after 9/11/01.

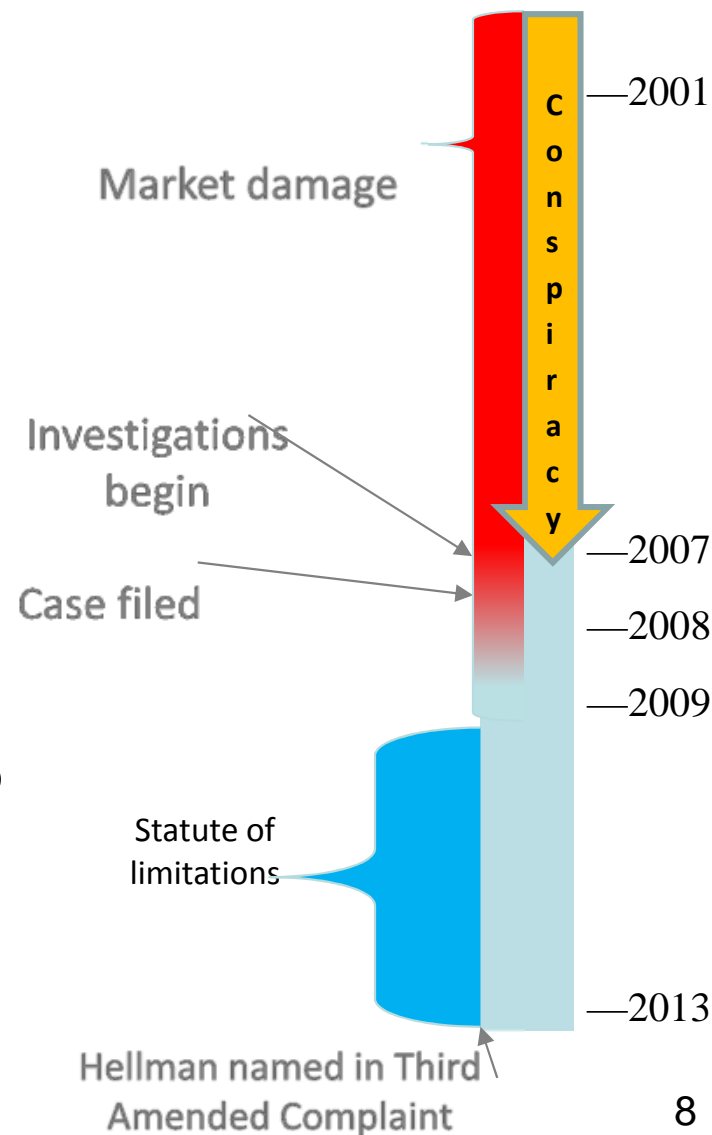
- Conspiracy allegedly existed until late 2007, when global antitrust authorities announced investigations into possible price-fixing in the industry.
- Private plaintiffs filed class action in January 2008.

Many defendants recently settled for \$197.6 million.

- Plaintiffs had urged court to approve settlement, writing in support of their motion that they were eager to settle after Supreme Court rulings in *Dukes* and *Comcast* that significantly tightened standards for certifying class actions and establishing and collecting damages.

Defendant Hellmann Worldwide Logistics won motion to dismiss claims against them

- Not named as defendant until 2013 in Third Complaint.
- Court found it “unreasonable” to conclude plaintiffs were still incurring damages from inflated prices occurring 18 months after investigation began.



Litigation Update

Keurig – Sherman Act Section II

In re: Keurig Green Mountain (2d Cir.)

JBR, Inc. - a manufacturer of unlicensed “K-Cups” that do not work in new versions of Keurig’s coffee machines due to a barcode scanner that “locks out” unlicensed cups - filed an antitrust complaint against Keurig.

- The complaint alleged the “lock out” was unlawful and constituted exclusionary behavior to maintain a monopoly in K-Cup product market where Keurig allegedly has an 86 percent market share.
- The court denied JBR’s request for an injunction during the litigation, which would have stopped Keurig from promoting, marketing or making available any Keurig machine that locked out unlicensed K-Cups.

Second Circuit affirmed denial of injunction due to failure to show irreparable harm.

- JBR contended it would lose sales on basis that retailers had already requested that JBR label its cups to clarify they were not compatible with Keurig 2.0.
- Court not convinced because JBR had no formal or informal sales projections to support loss of sales; projections presented showed consistent sales.

Litigation Update

Market Manipulation

Yen LIBOR class action – motion to intervene denied. *Laydon v. Mizhuo Bank* (S.D.N.Y.)

- California State Teachers’ Retirement System had sought to intervene.
- Defendants had argued that allowing intervenor would expand the scope of the putative class and interject already-dismissed legal claims.
 - Only remaining claims in suit arise under the Commodity Exchange Act.
 - The Yen currency forward agreements CALSTRS traded were not covered by the Commodity Exchange Act.
 - CALSTRS had wanted to bring claims against the banks for unjust enrichment and breach of the covenant of good faith and fair dealing.
 - CALSTRS argued their claims arose out of defendant’s manipulation of Libor, because it affected the price of their currency forwards.

ABA
SECTION OF

**ANTITRUST
LAW**

Promoting Competition
Protecting Consumers

INVESTIGATIONS / GOVERNMENT

Presented by Elai Katz

Investigations / Government Agency Update: Civil

Step N Grip settles with FTC over invitation to collude.

- Company Step N Grip sells a device designed to stop the corners of a rug from curling.
 - Sold primarily through Amazon.com.
- Following a price war with a competitor on Amazon, Step N Grip emailed competitor:
 - “*We sell at \$12.95? Or \$11.95?*”
 - Competitor reported communication to the FTC.
- Commission enforcement action reaffirms that a mere invitation to collude is type of § 5 violation FTC will pursue.
 - FTC policy statement in August said § 5 enforcement would focus on conduct that violates “spirit” of antitrust laws.
 - Policy statement singled out invitations to collude as an enforcement priority.

Investigations / Government Agency Update: Civil

United States of America v. Apple, Inc., et al. (S.D.N.Y.)

DOJ says extension of monitor's term in Apple e-book suit not necessary.

Background: The court found Apple conspired with five major publishers to raise the retail price of e-books, in violation of Section 1 of the Sherman Act.

- The court imposed a monitor to ensure that Apple implemented a significantly strengthened antitrust compliance program.
- This month, the DOJ submitted a letter to the court saying an extension of the monitor's term was not necessary.
 - The DOJ ultimately recommended against an extension of the monitor's term because Apple had put in place a “meaningful antitrust compliance program.”

Investigations / Government

U.S. Libor Criminal Trial of Individuals

U.S. v. Robson, et al. (S.D.N.Y)

In the first U.S. criminal trial for alleged LIBOR manipulation, two former Rabobank traders were tried for conspiracy to commit wire fraud and bank fraud. They did not face Sherman Act charges.

- Accused of manipulating rates to benefit co-workers' trading positions tied to LIBOR.
- Defendants chose to take the stand.
 - Faced heavy cross examination on statements in electronic messages.
- Other traders who pled guilty testified for the government.
- The two former traders were convicted on Nov. 5.

Investigations / Government Agency Update: Criminal

U.S. v. Kayaba Industry Co. (S.D. Ohio)

DOJ recommends reduced fine for auto parts defendant.

- The DOJ recommended a significantly reduced fine for an auto parts defendant accused of bid-rigging and price fixing because that defendant instituted a rigorous compliance program.
- The DOJ charged that the defendant, Kayaba Industry Co. (a Japanese corporation that manufactures shock absorbers for U.S. vehicle manufacturers) conspired with competitors to allocate markets, rig bids, and fix the prices of shock absorbers in the U.S.
- The DOJ recommended that the company be fined \$62 million (a 40% downward departure from the range recommended under the U.S. sentencing guidelines), did not request restitution, and did not request a term of probation.

Investigations / Government Agency Update: Criminal

Indictments in ongoing DOJ auto parts investigation. *U.S. v. Kyomoto, et al.* (E.D. Ky.)

- 58 individuals and 37 companies total have been indicted.
- Latest indictment of three Japanese executives accused of conspiring to fix bids and rig bids of body sealing products.

3 execs charged with bid-rigging, price-fixing in ocean freight probe. *In re: Vehicle Carrier Services Antitrust Litigation* (D.N.J.)

- Vehicle/industrial equipment shipping.
- Co-conspirator companies (Nippon Yusen Kabushiki Kaisha, K-Line) have already pled guilty and paid fines.

In both investigations, DOJ had previously announced it would target individuals who directed conspiracies, not just corporations.

Investigations / Government Bid-Rigging

Split verdict in New Jersey tax lien auction rigging. *U.S. v. Wolfson* (D.N.J.)

- Municipalities in New Jersey hold auction for liens on tax-delinquent properties.
 - Interest on the debt is set by competitors bidding on the lien.
 - More bids drive down the interest rate the debtor-owner owes to the auction winner who acquires his tax debt; deliberately decreasing bids ensures favorable interest rate for winner.
- Jury convicted only one of five defendants—the only one who was heard on the FBI tape presented as evidence during trial.
 - It has been observed this case matched recent patterns in jury convictions in antitrust cases and that juries are hesitant to convict based only on word of alleged co-conspirators, but tend to render a guilty verdict if there are corroborating documents or recordings.

Investigations / Government Agency Update: Criminal

Two Georgia real estate investors pled guilty in federal court in Georgia to bid rigging at public real estate foreclosure auctions. *U.S. v. Gaines* (N.D. Ga.); *U.S. v. Podber* (N.D. Ga.)

- Conspired not to bid against one another during foreclosure auctions.
- Nationwide probe involving 20 federal agencies and 94 U.S. Attorney's offices is active.

First Deutsche Bank employee pleads guilty in to alleged manipulation of Libor. *U.S. v. Curtler* (S.D.N.Y)

- Facing prison term of up to 30 years.
- More than 20 individuals charged in U.K. and U.S.

Investigations / Government Management Changes at FTC

- Deputy director Steve Weissman will return to private practice.
 - Markus Meier, current Assistant Director of the Health Care Division, will step up as Acting Deputy Director.
- Phil Broyles, Assistant Director of Mergers III, will retire at the end of the year.
- Chuck Loughlin, a former Baker Botts antitrust partner, has joined the Bureau as Deputy Assistant Director of the litigation shop headed by Tara Reinhart.
- Dominic Vote, most recently Counsel to the Director, will be the new Deputy Assistant Director of Mergers II.

MERGER REVIEW

Presented by Lauren Rackow

Merger Review

Steris-Synergy Prospective Merger Challenge: Potential Competition

FTC v. Steris (N.D. Ohio)

- The FTC sued Steris Corp. and Synergy Health PLC to block their prospective acquisition in May 2015, focusing on potential competition issues and alleging that absent the deal, U.K. based Synergy would have entered the U.S. market for sterilization by importing X-ray sterilization currently only offered in Europe.
- Steris and Synergy argued that the prospective acquisition was not anticompetitive because Synergy never intended to enter the sterilization market in the U.S. and the companies did not significantly overlap in any relevant geographic market.
- The U.S. district court judge denied the FTC's motion for an injunction to block the prospective acquisition in September 2015 finding (i) not a single customer was willing to provide the revenue commitments needed for Synergy to enter the U.S. X-ray sterilization market and (ii) the business model for entry was unlikely to obtain board approval.
- The FTC decided not to appeal the district court decision and dismissed its administrative complaint.

Merger Review

Two PA Orthopedic Practices Settle FTC Charges that Merger Was Anticompetitive

- Two Pennsylvania orthopedic practices settled FTC charges that their 2011 consummated merger was anticompetitive because the merger allegedly combined 19 of the 25 orthopedists into one practice (combined market share of 76%) in Berks County, Pennsylvania on October 21.
- The FTC alleged that prior to the merger health plans could choose among the different, independent practices and form a network with some of these practices, but that after the merger, the combined entity negotiated with health plans on behalf of all of its members and allegedly raised prices.
- The consent order requires Keystone Orthopaedic Specialists LLC and the other now independent practice to:
 - Obtain prior approval from the FTC before acquiring any interests in each other, another orthopedic practice in Berks County, or hiring or offering membership to another orthopedist who has provided services in Berks County; and
 - Refrain from any anticompetitive, illegal activity, such as coordinating their prices with other orthopedists in the market or jointly negotiating or refusing to deal with payors.

Merger Review

GE-Electrolux \$3.3B Deal

U.S. v. AB Electrolux, et al (D.D.C.)

- The DOJ challenged the prospective acquisition of General Electric Company's appliance business by AB Electrolux and Electrolux North America Inc. in July 2015 alleging that the deal would eliminate competition for the manufacture of top oven and cooktops in the U.S. by combining the two of the leading manufacturers for these products.
- During vigorous, ongoing litigation, on October 30, the DOJ rejected Electrolux's and GE's second divestiture offer to spin-off limited assets to a company that does not currently manufacture appliances in the U.S. to settle the litigation.
- The court decided that four top in-house lawyers at GE would not be denied access to confidential information in the lawsuit on October 9.
- Separately, the court ordered Electrolux to produce to the U.S. documents that related to the views of its former CEO, current CEO, and certain other employees regarding the company's competition strategy on October 5.

Merger Review

Fines: Failure to Make HSR Act¹ Filing

United States v. Blavatnik (D.D.C.)

- Investor Len Blavatnik agreed to pay \$656,000 in civil penalties to resolve the FTC's allegations that he violated premerger notification laws by failing to report his acquisition of voting shares he acquired in a California technology start-up – TangoMe – in August 2014.
- Blavatnik acquired approximately 30% of TangoMe's outstanding voting securities valued at about \$228 million on August 6, 2014 without making a premerger notification filing until December 17, 2014, when he made a corrective filing.
- Blavatnik previously neglected to make a premerger notification filing in 2010 and was not fined.
- Failure to comply with any provision of the HSR Act is liable to the United States for up to \$16,000 per day of the violation.

¹Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended

Merger Review

Private Lawsuits

Procaps S.A. v. Patheon Inc. (S.D. Fla.)

- Procaps S.A. and Patheon Inc. were JV partners, and Patheon then acquired one of Procaps' rivals in the softgel market, Banner Pharmacaps Europe BV.
- A Florida federal judge granted Patheon's motion for summary judgment against Procaps' challenge that Patheon's acquisition of Banner turned the JV agreement into an unlawful market allocation.
- The court found that the Procaps had to show evidence of actual damage to consumers in the market—such as a reduction of output or increase in price—and Procaps had not met this burden.
- The court held that the acquisition did not have any “substantial detrimental effect” on competition even though Patheon had to remove its Banner products in certain regions under the JV agreement.

INTERNATIONAL UPDATE

- ▶ International Update
- ▶ UK Consumer Rights Act

Presented by Elai Katz and Richard Kelly

International Update

European Court of Justice

- The European Court of Justice upheld an European General Court decision finding that an entity that helps a cartel can be held liable as part of the cartel for that conduct.
- The underlying European Commission's 2009 decision found that Zurich-based consulting company, AC-Treuhand AG, was liable for its role along with various suppliers of heat stabilizers for participating in a cartel for tin stabilizers between 1987 and 2000, and in a cartel for epoxidized soybean oil and esters between 1991 and 2000. The Commission fined AC-Treuhand two fines of €174,000. The European Commission found that AC-Treuhand participated in the cartel by:
 - Attending and actively participating in the meetings;
 - Collecting and supplying sales data to the participants;
 - Monitoring the implementation of the agreements; and
 - Offering to act as a moderator in case of disagreements between the other cartel participants.
- The ECJ found that the action taken by AC-Treuhand did not “constitute mere peripheral services that were unconnected with the obligations assumed by the producers and the ensuring restrictions of competition,” and that the “requirements necessary for a valid finding that AC-Treuhand is liable as a result of its participation in the agreements and concerted practices at issue are therefore satisfied in the present case.”

International Update

European Commission

- The European Commission fined eight optical disk drive suppliers a total of €116 million for colluding to rig bids to supply the products to Dell and HP from June 2004 to November 2008.
- The European Commission found that the companies participated in the cartel by sharing information about procurement tenders for the disk drives for laptops and desktops produced by Dell Inc. and Hewlett Packard Co., and also tried to conceal their conduct by engaging in face-to-face meeting in public locations outside of Europe where they would not be easily recognized.
 - The European Commission found that the companies engaged in the following behavior:
 - Communicating bidding strategies to each other;
 - Sharing the results of procurement tenders; and
 - Exchanging other commercially sensitive information concerning the drives used in laptops and desktops.

International Update

UK CMA

- The UK Competition and Markets Authority (“CMA”) found that Reckitt Benckiser’s prospective acquisition of Johnson & Johnson’s K-Y brand could lead to higher prices for personal lubricants for customers buying these products in grocery retailers and national pharmacy chains.
- The CMA found that Durex (RB’s brand) and K-Y accounted for approximately three quarters of the relevant product market in supermarkets and national pharmacy chains.
- The CMA will require RB to license the K-Y brand in the UK to a competitor for eight years, allowing time for the competitor to develop a new brand that will be a rival to Durex.



International Update

Collective actions under the UK Consumer Rights Act 2015

- The UK Consumer Rights Act 2015 has introduced very significant changes to the law.
- Those changes include a substantial redesign of the private enforcement mechanisms for relevant antitrust violations.
- Since October 1, 2015, the Competition Appeal Tribunal (“CAT”) has had jurisdiction to hear:
 - Stand-alone claims
 - “Opt out” collective claims
 - Collective claims brought by individuals for relevant antitrust violations.

International Update

Collective actions under the UK Consumer Rights Act 2015

- “Stand-alone” claims can now be brought.
 - Previously, individuals could only bring “follow-on” claims i.e. claims after certain bodies such as the Competition and Markets Authority, the Office of Fair Trading or the European Commission had issued a final decision finding that the proposed defendant violated relevant antitrust law.
 - Follow-on claims can still be brought before the CAT (and doing so may have advantages), but stand-alone claims are now possible too.

International Update

Collective actions under the UK Consumer Rights Act 2015

- Collective claims can now be brought on an “opt out” basis.
 - Collective claims under the previous CAT regime could only be brought on an “opt in” basis.
 - The new collective claim can be brought on an “opt out” basis.
 - The “opt out” aspect only applies to UK domiciled parties, with parties domiciled outside the UK still needing to “opt in”.

International Update

Collective actions under the UK Consumer Rights Act 2015

- Individuals can now bring collective claims.
 - Previously, only specified bodies could bring collective claims and they very rarely did so.
 - Now individuals can bring collective claims.
 - Further, the class representative need not himself have suffered a loss, allowing for other types of claimants (such as trade unions, litigation funders or law firms) to bring collective claims, subject to the control that the CAT must find that the class representative is “just and reasonable”.

International Update

Collective actions under the UK Consumer Rights Act 2015

- BUT notable restrictions still apply.
- Example 1: no exemplary damages.
- Example 2: risk of adverse costs.
 - Contingency fees are not permitted in opt out collective actions.
 - Prospect of adverse costs orders for the losing party (but on the claimant side, costs can generally only be assessed against the class representative).
- Example 3: limitation period for claims arising before October 1, 2015.
 - Two years from the later of the date that: (a) a decision from a relevant regulatory body became final; or (b) the cause of action accrued.

Questions

David Januszewski

Elai Katz

Richard Kelly

Lauren Rackow