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Expert Analysis

# Gas Prices, Class Arbitration, Foreclosure-Auction Bid Rigging

The U.S. Court of Appeals for the First Circuit rejected price fixing claims against gasoline stations on Martha's Vineyard as the evidence presented did not tend to exclude the possibility of merely parallel conduct without an agreement. The U.S. Court of Appeals for the Fifth Circuit dismissed a lawsuit challenging an oil price fixing cartel involving OPEC, declining to decide political questions and create diplomatic complications.

Other recent antitrust developments of note included the U.S. Court of Appeals for the Second Circuit's decision not to enforce an arbitration provision that barred class actions on the ground that it effectively deprived plaintiffs of the statutory protections of the antitrust laws and a district court's denial of the Federal Trade Commission's motion to preliminarily enjoin the merger of two clinical laboratory testing firms.

### Parallel Pricing

Summer and year-round residents of Martha's Vineyard in Massachusetts brought a lawsuit alleging that gasoline stations on the island conspired to fix prices in violation of §1 of the Sherman Act and engaged in price gouging in violation of Massachusetts state law. The plaintiffs calculated that the defendants' prices were, on average, 56 cents per gallon higher than the price of gas on nearby Cape Cod, more than double the additional cost of transporting gasoline to the island from the mainland. The defendants, who operated four of the nine gas stations on Martha's Vineyard, moved for summary judgment, arguing that the evidence presented suggested conscious parallelism in a market with few players and high barriers to entry rather than an agreement on prices.

The district court granted the defendants' motion, and the First Circuit affirmed. The appellate court stated that the evidence presented by plaintiffs did not clarify whether the supra-competitive parallel pricing was the result of an unlawful agreement or lawful interdependence.

The court observed that the Martha's Vineyard gasoline market was particularly susceptible to

By **Elai Katz**

interdependent parallel pricing. There were only nine gas stations on the island, and opening a new station required seldom-granted regulatory approval. Price changes—marked on large signs—were easy to monitor and respond to, such that a price drop by one station would likely be matched quickly by others, eliminating the lower price advantage for the first mover and reducing profit margins for all the stations. By the same token, the court went on to explain, there was little risk for a price leader to raise prices. The other stations would probably follow, recognizing the potential higher profit margins for all, but if the others did not follow, the leader could bring its prices right back down before losing too many customers.

> The Fifth Circuit dismissed a lawsuit challenging an oil price fixing cartel involving OPEC, declining to decide political questions and create diplomatic complications.

The First Circuit noted that the Supreme Court's 1986 opinion in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, established that, in the absence of direct evidence of an agreement, mere parallel conduct did not violate §1 of the Sherman Act. At the summary judgment stage, a plaintiff alleging a conspiracy based on parallel pricing must present "plus factors" that "tend to exclude the possibility" of lawful unilateral action.

The court stated that most of the plaintiffs' plus factors "show nothing more than that the gasoline market on Martha's Vineyard is conducive to conscious parallelism." The First Circuit acknowledged that a sudden shift to "abnormal" profits and price increases during periods of decreasing costs may be useful in identifying the beginning of a conspiracy. But when, as here, they are stable over many years, those indicators are as likely to suggest lawful parallelism, the court explained.

The court added that evidence of a motive to conspire did not constitute an effective "plus factor" because it merely showed that the defendants recognized that they could earn higher profits by maintaining supra-competitive prices through parallel pricing. The First Circuit also stated that enduring relative market shares are consistent with both collusion and independent conscious parallelism.

The court closely examined evidence of communications about prices between the defendants—including subsequent, possibly untrue, denials under oath of those conversations—and determined that they demonstrated efforts by some defendants in their role as wholesalers to leverage their position over wholesale customers rather than raising an inference of an agreement on pricing at the retail level. Similarly, a highly favorable loan from one defendant to another was viewed by the court as evidence of a wholesaler's efforts to keep an important customer in business, not a hint of a price fixing conspiracy.

The First Circuit also affirmed summary judgment on the state law price gouging claim because the challenged price increases could be explained by climbing costs and the plaintiffs failed to show "gross disparity" in prices.

*White v. R.M. Packer Co.*, 2011-1 CCH Trade Cases ¶77,352

### OPEC

In another case involving allegations of collusion in the oil business, the Fifth Circuit determined that the political question doctrine and the act of state doctrine prevented U.S. gasoline retailers and other purchasers of petroleum from proceeding with price fixing claims against oil petroleum companies, affirming the district court's dismissal of these allegations. The plaintiffs—attempting to frame the conspiracy as commercial in nature—alleged that foreign national oil companies conspired with Organization of the Petroleum Exporting Countries (OPEC) member nations to fix the prices of crude oil and refined petroleum products.

The court concluded that the plaintiffs failed to allege a conspiracy independent from broader agreements among the sovereign nations to fix prices. Therefore, the court found that the inquiry into OPEC implicated diplomatic determinations, such as foreign policy and national security, constitutionally committed to the executive and legislative branches.

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*In re Refined Petroleum Products Antitrust Litigation*, 2011-1 CCH Trade Cases ¶77,328

*Comment*: U.S. Senator Herb Kohl recently reintroduced legislation designed to allow the Department of Justice to bring antitrust actions against OPEC members. The proposed legislation would clarify that their activities are not protected by sovereign immunity or the act of state doctrine. No Oil Producing and Exporting Cartels Act of 2011, S. 394, 112th Cong. (Feb. 17, 2011)

### Arbitration

On remand from the U.S. Supreme Court, the Second Circuit ruled that a clause in contracts between American Express and merchants that bars class arbitration was not enforceable.

The Second Circuit stated that because the practical effect of enforcing the class action waiver provision would be to preclude merchants from bringing Sherman Act claims against the payment services company, the provision was unenforceable. The merchants' economic expert persuaded the court that it would not be economically rational for a merchant with annual sales of $10 million or less to pursue recovery of damages given the likely out-of-pocket costs, which included several hundred thousand dollars for economic antitrust studies.

The Second Circuit distinguished the Supreme Court's recent opinion in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), which held that a party cannot be compelled to submit to class arbitration unless it had agreed to do so, and explained that the question here was whether the class waiver clause was enforceable.

The court observed that it is a "firm principle of antitrust law that an agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy." The court clarified that class action waivers in arbitration agreements are not always unenforceable and that the party seeking to prevent enforcement of such a clause bears the burden of showing that the cost of individual arbitrations would be prohibitive.

*In re American Express Merchants' Litigation*, No. 06-1871-cv (March 8, 2011)

### Clinical Lab Merger

The Federal Trade Commission (FTC) sought a preliminary injunction in federal district court to prevent Laboratory Corporation of America (LabCorp) from completing its proposed acquisition of Westcliff Medical Laboratories Inc., a rival clinical laboratory testing company, and to enable the FTC to proceed with an administrative trial to determine whether the transaction would substantially lessen competition in violation of §5 of the FTC Act or §7 of the Clayton Act.

The district court declined to grant the injunction and rejected the commission's proposed relevant market, defined as the sale of clinical laboratory testing services to physician groups under capitated contracts, whereby the labs receive a fixed monthly payment for each member. The court stated that the FTC's asserted market failed to include "fee-for-service" testing in addition to "capitated" testing, which the court described as "merely two different ways of paying" for the same services. The court added that expanding the relevant market to include fee-for-service contracts would dramatically expand the number of competitors in the market.

*FTC v. Laboratory Corporation of America*, 2011-1 CCH Trade Cases ¶77,348 (C.D. Cal.)

*Comment*: The opinion in the case reported immediately above cites to Commissioner J. Thomas Rosch's statement dissenting from the commission's decision to issue an administrative complaint with an "erroneous" relevant market definition. Mr. Rosch observed that the two payment models are inextricably linked because without the incentive of obtaining lucrative fee-for-service business, labs would likely avoid entering into less profitable capitated contracts. (FTC Docket No. 9345, Nov. 30, 2010, available at www.ftc.gov/os/adjpro/d9345/)

### Exclusionary Contracts

The Department of Justice and the Attorney General of Texas charged United Regional Health Care System, a hospital operator in Wichita Falls, Tex., with illegally maintaining its monopoly by entering into exclusionary contracts with commercial health insurers. The enforcers alleged that United Regional was by far the largest hospital in Wichita Falls, with approximately 90 percent of acute-care inpatient hospital services and over 65 percent of outpatient surgical services. The department added that United Regional was a "must-have" hospital for any insurer that wished to provide health insurance in the area.

> The Second Circuit in 'In re American Express Merchants' Litigation,' stated that because the practical effect of enforcing the class action waiver provision would be to preclude merchants from bringing Sherman Act claims against the payment services company, the provision was unenforceable.

The challenged agreements provided for a "significant pricing penalty"—a substantially smaller discount—if the insurer contracted with one of United Regional's local rivals. The department alleged that these discount provisions effectively prohibited most insurers from contracting with rival health care providers, thereby delaying expansion and entry of competing hospitals and leading to higher prices.

As they filed the complaint, the federal and state enforcers announced a proposed settlement with United Regional that would prohibit the hospital system from offering discounts tied to exclusivity.

*United States and Texas v. United Regional Health Care System*, 11-cv-00030 (N.D. Tex Feb. 25, 2011), CCH Trade Reg. Rep. ¶¶45,111, 50,988, also available at www.usdoj.gov/atr

*Comment*: The Department of Justice underscored that the enforcement action reported immediately above was the first case brought by the department in more than a decade charging a monopolist with engaging in "traditional anticompetitive unilateral conduct."

### Bid Rigging

The Department of Justice announced that two individuals pleaded guilty to conspiring to rig bids at public real estate foreclosure auctions in San Joaquin County, Calif. The department asserted that the two individuals, along with three other real estate investors who had pleaded guilty in 2010, agreed not to bid against each other and designated one bidder to buy a given property at a public auction with the purpose of obtaining the property at less than competitive prices. They then held a second, private auction among the participants. The conspirator who bid the highest amount won the property and the difference between the price at the public auction and the second, private auction—the group's "illicit profit"—was divided among the participants, according to the indictment.

*United States v. Northcutt*, No. 11-CR 0038 MCE, *United States v. Marifat*, No. 11-CR 0039 WBS, CCH Trade Reg. Rep. ¶45,111 Nos. 5158, 5159 (E.D. Cal.), also available at www.usdoj.gov/atr

*Comment*: The success of bid rigging schemes like the one uncovered in the enforcement action reported immediately above depends on their secrecy. Had the sellers at the public auction known that the bidding was not competitive, they would likely have invited additional bidders to obtain a competitive price, which could have trimmed or even eliminated the conspirators' illicit profit.

### Indian Merger Control

The Central Government of India issued a notification bringing into force, effective on June 1, 2011, the merger control provisions of the Indian Competition Act, 2002, which authorize the Competition Commission of India (CCI) to review proposed mergers and acquisitions. Contemporaneously, the thresholds for notifiable transactions were enhanced by 50 percent and acquisitions of smaller target companies were exempted for five years. The CCI also circulated draft regulations setting forth filing fees and procedures.

Combination Provisions Notified, http://www.cci.gov.in/index.php