New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 246—NO. 77
THURSDAY, OCTOBER 20, 2011

ANTITRUST

Expert Analysis

Foreign Cartel With Domestic Ripple Effects

By **Elai Katz**

The U.S. Court of Appeals for the Seventh Circuit ruled that a conspiracy to fix potash prices abroad, alleged to have set a benchmark for U.S. prices, fell outside the reach of U.S. antitrust laws. The U.S. Court of Appeals for the Ninth Circuit ruled that suits brought by state attorneys general on behalf of citizens did not constitute class actions and should not be removed to federal courts under the Class Action Fairness Act.

Other recent antitrust developments of note included the approvals, with conditions, of pharmaceutical and radio station mergers and a Department of Justice enforcement action challenging a bank's facilitation of a swap arrangement concerning the price of electricity in New York City.

Foreign Conduct

Direct and indirect purchasers of potash, a mineral used in fertilizer, filed suits in U.S. federal courts and claimed that potash producers conspired to fix potash prices in Brazil, China, and India and that the elevated prices in those markets influenced and increased the price of potash in the United States.

The defendant potash producers, based in Canada, Russia and Belarus, moved to dismiss the complaint because the alleged violations occurred outside the territorial reach of the Sherman Act, as delineated by the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. §6a.

The FTAIA, adopted in 1982, incorporated into the statute the long-standing principle that U.S. antitrust laws do not regulate the competitive conditions of other nations and provides that the Sherman Act does not apply to foreign anticompetitive conduct unless the conduct involves U.S. import commerce or has a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. The district court denied the potash producers' motion to dismiss but certified interlocutory appellate review of its decision, which, as a non-final order, is ordinarily not subject to appeal and cannot be appealed as of right. The Seventh Circuit agreed to take the appeal and reversed, ruling that the complaint should be dismissed.

The complaint alleged that the potash industry was highly concentrated, that demand was relatively inelastic because potash accounts for a relatively small portion of total crop-production costs, and that potash producers had opportunities to conspire through joint ventures and trade association meetings. The complaint went on to assert that the potash producers engaged in suspicious parallel business conduct, including, for instance, temporary suspension of sales by several producers as soon as one rival announced a mechanical disruption in its production capacity, when it would have made economic sense to increase sales efforts to take advantage of a competitor's difficulties.

The Seventh Circuit pointed out that all of the alleged anticompetitive conduct took place outside the U.S. and that the only asserted connection between the coordinated price increases in Brazil, China and India and the U.S. was that prices in those foreign markets served as a "benchmark" for U.S. potash prices.

The appellate court stated that the fact that the defendants were generally engaged in the U.S. import market was not enough to satisfy the FTAIA's import exception, as the district court assumed incorrectly, unless the foreign anticompetitive conduct specifically targeted the U.S. import market. In addition, the complaint did not provide sufficient factual content to explain the way in which potash prices in Brazil, China and India served as a benchmark for U.S. prices to satisfy the direct, substantial and reasonably foreseeable effects exception. The court observed that the allegations amounted to nothing more than a "ripple effect" on the U.S. domestic market.

The Seventh Circuit panel stated that it need not decide whether application of the FTAIA's limitations is a jurisdictional question under Federal Rule of Civil Procedure 12(b)(1), as that court decided in *United Phosphorus v. Angus Chemical*, 322 F.3d 942 (7th Cir. 2003), or a substantive question to be determined under Rule 12(b)(6), as the U.S. Court of Appeals for the Third Circuit decided very recently in *Animal Science Products Inc. v. China Minmetals Corp.* 2011-2 CCH Trade Cases ¶77,566, discussed in last month's Antitrust column. The appellate panel nevertheless indicated that the *United Phosphorous* decision may be ripe for reconsideration and that Judge Wood's dissent in that case may ultimately prevail.

Minn-Chem Inc. v. Agrium Inc., No. 10-1712, 2011-2 CCH Trade Cases ¶77,611 (Sept. 23, 2011)

Comment: The Seventh Circuit demonstrated yet again—following last year's *Text Messaging* decision (630 F.3d 622) by Judge Richard Posner—that with the Supreme Court's new emphasis and guidance on the sufficiency of pleadings, the denial of a motion to dismiss a complaint may warrant intermediate appellate review.

Class Actions

The Ninth Circuit ruled that parens patriae suits brought by state attorneys general on behalf of state citizens did not constitute class actions under the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. §1332(d) et al., which allows some class actions instituted in state courts to be removed to the federal courts. The parens patriae doctrine permits state attorneys general to bring a suit on behalf of the state's citizens, as the "parent" or "guardian" of the state, when a sufficiently substantial segment of the population has been injured.

In this case, the attorneys general of Washington and California commenced state actions asserting that manufacturers of thin-film transistor liquid crystal display (TFT-LCD) panels, used in televisions and mobile phones, conspired to fix prices in violation of state antitrust laws. The defendants removed the cases to federal court on the ground that the parens patriae claims were disguised class

ELAI KATZ *is a partner at Cahill Gordon & Reindel.* LAUREN RACKOW, *an associate at the firm, assisted in the preparation of this column.*

actions since consumers were the real parties in interest. The appellate court affirmed the district court's determination that the suits should not have been removed because attorneys general bringing parens patriae suits need not demonstrate many of the elements typically required to certify class actions.

The Ninth Circuit noted that the U.S. Court of Appeals for the Fourth Circuit's recent decision in *West Virginia v. CVS Pharmacy Inc.*, 646 F.3d 169 (4th Cir. 2011), reached a similar conclusion.

Washington v. Chimei Innolux Corp., No. 11-16862, 2011-2 CCH Trade Cases ¶77,615 (Oct. 3, 2011)

Drug Merger

The Federal Trade Commission (FTC) approved the combination of Israel-based Teva Pharmaceuticals Industries, the world's largest generic drug company, with Cephalon, a U.S.-based drug company, subject to the divestiture of a generic cancer pain drug and a generic muscle relaxant, as well as a supply agreement that will enable a competing firm to sell a generic version of Cephalon's highly successful sleep disorder drug, Provigil. The FTC alleged that the proposed acquisition would have harmed competition in three markets where Teva marketed (or would likely market) a generic version of a Cephalon branded drug: (i) transmucosal fentanyl citrate lozenges (generic Actiq) used to treat cancer pain; (ii) extended release cyclobenzaprine hydrochloride (generic Amrix) used as a muscle relaxant; and (iii) modafinil (generic Provigil) tablets used to treat excessive sleepiness disorders such as narcolepsy.

The FTC stated that Teva would have accounted for 80 percent of the sales of generic Actiq and that Teva and Cephalon were two of a limited number of companies capable of quickly bringing to market generic Amrix. The FTC was also concerned that industry consolidation would hamper the introduction of generic Provigil products during the exclusivity period afforded to the first-to-file generic supplier under the Hatch-Waxman Act.

The FTC identified Par Pharmaceuticals, an experienced, U.S.-based generic drugmaker, as the approved ("up-front") buyer of the three drugs at issue.

The European Commission also approved the proposed acquisition, conditioned on Cephalon's divestiture of rights to sell generic modafinil in France and other related rights.

Teva Pharmaceutical Industries Ltd., and Cephalon Inc., FTC File No. 111 0166 (Oct. 7, 2011), available at www.ftc.gov; "Commission approves the acquisition of Cephalon by Teva, subject to conditions," IP/11/1193 (Oct. 14, 2011), available at ec.europa.eu/competition

Radio Merger

Cumulus Media consummated its $2.5 billion acquisition of Citadel Broadcasting, after agreeing to divest three radio stations in two geographic markets to address the Department of Justice's concerns. The department alleged that the merger would eliminate competition among radio stations for the sale of advertising time in the Flint, Mich., and Harrisburg, Pa., metropolitan statistical areas (MSAs—officially designated geographical units accepted in the industry for analysis of broadcast markets). The department concluded that the divestiture of three radio stations would alleviate competitive concerns in local markets, although the merger made Cumulus the third largest operator of broadcast radio stations nationwide.

United States v. Cumulus Media Inc. and Citadel Broadcasting Corporation, No. 11-cv-01619 (D.D.C. Sept. 8, 2011), available at http://www.justice.gov/atr/

> The Ninth Circuit ruled that parens patriae suits brought by state attorneys general on behalf of state citizens did not constitute class actions under the Class Action Fairness Act of 2005.

Satellite Radio Merger

Satellite radio listeners alleging that the 2008 merger of Sirius Satellite Radio and XM Satellite Radio, now Sirius XM Radio, lessened competition in violation of §7 of Clayton Act and monopolized the market in violation of §2 of the Sherman Act, among other claims, agreed to settle their class action on the eve before trial for $180 million. The court approved the settlement and noted that the Department of Justice and the Federal Communications Commission (FCC) had assessed the merger in 2008, and the department concluded that it was not likely to have unlawful anticompetitive effects, while the FCC approved the merger with conditions.

Blessing v. Sirius XM Radio Inc., 2011-2 Trade Cases ¶77,579 (SDNY Aug. 24, 2011)

Comment: By and large, when antitrust enforcers have decided that a merger was not likely to lessen competition, private plaintiffs have had difficulty obtaining a different result in court. The settlement reported immediately above indicates that not every private action challenging a merger conforms to this generality.

Energy 'Swap' Derivatives

The Department of Justice agreed to settle charges brought against Morgan Stanley for arranging a financial derivative or "swap" involving the price of electricity in New York City that, according to the government's complaint, effectively combined the economic interests of the two largest local providers of electricity. As part of the settlement, the bank agreed to disgorge $4.8 million in profits derived from the arrangement.

According to the complaint, KeySpan, the leading provider of electricity in New York City, considered various strategies in anticipation of the introduction of additional electricity-generating capacity by Astoria Generating Company in 2006, including acquiring the new plant, but, in light of potential antitrust concerns, settled upon a swap with Morgan Stanley that was contingent on the bank's entering into an offsetting agreement with Astoria.

Under the agreement, if the market price went above $7.57 per kW-month, Morgan Stanley would pay KeySpan the difference multiplied by 1,800 MW, and if the price was below $7.57, KeySpan would pay Morgan Stanley. The offsetting agreement with Astoria provided that if the market price went above $7.07, Astoria would pay Morgan Stanley the difference multiplied by 1,800 MW, and if it went below $7.07, Morgan Stanley would pay Astoria.

The department asserted that the swap agreement eliminated KeySpan's incentive to compete with Astoria in the same way that a merger or direct agreement with Astoria would have done. The complaint also alleged that despite the addition of significant new generating capacity, the market price in New York City did not decline.

United States v. Morgan Stanley, 11-cv-06875 (SDNY Sept. 30, 2011), CCH Trade Reg. Rep. ¶45,111, No. 5232, also available at www.usdoj.gov/atr

Comment: Swaps, futures and other derivative contracts are commonplace in energy markets as a means for producers, which must make substantial upfront capital investments, to hedge against the risks of price volatility. Financial institutions that facilitate such derivatives and their counselors should scrutinize the particular facts of the enforcement action reported immediately above and take note of the Department of Justice's admonition that "use of derivatives for anticompetitive ends will not be tolerated."

Reprinted with permission from the October 20 2011 edition of the NEW YORK LAW JOURNAL © 2011 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. # 070-01-11-24