September 6, 2019

Antitrust Month in Review – August 2019

In August, there were several developments in private litigation cases, including notable decisions at both the district and circuit court levels denying class certification because of the presence of uninjured class members. Also, a district judge in Minnesota dismissed plaintiffs' complaints in the pork price-fixing litigation, but granted leave to file amended complaints. Elsewhere, in a case relating to an alleged unlawful agreement to delay entry of a generic pharmaceutical, a judge ruled that *per se* treatment was not proper; while another court allowed claims of an "overarching" generic pharmaceutical price-fixing conspiracy to proceed.

We discuss these and other developments below.

US – DOJ/FTC Merger

FTC Requires Divestitures in Boston Scientific's Acquisition of BTG

On August 7, the Federal Trade Commission (FTC) announced that it is requiring Boston Scientific to divest its drug eluting bead (DEB) and bland bead businesses to Varian Medical Systems in order for Boston Scientific to complete its acquisition of BTG. According to the FTC's press release, "Boston Scientific and BTG are the two largest suppliers of DEBs in the United States," and without the divestiture, "higher prices, reduced innovation, and less choice for consumers" would result as a consequence of the combined firm's market power. DEBs are "are microscopic beads used to treat certain liver cancers." The FTC is requiring the divestiture of the bland bead business in addition to the DEB business "to ensure the divestiture's effectiveness." According to the FTC, "[b]land beads are used in . . . [a] procedure to block the flow of blood to a liver tumor." Press Release, Fed. Trade Comm'n, FTC Requires Divestitures and Imposes Conditions on Boston Scientific Corp.'s Acquisition of BTG plc (Aug. 7, 2019).

US – Private Litigation

Court Grants Motion to Dismiss Complaints Alleging Pork Price Fixing

On August 8, Judge John R. Tunheim of the United States District Court for the District of Minnesota granted the defendants' motion to dismiss in *In re Pork Antitrust Litigation* because the court found that the plaintiffs "have not adequately pleaded parallel conduct sufficient to support an inference of conspiracy." Here, plaintiffs alleged that the defendants in 2009 "began to discretely conspire with one another to decrease pork production and/or to limit production increases in an effort to raise the price of

pork" by "aim[ing] public statements at one another emphasizing the need to cut production" and "exchang[ing] detailed, competitively sensitive, and closely guarded non-public information about prices, capacity, sales volume, and demand through their co-conspirator, Defendant Agri Stats." Agri Stats compiles industry data into benchmarking reports.

According to the court's decision, plaintiffs relied on parallel conduct and "plus factors" to infer an agreement, including "the collusive and constricted nature of the industry, the inelasticity of pork demand, trade associations attended by the Defendants, actions taken by some of the Defendants against their own self-interests, pricing practices, and the fact that some of these Defendants engaged in similar practices in the chicken industry," as well as "the central role that Agri Stats played in the alleged conspiracy and the frequent public statements made by Defendants regarding the state of the pork market."

However, the court wrote that "[w]hile Plaintiffs' cited plus factors are strong, the allegations at this point regarding parallel conduct are sparse and conclusory." The court found that plaintiffs failed to allege "specific information regarding each Defendant, [regarding] . . . how many, or when any of the individual Defendants may have affirmatively acted to reduce the supply of pork. And that type of information is vital to pleading parallel conduct." The court granted plaintiffs leave to amend their complaints. *In re Pork Antitrust Litig.*, No. 18-cv-1776 (D. Minn. Aug. 8, 2019).

Court Grants Motion to Dismiss Per Se *Generic Delay Claims*

On August 15, Judge Alvin K. Hellerstein of the United States District Court for the Southern District of New York granted defendants' motion to dismiss claims alleging that an agreement between Novartis and Par Pharmaceutical was a *per se* violation of section 1 of the Sherman Act. According to the court, "Plaintiffs' core allegation is that Novartis and Par entered into an unlawful settlement agreement in which Par would not compete in the Exforge market by introducing a generic version of Exforge for a period of time, effectively extending the life of Novartis' patents." Exforge is a blood pressure medicine. The plaintiffs claimed that the agreement, a "no authorized generic" or no-AG agreement, "is a market division that is *per se* illegal." The court, however, held that the Supreme Court's decision in *FTC* v. *Actavis* "forecloses the type of *per se* claim that plaintiffs seek to assert here." Judge Hellerstein wrote that he could "infer no basis for . . . treating a no-AG reverse payment agreement as an output restriction or price-fixing agreement," did not credit the plaintiffs' attempts to distinguish the *Actavis* case from the case before him, and held that the rule of reason should apply to the case. The court also dismissed state law claims against the defendants. *In re Novartis & Par Antitrust Litig.*, No. 18-cv-4361 (Aug. 15, 2019).

Court Allows Claims of "Overarching" Generic Pharmaceutical Price-Fixing Conspiracy to Proceed

On August 15, Judge Cynthia M. Rufe of the United States District Court for the Eastern District of Pennsylvania denied defendants' joint motion to dismiss claims based on an "overarching conspiracy" by

which the defendants allegedly "pursued a common goal – to achieve artificially-inflated generic drug prices through the allocation of markets and through price-fixing agreements – and that they did so through a wide-ranging 'fair share' arrangement." (The court wrote that "[t]he claims asserted in the Overarching Complaints would impose joint and several liability on Defendants not just for their participation in any individual drug conspiracy, but also for their participation in the alleged overarching scheme.")

Judge Rufe held that "[t]he allegations in Plaintiffs' Overarching Complaints plausibly allege that Defendants engaged in a conspiracy regarding the broader market for generic drugs, and not just the market for any individual drug" and that the "[p]laintiffs make plausible claims that the alleged individual drug conspiracies were connected by common goals, methods, or actors so as to form a broader overarching conspiracy." *In re Generic Pharms. Antitrust Litig.*, No. 16-md-2724 (Aug. 15, 2019).

D.C. Circuit Upholds Denial of Class Certification Where Plaintiffs' Economic Model Showed Uninjured Members

On August 16, the United States Court of Appeals for the District of Columbia Circuit affirmed the denial of class certification in *In re Rail Freight Fuel Surcharge Antitrust Litigation*. With the plaintiffs' economic model showing no damages for over 2,000 members of the proposed 16,000-member class, the court concluded that common issues did not predominate over the individualized inquiries necessary to determine injury and causation for the class. Therefore, the court held it was within the district court's discretion to reject class certification for failing to satisfy the requirement of predominance under the applicable federal rule. *Dakota Granite Co. v. BNSF Ry. Co. (In re Rail Freight Fuel Surcharge Antitrust Litig.)*, No. 18-7010 (D.C. Cir. Aug. 16, 2019) (reissued Aug. 30, 2019); Paul, Weiss Client Memo., D.C. Circuit Upholds Denial of Class Certification Where Plaintiffs' Economic Model Showed Uninjured Members (Aug. 23, 2019).

Eleventh Circuit Holds that Georgia City's Alleged Tying of Water Service and Natural Gas Service is Not Protected by State-Action Immunity

On August 20, the United States Court of Appeals for the Eleventh Circuit affirmed a district court's decision denying the City of LaGrange, Georgia's motion to dismiss a complaint alleging that the city illegally tied its provision of natural gas service to its provision of water service. Under the relevant municipal ordinance, the city provides water service outside the city's limits "only to those customers who install" natural gas appliances. The court held that because the legislature, in enacting the statutory scheme under which the ordinance was adopted, could not "have foreseen that cities would use their water monopoly to increase their share of an unrelated market," the city was not entitled to state-action immunity. The suit was brought by Diverse Power, Inc., a provider of "electric service . . . in direct competition [with the city] for retail energy customers." *Diverse Power, Inc. v. City of LaGrange, Ga.*, No. 18-11014 (11th Cir. Aug. 20, 2019).

Court Denies Motion for Certification of Class of Indirect Purchasers in Intuniv Pay-for-Delay Case Because of Uninjured Class Members

On August 21, Judge Allison D. Burroughs of the United States District Court for the District of Massachusetts denied a motion to certify classes of nationwide and certain state indirect purchasers of Intuniv or its generic version (which are treatments for ADHD). Here, the plaintiffs alleged that Shire, the manufacturer of Intuniv, and Actavis, the manufacturer of its generic equivalent, conspired to delay the entry of the generic version of the drug.

The court found that "based on the experts' reports . . . [u]ninjured consumers likely comprise at least 8% of each putative class, and perhaps considerably more." This is because, according to the court, "25,000 brand loyalists, several thousand coupon-using class members, and some relatively de minimis number of class members who purchased Intuniv only after reaching their health insurance out-of-pocket maximum were not injured by the allegedly anticompetitive conduct at issue." Brand loyalists are those who "would have continued to purchase brand Intuniv over a generic" even if a generic had been available; coupon users availed themselves of a manufacturer's coupon which lowered their out-of-pocket cost of the branded drug below the generic price; and those who reached their insurance maximums did not themselves have to pay for the drug.

According to the court, the indirect purchasers "have not put forth a reasonable and workable plan to weed out uninjured class members." *In re Intuniv Antitrust Litig.*, 16-cv-12396 (Aug. 21, 2019).

Canadian Development

Canadian Competition Bureau Requires Private Equity Fund to Divest Software Business of Portfolio Company to Remedy Alleged "Merger to Monopoly"

On August 20, the Canadian Competition Bureau announced that the private equity firm Thoma Bravo has agreed to sell the MOSAIC "oil and gas reserves valuation and reporting software" business owned by its portfolio company Quorum. According to its press release, the Bureau determined that Thoma Bravo's May 2019 acquisition of Aucerna, which offers a software product called Value Navigator, or Val Nav, "resulted in a merger to monopoly in the supply of oil and gas reserves valuation and reporting software to medium and large producers in Canada." According to the Bureau, "[p]rior to the acquisition, MOSAIC [owned by Quorum] and Val Nav [owned by Aucerna] were each other's only effective competitors." Press Release, Competition Bureau Canada, Competition preserved in the supply of oil and gas reserves software in Canada (Aug. 20, 2019); Press Release, Competition Bureau Canada, Competition Bureau challenges Thoma Bravo's acquisition of oil and gas reserves software firm Aucerna (Jun. 17, 2019).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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