November 25, 2019

Antitrust Month in Review – October 2019

In October, a court in New York dismissed claims in an antitrust suit involving patent settlement agreements and a court in Northern California denied a motion to certify a damages class in a suit alleging unlawful tying of hospital services in certain local markets.

At the Federal Trade Commission (FTC), the chief administrative law judge sided with FTC complaint counsel and found that two dental products distributors illegally conspired with respect to their dealings with buying groups, but also found that complaint counsel failed to prove that a third distributor was involved in the conspiracy.

The European Commission (EC) required divestiture in an acquisition in the aluminum industry and imposed interim measures on Broadcom requiring it to cease certain contracting practices while the Commission's investigation continues. The United Kingdom Competition and Markets Authority (CMA) provisionally found that a guitar seller engaged in illegal resale price maintenance.

We discuss these developments below.

US – DOJ/FTC Civil Non-Merger

FTC Administrative Law Judge Finds That Two Dental Products Distributors Conspired to Refuse to Negotiate with Buying Groups

On October 15, FTC Chief Administrative Law Judge D. Michael Chappell found that Benco Dental Supply and Patterson Companies "conspired to refuse to offer discounted prices or otherwise compete for the business of buying groups and that such an agreement is a per se violation of Section 5 of the FTC Act." Judge Chappell also found that "[t]he evidence fail[ed] to prove a conspiracy involving" a third distributor, Henry Schein. As evidence of an agreement between Benco and Patterson, Judge Chappell cited, among other things, emails between the two companies "constitut[ing] evidence of exchanges of assurances and a confrontation about perceived cheating followed by reassurance." Judge Chappell also cited "Patterson's conduct following the . . . exchange of assurances, . . . effectively adopting a blanket policy of summarily refusing to deal with buying groups, without evaluation." Initial Decision, In the Matter of Benco Dental Supply Co., FTC Docket No. 9379 (Oct. 15, 2019).

US – Private Litigation

Judge Dismisses Claims in In re Actos Direct Purchaser Antitrust Litigation, *Finding Plaintiffs' Liability Theory "Novel" and "Unsupported by Current Law"*

On October 8, Judge Ronnie Abrams of the United States District Court for the Southern District of New York granted defendants' motions to dismiss most of the claims asserted by the plaintiffs in *In re Actos Direct Purchaser Antitrust Litigation*. The plaintiffs in this litigation sued Takeda, Mylan, Actavis, Ranbaxy and Teva, challenging patent settlement agreements entered into by Takeda and the manufacturers of the generic versions of Takeda's ACTOS and ACTO*plus* diabetes drugs. The plaintiffs asserted what the court characterized as "a novel, non-reverse payment theory" of liability. (Generally, in a reverse payment case, plaintiffs challenge patent settlement agreements whereby a patent holder is alleged to have made a large and unjustified payment to a generic manufacturer to delay its entry into the market.)

According to the court, after Takeda sued the generic manufacturers alleging patent infringement, Takeda and the generic manufacturers entered into settlements, which, among other things, allowed the generics to enter the market a number of "months after the [relevant] drug substance patent expired" but several "years prior to the expiration of the" related method-of-use patents. Additionally, one of the generics (Teva) counterclaimed against Takeda, seeking to "delete the description" of Takeda's method-of-use patents "as drug product patents for the ACTOS" new drug application based on alleged "false" statements Takeda made to the FDA. This litigation settled with an agreement by which "Takeda granted to Teva licenses to launch authorized generic versions of ACTOS and ACTO*plus* during the first 180 days of generic marketing," a period during which a brand (or its licensee) and the first generic manufacturer involved in a certain regulatory process normally enjoy exclusivity.

In the direct purchaser litigation, plaintiffs claimed, among other things, that these settlement agreements "constituted a conspiracy to restrain trade." As explained by the court, the plaintiffs claimed that the defendants "knew at the time they" entered into settlement agreements "that the 180-day exclusivity had been obtained through Takeda's allegedly fraudulent statements to the FDA" and the generic defendants "exacerbated the exclusivity by agreeing not to enter the ACTOS market until 20 months after the [drug substance patent] expired." Under the plaintiffs' theory, the court wrote, "had the Generic Defendants continued the litigation against Takeda . . . those defendants would have won, and entered the market" earlier. Therefore, according to the theory, "the settlement agreements restrained trade outside the scope of the [p]atents."

Judge Abrams found that this theory "is unsupported by current law." She found that the "exclusivity period . . . was not obtained as a result of the concerted conduct." Rather, the defendants, through their settlement agreements, allegedly conspired to delay generic entry when they "allegedly knew" that the exclusivity period was obtained as a "result of *Takeda's* false representations to the FDA." She reasoned

that "[p]ermitting antitrust scrutiny . . . based on a generic's alleged awareness of [this] impropriety . . . would . . . impose an untenable choice on generic defendants: litigate their patent claims to the end, or risk antitrust liability by settling." According to the court, Supreme Court precedent allows parties to patent litigation to "settle 'by allowing the generic manufacturer to enter the patentee's market prior to the patent's expiration, without the patentee paying the challenger to stay out prior to that point.'" In re Actos Direct Purchaser Antitrust Litig., No. 15-cv-3278 (S.D.N.Y. Oct. 8, 2019).

Court Denies Certification of Damages Class for Lack of Common Proof of Antitrust Injury and Damages

On October 18, Magistrate Judge Laurel Beeler of the United States District Court for the Northern District of California released a public redacted version of an Order denying certification of a Rule 23(b)(3) damages class in a case alleging that a Northern California healthcare network illegally tied services in four geographic markets to services in seven other geographic markets where it allegedly has monopoly power. The court denied certification because "the plaintiffs have not made a showing that issues of antitrust injury and damages are subject to common proof" and therefore did not meet Rule 23(b)(3)'s predominance requirement.

According to the Order, the defendant, Sutter Health, "allegedly . . . require[s] that health plans enter into 'systemwide contracts' that include 'all-or-nothing' and 'antisteering' provisions. Those provisions (1) require health plans to accept as in-network providers all of Sutter's hospitals, at the prices Sutter dictates, and (2) prevent health plans from incentivizing their enrollees to go to lower-cost hospitals instead of Sutter's higher-cost hospitals." Plaintiffs allege that these provisions inflated costs to five health insurance plans and that the plans passed these "costs on to class members in the form of inflated premiums."

The court found that the plaintiffs' expert's methodology could not be relied upon to prove class-wide antitrust injury or damages because "(1) it does not include a reliable method for proving or calculating Sutter's overcharges to the five health plans, and (2) it does not include a reliable method for proving or calculating how the overcharges were passed through to health-insurance premiums paid by class members." Among other things, the court found that the plaintiffs' expert failed to "offer[] an overcharge model with respect to" three of the five health plans and failed to support her conclusion that all of the alleged overcharges were passed on to class members.

Magistrate Judge Beeler denied the motion for certification of a damages class without prejudice. At the same time, Magistrate Judge Beeler granted plaintiffs' motion to certify an injunctive-relief class under Rule 23(b)(2). Sidibe v. Sutter Health, No. 12-cv-4854 (N.D. Cal. Oct. 18, 2019).

EU Developments

European Commission Requires Divestiture in Acquisition of Aleris by Novelis

On October 1, the European Commission announced that it "has approved . . . the Acquisition of Aleris by Novelis" subject to "the divestiture of Aleris' aluminium automotive body sheets business in Europe." According to the Commission's press release, "[b]oth companies are global manufacturers of aluminium flat rolled products" including products used in automobile manufacturing. "The Commission found that aluminium flat rolled products, such as aluminium automotive body sheets, used in the automotive industry, are in a separate market than other aluminium products. This means that the merged entity would have had very high market shares and controlled a very significant proportion of the manufacturing capacity for aluminium automotive body sheets in the" European Economic Area. The Commission further found that "the limited number of smaller remaining competitors active in the market would not have been able to defeat a price increase, also due to their limited spare capacity" and that the "transaction . . . [would] reduce the incentives of the merged entity to invest in additional manufacturing capacity." The Commission said that the divestiture would "remove[] the entire overlap created by the transaction in aluminium automotive body sheets in Europe." In the United States, the DOJ is challenging the transaction and the parties have agreed to arbitrate the issue of market definition. The DOJ alleges that the relevant market is aluminum automotive body sheet. Press Release, Eur. Comm'n, Mergers: Commission clears Novelis' acquisition of Aleris, subject to conditions (Oct. 1, 2019); Compl., U.S. v. Novelis, Inc., No. 19-cv-2033 (N.D. Ohio Sept. 4, 2019); Paul, Weiss Client Memo., DOJ Announces First-Time Use of Arbitration to Resolve Merger Challenge (Sept. 4. 2019).

UK Competition Regulator Provisionally Finds that Guitar Firm Fender Europe Engaged in Illegal Resale Price Maintenance

On October 8, the UK Competition and Markets Authority (CMA) announced that it "has provisionally found that Fender Europe broke competition law by restricting online discounting for its guitars." According to the CMA, "between 2013 and 2018, Fender Europe operated a policy designed to restrict competitive online pricing, requiring guitars to be sold at or above a minimum figure." It said that "[t]he practice, known as resale price maintenance (RPM), is illegal." The Authority's press release notes that its "findings are provisional, and no final decision has been made about whether there has been a breach of competition law. The CMA will now carefully consider any representations from the company before reaching a final decision." Press Release Competition & Mkts. Auth., CMA alleges guitar firm illegally prevented price discounts (Oct. 8, 2019).

European Commission Requires Broadcom to Cease Enforcing Certain Agreements Related to its Systems-on-a-Chip

On October 15, the European Commission announced that it "has ordered Broadcom to stop applying certain provisions contained in agreements with six of its main customers" while the Commission's investigation into Broadcom continues. In announcing these interim measures, Commissioner Margrethe Vestager said: "Broadcom's behaviour is likely, in the absence of intervention, to create serious and irreversible harm to competition." The Commission determined that "Broadcom is, at first sight, dominant in three different markets, namely the markets for systems-on-a-chip for (i) TV set-top boxes, (ii) fibre modems and (iii) xDSL modems" and that "Broadcom is, at first sight, infringing competition rules by abusing its *prima facie* dominant position."

The measures require that Broadcom "cease to apply" parts of its agreements "containing exclusive or quasi-exclusive purchasing obligations and commercial advantages, such as rebates and other non-price related advantages (for example, early access to its technology and premium technical support) that are conditional on the customer buying these products exclusively or quasi-exclusively from Broadcom" and "clauses granting customers in these markets commercial advantages, such as price and non-price advantages, which are conditional on the customer buying systems-on-a-chip for cable modems exclusively or quasi-exclusively from Broadcom." Press Release, Eur. Comm'n, Antitrust: Commission imposes interim measures on Broadcom in TV and modem chipset markets (Oct. 15, 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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