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The Quick Look

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CAPACITORS PRICE-FIXING TRIAL ENDS IN SETTLEMENT DAYS AFTER EXPERT TESTIMONY ON DAMAGES IS STRICKEN

On December 15, 2021, the two remaining defendants, Nippon Chemi-Con and its U.S. subsidiary United Chemi-Con, settled with a class of around 1,800 U.S. companies in the long-running capacitors price-fixing case. *See In re Capacitors Antitrust Litigation*, No. 3:14-cv-03264 (N.D. Cal. 2014).

Capacitors are electronic circuits that store and filter electric charge and are ubiquitous in electronic devices. Antitrust agencies investigated price-fixing charges against roughly 20 capacitor manufacturers in several jurisdictions, including the United States, Taiwan, Japan, Singapore, and the European Union. Ultimately, the U.S. DOJ charged eight companies and ten individuals with their participation in the alleged conspiracy. By October 2018, all eight companies had pleaded guilty and were sentenced to criminal fines collectively totaling over $150 million.

By then, however, the case had spawned a follow-on civil class action alleging that between 2002 and 2014, defendants shared competitively sensitive information on current and future prices and production levels and discussed customer allocations and price increases (and resistance to price reductions). The plaintiffs claimed that this resulted in substantial overcharges beyond what they would have paid in the "but-for" world absent the conspiracy.

The extent of those purported overcharges became a point of expert contention during trial; while actual prices can typically be measured, but-for prices cannot be observed and have to be estimated. Moreover, not all conspiracies will be equally effective in raising prices (or effective at

all) and the market conditions that determine prices are complex. Disentangling the effect of the conspiracy from the lawful demand and supply factors is challenging and requires an economic model of but-for prices. Economists may reasonably (and unreasonably) disagree on the appropriate economic model and the statistical techniques for estimating such a model. Estimating but-for prices is particularly challenging in an environment—like for capacitors—where prices are rapidly changing since neither the pre- nor the post-conspiracy period is a good measure of but-for prices.

In this case, the plaintiffs' expert estimated $427 million in damages, while the defendants' expert testified at trial that the damages amount could not exceed $66 million. Plaintiffs' counsel moved to strike the expert's testimony regarding the alternative damages amount because the expert had not previously disclosed this figure in her expert reports. U.S. District Judge James Donato granted the request, rejecting defendants' argument that the testimony should be permitted because the data and calculations to get to that figure were in the expert's reports.

A few days later, the case settled for $160 million, bringing this nearly seven-year saga to a close. Although there was no further guidance on best practices for estimating alleged overcharges in the but-for wold, *Capacitors* serves as a cautionary tale for litigants and practitioners regarding the importance of expert disclosures during litigation.

UNIVERSITIES SUED OVER ALLEGED VIOLATION OF ANTITRUST EXEMPTION REGARDING NEED-BLIND ADMISSIONS

This past week, a group of former students lodged a class action lawsuit against a number of top universities alleging that certain admission policies—including preferencing children of donors, waitlisted students not requiring financial aid, and the like—nullify any antitrust protections the schools would otherwise receive for admitting students on a "need-blind" basis. *See Henry, et al., v. Brown University, et al.*, No. 1:22-cv-00125 (N.D. Ill. 2022).

Universities are allowed to collaborate on financial aid formulas with other U.S. universities under Section 568 of the Improving America's Schools Act so long as the universities admit students on a need-blind basis. Section 568 defines "need-blind" as meaning "without regard to the financial circumstances of the student involved or the student's family." 15 U.S.C. § 1 Note. The named defendants are part of the "568 Presidents Group," whose members have adopted a so-called "Consensus Approach" to determining applicants' ability to pay tuition. However, because the defendants also continue to use admission policies that favor children of wealthy past or potential future donors and have preferred students who will not need financial aid when admitting students off their waitlists, plaintiffs allege that the universities are, in fact, taking into account the financial circumstances of students and their families in violation of the "need-blind" exemption. They argue that the Consensus Approach has allowed the 568 Presidents Group to reduce price competition among its members and therefore artificially raise the price of attendance for financial aid recipients. Defendants have yet to file a response in court but a spokeswoman for Yale University rejected the allegations, stating that the university's "financial aid policy is 100 percent compliant with all applicable laws."

Stripped of their Section 568 protection, plaintiffs allege that the 568 Presidents Group is a cartel that engaged in *per se* unlawful price-fixing in violation of Section 1 of the Sherman Act.

RECAP OF DOJ/FTC'S "MAKING COMPETITION WORK: PROMOTING COMPETITION IN LABOR MARKETS" WORKSHOP

On December 6-7, 2021, the DOJ and FTC jointly hosted a virtual public workshop attended by lawyers, economists, academics, policy experts, labor groups, and workers to discuss efforts "to promote competitive labor markets and worker mobility." The workshop included a number of panels and presentations addressing labor market competition, including restrictive covenants in labor agreements (e.g., noncompetes and NDAs), HR-related information exchanges among employers, how to protect workers in the "gig economy," and future enforcement efforts suggested as part of President Biden's "whole-of-government" approach to competition policy. *See* https://www.ftc.gov/news-events/press-releases/2021/12/ftc-doj-announce-agenda-dec-6-7-workshop-making-competition-work.

As part of his first public remarks as AAG of the DOJ Antitrust Division, Jonathan Kanter promoted the event as a demonstration that the DOJ and FTC are "truly in lockstep as we advance our shared mission to protect competition." His pronouncement was underscored in the following days by new indictments of six aerospace executives and managers for allegedly agreeing not to poach each other's engineers and other skilled employees. *See United States v. Patel, et al.*, No. 3:21-cr-00220-VAB (D. Conn. Dec. 15, 2021). The defendants and their employers are also facing separate civil class actions. *See Granata, et al. v. Pratt & Whitney, et al.*, No. 3:21-cv-01657 and *Conroy, et al. v. Agilis Egineering, Inc., et al.*, No. 3:21-cv-01659 (D. Conn. Dec. 14, 2021). FTC Chair Khan added that the agencies are currently re-evaluating their merger guidelines in part "to clarify and update how we assess a merger's potential effects on labor markets."

Between the ongoing revision of the agencies' guidelines and upcoming trials scheduled for DOJ's first criminal no-poach charges, 2022 will be another significant year for competition enforcement in labor markets. Companies should remain alert for further labor market-related developments and ensure their staff are informed regarding these issues.

OTHER DEVELOPMENTS

Chicken Price-Fixing Case Ends in Mistrial. In Denver, a federal judge declared a mistrial after jurors were deadlocked after a seven-week trial of men who had worked at the top U.S. chicken producers and were charged with fixing prices and rigging bids in the U.S. poultry market. The judge set a retrial in February after prosecutors said they would go forward with the case.

Second Circuit Resurrects Libor Rate-Rigging Litigation. Without ruling on the merits of the case, the Second Circuit revived litigation accusing a slew of large banks of rigging the Libor interest rate benchmark. Defendants include Bank of America, Bank of Tokyo-Mitsubishi UFJ, Barclays, Citigroup, Credit Suisse, Deutsche Bank, HSBC, JPMorgan Chase, Lloyds Banking Group, NatWest, Norinchukin Bank, Rabobank, Royal Bank of Canada, Societe Generale, UBS and WestLB.

Prior Approval Order Entered Against DaVita. In October 2021, the FTC announced a new (or, in the agency's view, revived) policy requiring parties settling a merger investigation to get prior approval from the Commission before "closing any future transaction affecting each relevant market for which a violation was alleged." On January 12, 2022, the FTC finalized the first settlement under the policy, requiring dialysis provider, DaVita, to get "prior approval" from the FTC before acquiring any new ownership interests anywhere in the state of Utah for the next ten years.

Martin Shkreli Found Liable for Antitrust Violations. On January 14, 2022, Judge Denise Cote found Martin Shkreli liable for antitrust violations brought by the FTC and state enforcers challenging anticompetitive agreements allegedly aimed at blocking generic competition. The Court and imposed a lifetime ban on Shkreli from participating in the pharmaceutical industry and ordered Shkreli to disgorge $64.6 million. FTC Chair Khan stated; “This precedent-setting relief should be a warning to corporate executives everywhere that they may be held individually responsible for the anticompetitive conduct they direct or control.”

DOJ Extends Public Comment Period on New Bank Merger Guidelines. The DOJ has extended the period for public comment on whether and how the agency should revise its Bank Merger Competitive Review Guidelines to February 15, 2022. The Guidelines were last updated in 1995 and a target in President Biden’s July 2021 Executive Order on Competition, which encouraged DOJ and other agencies to update the guidelines “to provide more robust scrutiny of mergers.” This push comes as the DOJ and FTC consider revisions to their broader cross-industry Horizontal Merger Guidelines, as well.

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*The views expressed in The Quick Look reflect those of the authors, and are not necessarily those of the American Bar Association, the Section of Antitrust Law, or the Joint Conduct Committee.
