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Authors: Lauren Miller Forbes; Mathis Wagner; Segev Kanik*

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CLAIM OF MINIMUM PRICING CONSPIRACY ENDS IN LARGE SETTLEMENTS

Last week, defendant J&J Vision Care Inc. reached a settlement agreement with consumer plaintiffs in the long-running private class action regarding the pricing of disposable contact lenses. In 2015, the private plaintiffs first filed their lawsuit against four major manufacturers of disposable contact lenses and their primary distributor by imposing a "Unilateral Pricing Policy" on certain disposable contact lenses that established a minimum price. The complaint argued that defendants fell outside of the "Colgate" framework: because the defendants would engage in bargaining/discussions with resellers, they essentially created an agreement rather than a truly unilateral policy. The plaintiffs defeated defendants' dismissal motions, prevailed on summary judgment, and conducted substantial discovery, including the production of over 700,000 pages of defendant documents and depositions. The plaintiffs reached a settlement agreement with three of the defendants in 2020 and 2021. The remaining defendants agreed to a settlement mere days before the trial was set to commence on March 28, 2022.

The settlement agreement reached between the plaintiffs and J&J Vision ended the case, and is the largest dollar value, amounting to $55 million out of a total settlement value of $98.2 million. J&J Vision has continued to deny any claims of conspiracy, stating "We acted appropriately and responsibly in the marketing of our products and this settlement is not an admission of liability or wrongdoing[.]" Plaintiffs' counsel said the resulting settlement was "excellent" considering the complexity of the case, and the risks of a jury trial.

THIRD TIME'S THE CHARM FOR DOJ CHICKEN PRICE-FIXING PROSECUTION?

After its first two price-fixing trials against executives in the broiler chicken industry ended in mistrials, DOJ notified a federal court in Colorado that it has decided to proceed with an unprecedented third trial against a narrowed group of five executives from Claxton Poultry and Pilgrim's Pride. Federal prosecutors have already twice tried this group of executives (including former CEOs) alongside five others from Tyson Foods and Perdue Farms—ending in hung juries both times.

As we previously reported in Quick Look Issue 14, the presiding judge summoned Assistant Attorney General for Antitrust Jonathan Kanter to court to explain DOJ's decision to try the remaining defendants a third time. In response to the judge's concern that DOJ may be putting "hope over experience," Kanter responded that deadlocked juries do not "create a basis for reasonable doubt."

Several of the current or former defendants in the case previously cooperated with DOJ's investigation. Pilgrim's Pride entered a corporate guilty plea with a $107.9 million fine in February 2021; Tyson's publicly disclosed in 2020 that it had applied for leniency and "fully cooperat[ed] with the DOJ." Combined with its recent leniency program overhaul, DOJ's decision to pursue yet another trial in this matter may have unintended effects on other companies' willingness to come forward about potential antitrust crimes.

NINTH CIRCUIT REVIVES GROUP BOYCOTT CASE AND CLARIFIES SUPREME COURT TEST FOR DEMONSTRATING HARM IN A TWO-SIDED MARKET

The US Court of Appeals for the Ninth Circuit reversed the district court's dismissal of an action brought by real estate marketer PLS.com, alleging that its competitors in the real estate network services market violated antitrust laws because they conspired to take anticompetitive measures to prevent PLS from gaining a foothold in the market. PLS alleges that the National Association of Realtors (NAR) orchestrated an illegal group boycott of the plaintiff's business by requiring its members seeking to list properties on PLS to also list those properties on a NAR-affiliated real estate database. Judge John Holcomb dismissed the complaint in February 2021, finding that the plaintiff had failed to satisfy the Supreme Court's test outlined in *Ohio v Amex* (under §1 of the Sherman Act or California's Cartwright Act) for demonstrating antitrust harms to both sides of the two-sided market for home buyers and sellers.

The Ninth Circuit Panel found that the lower court had erred in finding that the plaintiff needed to demonstrate competitive harm to home buyers and sellers for the lawsuit to proceed. It found that NAR's policy "made it virtually impossible for new competitors to enter the market, leaving agents with fewer choices, supra-competitive prices, and lower quality products." The opinion finds:

> Amex does not require a plaintiff to allege harm to participants on both sides of the market. All Amex held is that to establish that a practice is anticompetitive in certain two-sided markets, the plaintiff must establish an anticompetitive impact on the "market as a whole." 138 S. Ct. at 2287. Sometimes this will be by alleging harm to participants on both sides of the

> market and sometimes it will not. It is possible that a practice harming participants on one side of the market could outweigh the benefits to participants on the other, causing anticompetitive effects on the market as a whole.

The opinion provides an important clarification of what is required to show anticompetitive harm in a two-sided market, following the Supreme Court's *Ohio v. Amex* decision.

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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.
