

# Cartel Watch

## Sixth Edition

In this sixth issue of **Cartel Watch**, we wrap up our US and international coverage in 2013 of select notable developments in cartel enforcement and follow-on civil antitrust class action lawsuits.

## US Criminal Enforcement Update

### AU Optronics Corp. Executive Acquitted of Price-Fixing

On October 10, 2013, a federal jury in San Francisco, California, acquitted AU Optronics Corp. (AUO) sales executive Richard Bai of allegedly price-fixing liquid crystal displays. Mr. Bai, a Taiwanese national, voluntarily came to the US for trial. Mr. Bai was the last of six indicted AUO executives to face trial. Three executives have been convicted of price-fixing, along with AUO and its US subsidiary. Two other AUO executives were previously acquitted. The track record in the prosecution of the AUO executives shows that there are risks to both the Department of Justice (DOJ) and individual defendants in going to trial. *United States v. Richard Bai*, No. CR 09-110 SI (N.D. Cal.).

### Municipal Bond Bid-Rigging Convictions Overturned on Appeal

On November 9, 2013, a divided three-judge panel of the US Court of Appeals for the Second Circuit reversed the municipal bond bid-rigging convictions of three former General Electric (GE) employees for conspiring to defraud the United States. Those individuals had received sentences ranging from three to four years in prison. On appeal, the individuals argued that their prosecutions came too late and were time-barred by the applicable statutes of limitations because the only conduct within the limitations period was artificially depressed interest payments to municipalities. Two judges agreed and concluded that such payments were the “*result of a completed conspiracy ... not in furtherance of one that is ongoing.*” One judge disagreed and reasoned that such payments were “essential to the scheme” and that the public policies underlying punishment of conspiracies warranted treating those payments as overt acts in furtherance of an ongoing conspiracy. This decision highlights the important debate over what acts extend the duration of a conspiracy, bringing otherwise time-barred conduct within the statute of limitations. *United States v. Grimm et al.*, No. 12-4310 (2d Cir. 2013).

### Auto Parts

- **Toyo Tire & Rubber Co., Ltd. Pleads Guilty to Price-Fixing – Two Executives Indicted – Anti-Vibration Rubber Parts and Constant-Velocity-Joint Boots:** On November 20, 2013, a federal grand jury in Cleveland, Ohio, indicted Masao Hayashi and Kenya Nonoyama,

who were previously employed by Toyo Tire & Rubber Co., Ltd (Toyo), for their role in an alleged conspiracy to fix the prices of anti-vibration rubber parts (AVPs), including engine mounts and suspension bushings. The indictment is based on alleged conduct that affected AVPs sold to Toyota Motor Corp. and Toyota Motor Engineering & Manufacturing North America Inc. in the United States and elsewhere. *United States v. Masao Hayasi*, No. 3:13-cr-514 (N.D. Ohio). Six days later, Toyo pled guilty to conspiring to fix the price of AVPs, including conduct that allegedly affected AVPs sold to Toyota Motor Corp., Nissan Motor Co. Ltd., and Fuji Heavy Industries Inc. (Subaru) in the United States and elsewhere, and constant-velocity-joint boots sold to US subsidiaries of GKN plc. Under the plea agreement, Toyo pled guilty to a single count of violating Section One of the Sherman Act and agreed to pay \$120 million in fines. *United States v. Toyo Tire & Rubber Co. Ltd.*, No. 3:13-cr-529 (N.D. Ohio).

- **Three Takata Corp. Executives Plead Guilty to Price-Fixing – Seat Belts:** On November 21, 2013, Yasuhiko Ueno, Saburo Imamiya, and Yoshinobu Fujino pled guilty to conspiring to fix the price of seat belts sold to Toyota Motor Corp., Honda Motor Co. Ltd., Nissan Motor Co. Ltd., Fuji Heavy Industries Inc. (Subaru), and Mazda Motor Corp. Under the plea agreements, each of the defendants pled guilty to a single count of violating Section One of the Sherman Act and agreed to serve jail sentences ranging from 14–19 months. *United States v. Yasuhiko Ueno*, No. 5:13-cr-20869 (E.D. Mich.); *United States v. Yoshinobu Fujino*, No. 5:13-cr-20870 (E.D. Mich.); *United States v. Saburo Imamiya*, No. 5:13-cr-20871 (E.D. Mich.). Takata Corp. previously pled guilty to conspiring to fix prices of seat belts and will pay a \$71.3 million fine. *United States v. Takata Corp.*, No. 2:13-cr-20741 (E.D. Mich.).

## Financial Services

- **Rabobank to Pay \$1B Over LIBOR / Euribor Manipulation – Chairman Resigns:** On October 29, 2013, Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. (Rabobank) agreed to pay a

\$325 million fine to the DOJ as part of a deferred prosecution agreement for its alleged manipulation of the London InterBank Offered Rate (LIBOR) and the Euro Interbank Offered Rate (Euribor). This shows the DOJ's focus, along with foreign regulators, on cartel behavior implicating financial benchmarks.

## Legislators Examine Cartel Enforcement

The US Senate Judiciary Committee's Subcommittee on Antitrust, Competition Policy, and Consumer Rights conducted hearings and is gathering information as part of an evaluation of the state of cartel enforcement. The topics being examined include: 1) the appropriate level of corporate and individual penalties for violations; 2) whether the Antitrust Division of the DOJ has sufficient resources to uncover and investigate cartel cases independent of the leniency program; and 3) whether defendants who plead guilty should be able to avoid the 15-year US travel ban that typically attaches to any conviction for a "crime of moral turpitude" under the DOJ's Immigration and Customs Enforcement Memorandum of Understanding dated March 15, 1996. On November 14, 2013, witnesses from the private sector and academia offered competing testimony on whether the current antitrust penalties are too lenient and unable to deter cartel behavior, or too harsh and chilling companies and individuals from coming forward to report violations. Assistant Attorney General William Baer did not take a position on the issue and instead highlighted the DOJ's recent cartel enforcement track record, including over a billion dollars in fines for fiscal year 2013. The full testimony of all the witnesses is available at: <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=5fa8a4fcfd512d43b3816f1ee71d3537>.

## Senate Unanimously Passes Whistleblower Protections

As was previously reported (<http://antitrust.weil.com/alerts/senate-passes-criminal-antitrust-whistleblower-bill/>), the US Senate unanimously passed the Criminal Antitrust Anti-Retaliation Act (CAARA) on November 4, 2013. The bill would protect whistleblowers from employer retaliation for reporting criminal antitrust violations. CAARA is limited to employees who report

criminal violations, not civil violations, and the bill would not protect employees who initiated an antitrust violation or obstructed a DOJ investigation. CAARA does not provide for damages, but it would allow an employee to secure reinstatement plus litigation costs. The bill is currently under deliberation in the US House. *Criminal Antitrust Anti-Retaliation Act of 2013*, S. 42, 113 Cong. (2013).

### **The DOJ Names New Head of Antitrust Criminal Enforcement**

In November, the DOJ named Brent Snyder Deputy Assistant Attorney General for Criminal Enforcement. Mr. Snyder previously tried several prominent matters as a trial attorney for the Antitrust Division, including last year's trial and conviction of AU Optronics. Mr. Snyder succeeds Scott Hammond, who recently resigned from the DOJ (<http://antitrust.weil.com/cartel-watch/cartel-watch-issue-4-developments-for-q2-2013/>). It is expected that cartel enforcement will remain aggressive and a top priority under Mr. Snyder's leadership.

### **Follow-On US Civil Class Action Update**

#### **Comcast Corp. Class Action Recertified on Remand from the Supreme Court**

On November 12, 2013, a federal trial court in Philadelphia, Pennsylvania, denied Comcast's motion to strike plaintiff's motion to recertify a narrowed class of Philadelphia area Comcast subscribers. In a May ruling previously reported (<http://antitrust.weil.com/alerts/supreme-court-issues-narrow-ruling-in-antitrust-class-action-case/>), the Supreme Court ruled that the trial court improperly certified the initial class of Comcast subscribers because plaintiffs' damage model was not precisely tied to the theory of liability. Only one of plaintiffs' four theories of anticompetitive harm survived Comcast's motion to dismiss, but plaintiff's damage model could only show the aggregated damages attributable to all four theories. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). On remand, the federal trial court found plaintiffs' original damages model sufficient to recertify a narrower class containing just five of the sixteen original counties where Comcast subscribers

are located. The trial court found that the Supreme Court's ruling permitted a "significantly narrowed class based on a more limited antitrust impact model ... ." *Glaberson v. Comcast Corp.*, 2013 US Dist. LEXIS 160892 (E.D. Pa.).

#### **Supreme Court Hears Oral Arguments in *Mississippi v. AU Optronics***

On November 6, 2013, the Supreme Court heard oral arguments in *Mississippi v. AU Optronics*. The issue before the Court is whether a defendant can remove an action from state to federal court under the Class Action Fairness Act (CAFA) when a state brings suit pursuant to its *parens patriae* authority. Although *parens patriae* lawsuits have only a single plaintiff, the state seeks to recover for aggregated harm done to a large number of residents, who might constitute a class if suing in their own right. One topic covered in the hearing was prudential concerns about letting *parens patriae* actions go forward. Some justices questioned if class action defendants would be unwilling to settle so long as state attorneys general could still bring suit on behalf of purchasers in their states. *Mississippi ex rel. Hood v. AU Optronics Corp.*, No. 12-1036 (US).

#### **LCD**

- **Hannstar Corp. Not Required to Pay Damages for Price-Fixing:** On November 20, 2013, a federal trial court in San Francisco, California, amended its award of \$7.4 million to Best Buy Corp to \$0. As we reported in our last issue (<http://antitrust.weil.com/cartel-watch/cartel-watch-issue-5-developments-for-q3-2013/>), a federal jury returned a verdict finding for Best Buy in September after its six-week price-fixing trial against HannStar and other defendants. The court found that the \$7.4 million verdict against Hannstar, trebled to \$22.4 million, was completely offset by the \$229 million in settlements from other parties. As of publication, there has been no ruling on Best Buy Corp.'s motion for attorneys' fees and costs. HannStar filed an appeal with the Ninth Circuit. *In re: TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-01827 (N.D. Cal.).

## International Developments

### European Commission Fines Financial Institutions €1.71 Billion for Rate Manipulation

On December 4, 2013, the European Commission (EC) reached settlements with Deutsche Bank AG, Société Générale, the Royal Bank of Scotland PLC, Citigroup Inc., and four other financial institutions for allegedly conspiring to manipulate interest rate benchmarks. The EC announced two separate, but partially overlapping, sets of cooperation agreements: one for manipulating the LIBOR and one for manipulating the Euribor. Some institutions allegedly participated in only one cartel, while others allegedly took part in both. Barclays PLC received a 100% fine reduction under the EC's leniency program for cooperating with the EC's investigation of the Euribor. Similarly, UBS AG received a 100% fine reduction for cooperating with the EC's LIBOR investigation. Other financial institutions were also able to secure partial reductions of their fines through the leniency program.

### Supreme Court of Canada Addresses Price-Fixing Class Actions

On October 31, 2013, the Supreme Court of Canada examined both the "passing-on" defense and whether indirect purchasers have a cause of action for price-fixing. As was previously discussed (<http://antitrust.weil.com/articles/the-supreme-court-of-canada-clarifies-the-rules-for-canadian-price-fixing-class-actions/>), the Court rejected the "passing-on" defense, holding it would put too high a burden on plaintiffs. In addition, the Court held that indirect purchasers have a cause of action, opening the door to a class composed of both direct and indirect purchasers. The rulings of the Supreme Court of Canada stand in contrast to the US Supreme Court's ruling in *Illinois Brick Co. v. Illinois*, 431 US 720 (1977), which held indirect purchasers have no cause of action for overcharges passed on by intermediate market channels. Moreover, the Supreme Court of Canada maintained a comparatively low evidentiary burden at the class certification stage, putting it at odds with the US Supreme Court's rulings in *Walmart v. Dukes*, 131 S.Ct. 2541 (2011) and *Comcast v. Behrend*, 133 S.Ct. 1426 (2013).

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