

Cartel Watch

Second Edition

This second edition of **Cartel Watch** continues our coverage of the latest key developments in cartel enforcement and follow-on civil damage antitrust class action lawsuits in the US and internationally.

The first quarter of 2013 has brought plenty of significant developments:

Follow-on US Civil Class Action Update

Federal Court Jurisdiction – The Supreme Court unanimously held that a named plaintiff representative in a proposed class action brought in *state* court could not agree to seek less than \$5 million in damages – in order to avoid *federal* court jurisdiction – because he did not have legal authority to bind all members of the as-yet-uncertified class. Under the Class Action Fairness Act of 2005, federal courts have jurisdiction over class actions seeking more than \$5 million in damages, so long as other requirements are met. The ruling eliminates a tactic used by plaintiffs to try to avoid federal courts, where multiple proceedings can be consolidated or coordinated in a single multidistrict litigation. *Standard Fire Ins. Co. v. Knowles*, 568 U.S. ___ (2013).

Class Certification and Expert Evidence – The Supreme Court in a 5-4 decision confirmed that plaintiffs seeking class certification bear the burden of demonstrating that damages attributable to the alleged theory of antitrust harm are capable of measurement on a classwide basis. Further, the Supreme Court held that trial courts, as part of conducting a “rigorous analysis” to determine if a plaintiff’s expert damages model meets this burden, must examine the merits of the claim to the extent necessary. The decision is notable because the class certification stage is generally regarded as one of the most critical phases of a lawsuit, one that can greatly increase the potential exposure facing defendants. *Comcast Corp. v. Behrend*, 569 U.S. ___ (2013). For additional analysis visit: <http://antitrust.weil.com/alerts/supreme-court-issues-narrow-ruling-in-antitrust-class-action-case/>.

Indirect Purchaser State Law Claims – In a decision in a follow-on litigation from the LCD cartel investigation, the Ninth Circuit held that plaintiffs could maintain indirect purchaser claims under California antitrust law for purchases that occurred *outside* of California if more than “slight and casual” alleged conspiratorial conduct occurred within California. Under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Supreme Court held that indirect purchasers could not recover damages under *federal* antitrust law; some states apply that holding to state antitrust law claims, but other states – including California – are so-called *Illinois Brick repealers* and allow indirect purchaser claims under

their state's antitrust law. This ruling is significant because, in cases where sufficient cartel conduct occurred in California, indirect purchasers who made purchases and reside in such states may still be able to bring claims under California law. *AT&T Mobility LLC v. AU Optronics Corp.* (9th Cir., Feb. 14, 2013).

Foreign Sovereign Compulsion Defense – In *In re Vitamin C Antitrust Litigation*, a jury in federal court in Brooklyn, New York rejected the defense of certain Chinese vitamin C manufacturers that they were forced to coordinate export pricing by the Chinese government and returned a \$54.1 million verdict for price-fixing, which will be trebled to \$162.3 million. China's Ministry of Commerce has supported the defense that the collusion was compelled and has spoken out criticizing the jury verdict. As the most recent test of the foreign sovereign compulsion defense in a US court, this verdict shows the difficulty foreign defendants have in convincing juries that companies were compelled to collude by their government. For additional analysis visit: <http://antitrust.weil.com/articles/jury-finds-two-chinese-companies-liable-for-antitrust-violations/>.

Developments Outside the US

Japan – Mr. Kazuyuki Sugimoto has been appointed the new Chairman of the Japan Fair Trade Commission (JFTC). Mr. Sugimoto was previously Chairman of Mizuho Research Institute and had spent most of his career in the Ministry of Finance. Chairman Sugimoto has announced that the JFTC will continue strict law enforcement against cartels and international cooperation under his leadership.

Cartel Arrests in the UK – Seven people have been arrested in connection with an Office of Fair Trading (OFT) investigation into a possible cartel among construction material suppliers. These are the first arrests since the OFT created a new position, Director

of Investigations and Criminal Enforcement, and appointed a former police detective and solicitor with the UK's Serious Fraud Office to fill the role.

In-House Privilege in Belgium – The Court of Appeal of Brussels has ruled that documents containing legal advice given by in-house counsel registered with the Belgian Institute for Company Lawyers are privileged and cannot be seized by the Belgian Competition Authority. The Court of Appeal held that the European Court of Justice's decision in Case C-550/07 P, *Akzo Nobel Chem. Ltd. v. Comm'n*, 2010 E.C.R. I-08301, which decided that communications with in-house lawyers were generally not protected by privilege and could be seized by the European Commission, was inapplicable to Belgian national court proceedings. The decision is subject to appeal to the Belgian Supreme Court. Court of Appeal of Brussels, No. 2011/MR/3, March 5, 2013.

Umbrella Pricing in the European Union – The Austrian Supreme Court has asked the European Court of Justice to consider whether liability exists in private actions for "umbrella pricing" claims. This is significant because cartel members could be liable for damages not only for their own price increases but also for higher prices charged by non-conspirators that benefited from the lack of competition in the market. Case C-557/12, *KONE AG v. ÖBB-Infrastruktur AG*, 2013 O.J. (C71) 5.

Canada 2012 Year in Review – For analysis of key Canadian developments, including Competition Bureau enforcement, pleas, and an expected decision from the Supreme Court of Canada on indirect purchaser standing in follow-on civil actions, visit: <http://antitrust.weil.com/articles/canada-cartels-other-criminal-prohibitions-and-class-actions-2012-developments/>.

Cartel Fine Tracker - Q1 2013

The first quarter of 2013 had a slow start in the US and EU after a year of record fines in 2012. Japan, however, levied fines totaling nearly as much in the first quarter of 2013 as they did in all of 2012. In fact, the European Union is – in a sense – negative for the year after 2008 cartel fines were reduced in both the automotive glass cartel and the bananas cartel. But activity may pick up throughout the year as enforcers remain active. The table below shows total fines in certain select jurisdictions in 2012 and Q1 2013.

Jurisdiction	Fines in 2012	Fines in Q1 2013	Fines by Investigation
United States	USD 1.1 Billion	USD 168.9 Million	USD 18.9 Million – Freight Forwarding – 3/8/13 USD 150 Million – LIBOR (RBS) – 2/6/13
EU	EUR 1.8 Billion (approx. USD 2.4 Billion)	EUR (-66) Million (approx. USD (-85) Million)	(EUR -29 Million) – Auto Glass (reduction of 2008 fines) – 3/6/13 (EUR -37 Million) – Bananas (reduction of 2008 fines) – 3/14/13
Japan	JPY 19 Billion (approx. USD 215 Million)	JPY 18.1 Billion (approx. USD 191 Million)	JPY 4.7 Billion – Auto Lights – 3/22/13 JPY 13.4 Billion – Bearings – 3/29/13

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