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Cartel Watch

Volume 3, Issue 3

In this issue of ***Cartel Watch***, we continue our coverage of notable developments in U.S. and international cartel enforcement and provide our Cartel Fine Tracker for Q2 2015.

Supreme Court Docket Update

Supreme Court to Review Class Certification in Major Civil Case

In a potentially important class action development, the Supreme Court has granted review of an Eighth Circuit decision that affirmed a jury verdict for a class of Tyson Foods employees who brought suit for labor law violations. The Eighth Circuit panel held, in a 2-1 decision, that the jury's determination of the defendants' liability, based on a sample of employee time records, was adequate to establish class-wide liability. The Supreme Court granted certiorari to review whether a class action can be certified when: (1) the plaintiffs' damages theory is based on a statistical model that looks at the average of a sample of employees, when those employees had individually differentiated damages; and (2) certain class members are not entitled to any damages. If the Supreme Court were to reverse the Eighth Circuit's decision on either or both of these grounds, the ruling could provide new avenues for challenging class actions, including in antitrust cases. *Bouaphakeo v. Tyson Foods, Inc., 765 F.3d 791 (Eighth Circuit 2014); Bouaphakeo v. Tyson Foods, Inc., 593 F. App'x 578 (Eighth Circuit 2014), cert. granted, 2015 WL 1278593 (U.S. June 8, 2015) (No. 14-1146).*

Supreme Court Declines to Consider the Reach of U.S. Antitrust Law to Foreign Trade

The Supreme Court has declined review of two Circuit Court decisions that addressed the extent to which the Foreign Trade Antitrust Improvements Act (FTAIA) limits criminal and civil liability under U.S. antitrust laws for conduct that occurs overseas. Without any Supreme Court review on the issue in the near future, there will continue to be uncertainty about the extent to which foreign trade can expose companies to civil and criminal antitrust liability in the U.S.

> In *Motorola Mobility LLC v. AU Optronics et al.*, No. 14-8003, which involved allegations of price fixing in the industry for flat monitor screens used in mobile devices, the Seventh Circuit ruled that the FTAIA blocked virtually all of Motorola's claims because the sales for which Motorola sought antitrust damages involved foreign purchases by its foreign subsidiaries. Those foreign subsidiaries made

purchases of components outside of the U.S., for installation into final products assembled outside of the U.S., and then sold the finished products in the U.S. and elsewhere. The Seventh Circuit held that because the effect of the foreign sales to Motorola's subsidiaries resulted only in indirect injuries to Motorola (as a later, indirect purchaser), the conduct did not give rise to a civil claim under U.S. antitrust law, which generally does not allow standing to private plaintiffs who suffer derivative or indirect injuries from conduct that otherwise violates the antitrust laws. The Seventh Circuit ruling could well narrow the scope of civil antitrust exposure based on the foreign sales of products that are later indirectly sold into the U.S.

In *United States v. AU Optronics Corp. America Inc.*, No. 14-1121, AU Optronics ("AUO") appealed a jury verdict of guilty and a $500 million criminal fine, arguing that the FTAIA barred the charges brought against it by the U.S. Department of Justice ("DOJ"). The Ninth Circuit ruled that AUO's sales to customers in the U.S. constituted "import trade," and therefore those sales did not implicate the FTAIA because they are not foreign trade. AUO argued that the Ninth Circuit wrongly applied the FTAIA, and its decision that AUO's sales constituted "import commerce" was in conflict with decisions from other courts, including the Seventh Circuit's decision in *Motorola Mobility*. The Supreme Court's denial of certiorari will leave standing AUO's conviction and $500 million fine.

U.S. Criminal Enforcement

Auto Parts Supplier Pleads Guilty to Bid Rigging in Parking Heaters

On June 25, 2015, Espar, Inc., a unit of Eberspacher Group, pled guilty and was sentenced in the Eastern District of New York to pay a $14.9 million fine for participating in a cartel that fixed prices for parking heaters. The charges against Espar spanned five years of conduct starting in 2007 that affected sales to OEMs that make commercial vehicles like long-haul trucks.

Five Major Financial Institutions Plead Guilty to Collusion in Foreign Currency Exchange Market

On May 20, 2015, in what the DOJ has called a "historic" outcome, five major financial institutions pled guilty to participating in conspiracies to affect financial market benchmark rates, stemming from bid rigging in the euro/U.S. dollar currency pair in the foreign currency exchange market ("FX"). JPMorgan Chase, Citicorp, Barclays, RBS, and UBS will pay a combined total of $2.5 billion in fines. The fines levied on UBS and Barclays also accounted for the DOJ's finding that their conduct violated the terms of their 2012 non-prosecution agreements related to the London Interbank Offered Rate ("LIBOR").

Notably, the DOJ lessened its fine on Barclays in light of the company's extraordinary efforts to improve its compliance culture. This is the first time the DOJ has ever reduced a company's fine as a result of implementing an effective compliance program after the start of the DOJ's investigation. DOJ Antitrust Division Deputy Assistant Attorney General Brent Snyder has recently publicly stated that a strong "culture of compliance" in response to a DOJ investigation can result in more favorable sentencing against the company, citing Barclays as an example.

DOJ Antitrust Deputy Head Offers Suggestions for Better International Coordination of Multi-jurisdiction Investigations

Brent Snyder, the Deputy Assistant Attorney General for the DOJ's Antitrust Division in charge of criminal enforcement, gave a speech on June 8, 2015 about the impact on international companies of simultaneously navigating the leniency programs of the DOJ and other major enforcers around the world. While extolling the benefits of seeking leniency, Mr. Snyder acknowledged that companies have to "operate in an increasingly complicated and crowded investigative environment." Mr. Snyder suggested several steps to help defray the costs and speed up the process of applying for leniency and other forms of early cooperation. First, he suggested improved coordination among enforcers of investigation deadlines and timetables. Second, he noted the need for enforcers to focus their investigations on conduct and effects in their respective jurisdictions.

Third, he recommended a more "strategic" approach to document demands, such as narrowing their scope to focus on the most important information. Fourth, he acknowledged the "disruption" and "toll" that interviews in multiple jurisdictions can take on witnesses, and suggested taking a cautious approach on the number of interviews requested of a witness and to better coordinate with other enforcers on their time and locations. Finally, Mr. Snyder recommended more coordination among enforcers to ensure that fine methodologies do not result in inconsistent and overlapping fines across jurisdictions.

U.S. Civil Litigation Developments

Plaintiffs File 30th Case in Auto Parts Litigation

On May 21, 2015, plaintiffs representing auto dealers and car buyers filed class action lawsuits against two manufacturers of spark plugs. Similar to other cases in the Auto Parts multidistrict litigation ("MDL"), the plaintiffs allege bid rigging in the supply of the parts to OEMs that made consumer cars. The sprawling auto parts MDL has now grown to 30 separate parts cases filed in the Eastern District of Michigan.

International Cartel Enforcement

Europe's Highest Court Extends Extraterritorial Reach of EU Antitrust Law to Certain Foreign Sales

On July 9, 2015, the European Court of Justice upheld a €288 million fine of InnoLux, a manufacturer found by the European Commission ("EC") to have engaged in cartel conduct in the liquid crystal display panels ("LCD") industry. InnoLux had argued that its fine should not include intercompany sales of LCDs to its own factories, which then incorporated the LCDs into finished products that were later sold in Europe, on the ground that the intercompany sales occurred outside of Europe. Although arguably limited to so-called "captive" sales, the Court's ruling could potentially be used by the EC to fine a company for non-captive sales of a component to any other company incorporating it into finished products that are eventually sold in Europe.

Cartel Fine Tracker – Q2 2015

Jurisdiction	Fines Imposed
U.S. Department of Justice	$2.7 billion
JFTC	¥13.9 million
European Commission	€94.6 million

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