Weil

Cartel Watch

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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 Q1 2016 through July 20, 2016.

U.S. Criminal

DOJ to Reduce Use of Carve-Ins

On May 10, 2016, at the New York City Bar's Fifth Annual White Collar Crime Institute in New York City, U.S. Deputy Attorney General Sally Yates said that the Antitrust Division of the U.S. Department of Justice ("DOJ") intends to reduce its use of "carve-ins" associated with corporate settlements of accused wrongdoing.[1] This means that the actions of corporate executives will less frequently be covered by the scope of settlements by the corporation, thus leaving the individuals open to prosecution even after the company settles.

Indeed, Deputy Attorney General Yates said that the DOJ will err on the side of "carving out" corporate executives from settlements, "taking a hard look at which individuals are 'carved in' – and thus receive protections against prosecution – and 'carved out' of a corporate agreement."[2] This policy is consistent with – and perhaps goes a step further than – the so-called "Yates Memo," a September policy announcement in which the DOJ stated that it would begin to be more aggressive in prosecuting individuals alongside their companies in order to deter wrongdoing.[3]

As noted in a previous issue of Weil's Cartel Watch, the Yates Memo specified the DOJ's policy to focus on prosecuting individual wrongdoing in cases involving corporate misdeeds. Since then, in September 2015, Deputy Assistant Attorney General Brent Snyder has spoken about the DOJ's increased focus on individual responsibility,[4] and in November 2015, Assistant Attorney General Bill Baer reiterated that the DOJ already follows the guidance of the Yates Memo in its criminal prosecutions and added that the DOJ will adopt its guidance in its civil antitrust investigations as well.[5]

Auto Parts Cases Update

On June 20, 2016, United States District Judge Marianne O. Battani of the Eastern District of Michigan gave final approval to a $225 million settlement agreement between purchasers of auto parts and nine defendants accused in a multidistrict litigation ("MDL") of conspiring to rig the prices of those parts. The settling plaintiffs were end payors who purchased new vehicles in the last ten years in the United States that included at least one of 19 component

parts that the defendants manufactured or sold. The settling defendants are: Nippon Seiki Co. Ltd., Lear Corp., Autoliv Inc., Panasonic Corp., TRW Automotive Holdings Corp., Yazaki Corp., Hitachi Automotive Systems Ltd., Fujikura Ltd. and Sumitomo Electric Industries Ltd.[6]

The settled cases are part of a large MDL that followed an investigation by the Antitrust Division of the U.S. Department of Justice ("DOJ") into the auto parts industry. That investigation, which has resulted in more than $2 billion in fines to date, is ongoing. The subsequent MDL plaintiffs, like the DOJ, allege that the manufacturers, sellers, and marketers of certain auto parts conspired to raise prices charged to automakers for those parts. The MDL has been divided into separate proceedings corresponding to particular auto parts. The parts that were the subject of the deal approved by Judge Battani are wire harness systems, instrument panel clusters, alternators, and starters, among others.[7]

Cartel Fine Tracker — Q1 2016 through Present (January 1, 2016 through July 20, 2016)

Jurisdiction	Fines Imposed
U.S. Department of Justice	**$322.3 million**
JFTC	**¥14.2 billion**
European Commission	**€1.6 billion**

U.S. Civil

Use of Sampling to Obtain Class Certification

As noted in a previous edition of Weil's Cartel Watch, in November 2015, the Supreme Court heard a challenge to the Eighth Circuit's decision affirming a jury verdict in favor of a class of Tyson Foods employees in a "don-doff" suit under federal and Iowa labor law. The Supreme Court affirmed the Eighth Circuit's decision on the two issues it examined. Specifically, the Court considered 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. In a 6-2 decision on March 22, 2016, the Court held that a class may be properly certified in these circumstances and remanded the case to the trial court to determine how to allocate damages.

The Court held that, in FLSA cases where a representative sample would be admissible in an individual action, the use of the class device is not inconsistent with the Court's admission of the sample. The Court noted that, often, a representative sample is the only practical means of providing evidence of liability and that, "[i]n a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class."[8] The Court held that plaintiffs could demonstrate that the sample it sought to present is admissible in a class case by showing that the same sample could support a jury finding in an individual case.

The Court was cautious to attempt to limit the applications of its decision, noting that, "In FLSA actions, inferring the hours an employee has worked from a study such as Mericle's has been permitted by the court so long as the study is otherwise admissible. The fairness and utility of statistical methods in contexts other than those presented here will depend on facts and circumstances particular to those cases."[9] Consequently, the Court was not announcing a "'broad and categorical rule[] governing the use of representative and statistical evidence in class

actions,'"[10] it held. Rather, the nature of the action and the purpose for which the sample is being introduced will determine whether that sample is an appropriate basis from which to determine classwide liability. The Court further noted that its decision was not inconsistent with its 2011 decision in Wal-Mart Stores, Inc. v. Dukes, et al.,[11] because that decision "does not stand for the broad proposition that a representative sample is an impermissible means of establishing classwide liability."[12]

Second Circuit Reverses LIBOR Ruling on Antitrust Standing

On May 23, 2016, the Second Circuit reversed a decision by Judge Buchwald of the Southern District of New York dismissing a class action alleging that sixteen large banks conspired to rig the London Interbank Offered Rate ("LIBOR"), a benchmark interest rate used to set numerous rates in many different contexts. The LIBOR is a benchmark used in setting credit card interest rates, mortgage rates, and rates for derivative contracts, among others. In 2013, Judge Buchwald dismissed a class action alleging that several large banks, including Citibank, JPMorgan Chase, Bank of America, Barclays PLC, Credit Suisse AG, and UBS AG, conspired to manipulate LIBOR. The dismissal was based on Judge Buchwald's holding that, because the process of setting the LIBOR is intended to be collaborative, rather than competitive, plaintiffs did not allege antitrust injury and, consequently, they failed adequately to allege antitrust standing.

On appeal, the Second Circuit remanded for further proceedings, holding that: (1) horizontal price-fixing is a per se antitrust violation; (2) plaintiffs alleging a per se violation need not separately plead harm to competition; and (3) a consumer who pays a higher price as a result of horizontal price-fixing suffers antitrust injury. In other words, per se antitrust plaintiffs are not required to make a specific showing of antitrust injury to properly allege a horizontal price-fixing conspiracy under Section 1 of the Sherman Act. Accordingly, the Second Circuit held, in alleging a broad conspiracy among rival banks to rig the LIBOR, plaintiffs here sufficiently alleged both a violation of antitrust law and antitrust injury.

Specifically, the Second Circuit found that the allegations that the banks' counterparties were potentially harmed in their negotiations of financial contracts that referenced the artificially-set LIBOR were adequate to proceed, holding, "The Sherman Act safeguards consumers from marketplace abuses; appellants are consumers claiming injury from a horizontal price-fixing conspiracy. They have accordingly plausibly alleged antitrust injury."[13]

The Second Circuit held that, as a result of Judge Buchwald's incorrect holding that plaintiffs did not adequately allege antitrust injury, Judge Buchwald did not consider the second component of antitrust standing, whether the plaintiffs would be an "efficient enforcer" of the Sherman Act. The Second Circuit remanded this question to Judge Buchwald, holding "since the district court did not reach the second component of antitrust standing – a finding that appellants are efficient enforcers of the antitrust laws – we remand for further proceedings on the question of antitrust standing."

Although this decision may be seen as a victory for plaintiffs in LIBOR-related and other rate-setting litigations, including those concerning the foreign exchange rate benchmark, the Second Circuit cautioned that, "[t]his decision is of narrow scope."[14] The Court was clear to indicate that its ruling was confined to the sufficiency of the allegations and does not constitute a finding that antitrust injury has in fact occurred. The Court indicated that the District Court will consider at the proof stage whether the alleged agreements in fact caused harm to competition and, if so, who are the proper plaintiffs to seek to redress that harm. Nonetheless, the Second Circuit's decision is an important decision that likely will have implications for other similar cases as well as the LIBOR cases.

International

Prosecution of Online Sales into the United States

In December 2015, the United States District Court for the Northern District of California unsealed a one-count indictment against a British individual, Daniel William Aston, and Trod, Ltd. ("Trod," doing business as Buy 4 Less, Buy For Less, and Buy-For-Less-Online), a British company of which Aston is a director and part-owner.[15] The indictment charges that, from September 2013 to January 2014, Aston, Trod, and their co-conspirators agreed to fix the prices charged for certain posters sold online in the U.S. through Amazon Marketplace. Specifically, the indictment charges that the conspirators discussed the prices of certain posters sold through Amazon Marketplace and agreed to use specific algorithms to set prices for certain posters, for the purpose of offering uniform prices for the same products and coordinating price changes.[16]

The indictment followed searches conducted by British law enforcement and the FBI of Aston's home and Trod's headquarters, both in the United Kingdom. These searches were executed as part of an ongoing investigation into price-fixing in the online wall décor industry conducted by the Antitrust Division of the U.S. Department of Justice ("DOJ") and the FBI, which led to the first e-commerce prosecution in DOJ history when a co-conspirator of Aston and Trod, David Tompkins, pleaded guilty to conspiring to fix prices of posters sold through Amazon Marketplace.[17]

After the indictment against Aston and Trod was unsealed, the DOJ stated that, "U.S. consumers deserve competitive markets when they shop online…. This company and its owner conspired to fix the prices for poster art and consumers unknowingly suffered the consequences. It doesn't matter whether price-fixers operate from an office in California or a warehouse in England. We will continue to prosecute conspiracies that subvert online competition."[18] The DOJ has indicated that it remains committed to ensuring competition for products sold in the U.S., regardless of whether they are sold through brick-and-mortar or online retailers.

EC Imposes Record-Setting Fine

On Tuesday, July 19, 2016, the European Commission (the "EC") announced that it fined truckmakers Volvo/Renault, Daimler, Iveco, and DAF €2.93 billion for their participation in a cartel that caused consumers to pay the costs of complying with emissions regulations. The individual fines ranged from €495 million (Iveco) to €1 billion (Daimler), and, in accordance with the EC's settlement procedures, were reduced by 10% because the cartel members acknowledged their participation. MAN, a subsidiary of Volkswagen, was also a member of the cartel, but was not fined because it brought the cartel to the EC's attention and cooperated in its case against the remaining cartel members. The EC is investigating whether Scania also participated.[19]

Specifically, from 1997 to 2011, the cartel members agreed on the timing of increases to their respective gross lists prices for medium to heavy trucks in Europe and coordinated their introduction of emission-reducing technologies to comply with European regulations, passing on the costs of developing and implementing those technologies to end consumers. Because of the volume of commerce affected – due to the size of the market and the long duration of the conspiracy – the record fine was justified, said the EC. The EC's Commissioner for Competition Margrethe Vestager said that, "We have today put down a marker by imposing record fines for a serious infringement. It is not acceptable that MAN, Volvo/Renault, Daimler, Iveco and DAF, which together account for around 9 out of every 10 medium and heavy trucks produced in Europe, were part of a cartel instead of competing with each other." Additionally, Vestager noted that, "The fight against cartels will remain one of our main priorities."[20]

U.S. and Canada Cooperate in Prosecution of Auto Parts Maker

Japanese auto part manufacturer Nishikawa Rubber Co., Ltd. ("Nishikawa") will plead guilty and pay a fine of $130 million for its participation in a cartel whose members conspired to rig bids in the U.S. and Canada. For a period of 12 years, Nishikawa conspired with other body sealing products suppliers,

affecting the prices of cars manufactured in the U.S. and Canada for sale in the U.S. Because the cartel's conduct had a more significant impact on consumers in the U.S. than Canada, the Canadian Competition Bureau and the Antitrust Division of the U.S. Department of Justice ("DOJ") agreed that the DOJ would prosecute Nishikawa. Both agencies commented on the valuable cooperation that permitted the successful investigation and prosecution.[21]

1. Richard Vanderford, "Antitrust division curtailing carve-ins, Yates says," MLex, May 16, 2016.
2. *Id.*
3. Sally Quillian Yates, "Individual Accountability in Corporate Wrongdoing," September 9, 2015.
4. Leah Nylen, "'Yates Memo' won't change the DOJ criminal antitrust investigations, Snyder says," MLex, Sept. 29, 2015.
5. Leah Nylen, "DOJ looking at individual liability for civil antitrust violations in wake of Yates memo, Baer says" MLex, Nov. 12, 2015.
6. Eric Kroh, "$225 Auto parts Price-Fixing Deal Gets Final Nod," Law360, June 20, 2016.
7. *Id.*
8. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036 (2016).
9. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036 (2016). Internal citation omitted.
10. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036 (2016).
11. *Wal-Mart Stores, Inc. v. Dukes*, et al., 564 U.S. 338 (2011).
12. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036 (2016).
13. LIBOR.
14. LIBOR.
15. United States Department of Justice Spring 2016 Division Update, Innovative Prosecutions Target 21st Century Schemes, available at: https://www.justice.gov/atr/division-operations/division-update-2016/innovative-prosecutions-21st-century-schemes.
16. *Id.*
17. *Id.*
18. *Id.*
19. Eric Kroh, "EU Hits Truck Makers With Record €2.9B Cartel Fine," Law360, July 19, 2016.
20. *Id.*
21. Leah Nylen, "Canada defers to U.S. prosecution of Nishikawa Rubber in auto body sealing products case," MLex, July 20, 2016.

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