
February 7, 2019

Antitrust Month in Review – January 2019

In January, there was a notable scarcity of news from the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) because of the U.S. federal government's lapse in appropriations. During the partial government shutdown, only a subset of the agencies' enforcement activities moved forward. Notable among these was the FTC's suit against Qualcomm regarding certain patent licensing practices. The bench trial in that case concluded on January 29; a decision is not expected for some time.

Shortly after the agencies fully reopened late in the month, the FTC announced that it agreed to accept a proposed settlement which would allow the Staples-Essendant transaction to proceed. The FTC's decision, which we discuss below, is notable because the Commission split 3-2 in accepting the proposed settlement; and several commissioners used the occasion to write at some length on their views of vertical mergers, among other things.

Also in January, two federal courts issued notable decisions denying class certification in antitrust cases. In one case, the court determined that the putative class representatives did not suffer injury as a result of each of the alleged modes of conspiracy and therefore could not represent class members which allegedly suffered injury by means different from the proposed representatives. In another case, the court denied class certification because it determined that the plaintiffs' expert failed to establish a causal link between the alleged antitrust violation and the putative class' alleged injuries.

We discuss these and other developments below.

US – DOJ/FTC Merger

FTC Requires Implementation of Information Firewall in Order for Staples' Acquisition of Essendant to Proceed; Commission Splits 3-2 in Accepting Proposed Settlement; Commissioners Issue Notable Statements

On January 28, the FTC announced that it agreed to accept a proposed settlement which would allow Staples to acquire Essendant. Staples is an office supply reseller which sells office supplies to businesses and others, and Essendant is a wholesaler which sells office supplies to Staples and competing resellers. According to the FTC, Staples "will establish a firewall separating Staples' business-to-business [resale] operations from Essendant's wholesale business This firewall will restrict Staples' access to the commercially sensitive information of Essendant's [reseller] customers" (which allegedly compete with

Staples for retail sales). The FTC appointed a monitor for the ten-year duration of the consent order and has required annual compliance reports.

In its complaint, the FTC identified “[t]he sale and distribution of office products to midmarket business-to-business customers in local areas” as the relevant market, and alleged that absent the firewall, “Staples would have access to Essendant’s reseller customers’ commercially sensitive business information, which could allow Staples to offer higher prices than it otherwise would when bidding against a reseller for an end customer’s business.” Under the settlement order, according to the FTC, “only those Staples employees who will be performing wholesale functions” will have access to Essendant’s commercially-sensitive reseller information.

The Commission’s decision was 3-2 and generated four different accompanying statements. Chairman Joseph J. Simons and Commissioners Noah Phillips and Christine S. Wilson voted to accept the proposed settlement and issued a statement. Commissioner Wilson issued an additional statement. Commissioners Rohit Chopra and Rebecca Kelly Slaughter each issued dissenting statements.

Both dissenting commissioners argued that the transaction should have been blocked on a vertical theory that the combined, vertically integrated Staples-Essendant firm could reduce competition by raising its reseller rivals’ costs for wholesale purchases of office supplies. They posited that the combined firm could profitably increase wholesale prices because (i) resellers face high switching costs and would not switch to rival wholesalers and (ii) retail customers, in the face of higher passed-on costs from competing resellers, would switch to Staples in numbers large enough to allow Staples to generate profits as a result of its wholesale price increase. The majority, however, found that the evidence obtained during the FTC’s investigation did not support this theory. Among other things, the majority observed that the evidence indicated that: (i) there were not significant switching costs in the wholesale market; and (ii) it would be unlikely that a significant number of retail customers would switch to Staples in the face of higher prices from Staples’ rivals. On this latter point, the majority observed that “Staples’ share in the downstream market for mid-sized businesses is small,” and Essendant’s retailers provided “high-touch” service of the type that Staples generally does not provide.

In his dissenting statement, Commissioner Chopra also raised concerns that the Commission’s investigation did not adequately examine whether the transaction would create harmful buyer power in the upstream wholesale market. He argued that because both “Staples and Essendant [both] source office supply products from a wide range of upstream trading partners, including small and large manufacturers alike,” the transaction may result in buyer power resulting in the “transfer[] of income from those suppliers to the merged firm, with little or no resource savings.” The majority, however, found that this theory was not supported by the evidence from the investigation.

Commissioner Chopra also suggested that the Commission’s investigation did not – but should have – examined the buyer’s plans for the acquired business. Staples is owned by Sycamore Partners, a private

equity fund. Commissioner Chopra has in the past been wary of possible competitive concerns related to private equity funds' incentives and here "suggest[ed] that the fund will operate assets much differently than a typical buyer, in ways that lead to higher margins, without any guarantee of greater output and service offerings." Again, the majority found that this theory was not supported by the evidence.

Commissioner Slaughter used her dissenting statement to set out her broader concerns about vertical mergers, writing that she is "particularly concerned that the current approach to vertical integration has led to substantial under-enforcement." In general, she expressed concerns about "unreliable assumptions" and "unsubstantiated" claimed benefits that are not, in her view, subjected to adequate investigation. She also suggested that when the Commission approves a deal that is a close call, it should commit to undertake a "retrospective investigation a few years after the merger is consummated," and secure cooperation commitments from the parties. The majority, while expressing openness to the idea of retrospective reviews, noted that the FTC's limited resources precluded it from undertaking a program of the breadth suggested by Commissioner Slaughter. Commissioner Wilson in particular warned of the consequences of the uncertainty that Commissioner Slaughter's suggestion would introduce for businesses subjected to the ever-present threat of some future unwinding. Moreover, both the majority – and, at greater length, Commissioner Wilson – criticized Commissioner Slaughter's broad-stroke critique of the Commission's vertical merger enforcement for, among other things, relying on debatable sources and support.

[Press Release, Fed. Trade Comm'n, FTC Imposes Conditions on Staples' Acquisition of Office Supply Wholesaler Essendant Inc. \(Jan. 28, 2019\)](#); [Complaint, In the Matter of Sycamore Partners II, L.P., FTC File No. 181-0180 \(Jan. 25, 2018\)](#); [Decision & Order, In the Matter of Sycamore Partners II, L.P., FTC File No. 181-0180 \(Jan. 25, 2019\)](#); [Stmt. of Chmn. Simons & Comm'rs Phillips & Wilson](#); [Stmt. of Comm'r Wilson](#); [Stmt. of Comm'r Chopra](#); [Stmt. of Comm'r Slaughter](#).

US – Private Litigation

Court Denies Class Certification in Automotive Parts Case

On January 7, Judge Marianne O. Battani of the United States District Court for the Eastern District of Michigan denied class certification in one of the numerous cases in the ongoing Automotive Parts Antitrust Litigation, finding that plaintiffs failed to meet Rule 23's predominance and adequacy requirements. Here, direct purchaser plaintiffs (DPPs) allege that automotive and industrial bearings manufacturers and suppliers engaged in price fixing, bid rigging and market allocation conspiracies.

In its ruling, the court first found that the plaintiffs satisfied the numerosity and commonality requirements of Rule 23. However, the court found that the plaintiffs failed to "establish[] the requisite uniformity of illegal practices through which the named DPPs and absent class members sustained their alleged injuries." The court observed that the plaintiffs' complaint asserted "that Defendants carried out an alleged price-fixing conspiracy through three means," but that the named plaintiffs allegedly suffered injury only as a

result of one of those means. Therefore, according to the court, the named plaintiffs cannot represent a class allegedly injured through the other means because they “lack the incentive to develop and introduce evidence” related to the other means. The court also held that, for similar reasons, the plaintiffs could not satisfy Rule 23(b)(3)’s predominance requirement in light of the Supreme Court’s *Comcast* decision. [In re Auto. Parts Antitrust Litig., No. 12-cv-00501 \(E.D. Mich. Jan. 7, 2019\)](#).

California Federal Court Grants Motion to Dismiss Complaint Alleging Bi-Coastal Price Fixing by Restaurateurs

On January 7, Judge Jeffrey S. White of the United States District Court for the Northern District of California granted defendants’ motions to dismiss in a case alleging a bi-coastal price-fixing conspiracy among certain well-known California and New York restaurants and restaurant owners whereby they allegedly eliminated tipping and increased prices. The court first declined to exercise jurisdiction over the New York restaurants in California, finding that there is an “absence of clear Ninth Circuit authority” recognizing so-called “conspiracy jurisdiction” (“a theory[] whereby a plaintiff may establish jurisdiction over alleged co-conspirators not subject to jurisdiction in a particular forum by alleging an actionable conspiracy and a ‘substantial act’ in furtherance of the conspiracy in the forum state”). The court also found that it lacked general and specific jurisdiction over several defendants.

The court went on to hold that the plaintiff failed to allege an agreement between the New York restaurants and the California restaurants, finding, among other things, that allegations of trade association meeting participation were not sufficient to suggest an agreement. The court also held that the plaintiff “fail[ed] to allege facts from which it would be reasonable and plausible to infer that the California Defendants compete with the New York Defendants,” questioning why restaurants on different coasts would be motivated to engage in price fixing with each other. In addition, the court noted that the no-tipping policies and price increases were implemented at different times. The court also found that the plaintiff failed to state a claim involving only the California restaurants, but allowed him “a final opportunity to amend the complaint solely against” them. [Brown v. 140 NM LLC, et al., No. 17-cv-5782 \(N.D. Cal. Jan. 7, 2019\)](#).

Court Denies Summary Judgment on Statute of Limitations Grounds in Milk Antitrust Case, Finding Issue of Fact on Whether Effects of Alleged Conspiracy Continued into Limitations Period

On January 16, Judge Brian J. Davis of the United States District Court for the Middle District of Florida denied defendants’ motion for summary judgment on statute of limitations grounds in a case in which supermarkets alleged that dairy cooperatives violated Section 1 of the Sherman Act. The case challenged the cooperatives’ “herd retirement program” which, according to the court, “helped dairy farmers . . . to market their dairy cattle for beef in an effort to better align supply and demand of raw milk.” According to the court, dairy farmers would be paid a sum “to help bridge the gap between the generally lower beef value of their cows and the generally higher milking value.” The program was discontinued in 2010. Several

plaintiffs sued in 2015, alleging that the herd retirement program led to supracompetitive milk prices as the result of “a horizontal agreement to restrict output.”

In opposing the defendants’ motion for summary judgment, the remaining plaintiff in the case argued that even though the “retirement” program ended in 2010, the price effects lasted until 2013, bringing the plaintiff’s claims within the four year statute of limitations. The court, citing the plaintiff’s experts, agreed with the plaintiff that this presented a disputed question of fact, and denied the motion for summary judgment on those grounds. The court also held that the “record does not support a finding at this juncture that Defendants withdrew from the alleged conspiracy with regard to the Statute of Limitations,” writing that “there is no evidence to support that Defendants affirmatively and completely disassociated themselves from the continued operation of the conspiracy.”

However, the court ruled in favor of defendants that the plaintiff’s claims were not tolled by fraudulent concealment, finding that the herd retirement program, which began in 2003, was “widely publicized.” Finally, the court granted in part and denied in part defendants’ motion with respect to the plaintiff’s class action tolling arguments, finding that certain earlier class actions upon which the plaintiff relied “do not as a matter of law align as to parties, subject matter, and time periods.” [Winn-Dixie Stores, Inc. v. Se. Milk, Inc., et al., No. 15-cv-1143 \(M.D. Fla. Jan. 16, 2019\)](#).

Court Denies Class Certification Where Expert Failed to Establish Causal Link Between Alleged Antitrust Violation and Injury

On January 22, Chief Judge Orlando L. Garcia of the United States District Court for the Western District of Texas granted in part defendants’ motion to exclude the testimony of the plaintiffs’ expert and denied plaintiffs’ motion for class certification in a case brought by a proposed class of registered nurses who allege that the defendant “hospital systems[] conspired to depress [their] wages . . . through explicit agreements and/or exchanges of wage information.” The court found that the plaintiffs satisfied Rule 23(a)’s numerosity, commonality, typicality and adequacy of representation requirements. However, the court held that the plaintiffs failed to satisfy Rule 23(b), writing that “the Court cannot conclude that common issues would predominate over individual issues.”

Specifically, the court found that the plaintiffs could not establish with common evidence that they were entitled to damages under Section 16 of the Clayton Act because plaintiffs’ expert failed to show that there was “a causal link” between the alleged antitrust violations and the plaintiffs’ alleged injuries. Instead, according to the court, the plaintiffs’ expert made only “broad assumptions about injury without an evidentiary link to the alleged conduct,” and failed to provide a “factual explanation of how plaintiffs would show a causal link between the conspiracy and the wages of staff registered nurses.” The court concluded that “[w]ithout some explanation of how Plaintiffs would show a causal connection, the Court cannot conclude that Plaintiffs will be able to show impact/injury through evidence common to the class. There is simply no explanation as to how Plaintiffs plan to link the alleged conspiracy to the alleged impact/injury,

with either common or individual evidence.” [Maderazo v. VHS San Antonio Partners, L.P., No. 06-cv-00535 \(W.D. Tex. Jan. 22, 2019\)](#).

US – Other News of Note

Third Circuit Holds that Attorney’s Fees Are Not Recoverable Where Court Relies on FTC Act, Rather Than Clayton Act, for Injunctive Relief

On January 23, the United States Court of Appeals for the Third Circuit issued an opinion in which it held that the Commonwealth of Pennsylvania was not entitled to attorney’s fees in a case it brought (together with the FTC) because the court ordered injunctive relief under the FTC Act rather than the Clayton Act. Key to the ruling is the difference in the standards for injunctive relief under these two provisions of law.

According to the court’s opinion, Pennsylvania and the FTC “jointly sued” defendants, seeking to preliminarily enjoin their merger “under Section 16 of the Clayton Act, and Section 13(b) of the Federal Trade Commission Act.” Section 16 of the Clayton Act allows “[a]ny person, firm, corporation, or association” to seek injunctive relief “against threatened loss or damage by a violation of the antitrust laws,” and provides for attorney’s fees where a plaintiff “substantially prevails.” Section 13(b) of the FTC Act provides that the FTC may seek an injunction for violations of “any provision of law enforced by the Federal Trade Commission,” but does not provide for the award of attorney’s fees.

The district court denied the injunction, but the Third Circuit reversed. The parties abandoned their transaction. Pennsylvania then sought attorney’s fees under Section 16 of the Clayton Act. The district court denied the request, holding that Pennsylvania “had not ‘substantially prevailed’ under Section 16.” On the question of attorney’s fees, the Third Circuit affirmed but for different reasons, holding that it had previously ordered the injunction based “solely on Section 13(b) of the FTC Act,” which has a different standard for injunctive relief than the “traditional . . . preliminary injunction standard,” and did not rely on Section 16 (which incorporates the “traditional” equity standard for issuing injunctions). The court noted that “the Section 13(b) standard is not only different from, but easier to satisfy than the traditional standard for injunctive relief that courts apply to claims under Section 16 of the Clayton Act.” [FTC v. Penn State Hershey Med. Ctr., No. 17-2270 \(3d Cir. Jan. 23, 2019\)](#).

EU Developments

European Commission Clears BASF’s Acquisition of Nylon Business of Solvay with Conditions

On January 18, the European Commission announced that it has cleared BASF’s proposed acquisition of the nylon business of Solvay, subject to a divestiture and the creation of a related joint venture. The Commission asserted that the transaction, as proposed, “would lead to a reduction of the number of suitable suppliers and likely price increases in a number of markets related to the nylon industry.” The Commission

also asserted that “the merged entity would also have the ability and incentive to restrict its competitors’ access to essential inputs” related to nylon production. “In addition,” according to the Commission, “there was no indication that the existing level of competition could be maintained by new entrants because of high barriers to entry in these markets. In particular, access to essential inputs is limited and critical to be able to compete effectively.” Therefore, the Commission required that certain Solvay facilities be divested “to a single suitable buyer,” that BASF enter into long-term supply agreements with the buyer for a certain nylon production input, and that the buyer enter into a production joint venture with BASF for another nylon production input. [Press Release, European Commission, Mergers: Commission approves BASF’s acquisition of Solvay’s nylon business, subject to conditions \(Jan. 18, 2009\)](#).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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