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So We Agree It's Price-Fixing, But ...

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Recently an experienced attorney with a class action plaintiffs firm responded to our article "Looks Like Price-Fixing Among Class Action Plaintiffs Firms," in which we observed that a very common practice among plaintiffs law firms looks an awful lot like outright price-fixing.

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In dozens of class action antitrust cases, multiple plaintiffs law firms file duplicative cases, with each asserting that it is adequate to represent the putative class — but then, oddly, each refuses to compete for the work by offering to lower its rates, and, instead, the competing law firms agree to simply present the class (and the court) with a single fee proposal. We noted that Sherman Act Section 1 would normally require competitive bidding and also that competitive bidding would make good sense from a policy perspective because it would likely increase the portion of any recovery that went to members of the class and decrease the portion captured by the lawyers.[1]

In the responding article, "In Defense Of Price-Fixing Among Class Action Plaintiffs Firms," the author conceded both of our key points, noting that "there is something to the first premise" — that the practice of cooperating on a single fee proposal is, in fact, price-fixing — and that the second premise, too, "is likely valid." He acknowledged that competitive bidding would "tend to result in class members recovering more for themselves, by reducing attorney fee awards," and that it is "somewhat ironic" that "attorneys seeking to enforce the antitrust laws [such as price-fixing] maintain such cooperative relationships with their competitors in the course of doing so."[2]

But the author nonetheless argued that the premise that class members would be better served by competitive bidding had been subjected to "exhaustive examination" by courts "and found lacking," and that a revival of competitive bidding among firms seeking to represent class plaintiffs in antitrust litigation "would be akin to a nail in a rapidly sealing coffin."[3]

He argued that plaintiffs attorneys routinely forego opportunities to prosecute antitrust cases because damages are insufficient to justify the time and expense necessary to try the case, and competitive bidding would only exacerbate this problem by further reducing attorneys' incentives to take on those cases. Essentially, the author acknowledged that collusion among plaintiffs firms not only exists but is commonplace, yet argued that it is a necessary evil because if firms were required to compete, antitrust

cases would go unprosecuted.

First, of course, there is no defense to price-fixing by competitors. Sherman Act Section 1 makes the agreement itself per se unlawful — and it does not matter whether the resulting prices are "fair" or "reasonable" or serve a self-proclaimed legitimate purpose, such as propping up the finances of the cartel members.[4]

Second, the argument that competitive bidding has been given "exhaustive examination" by courts and somehow found lacking is unconvincing, considering the author's only case cites were the exact same cases we cite in our article — and they say that bidding is appropriate in many circumstances. And given the exorbitant settlements and judgments obtained in antitrust class actions in recent years, we are highly skeptical of the other primary argument in the article — i.e., that competitive bidding would reduce the prosecution of legitimate antitrust cases.

In any event, the entire premise of the "In Defense Of Price-Fixing" article runs contrary to the position that many antitrust plaintiffs have taken recently. In fact, the outcome advocated for by the author — where separate class action plaintiffs law firms stop competing and, instead, cooperatively refuse to bid against each other and only offer their customers a single agreed-upon price (in the form of a contingency fee percentage) — is very similar to what defendant private equity firms are alleged to have done in the so-called "club deal"[5] cases, many of which have settled recently for substantial amounts.[6]

In the "club deal" cases, plaintiffs depicted the rival firms as having cozy relationships with one another, and cited email evidence suggesting that the firms would "stand down" and not compete on various deals because of "club etiquette." Plaintiffs alleged that this "club etiquette" denoted an accepted code of conduct between defendants that "tend[ed] to exclude the possibility of independent action" and amounted to an overarching conspiracy to rig the going-private transactions.[7] In other words, plaintiffs alleged that the practice of agreeing not to "jump" each other's deals, or outbid each other, amounted to a violation of Section 1 of the Sherman Act.

The fee agreements reached by class action plaintiffs firms are similar to the alleged conduct of private equity firms in the "club deal" cases, i.e., they agree to refrain from competing and outbidding each other's fee proposals and, instead, to work cooperatively under a single, common fee arrangement. Yet the "In Defense Of Price-Fixing" author argues that this should be allowed — and even goes so far as to suggest that there is, or should be, an "unspoken acknowledgement" that collusion among class counsel exists, and the practice should be "exempt" from the antitrust laws because it is necessary to prosecute complex cases. While there may be an "unspoken acknowledgement" that collusion exists among class action plaintiffs firms, there is no "exemption" to the antitrust laws for class plaintiffs attorneys that we are aware of.

The conduct is indistinguishable from per se illegal agreements and appears designed to maximize the fees earned by class counsel and, thus, minimize recoveries by class members. Indeed, antitrust class actions are routinely criticized for rewarding the plaintiffs lawyers with big fees — at agreed-upon contingency percentages — while netting class members little or nothing of value in comparison.[8]

We have yet to hear why the refusal by class plaintiffs firms to bid against each other amounts to something other than collusion condemned by the Sherman Act. It harms both actual class members and competition as a whole by reducing overall recoveries for class members, and only benefitting the attorneys. While other antitrust class plaintiffs attorneys may argue that there are pro-competitive

justifications for joining the “club,” it is unclear whether that is a legitimate defense. Antitrust regulators have been dormant on this issue as far as we know, but may want to take a look at the so-called “unspoken acknowledgement” of collusion that the “In Defense Of Price-Fixing” author describes and decide whether there should be an “exemption” or any legitimate defense.

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[1] Joseph A. Ostoyich and William C. Lavery, “Looks Like Price-Fixing Among Class Action Plaintiffs Firms,” Law360, May 28, 2014.

[2] Bart D. Cohen, “In Defense Of Price-Fixing Among Class Action Plaintiffs Firms,” Law360, July 3, 2014.

[3] Id.

[4] National Society of Professional Engineers v. United States, 435 U.S. 679, 685, 692 (1978) (the elimination of competitive bidding constituted a per se unlawful conspiracy “interfer[ing] with the setting of price by free market forces.”).

[5] A “club deal,” also referred to as a syndicated investment, refers to a transaction that involves a number of different private equity investment firms, where the firms pool their assets together to make the acquisition collectively.

[6] Kaitlyn Kiernan, “With Goldman, Bain Out, PE Players Pressured To Cut Deals,” Law360, June 13, 2014.

[7] See Gary Kubek, “Club Deal Class Action Survives — What This Means For PE,” Law360, Aug. 5, 2013.

[8] See Edward F. Sherman, “CONSUMER CLASS ACTIONS: WHO ARE THE REAL WINNERS?,” Maine Law Rev. Vol. 56:2 at 223.

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