

Criminal Antitrust Update

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INDUSTRY SCORECARD

Financial: While class action lawsuits have been pending in the Southern District of New York regarding alleged manipulation of interest rate benchmarks, evidence of a rumored parallel criminal investigation finally emerged. Class action plaintiffs had filed discovery requests that the civil defendants turn over any information supplied to the government as part of an investigation. The Justice Department appears to have confirmed that it is conducting an investigation of the Libor rates associated with several foreign currencies. Some large banks had previously advised they received subpoenas regarding their practices related to the Libor; others, like Barclays and Royal Bank of Scotland, mentioned multiple information requests from regulators in the United States, Europe, and Asia in their annual reports. The banks have also indicated they are defending the investigations and any claims that may arise. Like many recent antitrust investigations, it appears that European and Asian regulators are also looking at whether banks artificially deflated interest rate benchmarks by agreeing to submit misleading information regarding their financial strength.

In a continuing investigation of bid-rigging allegations in the tax lien auction business, a New York-based investor, Robert Rothman, entered a guilty plea for his role in conspiring to rig municipal tax lien auctions. Cities, towns, counties, and other municipal divisions have the authority to impose tax liens on property if the owner does not pay real estate taxes. Such liens can ultimately lead to foreclosure proceedings if they remain unpaid. The liens may, under certain circumstances, be auctioned to the highest bidder. The conspiracy, which focused on municipal tax liens auctions in New Jersey, allegedly involved investors agreeing not to compete against each other, which enabled the participants to purchase tax liens at lower-than-normal prices. According to the Justice Department, the conspiracy led property owners to pay artificially high interest on their tax obligations. A number of other individuals have entered guilty pleas in the investigation.

Automotive: We previously reported that some auto parts companies were contesting price-fixing indictments. Eagle Eyes Traffic Industrial Company, based in Taiwan, failed in its effort to obtain dismissal of a price-fixing indictment in California. The Court also refused to order the government to specify certain aspects of the charges by filing a “bill of particulars.” The government claims that Eagle Eyes and others participated in a multi-year conspiracy to fix the price of replacement auto parts. Two Eagle Eyes executives are also charged.

An executive of Japanese auto parts manufacturer Denso Corporation agreed to plead guilty in federal court in Michigan for his involvement in antitrust violations in the sales of auto parts. Norihiro Imai had managed relations with Toyota and allegedly conspired to rig bids and fix prices related to the sales of electronic heater control boards. Imai could receive a one-year prison sentence and a fine. Denso already pleaded guilty in the ongoing antitrust investigation of the auto parts industry.

Transportation: Prosecutors continue to pursue price-fixing allegations against Florida West International Airways. The most recent development in the case is the government's effort to introduce 'prior bad acts,' evidence that Florida West engaged in uncharged conduct that violated antitrust laws in a separate conspiracy. The government claims that Florida West and some of its competitors fixed the price of fuel surcharges and other fees related to air cargo transportation between South America and Florida. A federal judge previously dismissed indictments against a Florida West executive on the grounds that the executive was protected by a plea agreement reached by an airline that contained immunity provisions. The investigation of price-fixing surrounding airline activity in Florida has yielded a number of guilty pleas.

Concrete: GCC Alliance Concrete Inc. received a sentence that underscored growing Court interest in compliance-related consequences for regulatory violations. The U.S. District Court for Iowa sentenced GCC to a term of probation and required GCC to make antitrust compliance presentations at industry trade conferences. The court also imposed a \$100,000 fine. The sentence followed a guilty plea by GCC in an investigation that yielded a number of convictions in the past few years. GCC's presentation at sentencing, which highlighted its cooperation with the government and its strong internal programs regarding antitrust issues, undoubtedly contributed to this result.

Food Industry: The former chief executive of SK Foods agreed to plead guilty to allegations he fixed prices and bribed buyers at Frito-Lay, Kraft, and others. The executive, Frederick Salyer, had been fighting to exclude evidence from an upcoming trial. Salyer will serve at least four years in prison for a scheme to pay purchasing agents in exchange for assistance in structuring bids for various contracts. The purchasing agents allegedly provided confidential competitor information to SK Foods. SK Foods and Salyer were also accused of forging quality-related documentation about mold levels and organic content, among other things. In addition to antitrust violations, the government accused Salyer of mail fraud, wire fraud, and racketeering.

CASE DEVELOPMENT – SUPREME COURT DECLINES TO HEAR FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT APPEAL

The U.S. Supreme Court has decided to remain on the sidelines for now in the ongoing effort to define the foreign reach of U.S. antitrust laws. The Court has declined to hear an appeal from the Third Circuit Court of Appeals decision in *Animal Science Products v. China Minmetals Corporation*. In that case, the plaintiffs claim that foreign mineral and metal companies who export their products into the United States conspired to fix the price of certain raw materials. The defending companies obtained a dismissal in the district court, which concluded the claims were not subject to the jurisdiction of U.S. courts due to the application of the FTAIA. The Third Circuit disagreed and held that the FTAIA sets standards for making substantive antitrust allegations but *does not* set jurisdictional standards. If the Third Circuit approach were widely adopted, it would arguably limit arguments by foreign corporations seeking to avoid the reach of U.S. antitrust laws.

Other Circuit Courts of Appeal have strongly implied that they view the FTAIA as creating jurisdictional standards. We have been following ongoing litigation in the Seventh Circuit in *Minn-Chem, Inc. v. Agrium Inc.*, 675 F.3d 650 (7th Cir. 2011), in which the Seventh Circuit appeared to restrict jurisdiction over foreign conduct. That matter was the subject of a recent rehearing and remains pending on appeal.

THE IMPACT OF THE AU OPTRONICS CORP. CONVICTIONS

The Justice Department scored a very significant victory last month after a jury convicted AU Optronics Corporation (AUOC), one of the world's top five TFT-LCD screen manufacturers, of conspiring with other large TFT-LCD screen manufacturers to fix the price of flat screens. The jury found that the price-fixing yielded at least \$500 million in illegal gains. The government was not as successful at trial with the charges against individuals; while Vice-Chairman Hsuan Bin Chen and current director Hui Hsiung were both convicted of price-fixing, three other executives, including the current CEO, were either acquitted or avoided conviction due to a hung jury. AUOC has indicated it will appeal the verdict.

The government presented evidence of a detailed price-fixing scheme that included monthly meetings with competitors in Taiwan and detailed sharing of pricing information that occurred for at least five years. AUOC's defense prior to trial focused on the application of U.S. Antitrust Laws to overseas conduct under the Foreign Trade Antitrust Improvements Act (FTAIA); at trial AUOC claimed the company engaged in "fierce" competition and that sharing information with competitors was not sufficient proof of a price-fixing conspiracy. Previously, LG Electronics, Sharp Corp., and Chungwa entered guilty pleas and paid substantial fines as a result of the TFT-LCD price-fixing investigation, and a number of executives from these companies had entered guilty pleas as well.

Part of the significance of the AUOC convictions lies in the rarity of the trial itself. Few large corporations take antitrust allegations of this magnitude to trial. The potential financial exposure, in the form of massive fines, serves as a powerful deterrent. In addition, AUOC's reliance on the FTAIA will present another opportunity for the U.S. appellate courts to consider the application of the FTAIA to foreign conduct. The FTAIA has been hotly contested in recent appeals, and the development of judicial opinions surrounding this statute will have a profound impact on the way that corporations respond to antitrust investigations and defend or resolve claims. Third, the case featured some unusual drama that may present interesting issues on appeal. For example, AUOC claimed in pretrial filings that rival TFT-LCD manufacturer Chungwa paid an employee to plead guilty in the investigation – an employee who eventually cooperated with the government's investigation.

The jury's damages findings also present potentially significant challenges. The findings could justify a \$1 billion criminal penalty and treble damages of \$1.5 billion in pending civil litigation. The Justice Department claims that it has not previously proved economic impact of this magnitude to a jury in the past. We expect the Justice Department to take a hard line regarding the penalties in this case so that it might serve as a warning to other corporations which may consider defending themselves at trial.

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