

Criminal Antitrust Update

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INDUSTRY SCORECARD

Publishing: Although the case is civil rather than criminal, the U.S. Justice Department's Antitrust Division (Division) launched a significant price-fixing lawsuit against several publishers regarding alleged price-fixing related to their sales of E-books. Apple, Inc. was included among several publishers such as Simon & Schuster, HarperCollins, and Penguin Group. Three of the publishers (Hachette, HarperCollins, and Simon & Shuster) proposed to settle the Division's claims when it announced the lawsuit. Hachette and HarperCollins were also reportedly negotiating a deal with a number of state attorneys general to settle related allegations. Under the terms of the federal settlements, the publishers will agree to terminate certain agreements with Apple related to the sale of E-books. The conditions of the settlement include prohibitions against taking any action that might limit a retailer's ability to set pricing and discounts for E-books and against sharing sensitive information with competitors. The settling publishers are also required to implement improvements to their antitrust monitoring and compliance functions. Apple has publicly disputed the allegations in the complaint, pointing instead toward Amazon's former "monopolistic grip" on the publishing industry, and has indicated it plans to contest the matter in court.

Automotive: Fujikura, a Japanese auto parts manufacturer, has agreed to plea guilty and pay a \$20 million fine for its role in widespread price-fixing which took place in the auto parts industry. Fujikura manufactures parts used by automakers for the electronics in new cars. The plea agreement requires the parts manufacturer to cooperate with the government in its investigation. According to the criminal information filed with the plea documents, parts manufacturers in Japan met repeatedly and discussed the pricing of various auto parts, often using code to describe the parts. Fujikura was also fined \$15 million by Japan's antitrust regulators. Four other auto parts manufacturers have already been sentenced or have agreed to plead guilty in what may be the largest criminal antitrust investigation in the Division's history.

Maxzone Autoparts Corporation entered a guilty plea in Canada to a conspiracy to fix prices in the aftermarket auto parts industry. Maxzone sells, among other things, replacement automotive lights. According to the allegations by Canada's Competition Bureau, Maxzone agreed with competitors to fix the price of replacement lights in Canada from 2004 through 2008. The company will pay a fine of \$1.5 million. Maxzone became the first corporation to plead guilty in Canada's investigation of price-fixing in the auto parts industry; last November, Maxzone agreed to plead guilty to price-fixing allegations in the United States and pay

a fine of \$44 million over a five-year period. Two Maxzone executives may be prosecuted in the United States under the terms of the earlier plea agreement.

LCD Screens: A former AU Optronics executive who was convicted of criminal Sherman Act violations has requested that his conviction be reversed because the conduct in question occurred outside the United States. Hui Hsiung argued, consistent with a theme advanced by AU Optronics lawyers before and during the trial, that the Sherman Act does not and cannot provide jurisdiction over foreign citizens regarding overseas discussions, manufacturing, and shipments. The company has also asked the court to order a new trial or acquit the company, arguing the government did not prove that the price-fixing had significant impact on pricing in the United States. AU Optronics faces a fine of up to \$1 billion if the conviction stands.

Optical Disk Drives: An executive for a Hitachi/LG joint venture has agreed to plead guilty to conspiring to fix the price of optical disk drives. From 2006 to 2009, the conspiracy rigged bids to inflate the price and knock out competitors for Dell and Hewlett-Packard's optical disk drive business. In addition, the conspiracy fixed prices for drives sold to Microsoft. Three other executives associated with the same joint venture already pleaded guilty but have not yet been sentenced, though their plea agreements anticipate that each will be jailed for several months. The joint venture itself pleaded guilty late last year and agreed to pay a \$21.1 million fine. The co-conspirators allegedly exchanged sensitive sales, pricing, and financial information to further the conspiracy's goals and allow the co-conspirators to enforce compliance with the illegal agreements.

Airlines: British Airways (BA) received some positive news after the United Kingdom's Office of Fair Trading (OFT) substantially reduced a fine against BA for its role in fixing the prices of airline tickets. OFT imposed a penalty of nearly \$195 million on BA in 2007 as part of a negotiated agreement but reduced it to approximately \$94 million. BA's cooperation with this major government investigation likely contributed to the reduction. BA was fined \$300 million in the United States for price-fixing cargo and airline tickets, and it has paid well over \$100 million to plaintiffs in related civil litigation.

Real Estate: A broad investigation of real estate auction bid-rigging in California yielded two additional guilty pleas last month. Two real estate investors involved in public foreclosure auctions admitted conspiring to rig bids and committing mail fraud. The investors agreed to not compete with each other and to determine a winning bidder in advance of foreclosure auctions in San Francisco and San Mateo. In some cases, the agreements included payoffs to competitors in exchange for favorable bidding behavior. More than 20 individuals have agreed to plead guilty in the investigation.

Merger-related Conviction: In a relatively unusual crossover from the realm of mergers and acquisitions, a senior executive for Nautilus Hyosung Holdings will plead guilty to obstructing justice in the Justice Department and Federal Trade Commission's oversight of Nautilus Holdings' acquisition of Triton, a competing automated bank teller manufacturer. A vice-president for corporate strategy at Nautilus altered corporate documents submitted to the regulatory agencies in required merger-related submissions. The executive will serve a sentence of five months incarceration; obstruction of justice is punishable by twenty years in prison and fines of up to \$250,000. Nautilus Holdings had already pleaded guilty to two counts of obstruction of justice due to the alteration/falsification of acquisition-related documents.

http://www.pattonboggs.com/newsletters/antitrust/antitrustnewsletter_052012.html - 01 **MUNICIPAL BOND BID-RIGGING JURY CONVICTIONS**

Three former General Electric Capital executives who were on trial for alleged bid-rigging in the municipal bond markets from 1999 through 2006 have been found guilty of conspiring to rig bids in auctions for

municipal bond contracts. The government claimed that the executives paid brokers for information that was later used to submit artificially low bids for investment services being auctioned to cities and towns. In the specialized market for guaranteed investment contracts that was at the heart of the case, financial companies would agree to pay municipalities a fixed interest rate and then try to invest bond funds at a greater rate of return to make a profit, so deflated bids would arguably increase the defendants' profit margins. The defendants were also accused of submitting "courtesy bids" designed to help co-conspirators obtain business. The defendants were convicted of conspiracy, wire fraud, and defrauding the United States.

Antitrust offenses can be difficult to explain and prove to a jury, but the trial featured some old-fashioned drama and evidence. The prosecution relied heavily on tape-recorded conversations of the defendants and others regarding some of the suspect transactions and alleged efforts to conceal misconduct. During the trial, perjured testimony by a government witness resulted in the testimony being stricken and in one count of the indictment being dismissed. A former broker who claimed he discussed the alleged conspiracy with one of the defendants at a dinner was impeached when taped conversations revealed he had not attended the meal in question.

GE funding previously paid \$70 million to resolve state and federal allegations related to the bid-rigging scheme. At the time, GE claimed "the employees' behavior in this matter did not meet GE's standards." Fifteen individuals have been convicted of various offenses in the investigation; at least three additional people await trial.

Bid-rigging involves fraud in connection with bidding activity. The Sherman Act forbids price fixing, bid-rigging, and other anticompetitive behavior. In a typical bid-rigging scheme, competitors agree on which competitor will win a certain bid. As a result, the winning "low" bid may be artificially inflated by the lack of real competition during the bidding. Bid-rigging may take the form of bid suppression, in which competitors agree not to bid. In exchange, a competitor may expect similar behavior during subsequent bids (a practice sometimes referred to as "bid rotation") or some other kind of payoff in exchange for refusing to bid. Other schemes might involve courtesy or complementary bids that have no real hope of winning because they are artificially high, leaving the field clear for a competitor. Competitors might also engage in customer or market allocation by deciding in advance which competitor will obtain business from certain classes of customers or regions.

There are tell-tale signs of behavior that raises a concern about the possibility of bid-rigging. Most significantly, competitors meeting or communicating in the days before or during a key competitive bid would raise red flags. In addition, in-house counsel and compliance personnel would be well-advised to follow up if any of the following are brought to their attention:

- Bids from two or more competitors are highly similar or identical
- Certain itemized details or subsets of information in competing bids are highly similar and appear to be significantly inflated
- Itemized details of competing bids appear to be artificially high in some aspects of the bid but unusually low in others, and competing bids are either similar or directly opposite regarding the same details
- Multiple bids far exceed estimates or bids from other competitors for the same projects or work
- One bid appears far lower than other competing bids
- During the bidding process, competitors' bidding behavior or increments appear to be highly similar
- Unusual changes in bidding behavior occur late in the bidding process
- Bids for annual work are substantially higher than previous years with no corresponding cost increases
- Bidders who registered drop out unexpectedly

- Competitors enter into joint ventures or subcontracting relationships shortly before or after a competitive bidding process

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