Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Looks Like Price-Fixing Among Class Action Plaintiffs Firms

Law360, New York (May 28, 2014, 8:50 PM ET) -- Recently, we took a new look at an old and fairly common practice among businesses that ostensibly compete with each other. And it did not look good. In fact, it looked a lot like price-fixing. But not by the usual suspects.

Here is the common practice, and its backdrop, and we've all seen it over and over again with class action plaintiffs' lawyers, including multiple times in the last few months and as recently as last week. Libor.[1] Electronic Books.[2] Aluminum Warehousing.[3] Silver Futures.[4] North Sea Brent Crude.[5] Cast Iron Soil Pipe.[6] A government price-fixing investigation becomes public knowledge. Maybe the U.S. Department of Justice confirms that it is conducting an investigation of a certain industry or the major producers announce they are under investigation or a news outlet breaks the story.

Within a week, the first civil case is filed: a purported nationwide class action of direct purchasers filed in federal court by a law firm on behalf of a single named plaintiff. By filing its case, the law firm (let's call it Law Firm X) is telling the court that it is competent to represent the nationwide class. A few days later, Law Firms Y and Z each file separate cases in federal court. They represent different named plaintiffs who are also direct purchasers and they, too, seek to represent the same purported nationwide class. In fact, their complaints are verbatim the same as the first complaint. The only difference is the named plaintiffs — and the fact that Law Firms Y and Z have each told a federal court that they, too, seek to represent the same class.

Over the next two months, Law Firm X files three more complaints that are verbatim the same, Law Firms Y and Z each file two more, and Law Firms X2, Y2 and Z2 each file two. The same series of events also occurs on behalf of purported classes of indirect purchasers: multiple duplicative complaints filed by multiple law firms on behalf of different named plaintiffs each seeking to represent the same class.

Now, it seems clear that Law Firms X, Y, Z, X2, Y2 and Z2 are competitors, as are their indirect purchaser law firm brothers and sisters. They race each other to the courthouse. Their separate complaints all tell the courts that each of them wants to represent the same absent class members. In fact, their complaints often go further and expressly allege that each firm is, on its own, adequate to represent the putative class. In short, they are separate and independent law firms competing to sell their services to absent class members. (This is no different than defense-side firms competing to represent the defendants).

Somehow, though, these self-proclaimed competitors rarely compete on price. Instead, after these myriad competing class actions are consolidated by the Judicial Panel on Multidistrict Litigation and transferred to a single federal court, all that competition falls by the wayside.

A single consolidated amended complaint is filed by the same named plaintiffs and the same law firms — and the law firms all cooperatively work together and propose a single leadership structure comprised of some or all of Law Firms X, Y, Z, X2, Y2, and Z2 as proposed counsel to represent the direct purchaser class actions. Typically, their joint proposal includes no specifics on what rates they will charge absent class members, other than bland representations that they will collectively charge a lodestar or percentage of any common fund that is in line with very broad precedents in the circuit.

Thus, rather than compete on price — and bid the price of their services to the absent class members down — Law Firms X, Y, Z, X2, Y2 and Z2 cooperatively refuse to bid against each other and, instead, offer their customers a single agreed-upon price. It is an outcome that seems ironic, at best, in a price-fixing case.

No doubt the participants in these schemes could come up with an explanation for it. Maybe they need to pool their resources to combat the combined might of the defendants or to reduce the expense of major litigation or to hedge their risk. They might also argue that the resulting rates are reasonable and in line with circuit precedent and that post hoc judicial oversight is sufficient to protect absent class members. But none of those reasons is ordinarily a defense to naked price-fixing, and it's not clear why any of them should be defenses here.

There is a solution. Competitive bidding. Federal Rule of Civil Procedure 23 endorses the idea that courts should consider fee proposals in selecting class counsel. We propose going further. Courts can and should require law firms vying for lead counsel positions in class cases to submit blind bids detailing their rate proposals. The Manual For Complex Litigation calls this an "experimental" approach to lead counsel selection, but that is a holdover. It is no longer so novel.

Judge Vaughn Walker in the Northern District of California pioneered the technique nearly 25 years ago in the Oracle Securities Litigation, and dozens of courts have required competitive bidding since then.[7] It was widely regarded as beneficial to the class in the Auction Houses Antitrust Litigation, where the judge noted that "[a]s larger markets lead to more competition, and as competition leads to more efficient results, the number of prospective qualified bidders in this case undoubtedly" contributed to the submission of "higher quality" bids which "undoubtedly benefitted" class members.[8]

As Judge Walker likewise noted in his remarks to the Third Circuit Task Force On Selection Of Class Counsel in March 2001, the current system makes little or no sense. "A sophisticated and interested plaintiff does not blindly select a firm and then negotiate a fee arrangement after any recovery has been obtained. Rather, the plaintiff works out the terms of representation at the outset of the litigation, perhaps after asking a number of qualified firms to submit proposed fee arrangements."[9] The resulting fee is thus "the product of market forces."[10]

Defendants almost uniformly require up-front budget proposals, including fee discounts, and routinely require law firms to bid to represent them. Why should absent class members get less competitive results? The goal of the courts in selecting class counsel should be to increase the share of the recovery by the actual class members who have been harmed, and there is evidence that competitive bidding has successfully reduced the amount of attorneys' fees obtained by class lawyers (and, presumably, thus left greater overall recoveries to the class members).

Competitive bidding makes sense. It is, after all, what the antitrust laws require of all competitors. There should be no exception for plaintiffs' lawyers.

—By Joseph Ostoyich and William Lavery, Baker Botts LLP

Joseph Ostoyich co-chairs Baker Botts' litigation department in Washington, D.C. William Lavery is a senior associate in the firm's Washington office.

[1] In re Libor-Based Financial Instruments Antitrust Litig., No. 11-md-2262 (S.D.N.Y. 2013).

[2] In re Electronic Books Antitrust. Litig., 11-md-2293 (S.D.N.Y. 2014).

[3] In re Aluminum Warehousing Antitrust Litig. 1:13-md-02481 (S.D.N.Y. 2014).

[4] In re Commodity Exchange, Inc., Silver Futures & Options Trading Litig., (S.D.N.Y. 2011)

[5] In re North Sea Brent Crude Oil Futures Litig., 13-md-02475 (S.D.N.Y. 2014).

[6] In re Cast Iron Soil Pipe and Fittings Antitrust Litig., 1:14-md-2508 (E.D.T.N. 2014).

[7] In re Oracle Securities Litig., 131 F.R.D. 688 (N.D. Cal. 1990).

[8] In re Auction Houses Antitrust Litig., 197 F.R.D. 71, 73, 82 (S.D.N.Y. 2000).

[9] Statement of Vaughn R. Walker, Third Circuit Task Force on Selection of Class Counsel, Philadelphia, PA, March 16, 2001.

[10] Id.
