EC Merger Control Reforms: Do Good Things Actually Come in Small Packages?
By: Randa Adra
Discussion of the implications of the merger control reforms issued by the European Commission.

Vigorous Antitrust Enforcement in the Age of Obama: Anheuser-Busch InBev/Grupo Modelo
By: Timothy Hirsch and Eric Barstad
The Obama Antitrust Division’s aggressive antitrust enforcement in recent mergers.

By: Michelle Zolnoski
Guidance on what is now necessary for a customer to bring an antitrust claim in the 11th Circuit.

Comcast and Class Actions: Plaintiffs Must Match Theory of Harm to Damages
By: William A. Roach
Impact of the Comcast decision on antitrust class actions.

In biggest verdict of the year, Jury finds Dow Chemical Company Guilty of Price Fixing
By: Mohammad Huq
Dow Chemical’s loss in the Urethanes litigation leads to biggest verdict of the year

In late March, the European Commission (“EC”) announced that it plans to simplify the procedures for notifying mergers under the EU Merger Regulation (“EUMR”). Under the EUMR, there is a Notice that provides for a simplified notification procedure for mergers that generally...
do not raise anticompetitive concerns.\(^1\) One manner in which the simplified procedure may apply is when the combined market shares of the merging companies are below a specified threshold.\(^2\) The benefit of the simplified procedure is that the merger may be filed with shorter notification forms and cleared with a less extensive market investigation.\(^3\) If all of the requisite conditions are met, the Commission adopts a clearance decision within twenty-five working days from the date of notification.\(^4\)

The EC's proposed reforms address, in part, the mandatory market concentration threshold that a merger must not surpass in order to benefit from the simplified procedure. Specifically, the threshold for companies in the same market would be raised from 15 percent to 20 percent.\(^5\) The threshold for vertical mergers would increase from 25 percent to 30 percent.\(^6\) Moreover, a merger between two companies in the same market may be treated as simplified, despite a combined market share exceeding 20 percent, if the increase in the market share resulting from the merger is small.\(^7\) In essence, these changes mean that merging companies may now control a larger percentage of the market before triggering competition concerns. According to the EC, about 10 percent more mergers will qualify for the simplified procedure as a result of this reform.\(^8\) The reforms also notably target the informational burden on merging parties by "reducing the net amount of information required to notify all mergers."\(^9\)

There are clear benefits to these small but significant reforms to the merger notification requirements. Experts believe these changes will yield considerable savings for merging firms that may now file under the simplified procedure.\(^10\) A short-form notification could reduce the costs of a merger by half.\(^11\) It also allows the merging companies to avoid the burdensome Form CO, which can take a long time to complete.\(^12\) The "Short Form CO" is less cumbersome.
because it requires the submission of much less information. Unlike the standard Form CO, the shorter form does not demand the provision of all information related to the merger’s potential effect on economic markets or internal documentation regarding the economic rationale behind the transaction. Decreasing the net amount of information required to file the merger cuts back lawyers’ fees and preparatory work by in-house counsel, which significantly lessens the procedural and financial burden on companies.

While the EC affirms that these changes are designed to streamline procedures and stimulate growth and competition, others are skeptical about whether the measures will really make a difference. It is true that these reforms, though discreet, could simplify the review of nonproblematic transactions, while keeping the current, largely successful system in tact. The EC may also be setting an example for other merger control authorities to follow suit and update their frequently arduous filing requirements. Nonetheless, the changes do not seem to address the most problematic procedural requirements. The standard Form CO, for example, remains overbroad and complicated. Companies that cannot satisfy the requirements for the simplified notification procedure still face a lot of red tape and must provide copious amounts of information. Additionally, there is a risk associated with the proposed reform that would now allow the simplified notification procedure to apply to “bolt-on” acquisitions, where the merging companies’ combined market share would exceed the 20 percent threshold, but the transaction itself does not significantly affect competition. After reviewing this kind of deal, the EC may decide that the simplified notice is insufficient and require the parties to provide full information for a more in-depth investigation, essentially restarting the entire process. Avoiding this precarious scenario requires positive interactions and communications with the EC, especially when a relatively high combined market share is involved.

Regardless of one’s views on the reforms themselves, it remains unclear whether they will actually have a positive impact on merger approval in light of the EC’s recent merger bans. In January, the EC blocked United Postal Service’s (“UPS”) $6.9 billion bid for TNT Express. Despite UPS offering a number of remedies, including selling airline assets and divesting TNT’s subsidiaries in fifteen countries, the Commission stated that this was insufficient to appease their concerns regarding the anticompetitive effects of the merger. In February, the EU blocked another merger between Ryanair and Aer Lingus. This would be the first time that the

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14 Id.
16 Id.
17 Harms, supra note 13.
18 See id.
19 See Lipman, supra note 3.
20 See id.
21 See id.
23 See UPS/TNT Press Release, supra note 22.
EC blocked a proposed merger twice. In its most recent bid, Ryanair “put forward a ‘revolutionary’ package of competition remedies, which involved a de facto break-up of Aer Lingus.” Nonetheless, the remedies were not enough to address the competition concerns the merger would raise. These recently blocked transactions faced the same fate as another prominent merger the EU prohibited last year: the NYSE Euronext and Deutsche Boerse merger. Again, despite “significant and tangible remedies designed to address the European Commission’s concerns with the transaction,” the EC found that the deal would stifle competition and create a quasi-monopoly.

Many dealmakers are disgruntled by the EC’s recent aggressive approach. Prohibiting transactions in this manner could have a chilling effect on M&A activity or affect the prices parties are willing to pay for other companies. According to Joaquín Alumnia, Vice President of the EC responsible for competition policy, he is not being tough, but merely trying to preserve a competitive marketplace. However, taking into account Europe’s seemingly stringent merger blocking, the recent reforms that aim to encourage mergers by simplifying the notification process seem like a paradox. Perhaps the reforms are a means of altering the impression that the EC is getting tougher on mergers. While that could be one explanation, it is not likely that the reality of strict EU merger control will also be reformed. The proposed notification reforms mainly address the market share thresholds that qualify merging companies to use the simplified procedure. Interestingly, while defending his decision to block a merger, Alumnia explicitly stated that the EC is “less concerned about high levels of market share than what mergers might do to prices.” This seems to indicate that although the reforms may have a positive effect on streamlining and alleviating the administrative and financial burdens of some mergers, other merging companies will likely still face the tightening reins of Europe’s watchdog. Thus, this little gift from the EC, while beneficial, may not deliver the change that many dealmakers are actually seeking.

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25 Id.
28 De La Merced, supra note 22.
30 De La Merced, supra note 22.
31 See, e.g., White, supra note 29 (quoting Alasdair Balfour, “[I]t’s not just a question of negotiating the extent of the remedies, [the EC is] willing to say here’s what you have to do and if you don’t, we’ll block it.”).
32 De La Merced, supra note 22.

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Vigorous Antitrust Enforcement in the Age of Obama: Anheuser-Busch InBev/Grupo Modelo
By: Timothy Hirsch and Eric Barstad

Introduction

As the Obama Administration approaches its sixth year in office, many commentators have sought to assess whether President Obama has made good on his 2008 campaign pledge to reinvigorate antitrust enforcement.1 While the question of how to meaningfully measure the “vigor” of antitrust enforcement has been met with some skepticism or disagreement,2 figures released by the Antitrust Division of the Department of Justice and the Federal Trade Commission reveal that the past year has been an eventful and active one for the agencies. With respect to criminal enforcement, FY 2012 was a record-setting year for DOJ. The agency collected $1.14 billion in criminal antitrust fines—the highest total ever obtained in a single year. DOJ also announced that individual defendants are being sentenced to prison time at a higher rate and for longer durations compared with criminal enforcement proceedings in the 1990s. “The Division is now sending approximately twice as many defendants to prison as it did in the 1990s . . . In FY 2012, the average prison sentence for Division defendants was almost 25 months, more than three times the average of eight months in the 1990s.”3

The agencies’ Hart-Scott-Rodino Annual Report demonstrates that 2012 was a very busy year for the agencies’ merger review and enforcement efforts as well.4 Although the agencies issued fewer second requests in FY 2012 than they did the preceding year, they brought more enforcement actions to halt allegedly anticompetitive transactions, enjoining 44 mergers, compared to 37 in 2011.5 This increase was most noticeable at the FTC, where

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4 Id. at 9-13.

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merger challenges increased by 47 percent. While the DOJ largely maintained its merger challenge levels year-over-year, the agency targeted very high profile transactions in 2012. Those included the $7.9 billion merger of Exelon and Constellation Energy Group Inc., and United Technologies Corp.’s $18.4 billion purchase of Goodrich Corp., as well as the acquisition of Sara Lee Corp.’s North American fresh bakery business by Grupo Bimbo S.A.B. de CV and BBU Inc. This followed a series of similarly high profile challenges by DOJ at the end of 2011, where the agency sued to block major transactions such as AT&T’s acquisition of T-Mobile and H&R Block’s acquisition of TaxAct, both of which were seen as major victories for the Department.

Of the agencies’ FY 2012 merger enforcement efforts, one of the most significant—and perhaps illustrative—was DOJ’s move to challenge Anheuser-Busch InBev’s (“ABI”) proposed acquisition of Grupo Modelo (“Modelo”).

**Anheuser-Busch InBev/Grupo Modelo**

On June 29, 2012, ABI (which already owned approximately 35% of Modelo and 23% of Modelo’s operating subsidiary Diblo, S.A. de C.V.) announced that it would complete its ownership stake in Modelo in a transaction valued at approximately $20.1 billion. The deal would see the combination of the largest and third-largest brewers in the U.S. beer industries. As part of the transaction, ABI announced that Modelo would sell its existing 50% stake in Crown Imports (“Crown”—the joint-venture that imports Modelo beer into the United States—to Crown’s other owner, Constellation Brands, Inc. (“Constellation”). On January 31, 2013 the Department filed suit in the D.C. Circuit to enjoin the transaction.

The Department’s complaint focused on the role that Modelo played in the beer industry in the United States, which the Department observed was highly concentrated and characterized by interdependent pricing between ABI and the second-largest brewer in the industry, MillerCoors. ABI allegedly had a well-established practice of annually “leading prices upward” with the expectation that MillerCoors’ would follow. Modelo’s strategy was to hold its prices steady in the wake of ABI’s price increases, thereby encouraging consumers to “trade up” to Modelo’s brands as the price gap between its high-end beers and ABI’s premium beers narrowed. This resulted in greater market share for Modelo and constrained ABI’s ability to raise prices and forced ABI to offer innovative brands and packages to attract customers and limit its market share losses. The Department concluded that ABI’s acquisition of Modelo would eliminate this constraint on ABI’s and MillerCoors’s ability to raise prices, and diminish ABI’s incentives to innovate with new brands, products, and packaging.

The Department alleged that the parties’ proposed sale of Modelo’s 50% stake in Crown was insufficient to remedy the anticompetitive aspects of the merger, concluding that the deal was designed to create a “facade of competition” between ABI and its importer. In reality, the

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7 *Id.*
9 *Id.* at ¶ 4-5.
10 *Id.* at ¶ 53.
11 *Id.* at ¶ 9.

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Department noted that the transaction would simply eliminate an aggressive competitor and replace it with an entity wholly dependent on ABI.12 Two weeks after the Department filed suit, ABI and Constellation announced a revised agreement pursuant to which ABI would completely divest Modelo’s U.S. business to Constellation in connection with the acquisition.13 The Department was more amenable to this remedy, and on April 19 the Department and ABI filed a proposed settlement with the court.

The settlement, which the court approved on April 22, contains a number of mechanisms designed to effectuate the divestiture of Modelo’s U.S. business and maintain competition in the U.S. beer industry. Foremost among its provisions, ABI is required to divest to Constellation Modelo’s interest in Crown, along with Modelo’s most advanced brewery and associated assets, and to grant Constellation a perpetual, assignable license to ten of the most popular Modelo beers for sale in the United States. The settlement requires ABI to license rather than divest the Modelo brands because ABI “retains the right to brew and market Modelo’s brands throughout the rest of the world,” but the licenses are designed to provide “all the rights and abilities [Constellation] needs to compete in the United States as Modelo did before the merger.”14 Additionally, Constellation is required to expand the acquired brewery in order to produce 20 million hectoliters of packaged beer annually by the end of 2016, which will allow Constellation to independently produce enough beer to replicate Modelo’s competitive role in the U.S.15

Conclusion

ABI’s willingness to divest Modelo’s U.S. business underscores what was perhaps the driving motivation for the transaction: the opportunity to secure a stronger position in the Mexican market, where beer constitutes 70% of the alcoholic beverage market, and where “[a] growing middle class, rising urbanization rates and increased consumer spending due to higher disposable incomes are expected to drive category growth.”16 Although ABI’s aspirations with its Modelo acquisition may be global, the Department’s decision to sue is a reminder that national considerations cannot be overlooked.

Indeed, the Department’s complaint serves as a reminder that local considerations must not be forgotten either: the complaint lists 26 local markets within the U.S. where the ABI-Modelo transaction would have allegedly substantially lessened competition.17 While a transaction’s effects on consumers in Minneapolis, MN or Raleigh, NC may strike merging parties as tertiary and overly-granular details in the context of a massive, globally-focused deal, DOJ made it clear that such considerations must be given adequate attention if U.S. clearance is to be expected—particularly if the agencies continue to strive for record-setting year-over-year enforcement metrics.

12 Id.
15 Id. at 12.
16 Supra n. 6.
17 Supra n. 8, Appendix A.
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By: Michelle Zolnoski

On March 4, 2013, the Eleventh Circuit in Sunbeam Television Corp. v. Nielsen Media Research, Inc. held that Sunbeam Television Corporation (“Sunbeam”), a customer of Nielsen Media Research, Inc. (“Nielsen”), lacked standing to assert antitrust claims under Section Two of the Sherman Act against Nielsen because Sunbeam failed to demonstrate that it was an “efficient enforcer of the antitrust laws.”¹ This was the first time the Eleventh Circuit addressed what is required of a customer-plaintiff to prove its standing as an efficient enforcer. The court held that, regardless of Sunbeam’s position as a customer of Nielsen, Sunbeam was required to “prove the existence of a competitor willing and able to enter the relevant market, but for the exclusionary conduct of [Nielsen]”, in order to establish antitrust standing.²

Background of the Dispute

Nielsen provides television audience rating services³ to, among others, “television broadcast stations, cable television operators, advertising agencies.”⁴ Nielsen does not dispute its monopoly power over the television ratings industry both nationally and for 210 local markets, including the Miami-Fort Lauderdale television market.⁵ Sunbeam operates the Fox-affiliated broadcast television station WSVN in Miami and has purchased ratings from Nielsen for over thirty years.⁶ The dispute arose from Nielsen’s introduction of new rating technology, the Local People Meter methodology (“LPM”),⁷ in the Miami-Fort Lauderdale market in 2008. Sunbeam alleged

¹ 711 F.3d 1264, 1273 (11th Cir. 2013).
² Id.
³ Nielsen translates the measurement of a television audience into ratings, which include the number of viewers and households and types of viewers watching a television station or program at a given time. Id. at 1267.
⁴ Id. at 1267 n.3.
⁶ Sunbeam, 711 F.3d at 1267.
⁷ The LPM method “combines an electronic meter, which tracks household viewership in general, with a remote control device . . . requir[ing] the individual household viewer to press unique identifying buttons on the handheld remote control provided with the meter. It enables Nielsen to determine which family member is viewing a particular television program at a particular time.” Id. at 1268.
that following the new rating system’s implementation, WSVN’s ratings immediately and drastically declined, resulting in loss of advertising revenue and a drop in its going-concern value. Further, Sunbeam claimed that the LPM Method is flawed and inferior to old rating methods and significantly understates actual viewership.\(^8\)

Sunbeam contended that it was Nielsen’s violations of the antitrust laws that enabled it to force the inferior LPM product and supracompetitive prices upon customers. Sunbeam alleged that but for Nielsen’s “exclusionary conduct in willful pursuit of remaining a monopolist” in violation of Section Two of the Sherman Act, “competitors likely would have entered or would enter the Relevant Market [the Miami-fort Lauderdale area].”\(^9\)

Although Sunbeam sufficiently pled the existence of potential television rating competitors,\(^10\) establishing an issue of fact for trial proved to be far more challenging. The district court granted partial summary judgment to Nielsen dismissing Sunbeam’s antitrust claims because Sunbeam failed to raise an issue of material fact regarding whether the potential competitors were willing and able to enter the television ratings market.\(^11\)

Two of the issues considered on appeal by the Eleventh Circuit were: (1) “Whether Sunbeam has standing to sue Nielsen under Section Two of the Sherman Act. . .” and (2) “Whether, to establish antitrust standing, Sunbeam, as one of Nielsen’s customers, must establish the existence of a willing and able competitor that would have entered the relevant market and competed with Nielsen, but for Nielsen’s exclusionary conduct.”\(^12\)

Proving Standing as an “Efficient Enforcer of the Antitrust Laws”

Section Four of the Clayton Act\(^13\) provides a private plaintiff with the right to sue for treble damages when injured by a violation of federal antitrust law, so long as the plaintiff can establish both standing and a violation. Standing to enforce federal antitrust laws “requires that a party must do more than meet the basic ‘case or controversy’ or ‘injury in fact’ required by Article III of the Constitution.”\(^14\) A private plaintiff must also meet threshold limits to federal antitrust standing.\(^15\) As explained in Sunbeam, the Eleventh Circuit employs a two-prong test when analyzing antitrust standing under Section Four of the Clayton Act, requiring the plaintiff to establish that: (1) it suffered an antitrust injury and (2) it is an “efficient enforcer” of the antitrust

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\(^8\) Id.
\(^9\) Id. at 1269; 15 U.S.C. § 2. For a list of Nielsen’s alleged exclusionary conduct, see Sunbeam, 711 F.3d at 1269 n.11. The lower court did not reach whether Sunbeam raised a triable issue of fact concerning the alleged exclusionary conduct.
\(^10\) Sunbeam, 711 F.3d at 1269. Sunbeam was instructed by the district court to establish in its second amended complaint that potential competitors existed who would have been, in absence of Nielsen’s exclusionary conduct, willing and able to supply a product superior to Nielsen’s. Thereafter, Sunbeam alleged that three potential competitors met the criteria: Arbitron, Inc., ADcom Information Services Company, and erinMedia, LLC. Id.
\(^11\) Id. at 1269-70.
\(^12\) Id. at 1270.
\(^14\) Sunbeam, 711 F.3d at 1270.

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laws. As the district court did not address Sunbeam’s alleged antitrust injury, the Eleventh Circuit only reviewed the “efficient enforcer” prong.

To determine whether a plaintiff is an efficient enforcer of the antitrust laws, among the prudential standing factors to be considered are the remoteness of the defendants conduct to the alleged injury and whether damages are highly speculative. The district court’s analysis of these factors “focused upon whether or not Sunbeam had demonstrated a causal relationship between the antitrust violation alleged and the antitrust injury sustained.”

At the crux of the appeal is what proof Sunbeam, as a customer of Nielsen, was required to proffer in order to demonstrate this causal relationship. Sunbeam argued that its burden should be less than the burden of a competitor-plaintiff.

Having never been confronted with the issue of what proof a customer must put forward to establish that it is an efficient enforcer, the Eleventh Circuit found persuasive the standard set forth by the D.C. Circuit in Meijer, Inc. v. Biovail, Corp., as adopted by the district court: Whether or not the plaintiff is a customer or a competitor, in order to meet the second prong [efficient enforcer of the antitrust laws], the plaintiff must prove the existence of a competitor willing and able to enter the relevant market, but for the exclusionary conduct of the incumbent monopolist.

To meet this burden of proof, Sunbeam was required to set forth evidence demonstrating that a potential competitor was prepared to enter the television ratings market, and had taken affirmative steps to do so. The court noted that the necessity of the preparedness requirement was particularly important in this case because it involved a “capital intensive” industry. Sunbeam was unable to demonstrate the preparedness requirement. The district court found that, out of the three potential competitors alleged by Sunbeam, the first lacked intent to enter the market, the second lacked the ability to enter by not obtaining necessary cooperation of cable companies, and there was no evidence from the third concerning whether it was willing or able to enter.

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16 See Sunbeam, 711 F.3d at 1271.
17 Id. at 1272.
18 711 F.3d at 1271 (citing Associated, 459 U.S. at 538-44).
19 Id. at 1272.
20 Id.
21 533 F.3d 857 (D.C. Cir. 2008).
22 Sunbeam, 711 F.3d at 1273. In Meijer, wholesale purchasers of a brand-name drug alleged that the drug’s manufacturer excluded a generic equivalent from entering the market by misusing its patent and engaging in sham litigation, in violation of Section Two of the Sherman Act. 533 F.3d at 859-61.
23 Sunbeam, 711 F.3d at 1273 (internal quotations omitted). Examples of affirmative steps include that the competitor: “prepared cash flow estimates and financial statements in order to determine the profitability of the expansion, had existing capabilities that would have allowed it to serve the market, took affirmative steps to obtain necessary government permits, etc.” Id. (internal quotations omitted).
24 Id.
25 Sunbeam, 763 F.Supp.2d at 1355-57. Likewise, in Meijer, the plaintiffs did not satisfy the preparedness requirement by failing to demonstrate that the generic drug manufacturer was able to enter the market because it was not clear that the Food and Drug Administration would have granted the manufacturer necessary approvals. 533 F.3d at 862-63.

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Agreeing with the district court’s analysis of the evidence proffered by Sunbeam, the Eleventh Circuit found that Sunbeam failed to raise a disputed issue of fact to survive summary judgment with regard to the existence of a competitor willing and able to enter the capital intensive television ratings market but for Nielsen’s exclusionary conduct. Thus, the Eleventh Circuit affirmed the district court’s holding that “Sunbeam lacked antitrust standing . . . as it failed to establish that it was an efficient enforcer of the antitrust laws.”

**Impact of Sunbeam**

*Sunbeam* will be instructive for future customers seeking to bring private monopolization claims. Even before the court can reach the merits of its antitrust claims, a customer must be in a position to prove that it is an efficient enforcer of the antitrust laws to meet the threshold antitrust standing requirements. This will require the customer to present testimony and other evidence from potential competitors of the alleged wrongdoer to establish the competitors’ intent and capability to enter the relevant market. As was the case in *Sunbeam*, this will be a difficult burden to meet, particularly in capital intensive industries.

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26 *Sunbeam*, 711 F.3d at 1273.
27 *Id.* at 1273-74.
I. Introduction

On March 27, 2013, the Supreme Court for the second time in three years issued an opinion that arguably will make it more difficult for parties seeking class-representative status under Federal Rule of Civil Procedure 23. In Comcast Corp. v. Behrend, the Supreme Court reaffirmed its prior precedent that district courts must undertake a “rigorous analysis” to ensure that a putative class meets each element of Rule 23. This “rigorous analysis,” the Court held, “will frequently entail ‘overlap with the merits of the plaintiff’s underlying claim.’” Id. at 6 (quoting Wal Mart Stores, Inc. v. Dukes, 564 U.S. ___ (2011), Slip. op. at 10). For companies facing class-action antitrust litigation, especially those who are up against well-funded plaintiffs’ firms with the resources to hire expert economists and produce sophisticated econometric damages models, the Comcast Court provides confirmation (and perhaps a certain degree of comfort) that an expert’s damages model that purports to calculate damages on a class-wide basis does not guarantee class certification.

II. Procedural History & Factual Background

The District Court certified a class of more than 2 million current and former Comcast subscribers in the Philadelphia area who were seeking damages for Comcast’s alleged violations of Section 2 of the Sherman Act. The plaintiffs alleged that Comcast’s anticompetitive conduct was twofold: (1) that Comcast had acquired its competition in the region, and (2) that Comcast had entered anticompetitive agreements to swap its own systems outside the region for competitor systems inside the region (a theory plaintiffs called “clustering”). According to the plaintiffs, Comcast’s dual strategy of acquiring competitors and swapping service areas eliminated competition, gave Comcast a 70% share of the market, and allowed Comcast to charge supra-competitive prices for cable television services.

Plaintiffs proposed four theories of harm at the class certification stage, but the district court accepted only one as being capable of class-wide proof: their “over-builder theory.” This impact theory posited that Comcast’s conduct “reduced the level of competition from ‘overbuilders,’ [i.e.,] companies that built competing cable networks in areas where an incumbent cable company already operates.” Id. at 3. In addition, the District Court “found that the damages resulting from overbuilder-deterrence impact could be calculated on a classwide basis.” Id. at 3.

To establish classwide damages, plaintiffs relied on their expert economist’s regression model, which compared actual cable prices in the Philadelphia market with hypothetical prices that would have prevailed but for Comcast’s allegedly anticompetitive activities. The District Court certified the class despite the plaintiffs’ expert’s acknowledgement during an evidentiary hearing that his model did not isolate damages resulting from any one theory of antitrust impact; instead, it calculated damages on an aggregate basis.

Comcast appealed to the Third Circuit arguing that the District Court erred in certifying the class because the plaintiff’s damages model “failed to attribute damages resulting from overbuilder deterrence, the only theory of injury remaining in the case.” 655 F.3d 182, 207 (3d Cir. 2011). The Third Circuit demurred on Comcast’s argument, stating that “such an ‘attac[k] on the merits of the methodology [had] no place in the class certification inquiry.’” Id. at 4 (quoting 655 F.3d 182, 207 (3d Cir. 2011). And in any event, plaintiffs were not required to “tie

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each theory of antitrust impact to an exact calculation of damages.” 655 F.3d 182, 206. Plaintiff must only “assure [the court] that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations.” 655 F.3d 182, 206. The Court of Appeals affirmed the District Court’s certification order, and Comcast filed a petition for writ of certiorari.

III. Supreme Court’s Opinion

Damages Models Must Be Consistent With Alleged Harmful Conduct

In an eagerly anticipated and closely watched decision, the Supreme Court reversed and held that the District Court erred in certifying the class. The Court held that “at the class-certification stage (as at trial), any model supporting a plaintiff’s damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation.” Id. at 7 (citation omitted). The lower courts erred because they “saw no need to for [plaintiffs] to ‘tie each theory of antitrust liability impact’ to a calculation of damages” because this type of analysis would address “merits” issues “having ‘no place in the class certification inquiry.’” Id. at 8 (citing 655 F.3d at 206-07). The lower courts’ refusal to consider these merits-based arguments “flatly contradicts” the Court’s precedents, which “require a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim.” Id. at 8. The Court made clear that plaintiffs must provide more than a method to measure and quantify damages on a classwide basis; they must show “whether the methodology is a just and reasonable inference or speculative.” Id.

The plaintiffs’ “but-for” damages model was deficient because it “failed to measure damages resulting from the particular antitrust injury on which defendant’s liability in this action is premised.” Id. at 8. The shortcoming was that the plaintiffs’ expert calculated the but-for figure “by assuming a market that contained none of the four distortions that [plaintiffs] attributed to [Comcast’s] actions. In other words, the model assumed the validity of all four theories of antitrust impact initially advanced by [plaintiffs].” Id. at 9. Indeed, price increases “caused by factors unrelated to an accepted theory of antitrust harm are not ‘anticompetitive.’” Id. at 11. The Court further pointed out that federal judges are educated on this very issue: “The first step in a damages study is the translation of the legal theory of the harmful event into an analysis of the economic impact of that event.” Id. at 11 (quoting Fed. Judicial Ctr., Reference Manual on Scientific Evidence 432 (3d ed. 2011) (emphasis in original). In the end, the Court found plaintiffs’ damages model insufficient to meet the predominance requirement because “of the model’s inability to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of over-building.” Id. at 10.

In light of the Court’s holding in Wal Mart—and now Comcast—a merits-based inquiry into the details of the plaintiff’s damages model is essentially required when a plaintiff advances a sophisticated model in attempt to show that a common methodology exists to calculate damages on a class-wide basis.

Dissent

Justices Ginsburg and Breyer, joined by Justices Kagan and Sotomayor, argued that the Court should have dismissed the writ of certiorari as improvidently granted. The crux of the dissenting justices’ argument was that the Court granted certiorari on an entirely different question; namely, whether a district court could certify a class without resolving whether the
plaintiff has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis. The parties spent much of their briefing addressing whether the standards for admissibility of expert evidence apply in class certification proceedings. According to the dissent, the majority was unfair to the plaintiffs because the plaintiffs “did not train their energies on defending the District Court’s finding of predominance in their briefing or at oral argument.” Dissenting Op. at 3 (“The Court’s newly revised question, focused on predominance, phrased only after briefing was done, left respondents without an unclouded opportunity to air the issue the Court today decides against them.”).

In any event, the dissenting justices were steadfast in their view that “the [majority’s] opinion breaks no new ground on the standard for certifying a class” and should not be read to “require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable on a class-wide basis.” Id. According to the dissent, it is “well nigh universal[ly]” recognized that “individual damages calculations do not preclude class certification.” Id.

IV. Comcast’s Effects on Class Action Litigation

As a result of the Court’s opinion, plaintiffs proceeding under Rule 23 must connect their damages model to their theory of harm. For those litigants currently involved in class action litigation—or those likely soon to be involved—the Court’s opinion may change the nature of the pre-trial litigation procedure. For example, plaintiffs may prefer not to bifurcate class and merits discovery; rather, to ensure that they have sufficient facts prior to moving to certify a class, plaintiffs may wish to conduct all discovery together. Along the same lines, plaintiffs may decide to wait until the close of discovery before moving to certify a class or even until the eve of trial as they scramble to cobble together enough evidence to match their theory of liability to their damages model. And now that courts are diving deeper into the merits at the class certification stage, it may not make practical sense for trial courts to hold a class certification hearing prior to trial. Perhaps it would make the most sense to hold the class certification hearing immediately after the liability trial but before the hearing on damages (assuming plaintiffs carry their burden of proof on liability).

On a different but related note, plaintiffs who are worried about matching multiple theories of liability to their damages model may be smart to narrow their theories of liability early in the case, which could streamline the discovery and class certification phases of the case. Or they may enlist the services of multiple experts who can craft reports on multiple theories of damages, hoping at least one model sticks. Regardless of their pre-trial litigation strategy, both plaintiffs and defendants will be thinking hard about how best to use Comcast to gain a procedural advantage over the other side.

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In biggest verdict of the year, Jury finds Dow Chemical Company Guilty of Price Fixing
By: Mohammad Huq
Dow Chemical’s loss in the Urethanes litigation leads to biggest verdict of the year

After eight years of litigation, a federal jury in Kansas ruled against Dow Chemical Company finding that they conspired with their competitors to fix urethane prices on February 21st, 2013. Urethane is an important precursor product used in a variety of industries like automotive, construction, appliance and furniture.1 The case initially began in 2004 in federal court in New Jersey but was transferred to the multidistrict docket in Kansas City. The defendants in the original complaint were Dow as well as four of their competitors: Huntsman International, Lyondell Chemical, BASF, and Bayer. All of the other defendants settled with the plaintiffs before the trial. Bayer was the first defendant to settle with the plaintiffs on October 17th, 2006.2 Both Huntsman International and Lyondell Chemical settled their cases in 2011, with their settlement agreements being approved by Judge Lungstrum at a fairness hearing on September 27th 2011.3 BASF settled last and their settlement with the plaintiffs approved on December 12th, 2011.4

Last year, Dow filed a motion seeking summary judgment on several grounds. Judge Lungstrum denied Dow’s motion for summary judgment on all the grounds on December 18th, 2012. The court found that there was enough direct and circumstantial evidence to create a reasonable inference of a conspiracy so that the plaintiff’s case could go to a jury. In rejecting Dow’s motion for summary judgment, the judge made particular mention of the testimony offered by Stephanie Barbour, Dow’s Global Business director for MDI [a urethane product].5 Ms. Barbour testified that she met with Marco Levi, Dow’s global TDI [another urethane product] manager, and their boss, David Fischer, and on more than ten occasions Mr. Levi mentioned that he had met with BASF and Bayer and agreed to set prices and make sure that price increases stuck.6 Ms. Barbour also described another incident where her counterpart at Bayer called and stated that, “I know that I’m not supposed to have these conversations with you, I’ve been told that you don’t have these conversations, but I just want to let you know we’re being good.”7

Judge Lungstrum also highlighted circumstantial evidence including evidence that throughout the period when a conspiracy was alleged, the defendants announced identical price increases simultaneously or within short period of time.8 Larry Stern, Bayer’s former head of

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6 Id.
7 Id.
8 Id. at 11.
9 Id. at 13.
polyurethanes, testified of conversations between himself and his counterparts at Dow, BASF, and Huntsman regarding future pricing, their companies’ intent to raise prices, and the need for competitors to support their price increases.\textsuperscript{10} There was also evidence given that related an incident where an executive from Bayer berated subordinates when they attempted to take business away from BASF, a competitor in the market.\textsuperscript{11}

In their motion for summary judgment, Dow also made the claim that any claims made before November 24\textsuperscript{th}, 2000 as there is a four year statute of limitations. The plaintiffs contended that the statute of limitations had not tolled because the defendants engaged in fraudulent concealment which extends the statute of limitations.\textsuperscript{12} In order to show fraudulent concealment, the plaintiffs had to prove (1) the use of fraudulent means by the conspirators; (2) successful concealment from plaintiffs; and (3) that plaintiffs did not know or by the exercise of due diligence could not have known that they might have had a cause of action.\textsuperscript{13} The decision noted that while there were three standards that had been used by the courts for determining the first prong of the test and decided to apply the intermediate “affirmative acts” standard. Under this standard, Judge Lungstrum decided that the plaintiffs had provided adequate evidence for this issue to be put to the jury.

The trial began on January 23\textsuperscript{rd}, 2013 and lasted four weeks. On February 19\textsuperscript{th}, David Bernick, an attorney for Dow Chemical argued in his closing arguments that “There’s a difference between a conversation and an agreement, this is key.”\textsuperscript{14} The attorney for the plaintiffs, Joseph Goldberg, responded that, “An agreement can be just a wink and a nod.”\textsuperscript{15} The jury agreed with Goldberg and found that Dow was part of a conspiracy and found for the plaintiffs in the amount of 400,049,039 dollars (USD) on February 21\textsuperscript{st}, 2013. The plaintiffs in the case had initially asked the court for a 1.125 billion dollars (USD) in damages and with treble damages, this ruling might end up costing Dow 1.2 billion dollars (USD). The jury rejected the plaintiffs’ claims before November 2000, likely because they were not swayed by the plaintiff’s submissions regarding fraudulent concealment. As a result, the statute of limitations had tolled for those claims.

The attorneys for Dow wasted little time filing motions to decertify the class and for judgment as a matter of law or in the alternative, for a new trial on March 6\textsuperscript{th}, 2013.\textsuperscript{16} They argued that there is no evidence to support the plaintiff’s claims of price-fixing in the market for urethane product prices that the class should be decertified as a class because they did not suffer the same injury, a requirement for “commonality.”\textsuperscript{17} In the court’s decision released on May 15\textsuperscript{th}, 2013, Judge Lungstrum rejected Dow’s argument to de-certify the class, reasoning

\textsuperscript{10} Id.
\textsuperscript{11} Id. at 15.
\textsuperscript{12} Id. at 21-22.
\textsuperscript{13} See Ballen v. Prudential Bache Securities, Inc., 23 F.3d 335, 336-37 (10th Cir. 1994).
\textsuperscript{15} Id.
\textsuperscript{17} Id.

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that even if there are parties who are not injured involved as plaintiffs. Furthermore, the judge rejected Dow's motion for judgment as a matter of law, stating that evidence was sufficient to support a finding of a price-fixing conspiracy involving Dow. Judge Nordstrom trebled the damages and ruled for damages in the amount of 1,200,147,117 dollars (USD). This is the largest verdict in the United States to date this year. However, Dow did earn a small victory in that the definition of the certified class was found in the decision to exclude purchases in 2004, which will presumably reduce Dow's liability.

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19 Id. at 10.