

### 3 Tips For Understanding Price-Fixing Conspiracy Liability

*Law360, New York (October 09, 2013, 6:23 PM ET)* -- Consider this scenario: In the wake of government indictments against participants of a long-running global conspiracy, purchasers of the price-fixed product bring a class action against all indicted manufacturers. Among these defendants is Company A, who, years after the conspiracy initially began, joined the unlawful cartel. In addition, Company A attempted to withdraw from the conspiracy before it ended. While Company A never formally voiced its withdrawal to its fellow co-conspirators, it stopped responding to conspiratorial communications and recommenced competitively pricing its products.



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Given Company A's minimal participation in the conspiracy, it is shocked to learn from its counsel that it may be subject to millions of dollars in liability. However, if Company A had been given proper antitrust compliance counseling, it would have already known that under the federal antitrust laws, members of a price-fixing conspiracy are jointly and severally liable for all acts in furtherance of the conspiracy, including the independent acts of co-conspirators.

Moreover, it is highly likely that Company A is liable for the damages caused by the conspiracy prior to its entry, and for those that occurred after it decided to leave. Antitrust lawyers never want to get a call from a client in Company A's predicament. To avoid this scenario, antitrust counsel should always advise their clients of the following essential tips in their antitrust compliance programs.

#### **Tip 1: A Defendant That Joins an Ongoing Price-Fixing Conspiracy Is Generally Liable for Damages Caused by Prior Bad Acts of the Conspiracy**

Courts find that where a defendant joins an ongoing price-fixing conspiracy knowing of the conspiracy's past illegal conduct, and intending to pursue the same anti-competitive objectives, that defendant is jointly and severally liable for all damages that arose during the full duration of the conspiracy. This includes damages caused by the conspiracy prior to the defendant's participation in the unlawful conduct.

In *In re Polyurethane Foam Antitrust Litigation*, for example, class plaintiffs alleged that the defendants fixed the prices for polyurethane foam sold in the United States from 1999 to 2011.[1] Defendant foam manufacturer FXI Innovations, which was incorporated in May of 2009, purchased in July of that same year the assets of Foamex International Inc., a foam manufacturer that was then a debtor in bankruptcy under Chapter 11 of the United States Bankruptcy Code.

The bankruptcy court approved the asset sale and ordered that FXI would have no successor or vicarious liabilities of any kind, including antitrust liability, for Foamex's past acts. As a result, FXI argued that the asset sale eliminated its responsibility in the class action for any antitrust liability attributable to Foamex. The Polyurethane Foam court disagreed about the need to reach FXI's argument because the plaintiffs' complaints identified senior FXI personnel that engaged in conspiratorial discussions during the class period, both before and after the asset sale.

The court explained, "[b]ecause the Complaints allege FXI participated in the conspiracy after the asset sale, a fundamental tenant of conspiracy law that holds one participating conspirator jointly liable for all his co-conspirators' prior acts renders immaterial any alleviation of antitrust liability resulting from the asset sale." [2] Thus, FXI's participation in the conspiracy after the asset sale meant it was liable for both its own actions in furtherance of the conspiracy prior to the asset sale, and all related prior acts of its co-conspirators.

## **Tip 2: A Defendant That Attempts To Withdraw From an Ongoing Conspiracy Must Take Unambiguous Affirmative Steps To Avoid Further Liability**

For a defendant to sufficiently prove withdrawal — and thus avoid liability for damages caused by the bad acts of the conspiracy after it leaves — it must show affirmative, unequivocal communication to co-conspirators renouncing, or withdrawing from, the conspiracy. Importantly, merely exiting the industry, or reporting the conspiracy to the government alone, may not be enough to effectively communicate withdrawal.

For example, in *In re Marine Hose Antitrust Litigation*, an action alleging a conspiracy to fix the prices of rubber marine hose, certain defendants argued, among other things, that their decision to sell the subsidiary involved in the marine hose business and exit the industry over a decade earlier was akin to an affirmative withdrawal from the conspiracy, and therefore commenced the running of the statute of limitations as of the date of the subsidiary's sale.[3] The court rejected the defendants' argument and denied their motion to dismiss on statute of limitations grounds.[4] Thus, even where a company exits the relevant industry, that fact may not be sufficient proof of an effective withdrawal from a price-fixing conspiracy.[5]

Meanwhile, in *In re TFT-LCD (Flat Panel) Antitrust Litigation*, an action alleging a global price-fixing conspiracy in the liquid-crystal display panel market, the court denied a defendant's partial summary judgment motion on the issue of withdrawal, despite the defendant's argument that it effectively

withdrew upon reporting the cartel to the government.[6]

While acknowledging that reporting an illegal conspiracy to the government can be a means of withdrawal, the LCD court found the defendant's evidence — (1) a letter from the government stating when the defendant reported the conspiracy, (2) the government's subsequent instructions to limit knowledge of its investigation and the defendant's cooperation with its investigation to a small number of senior employees, (3) a declaration from an executive of the defendant stating the company's adherence to the government's request, and (4) the defendant's affirmance that, after self-reporting, it did not enter into (further) price-fixing agreements — insufficient to meet the summary judgment standard.

In reaching its decision, the court noted that the plaintiffs had produced evidence showing the defendant's business behavior did not change following its purported withdrawal, and the evidence the defendant provided did not confirm its assertion that it was only acting on the government's instruction.[7]

Additionally, earlier this year the U.S. Supreme Court handed down its decision in *Smith v. United States*, a criminal narcotics case with implications for antitrust conspiracy actions.[8] While primarily resolving a circuit split as to the burden of proof (in the criminal context) with respect to a statute of limitations defense premised on withdrawal from an illegal conspiracy, *Smith* also affirms the necessity of unambiguous, affirmative action to demonstrate withdrawal. The Supreme Court explained:

Passive nonparticipation in the continuing scheme is not enough to sever the meeting of minds that constitutes the conspiracy. To avert a continuing criminality there must be affirmative action . . . to disavow or defeat the purpose of the conspiracy.[9]

These cases amply demonstrate that unambiguous affirmative action is necessary to demonstrate withdrawal from a conspiracy to avoid further liability under the antitrust laws.

### **Tip 3: A Defendant May Be Able To Limit Its Co-Conspirator Liability by Participating in the Government's Leniency Program**

One way in which a price-fixing defendant may attempt to curb its liability is through participation in the Antitrust Criminal Penalty Enhancement and Reform Act of 2004.[10] ACPERA provides potential leniency applicants, in exchange for their cooperation with the government and civil plaintiffs, elimination from joint and several liability and from treble damages. As such, an ACPERA participant can limit its liability to damages actually attributable to it. The cooperation obligations are vague, however, and the adequacy of a defendant's cooperation is to be adjudicated by the court, which means that ACPERA participants are not absolutely guaranteed reduced liability.[11]

### **Conclusion**

Company A obviously made a poor decision when it decided to join the price-fixing conspiracy. But Company A's mistaken belief that it had effectively withdrawn from the conspiracy only compounded its problems. By stressing these three essential pieces of advice in your antitrust compliance program, you

can help protect your clients from landing in Company A's shoes.

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[1] 799 F. Supp. 2d 777 (N.D. Ohio 2011).

[2] *Id.* at 800.

[3] For antitrust violations, the statute of limitations – the period of time in which plaintiffs can bring claims – is four years after the illegal conduct occurred. See Section 4(b) of the Clayton Act, 15 U.S.C. § 15b.

[4] Order on Motions to Dismiss Second Amended Class Action Complaint at 12, No. 08-md-01888 (S.D. Fla. May 26, 2009). The court went on to note that that the plaintiff alleged a continuing conspiracy and as such the statute of limitations began anew with each sale of marine hose. When a plaintiff successfully alleges a continuing conspiracy, a defendant is still liable for the acts of co-conspirators even after its withdrawal, as long as the plaintiff files its complaint during the limitations period.

[5] It should be emphasized that for purposes of determining when the statute of limitations begins to run as to a particular defendant, the question of when and whether a defendant withdrew from the conspiracy is not the end of the inquiry. In *Morton's Market, Inc. v. Gustafson's Dairy, Inc.* the Eleventh Circuit clarified that a defendant who withdraws from an antitrust conspiracy does not escape liability for its wrongful acts when “the statute [of limitations] was equitably tolled by fraudulent concealment,” regardless of how much time has passed between that withdrawal and commencement of the suit in question. 211 F.3d 1224 (11th Cir. 1999) (emphasis omitted). Accordingly, where plaintiffs can adequately satisfy the elements of fraudulent conspiracy, a defendant’s withdrawal from the conspiracy will not start the running of the statute of limitations.

[6] 820 F. Supp. 2d 1055 (N.D. Cal. 2011).

[7] *Id.* at 1061.

[8] 568 U.S. \_\_\_, 133 S.Ct. 714 (2013).

[9] *Id.* at 720 (quotation marks omitted).

[10] Pub. L. No. 108-237, 118 Stat. 661, 665 (June 22, 2004), amended by Pub. L. No. 1111-190, 124 Stat. 1275, 1276 (June 9, 2010).

[11] See, e.g., *In re Aftermarket Auto. Lighting Prods. Antitrust Litig.*, No. 09 MDL 2007-GW(PJWx), 2013 U.S. Dist. LEXIS 125287 (C.D. Cal. Aug. 26, 2013) (finding defendants not entitled to the damages-limiting

benefits of ACPERA because they did not disclose all relevant information to civil class action plaintiffs in a timely fashion).

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