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The Quick Look

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END PAYOR AND DIRECT PURCHASER SECTION 1 CLAIMS SURVIVE DISMISSAL IN MDL ALLEGING ILLEGAL REVERSE PAYMENT SCHEME INVOLVING GENERAL CALCIUM CONTROL DRUGS

In a case alleging pharmaceutical manufacturers engaged in a reverse payment scheme by failing to collect sufficient damages involving a patent on Sensipar, a drug used to treat secondary hperparathyroidim and hypercalcemia, Judge Leonard P. Stark of the United States District Court for the District of Delaware has allowed Section 1 claims to go forward following Defendants' motions to dismiss. Purported classes of direct purchaser plaintiffs ("DPPs") and end payor plaintiffs ("EPPs") brought suit against defendants Amgen, Inc. ("Amgen") and Teva Pharmaceuticals USA ("Teva").

The case involves generic entry for Sensipar (cinacalcet). Plaintiffs allege that Amgen, which markets Sensipar, faced generic challenges to its patent from more than 20 manufacturers. Amgen brought a series of patent infringement lawsuits against these filers, and beginning in September 2017, it settled most of these suits. The settling defendants promised not to launch

prior to specified dates, which varied among the defendants but were prior to patent expiration. Settlements included an "acceleration clause" that would allow the settling generic manufacturer to enter if another generic manufacturer entered without authorization from Amgen. In March 2018, lawsuits against four generic manufacturers that did not settle went to trial, with the Court ultimately finding the generic applications of three of the four manufacturers did not infringe any of the asserted claims. While appeals were pending, Teva, which owned one of the prevailing applications, launched its product at risk, i.e., prior to the resolution of patent litigation. It made sales of $393 million and earned approximately $213 million in profit. In less than a week, Teva entered into a settlement with Amgen, under which it would immediately cease further sales of its generic cinacalcet product and not resume sales until June 30, 2021, five years prior to patent expiration, but otherwise the same as seven other generic manufacturers. Teva was not required to remove the product it had distributed from the market, but was required to pay Amgen up to $40 million.

DPPs and EPPs alleged a reverse payment (*see FTC v. Actavis, Inc.*, 570 U.S. 136 (2013)) under Section 1 of the Sherman Act. The case is novel in that the "large and unjustified" reverse payment was centered around the failure to collect greater damages from Teva's at-risk generic launch of the product at issue. Notably, to the extent there was no perceived risk of Teva losing the patent litigation, it received nothing of value as it would not have otherwise paid any damages. The district court allowed this theory to proceed along with certain state law claims. Judge Stark dismissed theories that the acceleration clauses were anticompetitive market allocations with other generic manufacturers under Section 1 or were attempts at monopolization under Section 2, largely based on case-specific facts. Finally, the court explicitly recognized that the parties' beliefs as to the strength of the patent may have differed, potentially posing a problem for some of the economic models on reverse payments that assume a single shared belief. *See, e,g.,* Soheil Ghili & Matt Schmitt, *A Framework for Estimating Damages in Reverse Payment Cases,* 81 ANTITRUST L.J. 873, 886 (2017).

$264M SETTLEMENT OVER CLAIMS OF COLLUSION BETWEEN MYLAN AND PFIZER OVER GENERIC EPIPENS RECEIVES PRELIMINARY APPROVAL

A Kansas federal court has preliminarily approved a settlement over claims of collusion between Mylan and Pfizer over generic EpiPens. The parties, engaged in litigation since 2016, sought $1 billion in damages contesting the market monopoly over the Epipen Auto Injector devices. The plaintiffs alleged that Mylan and Pfizer had entered into an unlawful "pay-for-delay" settlement with Teva that resulted in the delayed release of a generic version of the EpiPen, allowing Mylan to raise prices without fear of competition.

The plaintiffs alleged that Mylan as part of a "quid pro quo" agreed to similarly settle unrelated patent litigation involving a brand name drug Teva produced and delay the release of Mylan's proposed generic version of that medication. Mylan and Pfizer denied wrongdoing. The recently-approved $246M settlement is in addition to a settlement that was reached between Plaintiffs and Pfizer last June for $345M.

PLAINTIFFS CHALLENGING AMAZON'S FAIR PRICING PROVISIONS PERMITTED LEAVE TO AMEND

On March 11, 2022, Judge Richard A. Jones of the Western District of Washington granted in part and denied in part Amazon's motion to dismiss a suit alleging that it effectively prohibits third-party retailers from offering lower prices on other sites. Plaintiffs, a putative class of buyers of products from third-party retailers, claimed that Amazon continued to impose a pricing policy prohibiting retailers from offering better rates and terms than those offered through Amazon despite withdrawing pricing parity contract language in March 2019. Amazon, in moving to dismiss, argued that the putative class of consumers lacked standing and failed to state a claim, and the policies were procompetitive and encouraged low prices. *See Frame-Wilson, et al. v. Amazon.com, Inc.* Case No. 2:20-cv-00424 (W.D. Wash. 2020)

First, the court found that Plaintiffs had standing on the basis that online sellers become co-conspirators of alleged price-fixing conspiracy by virtue of their agreement with Amazon to sell products on third-party sites at allegedly supracompetitive prices. The court confirmed that "a conspiracy to monopolize may exist even where one of the conspirators participates involuntarily or under coercion," and thus standing can be established as a direct purchaser of an alleged antitrust co-conspirator.

Second, the court rejected Plaintiffs' claim that the pricing provision at issue constituted a *per se* violation of Section 1 based on the horizontal agreement between Amazon and third-party sellers on the Amazon platform. The court found that the agreement at issue connotes a vertical relationship "where Amazon is not competing with third-party sellers, but rather setting requirements as a condition of platform access." As such, Plaintiffs failed to plausibly allege a *per se* violation based on a horizontal agreement between Amazon and the third-party sellers.

Third, the court addressed Amazon's assertion that Plaintiffs' Section 1 rule of reason and Section 2 claims both fail because Plaintiffs did not properly define relevant antitrust markets or allege plausible anticompetitive harm. Regarding market definition, Plaintiffs alleged that the retail ecommerce market is a "publicly recognized … distinct market within the U.S. retail market by government agencies, economists, customers, and retailers," and the "U.S. Census Bureau and the Bureau of Labor Statistics both track and analyze the ecommerce industry group." The court found these facts sufficient to support a distinction between the ecommerce retail market and the physical market. The court did not make a finding on the validity of the market, noting that it is a factual question inappropriate to resolve on the pleadings.

On the claim of anticompetitive conduct, Amazon argued that best price policies that encourage low prices from third-party sellers have not been found to violate the Sherman Act. While the court agreed that certain most-favored nations and best price provisions do not run afoul of the Sherman Act, it found that the policies here are distinct as Amazon's policy does not "simply require that sellers sell their products on Amazon.com for a price equal to or lower than the price they sell the same products on other platforms," but instead "requires sellers to add Amazon's fees to the cost of their products when they sell them on all external platforms." Thus, the court found that such provisions suppress competition from sellers on external platforms.

Finally, Amazon argued that Plaintiffs did not plausibly allege antitrust injury or that the policies harmed the process of competition or consumer welfare. Plaintiffs stated that they had been injured and would continue to be injured by paying more for class products that they would pay in the absence of Amazon's pricing policy. The court concluded that Plaintiffs adequately pled antitrust injury and plausibly stated claims under Section 1 and Section 2 sufficient to survive a motion to dismiss.

Plaintiffs also asserted state law claims and unjust enrichment claims. The court dismissed Plaintiffs' claims in several states where they did not reside for lack of standing, and dismissed other state laws claims for failure to sufficiently alleged facts establishing the elements of those claims. The court also dismissed Plaintiffs' unjust enrichment claim for failure to sufficiently allege that they conferred a benefit or enriched Amazon. The court granted leave to amend the complaint.

SECOND CIRCUIT AFFIRMS DISMISSAL OF SUIT ALLEGING CONSPIRACY AMONG VOLKSWAGEN, DAIMLER, AND BMW TO COORDINATE ON COSTS, SUPPLIES AND VEHICLE TECHNOLOGY

On March 15, 2022, the Second Circuit affirmed the dismissal of a putative class action suit brought by investors alleging that Volkswagen AG covered up a decades-long conspiracy with Daimler AG and BMW AG to suppress competition by coordinating costs, supplies, and vehicle technologies that had resulted in inflated prices for Volkswagen-sponsored American depositary receipts. U.S. District Judge Dora L. Irzarry had dismissed the claims on the grounds that the Plaintiffs failed to adequately allege that Volkswagen engaged in any unlawful conduct, "even

identify a single antitrust law" that Volkswagen violated, or plead with particularity how Volkswagen's conduct violated said laws. *See Mucha v. Volkswagen Aktiengesellschaft*, Case No. 21-1511 (2d Cir. 2021).

On appeal, Plaintiffs took issue with Judge Irzarry's finding that the plaintiffs had failed to "identify any specific laws or [] plead with particularity how Volkswagen's conducted violated those laws," contending that they had sufficiently alleged the basic elements of a claim. In last Tuesday's decision, the Second Circuit held that the amended complaint did not sufficiently allege a material misstatement or omission against Volkswagen AG, board members, or the former CEO and that the claims lacked the necessary detail about the purported collusive conduct. In the decision, the panel noted that the amended complaint repeatedly alleges that Volkswagen's "illegal collusive activities' rendered the challenged statements false or misleading," but did not set forth how defendants conduct was unlawful or the manner in which the alleged unlawful conduct occurred. For example, Plaintiffs alleged that Volkswagen was engaged in "anticompetitive" conduct but did not plead sufficient facts describing the elements of the underlying antitrust conspiracy, or the presence of a contract in restraint of trade. The panel also found no basis to remand the suit to permit the Plaintiffs to amend once again.

IN NEW ARTICLE, HERBERT HOVENKAMP MAKES THE CASE FOR INTEROPERABILITY AS OPPOSED TO STRUCTURAL REMEDIES FOR ANTITRUST VIOLATIONS IN DIGITAL MARKETS WITH NETWORK EFFECTS

In a new working paper titled "Antitrust Interoperability", Professor Herbert Hovenkamp advances the case for the use of compelled interoperability as a more meaningful remedy to address competition issues arising with digital platforms. Compared to traditional structural remedies, which would require divestiture or the spin-off of assets, Hovekamp argues that compelled interoperability would allow digital platforms and other firms operating in industries subject to network effects to maintain the benefits of their scale, which is critical to the value of the products and services they provide, while also addressing any anticompetitive effects stemming from exclusionary practices.

In particular, Hovenkamp argues that interoperability as an antitrust remedy could be a particularly effective way to address exclusionary practices such as anticompetitive acquisitions by dominant firms that operate digital platforms. He posits two kinds of interoperability remedies – "dynamic" and "static" interoperability. Dynamic interoperability would entail real-time portability of data and other assets to mitigate the significant entry barriers created and reinforced by the network effects of a platform's significant membership. Static interoperability would entail requiring a dominant firm or platform to allow its users to port their data to other firms or platforms.

Hovenkamp recognizes the potential administrability issues raised by interoperable remedies, but nevertheless they do present a more nuanced approach to addressing potential anticompetitive issues with dominant platforms, all while preserving the network effects that also generate considerable consumer value.

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*The views expressed in The Quick Look reflect those of the authors, and are not necessarily those of the American Bar Association, the Section of Antitrust Law, or the Joint conduct Committee. Mr. Ruparel did not contribute to articles on Amazon, Volkswagon, or EpiPen.
