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The Bulletin is a quarterly newsletter by Kessler Topaz Meltzer & Check to help institutional investors stay

FULLY INFORMED

HIGHLIGHTS

KESSLERTOPAZ MELTZERCHECK LLP

THE GENERIC DRUG PRICE-FIXING SCANDAL: RECENT DEVELOPMENTS IN THE FEDERAL AND STATE INVESTIGATIONS AND PARALLEL CIVIL LITIGATION

Matthew L. Mustokoff, Esquire, Joshua A. Materese, Esquire, Jonathan F. Neumann, Esquire, and Evan Hoey, Esquire

The importance of generic drugs to the U.S. healthcare system cannot be overstated. Generic drugs have long been referred to as one of the few "bargains" in the U.S. healthcare system, and historically, have played a critical role in containing overall healthcare costs. In the early part of the last decade, prices for dozens of generic drugs rose or remained at suspiciously high levels, triggering alarm bells for lawmakers and regulators. In response, the U.S. Department of Justice ("DOJ") and a coalition of attorneys general from nearly every state launched investigations that have since laid bare a well-coordinated and long-running scheme to fix prices, rig bids for supplier contracts, and secretly allocate the market for scores of generic drugs.

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PITFALLS OF RELYING ON MANY THIRD PARTY SERVICE PROVIDERS IN NON-US LITIGATION

Emily N. Christiansen, Esquire

Many third party claims filing service providers offer services to clients for shareholder litigation outside the U.S. where an investor is required to opt-in to participate at the inception of the litigation. These services are not quite what they purport to be and investors should be careful in assuming that they are fully covered when they rely on a third party claims filing service provider to assist them with evaluating and joining actions outside the U.S.

As you may know, Kessler Topaz provides claims filing and portfolio monitoring services for clients. We realize that this article may, at first glance, seem self-serving and like a mere sales pitch for our services. While we think our portfolio monitoring and claims filing services are among the best, our intention in writing this

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THE DELAWARE SUPREME COURT REINSTATES CLAIMS OF FORMER TOWERS WATSON STOCKHOLDERS

Stacey A. Greenspan, Esquire

On June 30, 2020, Kessler Topaz convinced the Delaware Supreme Court to reinstate stockholders' claims for breaches of fiduciary duty in connection with the 2016 merger ("Merger") of Towers Watson & Co. ("Towers") and Willis Group Holdings plc ("Willis") to form Willis Towers Watson plc ("Willis Towers Watson").[1] Kessler Topaz's plaintiff, City of Fort Myers General Employees' Pension Fund, on behalf of a class of former Towers investors, challenged the Merger as unfair. Plaintiff alleged that Towers' former Chairman and CEO John Haley breached his duty of loyalty by engineering the Merger to secure a highly-lucrative pay package as Willis Towers Watson's CEO that Willis' significant stockholder ValueAct Capital Management, L.P. ("ValueAct") and its CEO Jeffrey Ubben secretly promised him.

Specifically, plaintiff alleged that in late 2014, ValueAct, then a 10% owner of Willis, and Ubben, who sat on Willis' board, were pushing Willis to consider strategic alternatives. ValueAct's investment in Willis was beyond its average investment horizon and below ValueAct's average internal rate of return, and ValueAct was looking for ways to salvage its flagging Willis investment before selling it. ValueAct correctly identified the Merger as an alternative to boost Willis' value. Unlike Willis which had posted flat earnings in the years following the 2008 financial crisis and was highly leveraged, Towers had performed exceptionally since its 2010 formation and had very little debt. Accordingly, at ValueAct's and Ubben's urging, Willis' CEO Dominic Casserley was negotiating the Merger with Haley by January 2015.

After months of negotiations, in May 2015, Haley proposed to Willis that Towers' stockholders own a majority of the post-Merger entity. Haley, however, reversed his position and agreed that Willis stockholders could own a majority of Willis Towers Watson after Willis agreed that Haley would be CEO of the post-Merger entity. Haley instead proposed that Towers' stockholders receive a pre-Merger special dividend to bridge the gap in *pro forma* ownership, as Towers would be contributing $1 billion more in market capitalization to Willis Towers Watson than Willis. Ultimately, on June 29, 2015, Towers' and Willis' boards approved the Merger on terms that would have Towers' stockholders receiving a value of $125.13 per Towers share — a 9% discount to Towers' unaffected trading price.

The Merger was announced on June 30, 2015 to terrible reviews from Towers' stockholders. By the end of trading on June 30, Towers stock price dropped 9%; Towers' investors were expressing reluctance to approve the Merger; and analysts observed that the Merger was a boon to Willis and bad for Towers. In contrast, the trading price for Willis stock soared. ValueAct's plan to boost the value of its Willis investment had therefore worked, but was threatened by the risk that Towers' stockholders would not approve the deal.

To mitigate the risk that the Merger would fail, ValueAct and Ubben bought Haley's fealty, as they knew they needed his unwavering support to push the Merger through. Indeed, analysts observed that although the Merger appeared unfair to Towers' stockholders, investors might be won over by Haley given his track record integrating complicated acquisitions. Accordingly, in September 2015, ValueAct and Ubben secretly met with Haley and offered him a massive compensation package under which he could earn as Willis Towers Watson's CEO ***up to five times*** what he made at Towers (the "Proposal"). Plaintiff alleged that ValueAct and Ubben used the Proposal to induce Haley to use his maximum best efforts to convince reluctant stockholders to approve the Merger, or, if the Merger had to be re-negotiated, to do so at the lowest cost to Willis and ValueAct.

In November 2015, despite Haley's and ValueAct's efforts to sway Towers' stockholders to approve the deal, the Merger was facing sure defeat by Towers' stockholders. Haley and Ubben therefore renegotiated the Merger price for what Haley admitted during sworn testimony in a related appraisal action was the "minimum bump" necessary to secure Towers' stockholder approval — an additional $5 per Towers share — which was still a 7% discount to Towers' stock trading price prior to the Merger's announcement. It was only through Haley's and ValueAct's significant lobbying of Towers' stockholders that the renegotiated Merger was narrowly approved by Towers' stockholders.

Significantly, Haley never disclosed the Proposal to Towers' board, nor to Towers stockholders when they voted to approve it.

In 2018, after the secret Proposal was publicly disclosed in unrelated litigation, a former Towers' stockholder discovered and made the Proposal public during an appraisal proceeding, plaintiff filed a complaint in the Delaware Court of Chancery, alleging that Haley breached his duty of loyalty by (1) failing to disclose the Proposal to Towers' board and stockholders and (2) selling out Towers' stockholders during the Merger renegotiations to secure the massive Proposal that ValueAct and Ubben had promised him.[2] Plaintiff also alleged that

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[1] *See City of Ft. Myers Gen. Emps.' Pension Fund v. Haley*, 2020 WL 3529586 (Del. June 30, 2020).

[2] *See City of Ft. Myers Gen. Emps.' Pension Fund v. Haley, et al.*, Consol. C.A. No. 2018-0132-KSJM (Del. Ch.).

KTMC INVESTIGATES WHETHER WAYFAIR INC. INSIDERS TOOK ADVANTAGE OF ECONOMIC UNCERTAINTY CAUSED BY COVID-19

Matthew Benedict, Esquire

The arrival of the COVID-19 epidemic in North America late this winter took the global economy by surprise. The lack of information about the virus and its increasingly rapid spread beyond mainland China caused investors to panic. In the last week of February, when the first cases of community transmission in the United States, United Kingdom, Germany, and numerous other European and American nations were reported, global stock markets suffered their largest single-week decline in over a decade. By mid-March, more than a third of the global population was under strict quarantine. Continued uncertainty regarding the duration and effectiveness of a vast array of differing governmental responses triggered a series of record-setting drops in the Dow Jones Industrial Average. Brief one-day rallies were followed suddenly by even greater declines.

While such volatility had not been experienced since the Great Depression, it was unprecedented in its brevity. After reaching its nadir on March 23, the global stock market began a sharp and steady recovery. On August 18, the S&P 500 eclipsed the record high it had set six months earlier, making it official: the 2020 bear market was the shortest in the index's history.

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PENDING THIRD CIRCUIT APPEAL ON EQUITABLE TOLLING IMPLICATES CLASS MEMBERS' ABILITY TO BRING INDIVIDUAL ACTIONS

Ryan T. Degnan, Esquire and Karissa J. Sauder, Esquire

The Third Circuit is slated to hear argument in *Aly v. Valeant Pharmaceuticals International, Inc.*, No. 19-3326, which presents the issue whether, under *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974), the filing of a class action tolls the statute of limitations for putative class members who choose to file individual actions ***before*** a ruling on class certification. The Second, Ninth, and Tenth Circuits have already decided this issue and have concluded that class members are protected under *American Pipe* regardless of whether they opt out before or after a ruling on class certification. The Sixth Circuit reached the opposite conclusion, but relied on a subsequently reversed district court opinion. The Third Circuit's pending decision has important implications for the rights of class members seeking to opt out of class actions and bring individual claims without waiting — potentially years — for the resolution of class certification, and could implicate statutes of repose, which, unlike statutes of limitations, are not tolled under *American Pipe*.

American Pipe Establishes Equitable Tolling for Putative Class Members

Generally speaking, statutes of limitations set a time limit on how long plaintiffs can wait to bring suit after discovering (or after they should have discovered) that they have claims. In *American Pipe*, the Supreme Court of the United States established that the timely filing of a class action tolls the applicable statute of limitations for all members of the purported class. Specifically, the Supreme Court held that the "commencement of the original class suit tolls the running of the statute [of limitations] for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status."[1]

The Supreme Court later clarified that *American Pipe*'s equitable tolling rule is not dependent on intervening in or joining an existing suit, but applies, as well, to putative class members who, after denial of class certification, "prefer to bring an individual suit rather than intervene . . . once the economies of a class action [are] no longer available."[2] That is, the statute of limitations is also tolled for putative class members who file individual actions after class certification is denied. The Supreme Court has further suggested that *American Pipe* tolling applies not only to cases where class certification is denied, but also to cases where a class is certified.[3]

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[1] 414 U.S. at 553.

[2] *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983).

[3] *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974) ("Petitioner also argues that class members will not opt out because the statute of limitations has long since run out on the claims of all class members other than petitioner. This contention is disposed of by our recent decision in *American Pipe*.").

Institutional Investor

KESSLER TOPAZ MELTZER CHECK LLP

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Litigation & Governance Trends for Asset Management Firms

SPECIAL GUEST

Chuck Todd

NBC News Political Director and Moderator of Meet the Press and MTP Daily

When is taking action appropriate for your firm and your clients?

As old standards and norms change and new trends and priorities emerge, active investors have a lot to worry about at both the macro and the firm levels. From the fiduciary, legal and investment ramifications of climate change to firm-specific concerns of privacy and data as well as the altered role of the legal team within the decision-making structure from increasing privacy concern to climate change and from cryptocurrency to power shifts within the company, times they are a-changing. And one of those changes is the way an increasing number and diversity of asset management firms are approaching their obligations when it comes to protecting and recovering assets, and integral to this process is the question of when and how to get involved when the need arises.

This year's Litigation & Governance Trends program is going to focus more on the how than the why, reflecting the growing acknowledgement of the value and efficacy of appropriate shareholder litigation and next-generation corporate governance efforts. This day and half event is the third event in a three-part annual global series focusing exclusively on the needs of legal and compliance teams at global asset management firms through the lens of active engagement, shareholder actions, and affirmative litigation.

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Registration is COMPLIMENTARY for qualified delegates

FIRST CIRCUIT UPHOLDS ABILITY OF SECURITIES CLASSES TO ADD NAMED PLAINTIFFS

Geoffrey C. Jarvis, Esquire and Raphael Janove, Esquire

There is a split among the Federal Courts of Appeals as to whether a plaintiff in a class action whose claims have been dismissed for lack of standing can be permitted to amend the operative complaint to add a new plaintiff who would satisfy the standing requirements. The Fifth and Ninth Circuits have concluded that any further action by such a plaintiff, including curative amendments, would be improper,[1] while the Second Circuit, relying on the liberal amendment[2] polices embodied in Rule 15 of the Federal Rules of Civil Procedure, has permitted such amendments. A recent, well-reasoned decision from the First Circuit explicitly addressed the existing circuit split and held that a plaintiff in a securities class action does have the ability to use Rule 15 to add named plaintiffs to cure standing issues.[3]

On August 25, 2020, the First Circuit in *Yan v. ReWalk Robotics Ltd,* while affirming the dismissal of a proposed securities class action alleging Securities and Exchange Act violations, nonetheless rejected a holding by the district court that a plaintiff who has been found to lack standing was precluded from taking any further action in the case — including seeking amendment to cure the standing issue.[4] The district court had found that statements in documents supporting an initial public offering were not actionably false, requiring dismissal of the Securities Act claims. It then dismissed the Exchange Act claims on standing grounds because the lead plaintiff purchased shares

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[1] *See Summit Office Park, Inc. v. U.S. Steel Corp.*, 639 F.2d 1278, 1282 (5th Cir. 1981); *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1023 (9th Cir. 2003).

[2] *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 13 (2d Cir. 1997).

[3] *Yan v. ReWalk Robotics Ltd,* --- F.3d ---, No. 19-1614, 2020 WL 5014858, at *1 (1st Cir. Aug. 25, 2020)

[4] *Wang Yan v. ReWalk Robotics Ltd.*, 391 F. Supp. 3d 150, 156 (D. Mass. 2019).

JUDGE GRANTS FINAL APPROVAL TO $120 MILLION SETTLEMENT ENDING SEVEN-YEARS OF LITIGATION IN *In re Loestrin 24 Fe Antitrust Litigation*[1]

Donna Siegel Moffa, Esquire and Terence S. Ziegler, Esquire

On September 1, 2020, Judge William E. Smith of the United States District Court for the District of Rhode Island issued an order granting final approval to the $120 million settlement achieved by a class of Direct Purchasers of brand and generic Loestrin 24 Fe ("Loestrin"), bringing to an end over seven years of hard fought litigation involving antitrust claims asserted by the Direct Purchasers against pharmaceutical companies Warner Chilcott[2] and Watson.[3] Kessler Topaz, along with three other firms, served as lead counsel for the Direct Purchasers. The settlement was agreed to just two days before jury selection was set to begin for a trial scheduled to start on January 6, 2020 in Providence. The complex antitrust claims involved had been aggressively prosecuted and defended throughout the litigation, making the substantial recovery an especially significant accomplishment.

Judge Smith's Final Approval Order finding the settlement to be fair and reasonable followed an August 27, 2020 final fairness hearing which was conducted remotely over Zoom. In addition to finding that the settlement warranted final approval, Judge Smith adopted the report and recommendation of Magistrate Judge Patricia A. Sullivan in awarding attorneys' fees and costs and a service award to the Class Representative Ahold USA.

Throughout the final fairness hearing, Judge Smith repeatedly noted the complexity of the litigation, observing that it was "maybe the most complex case . . . that I've had in my career on the bench, which is, you know, not quite 20 years." In the complaint, which the Direct Purchasers first filed in 2013, the plaintiffs alleged that Defendants engaged in an unlawful scheme encompassing a variety of anticompetitive conduct to delay market entry of less expensive, generic versions of the oral contraceptive Loestrin. The conduct that the Direct Purchasers alleged Defendants engaged in included: patent fraud; the filing of sham patent infringement litigation by Warner Chilcott (the brand manufacturer of Loestrin) against prospective generic entrants; settling such litigation, including the case instituted against Watson (the first FDA-approved generic manufacturer) with a large, anticompetitive reverse payment from Warner Chilcott to delay Watson's launch of a less expensive generic product; and Warner Chilcott's formulation of a new drug (Minastrin)

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[1] *In re Loestrin Fe Antitrust Litigation,* Civil Action No. 1:13-md-2472-WES-PAS (D.R.I.).

[2] There are five different Warner Chilcott defendants: Warner Chilcott (US), LLC; Warner Chilcott Sales (US) LLC; Warner Chilcott Company LLC; Warner Chilcott, plc, and Warner Chilcott Limited.

[3] The two Watson defendants are Watson Pharmaceuticals, Inc. and Watson Laboratories, Inc.

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This conspiracy is now believed to be the largest pharmaceutical price-fixing cartel in history.

To date, seven drug companies have been criminally charged, with five admitting guilt and paying hundreds of millions of dollars in fines for their role in this wide-ranging conspiracy. Most recently, in August 2020, the DOJ charged one of the largest generic pharmaceutical manufacturers in the world, Teva Pharmaceuticals USA Inc. ("Teva"), dubbing it as one of the "ringleaders" of the price collusion. Another pharmaceutical giant, Glenmark Pharmaceuticals Inc., USA ("Glenmark"), has also been charged and is awaiting trial. Former executives from several of these companies have also been swept up in the government investigations, with at least three entering guilty pleas and agreeing to cooperate with the federal and state probes. All told, the scandal has embroiled over 25 generic drug makers.

The price collusion has also spawned hundreds of parallel antitrust and securities fraud lawsuits against some of the largest players in the generic drug industry, including sprawling cases brought by attorneys general from 51 states and jurisdictions. Of particular note, a multidistrict ("MDL") antitrust litigation comprising over 200 cases and implicating dozens of drug makers and generic drugs is ongoing in the U.S. District Court for the Eastern District of Pennsylvania. Several of the defendants in this MDL have also been sued in related securities fraud actions pending in federal courts in Connecticut, New Jersey, and New York, among others. These litigations, while still in their early stages, have cleared important hurdles and are proceeding in discovery, with the litigants in each case closely watching the still-unfolding DOJ investigation.

In this article, we first provide an overview of the generic drug industry and explain how price collusion operates and cheats consumers. We then trace the still-expanding price-fixing investigations and discuss the charges brought by the DOJ and admissions of guilt the probe has returned. We conclude with a brief discussion of the civil actions stemming from this extraordinary conspiracy, including the antitrust MDL and three securities fraud litigations in which Kessler Topaz is serving as counsel to damaged institutional investors.

A. How Price Collusion Occurs and Impacts the Pricing of Generic Drugs

Generic versions of brand name drugs — which, in simple terms, are the first drugs of their kind to hit the market — contain the same active ingredient and have been determined to be just as safe and effective as their brand name counterparts. The only material difference between generic drugs and their corresponding brand name versions is their price. Similarly, because generics are commodities that cannot be differentiated (i.e., one generic cannot deviate from another in substance), the primary basis for generic competition is pricing.

Against this backdrop, the market for generic drugs is designed to *lower* the price of drugs gradually over time. Typically, the first generic drug to enter the market is priced 15% to 25% lower than the brand name drug. This discount often reaches 50% to 80% (or more) when multiple manufacturers market generics of a given brand. Consequently, as intended, generic drugs usually result in significant cost savings to all drug purchasers.

In the U.S healthcare system, generic drugs save consumers billions of dollars each year because such drugs must be "substituted" for branded product when a prescription is filled by a pharmacy. Every state has adopted substitution laws that, absent certain circumstances (such as the prescribing physician directing otherwise), either require or permit pharmacies to substitute generic equivalents when filling prescriptions for the brand. At present, generics account for approximately 88% of all prescriptions written in the country.

This was the way the generic drug market was intended to work — and until recently, has worked — since the passage of the Hatch-Waxman Act in 1984. Over roughly the last decade, however, prices for commonly prescribed generic drugs have skyrocketed without legitimate economic reasons, sparking outrage from consumers whose costs have doubled, tripled, or in some cases increased more than ten-fold. Normal market forces cannot explain these astronomical hikes. As a general matter, in a market free of price collusion, if one manufacturer raises the price of a given drug, its competitors will simply seek to increase their own market share by selling the drug at lower prices. In other words, absent a larger driving force (such as a product shortage), there is no economic rationale for generic drug manufacturers to collectively raise prices rather than undercut one another to gain market share.

However, because the regulatory scheme for generics is designed to drive prices down over time, drug makers had a clear motive to conspire to raise prices. As discussed in the next section, in order to prop up prices, in most instances, two or more drug makers would secretly agree to increase or maintain prices for a certain generic drug (or drugs), thus eliminating cost savings for consumers. These same companies would then conspire to rig bids for large customer orders and to allocate customers (i.e., market share for a given generic drug), ensuring their ability to maintain control over pricing and further bilk consumers of the benefits of a free market.

These covert agreements to rig the market are extremely difficult to detect and even more difficult to prove — they rarely take place through the usual business channels (for example, e-mails or conference calls). Rather, the collusive agreements are typically reached through private text messages, off-business line phone calls, or at seemingly innocuous meetings, dinners, golf outings, or other social gatherings. Remarkably, the ability to conspire and evade regulators results in part from the very structure of the generic drug industry — a series of large acquisitions over the last two decades have reduced the number of market participants and created highly concentrated markets, giving rise to opportunities for industry players to conspire at trade association meetings and other gatherings under the cloak of legitimate business operations.

For these reasons, the alleged price collusion went on for years, undetected. But when pricing for a handful of large generic products suspiciously remained at high levels well-after patents had expired and multiple competitors had entered the market, authorities began to probe for anticompetitive behavior.

B. Suspicious Pricing Draws the Ire of Federal and State Prosecutors, Sparking Investigations, Criminal Charges, and Admissions of Guilt

Investigations to uncover the explanation for significant price increases in dozens of generic drugs trace back to 2014 when the National Community Pharmacists Association, which represents tens of thousands of pharmacies in the U.S, wrote to Congress requesting hearings on the significant spike in generic pharmaceutical pricing. In response, U.S. Senator Bernie Sanders and U.S. Representative Elijah E. Cummings issued requests for detailed information on various price hikes from 13 drug companies.

On the heels of Congress' inquiries, the Antitrust Division of the DOJ, with the assistance of the U.S. Postal Service Office of Inspector General, the FBI's Washington Field Office, and the U.S. Attorney's Office for the Eastern District of Pennsylvania, began its pursuit. In November 2014, the DOJ convened a grand jury in the Eastern District of Pennsylvania which would ultimately lead to the initial charges in the investigation.

The first domino in the probe fell in December of 2016 when the DOJ unsealed criminal informations charging the former CEO of Heritage Pharmaceuticals, Inc. ("Heritage"), Jeffrey Glazer, and its President, Jason Malek, for illegally conspiring to fix prices, rig bids, and allocate customers for numerous generic drugs.[1] Glazer and Malek pled guilty to the charges the following month, agreeing to cooperate with the DOJ's ongoing investigation and pay hefty criminal fines.

The next shoe dropped in May 2019, when Heritage itself admitted guilt for its role in the conspiracy, agreeing to pay over $7 million in criminal penalties, restitution, and civil damages to resolve claims brought against it under the False Claims Act.[2] As part of the settlement, Heritage entered into a three-year deferred prosecution agreement with the DOJ. (A deferred prosecution agreement generally requires a monetary penalty and allows a company to avoid prosecution if it complies with the terms and conditions of the agreement).

Heritage was the first of several drug companies to publicly admit to conspiring to suppress and eliminate competition by allocating customers, rigging bids, and fixing and maintaining prices for certain generic drugs. Through August 2020, four other pharmaceutical companies admitted guilt for their roles in the charged conspiracy, each agreeing to pay millions of dollars in penalties, restitution and civil damages.

In December 2019, Rising Pharmaceuticals Inc. ("Rising") admitted that it participated in an illegal conspiracy with a competing generic drugs manufacturer to fix prices and allocate customers for Benazepril HCTZ, a medicine used to treat hypertension.[3] Rising agreed to pay

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[1] Dep't of Justice, Former Top Generic Pharmaceutical Executives Charged with Price-Fixing, Bid-Rigging and Customer Allocation Conspiracies (Dec. 14, 2016), https://www.justice.gov/opa/pr/former-top-generic-pharmaceutical-executives-charged-price-fixing-bid-rigging-and-customer.

[2] Dep't of Justice, Heritage Pharmaceuticals Pays Over $7 Million to Resolve Civil False Claims Act Allegations (May 31, 2016), https://www.justice.gov/usao-edpa/pr/heritage-pharmaceuticals-pays-over-7-million-resolve-civil-false-claims-act-allegations.

[3] Dep't of Justice, Second Pharmaceutical Company Admits to Price Fixing, Resolves Related False Claims Act Violations (Dec. 3, 2019), https://www.justice.gov/opa/pr/second-pharmaceutical-company-admits-price-fixing-resolves-related-false-claims-act.

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over $3 million in criminal penalties, restitution and civil damages. Sandoz Inc. ("Sandoz"), another major player in the generic drug industry, followed suit in March 2020, admitting it took part in a criminal conspiracy to fix prices and allocate market share for several generic products including clobetasol and nystatin triamcinolone.[4] To resolve the charges, Sandoz agreed to pay a staggering $195 million criminal penalty — at the time, the largest penalty for a domestic antitrust case. Then, in May 2020, Apotex Corporation ("Apotex") admitted guilt, agreeing to pay a $24.1 million criminal penalty for fixing the price of pravastatin, a commonly prescribed cholesterol medication.[5]

On the heels on the Sandoz plea, Taro Pharmaceutical U.S.A. ("Taro") admitted in July that it participated in two criminal antitrust conspiracies, including one involving Sandoz.[6] Taro agreed to pay over $205 million in criminal penalties. Like Heritage, Rising, Sandoz, Apotex, and Taro each entered into deferred prosecution agreements, agreeing to cooperate with federal and state authorities.

Glenmark and Teva, two other pharma giants, have also been criminally charged. Glenmark is charged with conspiring to fix prices for pravastatin (along with admitted co-conspirator Apotex) and other generic drugs.[7] Glenmark was indicted by a grand jury on July 14, 2020. Teva is charged with participating in three conspiracies, including with Apotex (who has already admitted guilt), Glenmark, and others relating to multiple generic drugs used to treat and manage arthritis, seizures, skin conditions, and blood clots.[8] As of the date of this article, both Glenmark and Teva continue to deny any wrongdoing.

Several former executives from the charged companies are also caught up in the government probes. In February 2020, a Pennsylvania federal grand jury returned a three-count indictment again Ara Aprahamian, a former sales executive at Taro, making him the third executive (along with Glazer and Malek) charged for conspiracy to fix prices and rig the market.[9] Aprahamian was also charged with making false statements to federal agents — he claimed he never had a conversation with a competitor about the pricing of a product before that product was launched. (Notably, as explained above, Aprahamian's employer, Taro, has already admitted guilt). Also in February 2020, Hector Armando Kellum, a former executive at Sandoz, pled guilty for his role in the conspiracy and has agreed to cooperate with the DOJ.[10]

Connecticut Attorney General William Tong and his office are working in parallel with the DOJ. Tong is leading the coalition of now 51 states and territories in an overlapping investigation into the widespread conspiracies. Like the federal probe, the attorneys general investigation is examining evidence from several cooperating witnesses at the core of the conspiracy, a massive document database of over

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[4] Dep't of Justice, Major Generic Pharmaceutical Company Admits to Antitrust Crimes (Mar. 2, 2020), https://www.justice.gov/opa/pr/major-generic-pharmaceutical-company-admits-antitrust-crimes.

[5] Dep't of Justice, Generic Pharmaceutical Company Admits to Fixing Price of Widely Used Cholesterol Medication (May 7, 2020), https://www.justice.gov/opa/pr/generic-pharmaceutical-company-admits-fixing-price-widely-used-cholesterol-medication.

[6] Dep't of Justice, Sixth Pharmaceutical Company Charged In Ongoing Criminal Antitrust Investigation (July 23, 2020), https://www.justice.gov/opa/pr/sixth-pharmaceutical-company-charged-ongoing-criminal-antitrust-investigation.

[7] Dep't of Justice, Fifth Pharmaceutical Company Charged In Ongoing Criminal Antitrust Investigation (June 30, 2020), https://www.justice.gov/opa/pr/fifth-pharmaceutical-company-charged-ongoing-criminal-antitrust-investigation.

[8] Dep't of Justice, Seventh Generic Drug Manufacturer Is Charged In Ongoing Criminal Antitrust Investigation (Aug. 25, 2020), https://www.justice.gov/opa/pr/seventh-generic-drug-manufacturer-charged-ongoing-criminal-antitrust-investigation.

[9] Dep't of Justice, Generic Drug Executive Indicted on antitrust and False Statement Charges (Feb. 4, 2020), https://www.justice.gov/opa/pr/generic-drug-executive-indicted-antitrust-and-false-statement-charges.

[10] Dep't of Justice, Former Generic Pharmaceutical Executive Pleads Guilty for Role in Criminal Antitrust Conspiracy (Feb. 14, 2020), https://www.justice.gov/opa/pr/former-generic-pharmaceutical-executive-pleads-guilty-role-criminal-antitrust-conspiracy.

20 million documents, and phone records for millions of calls made by over 600 sales and pricing personnel in the generics industry.

To date, Attorney General Tong has filed three lawsuits which, collectively, charge over 25 companies and dozens of individuals with conspiring to artificially inflate and manipulate prices, reduce competition, and unreasonably restrain trade for generic drugs. Most recently, in June 2020, Attorney General Tong filed a 543-page complaint (on behalf of the expanded coalition of 51 states and territories) against 26 drug makers — including Sandoz, Actavis, Glenmark, Taro, Mylan N.V., Perrigo Company plc, and Pfizer Inc. This expansive complaint is rife with evidence of phone calls, text messages, and other collusive communications among the alleged co-conspirators and contains allegations that the defendants conspired to fix prices and allocate markets for over 80 generic drugs.

These investigations and resulting pleas have provided important evidence for private litigants, paving the way for civil suits seeking to make whole two groups of plaintiffs: (1) consumers harmed by the pervasive price-fixing; and (2) shareholders who unwittingly invested in these pharmaceutical companies and were harmed when the anticompetitive activities came to light and the companies' stock prices fell.

C. Civil Antitrust Actions: Multidistrict Litigation in Federal Court in Philadelphia

The first civil action alleging antitrust claims against a generic drug manufacturer was filed in March 2016. Dozens of related actions followed, culminating in August 2016 with the consolidation of all such suits in the MDL before Judge Cynthia Rufe of the Eastern District of Pennsylvania. Today, the MDL spans nearly 200 separate cases, including the original 44-state lawsuit Attorney General Tong brought against Heritage and others in December 2016. These cases, collectively, implicate more than 20 drug companies and 20 specific generic drugs.

In October 2018, the court denied the first tranche of motions to dismiss the various complaints, sustaining antitrust claims against numerous drug makers including Actavis, Perrigo, Teva, Sandoz, and Mylan.[11] In doing so, the court relied heavily on the so-called "plus factors" — indirect evidence courts look to in antitrust cases that indicate an agreement to collude. Judge Rufe concluded that the plaintiffs sufficiently alleged that the defendants had both the motive and opportunity to conspire, explaining that the "regulatory regime" for generic drug pricing, if operating as intended, "could reduce . . . [d]efendants' profits by driving down generic drug prices over time and which would give them a common motive to set drug prices."[12] Relatedly, the court held that each implicated drug maker had ample opportunity to conspire, as their membership in relevant trade associations and participation on trade association boards and at various industry events allowed them "to connect with each other, to engage in strategic business discussions, and to gain awareness of their competitors' current and future business plans."[13] The court also acknowledged that "no rational company selling a commodity product and acting alone would have implemented price increases consistent with the increases alleged in [the] complaints in the absence of changes in demand, production costs or other market factors."[14] Finally, the court gave weight to the existence of the government investigations and criminal guilty pleas concerning the alleged price collusion.[15] Based on these "plus factors," Judge Rufe found that the plaintiffs had sufficiently alleged antitrust violations.

The MDL has also resulted in discovery rulings that illuminate the expansive discovery warranted in antitrust conspiracy cases, much to the chagrin of the named defendants. At the start of discovery, Judge Rufe ordered the MDL defendants to produce all documents responsive to the parties' agreed-upon discovery protocols (i.e., search terms), regardless of the relevance those materials purportedly had to the claims asserted.[16] This seemingly sweeping and unusual discovery ruling was appropriate under the circumstances, the court explained, because an antitrust conspiracy can be proven — at least circumstantially — by establishing the *frequency* of communications between and among competitors (i.e., not just the actual content of the communications). And, because the price-fixing scheme was largely orchestrated outside of traditional business channels, broad discovery into text messages and phone records was warranted. Indeed, as the plaintiffs argued in seeking such broad discovery — and as the court largely accepted — full custodial files were necessary to detect "patterns of communications around price increases and other strategic market decisions."[17] Such discovery was also critical to understanding the context of particular documents, as the defendants frequently "relied on subterfuge, using codes and

(continued on page 10)

[11] *See In re Generic Pharm. Pricing Antitrust Litig.*, 338 F. Supp. 3d 404 (E.D. Pa. 2018).

[12] *Id.* at 448.

[13] *Id.* at 450.

[14] *Id.* at 448-449.

[15] *Id.* at 452.

[16] *In re Generic Pharm. Pricing Antitrust Litig.*, MDL 2724, 2019 WL 8106511, at *1 (E.D. Pa. Oct. 24, 2019).

[17] Plaintiff States' Response and Objections to Special Master's Aug. 16, 2019 Report and Recommended Order, MDL 2724, *In re Generic Pharm. Pricing Antitrust Litig.*, No. 2:16-md-02724-CMR (E.D. Pa. Sept. 13, 2019), ECF No. 1086 at 11.

THE GENERIC DRUG PRICE-FIXING SCANDAL: RECENT DEVELOPMENTS IN THE FEDERAL AND STATE INVESTIGATIONS AND PARALLEL CIVIL LITIGATION *(continued from page 9)*

obscure allusions to hide their conservational activity."[18]

Defendants subsequently appealed Judge Rufe's discovery order all the way to the U.S. Supreme Court, which denied their petition for certiorari, leaving the district court's order intact and allowing discovery to proceed as the order had originally contemplated.[19] This decision is likely to re-appear in future antitrust cases, giving plaintiffs a strong basis to argue for expansive discovery.

Despite what appeared to be a clear path to discovery, the MDL has had its share of roadblocks — namely, the ongoing DOJ investigation, which has resulted in the government intervening in the MDL to stay certain categories of discovery, including depositions of certain witnesses, pending the continuing investigation. Given these and other procedural hurdles, a trial will likely not occur for at least another two to three years.

D. Securities Litigation: Investors Charge Generic Drug Makers with Securities Fraud

In addition to the criminal and civil antitrust actions discussed above, the alleged price collusion has also given rise to securities fraud class actions and direct (or "opt-out") actions in numerous jurisdictions across the country against at least eight generic drug manufacturers.

As a general matter, plaintiffs in these cases are shareholders in the various drug companies implicated in the price-fixing scandal and allege that these companies and their executives denied the existence of anticompetitive conduct in the generic drug markets, concealed their participation in the cartel, and misrepresented the nature and sustainability of increased drug prices. These falsehoods, plaintiffs allege, served to inflate the companies' stock prices until the allegations of collusion were revealed, causing those prices to plummet. Kessler Topaz is currently serving as counsel to institutional investors in three of these actions, which we discuss briefly below.

In *In re Allergan Generic Drug Pricing Securities Litigation*, No. 16-cv-9449-KSH-CLW (D.N.J.), a securities fraud class action in the District of New Jersey, the plaintiffs allege that the company (through its generics unit, Actavis) participated in a wide-ranging conspiracy to fix prices with respect to at least six generic drugs. The plaintiffs further allege that Allergan misled investors by, among other things, touting Allergan's competitive position in the market (falsely claiming that it "actively competes . . . in the generic pharmaceutical industry") and falsely denying any involvement in the price-fixing conspiracy after receiving a subpoena from the DOJ in 2015 and being questioned by analysts and the financial media.

Counsel from Kessler Topaz successfully argued the opposition to Allergan's motion to dismiss before U.S. District Judge Katharine S. Hayden. Following a four-hour oral argument, Judge Hayden sustained the plaintiffs' claims in full. In an opinion issued on August 6, 2019, the court found that the complaint sufficiently alleged "both direct and indirect evidence of an [anticompetitive] agreement," including through: (i) "communications between executives of different companies regarding price increases, at least two of whom pleaded guilty to violating antitrust laws" (i.e., the Heritage executives discussed above); (ii) "various opportunities to collude, including a host of communications and various trade association meetings"; (iii) "relevant market conditions and attributes"; and (iv) "the timing of parallel price increases."[20] The court further held that while the "complaint affirmatively alleges that 'there was no reasonable explanation for the price hikes' — no supply shortages were reported, nor were there

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[18] *Id*. at 4.

[19] *Actavis Holdco U.S., Inc. v. Connecticut*, No. 19-1010, 2020 WL 3146845 (June 15, 2020); *see also In re Actavis Holdco U.S., Inc.*, No. 19-3549, 2019 WL 8437021, at *1 (3d Cir. Dec. 6, 2019).

[20] *In re Allergan Generic Drug Pricing Sec. Litig.*, No. 16-9449 (KSH) (CLW), 2019 WL 3562134, at *6 (D.N.J. Aug. 6, 2019).

significant increases in demand for the drugs," Allergan's "officers repeatedly represented that the price increases were attributable to benign market explanations, such as supply and demand issues."[21] Such categorical statements, the court explained, made in the face of directly contradictory information, provided strong evidence of defendants' knowledge of the alleged fraud.

Similarly, plaintiffs in *Roofers' Pension Fund v. Papa*, No. 16-2805-MCA-LDW (D.N.J.), a securities class action, and in a series of 17 related "opt-out" cases bring securities fraud claims against Perrigo and two of its former executives based on Perrigo's participation in the price-fixing scheme. Specifically, the plaintiffs allege that Perrigo made numerous statements that were rendered false or misleading as a result of this undisclosed conduct, including statements that the company's pricing strategy was to keep generic drug prices "flat to up slightly" — representations that are inconsistent with a price-fixing scheme.[22]

In addition to these price collusion-based claims, seven opt-out actions in which Kessler Topaz serves as counsel have also brought claims alleging that Perrigo concealed the extent to which the company was exposed to, and impacted by, pricing pressure in the generic drug markets that drove prices for a large part of the portfolio downward.[23] This pricing pressure came from a number of sources — including the federal government's increased focus on streamlining the process of approving generic drug applications, thus saturating the market with new, competing generics and driving prices down.

In rejecting Perrigo's motion to dismiss these pricing pressure claims, U.S. District Judge Madeline Cox Arleo credited plaintiffs' theory that, insofar as the negative pricing pressure impacting some of Perrigo's generic drug products prompted Perrigo to participate in the illegal price-fixing scheme for *other* generic products, such pricing pressure (and the company's attempts to conceal it) is entirely consistent with anticompetitive conduct.[24] As the court reasoned, "[i]n light of the vast number of drug products Perrigo manufactures, the Court finds it plausible that the Company could have faced and concealed increased competition with respect to some products, while engaging in price collusion with respect to other products."[25]

Finally, in *Ontario Teachers' Pension Plan Board v. Teva Pharmaceutical Industries Ltd.*, No. 3:17-cv-558 (SRU) (D. Conn), a federal court in Connecticut sustained securities fraud class action claims against Teva and its former senior executives arising from Teva's concealment of its role in the alleged price-fixing conspiracy.[26] The plaintiffs alleged that Teva failed to disclose that a driving force behind its record revenues was its participation in the price-fixing scheme. As explained by U.S. District Judge Stefan R. Underhill, "[p]laintiffs basically allege that the defendants implemented 'a strategy to systematically raise generic drug prices across a large swath of Teva's generic drug portfolio.'"[27] The court agreed, finding that "defendants' statements that Teva's success was not because of pricing and price increases, . . . were themselves misleading and, also, half-truths because the defendants failed to disclose that they were involved in price-hiking."[28] The court made clear that "[g]enerally, [d]isclosure [of corporate misconduct] is not a rite of confession, and companies do not have a duty to disclose uncharged, unadjudicated wrongdoing. . . . However, the failure to disclose uncharged criminal conduct may be actionable where the failure to do so would make other disclosures materially misleading."[29]

E. Conclusion

The price-fixing scandal is now several years old, with the DOJ investigation dating back to 2014 and the earliest state attorneys general actions dating back to 2016. Nevertheless, given the extraordinary scope of this industrywide conspiracy — implicating over 20 drug companies and scores of generic drug products — it has taken a long time for the DOJ and the States to amass the sprawling evidence through their investigations. Six of the seven companies charged by the DOJ have been charged in just the last ten months (Teva most recently, in August 2020), and most of the related civil actions, including the MDL in Pennsylvania, remain in their nascent stages — a long way off from trial dates. As these investigations and case dockets trudge forward, we anticipate further revelations of collusion among the drug makers, accompanied by further criminal charges and amended civil pleadings. In short, it may be several more years before the numerous enforcement actions and litigations arising from this historic conspiracy are resolved. In the meantime, one would expect this spate of litigation to make pharmaceutical companies think twice about conspiring to manipulate these vital markets. ■

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[21] *Id.* at *12.

[22] *Roofers' Pension Fund v. Papa*, No. 16-2805, 2018 WL 3601229, at *10-11 (D.N.J. July 27, 2018).

[23] *Carmignac Gestion, S.A. v. Perrigo Co. PLC*, 2019 WL 3451523 (D.N.J. July 31, 2019).

[24] *Id.* at *11.

[25] *Id.*

[26] Kessler Topaz represents plaintiffs in two opt-out actions that have been consolidated with the class action for purposes of discovery.

[27] *Ontario Teachers' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 143 (D. Conn. 2019).

[28] *Id.* at 158.

[29] *Id.* at 160 (citation omitted).

PITFALLS OF RELYING ON MANY THIRD PARTY SERVICE PROVIDERS IN NON-US LITIGATION

(continued from page 1)

article is to highlight for investors the typical pitfalls with third party claims filing services and opt-in litigation. Although we offer claims filing and portfolio monitoring services to institutional investors, first and foremost we are a law firm that is committed to protecting investors from fraud, abuse, misconduct and negligence by publicly-traded corporations. We organize and prosecute shareholder recovery actions both in the U.S. and with local counsel partners in a number of countries around the world. For example, we are actively representing institutional investors in litigation in Australia, Brazil, France, Germany, Japan, The Netherlands, and Portugal. In addition, we evaluate all shareholder actions around the world, advise and assist clients in protecting their interests in active litigation and continue to monitor and manage that ongoing litigation on their behalf. All investors, especially investors who work with third party service providers, have an interest in ensuring that they are properly informed and advised about opt-in opportunities. Further, it is important that their registration is completed properly and that their claims are not dismissed outright due to a formality like how they were named or who signed the document.

What follows below are suggested questions and discussion points an investor can and should raise with their third party claims filing service to determine whether their interests are protected or whether there are deficiencies in the services they are receiving. These questions and discussion points are based on real-world examples of the risks posed to institutional investors who solely rely on third party claims filing services to navigate the global landscape and register them for non-U.S. opt-in litigation. We witnessed many of these examples in preparing and filing some of our active cases; a few are examples we identified while assisting and advising investors how best to correct a problem created by a third party claims filing service that registered them for non-U.S. litigation.

- **Are you receiving adequate notice regarding potential actions to join? How does the service provider ensure they are collecting and providing you with all relevant information in a timely manner?** In a recent case, a third party service provider contacted us for the first time *two days* before the registration deadline we advertised and asked for additional information. The service provider asked if we would calculate and provide estimated damages for hundreds of its clients. At that point, we had been advertising the case and registering investors to participate in the case for more than four months. We informed the service provider that it was too late. Its response was that it had emailed an attorney three months earlier and had not heard back. They made no attempts to follow up or to conduct further due diligence.

- **If you plan to join or have already joined an action, how quickly will the service provider reach out to you for any documentation or information requested by the law firm? Are they providing adequate notice in advance of a deadline? Or are they sitting on things for days or weeks after they receive a request?** Unfortunately, it is not unusual for third party service providers to struggle with meeting deadlines. For service providers not staffed with lawyers, their representatives appear to operate as though they are submitting a claims form (where there is often some flexibility and where a placeholder can be filed) and they fail to understand that there are real consequences involved in missing deadlines or providing incomplete information in active litigation. Service providers that do not meet a deadline or adequately communicate to an investor that the deadline is a hard deadline set by a court, there is potential that the investor's claim may be jeopardized.

- **What have you actually authorized your service provider to do with respect to non-U.S. litigation?** Some service providers attempt to sign retainers and power of attorney agreements on their clients' behalf. While they may have a power of attorney executed by a client that allows them to sign and submit claim forms in U.S. class action settlements, that same authority is not sufficient for registering for and joining non-U.S. litigation because the agreement with the service provider is usually limited in scope and most courts outside the U.S. will only recognize documents that are signed by official authorized signatories of the investor. Even setting aside the formal requirements that preclude a service provider from registering for an action on an investor's behalf in many jurisdictions, we have doubts that many investors are even aware that their service provider was attempting to register them for active litigation. Indeed, in many instances, when we go back to the service provider to obtain the necessary documentation, there are investors that elect to then withdraw from the case.

- **How informed is the service provider regarding the case and what documentation and information will be required of you? Do they properly inform you of that information before registering you to participate or encouraging you to join an action?** We have heard from investors seeking assistance when they joined an action in a country where more evidence and work is required in connection with their participation in the action (for example, some actions in the United Kingdom require evidence of reliance). The investors become frustrated because their service provider is not able to sufficiently explain or prepare them what is or may be required in the action. As a result, often times the case proves to be more work than they bargained for.

- **How organized is the provider? Are they keeping adequate records or who they are in contact with at your firm? Are they keeping adequate records of what they've requested and sent to the law firm organizing the action on your behalf?** A lack of organization seems pervasive at many third party service providers. We have seen service providers fail to keep track of their list of clients they registered for an action and fail to keep track of documentation or information they provided. Frequently, service providers, which are not accustomed to managing active litigation, lose track of what information has been requested from them on behalf of their clients and repeated reminders are required in order to finally get complete documentation. In one instance, we had a service provider ask us whom at their investor/client to reach out to in order to request certain documentation because it did not track its prior communication. We also notice that many of these providers do not have a central contact person and, as a result, they utilize various different representatives to manage the process of requesting and producing necessary documentation.

- **Does the service provider have data analysts review your transaction data before submission in order to ensure everything balances, that all your accounts with trades are included, and to ensure there are no other issues or inconsistencies? If the law firm pursuing the case has questions about the data, are they well-equipped to review and answer those questions or to communicate the questions to your data teams?** Third party service providers frequently send us transaction data on behalf of clients that is out of balance and clearly missing accounts or transactions. It is apparent that the data was never reviewed before sending it to us which creates a lot of back and forth. This presents a risk if the law firm running the litigation also does not have data analysts reviewing the data before submitting it to the court. This incomplete process may jeopardize your claims or the amount of damages you are eligible to recover. It also calls into question whether any analysis is being done prior to the service provider filing a claim for U.S. class action settlement proceeds and whether you are receiving the full amount of compensation you should be entitled to.

These real examples are intended to raise questions with investors with global portfolios. The issues presented are generally applicable when third party claims filing services use client service representatives that have no legal background and do not understand many of the nuances associated with non-U.S. litigation (for example, recognizing the differences between submitting a claim form in a U.S. class action settlement and registering for an active litigation). When third party claims filing providers do employ persons with a legal background, it is important to question whether and to what extent they have experience with litigation. Further, these providers should be able to demonstrate their experience and expertise with managing actions outside the U.S. Investors are encouraged to vet their providers along these lines so they can better understand the true level of services being offered. This sort of analysis will go a long way to ensure that investors' interests are indeed protected. ■

KTMC INVESTIGATES WHETHER WAYFAIR INC. INSIDERS TOOK ADVANTAGE OF ECONOMIC UNCERTAINTY CAUSED BY COVID-19

(continued from page 3)

To be sure, the benefits of the recovery have not been shared equally across the global economy. Numerous businesses have been felled — even permanently — by the COVID-19 epidemic, while other corporations were provided an opportunity for exponential growth. A striking example of the starkly differing effects the pandemic has had on businesses can be seen in the furniture retail industry.

Few corporations have been impacted as positively by the pandemic as has Wayfair Inc. An online retailer of home goods with operations throughout North America and Europe, Wayfair generated more than $9 billion in net revenue in 2019 but entered 2020 without yet having attained profitability. The forced closures of brick-and-mortar stores imposed by government-mandated quarantines immediately eliminated much of Wayfair's competition. Art Van Furniture began shutting down stores in March and is no longer in business. Pier 1, which had already filed for bankruptcy protection in February, began shuttering permanently all of its stores in May, citing COVID-19 as the primary cause. Quarantines caused Ethan Allen Interiors to close many of its outlets; its stock did not begin to recover until nearly six months later. As an online retailer, Wayfair was able to gobble up a significant portion of these once formidable businesses' market share. Even rival Amazon.com was hampered, having announced in March its intention to delay shipments of non-essential items by up to one month.

Meanwhile, millions of potential customers, discovering that they would be working from home for the foreseeable future, began re-evaluating their home office furniture needs. During the second half of March and first week of April, Wayfair's gross revenue skyrocketed, growing at more than double its rate from earlier in the year. Similarly, by March's end Wayfair's stock price had more than doubled. The sudden and dramatic decline in stock price that Wayfair had suffered along with the rest of the economy was immediately followed by an equally sudden and dramatic recovery.

On June 23, 2020, on behalf of plaintiff Equity-League Pension Trust Fund, KTMC filed a complaint for inspection of books and records under Section 220 of the Delaware General Corporation Law to investigate whether Wayfair's corporate directors breached their fiduciary duties by rushing Wayfair into an unnecessary, self-dealing financing transaction before the market could fully correct itself. At the end of an April 6 press release touting the company's exceptional recent financial performance, Wayfair additionally announced that its board had approved a private placement of convertible senior notes in an aggregate principal amount of $535 million, most of which were being acquired by companies with which Wayfair's directors are affiliated. In describing the notes' $72.50 conversion price as "representing a 46% premium to the average closing price of Wayfair's Class A common stock over the last 30 days," Wayfair neglected to mention that Wayfair stock's average closing price over the prior 90 days was $74.34 per share, and its average closing price over the prior year was $110.61 per share.

KTMC is looking closely at this and similar financing transactions engaged in by U.S. corporations earlier this year to determine whether corporate insiders have exploited market uncertainty and government largesse for personal gain. In the second quarter, Congress and the Federal Reserve provided trillions of dollars in stimulus aid to prop up the U.S. economy in a time of dire need. In response, businesses, most of which had suffered severe hits to their expected first-quarter revenues, turned to private offerings to raise much-needed cash at a rate and degree rarely seen before. In April, U.S. corporations sold more than $300 billion in debt, shattering the previous monthly record. During the second quarter of 2020, companies raised approximately the same amount in convertible financings that they had during all of 2019. While many of these transactions involved companies in severe distress — for example, Live Nation Entertainment, Inc., Carnival Corporation, and American Airlines, Inc. — according to Ernst & Young, "the majority of transactions have been opportunistic in nature, with companies taking advantage of share price rebounds to raise attractively priced capital to fund growth, refinancing and future M&A."[1] The Wayfair transaction is one of many examples in which investors who were offered an opportunity

[1] https://www.ey.com/en_us/ipo/why-the-first-half-of-2020-saw-record-convertible-issuance

to participate in one of these financing transactions did not need to pay a meaningful premium; rather, they merely bet that the company would return to its pre-coronavirus performance level.

Notably, many of these convertible notes issuances occurred shortly after the end of the first quarter, when insiders knew how the pandemic was impacting operations and revenues but had not yet disclosed that information. Wayfair is a case in point: Wayfair entered into its convertible notes issuance agreement immediately before previewing for shareholders that it expected to "meet or exceed" its previously issued quarterly guidance and less than a month before the company confirmed in its first-quarter earnings release that revenue growth was substantially greater than had been anticipated. That earnings release sparked a $31.77 per share, or 23.7%, single-day increase in Wayfair's stock price. Since early summer, the stock has been trading north of $200 per share. The Wayfair directors who stood on both sides of the transaction stand to reap hundreds of millions.

Claims for breach of fiduciary duty by directors approving financing transactions during the COVID-19 pandemic are generally difficult because, on the surface, they fall within directors' business judgment. After all, more than six months later, there remains considerable uncertainty regarding whether specific businesses will be open next week, let alone what their operations might look like months or years from now. Evaluating whether a corporate board's decision-making merits that level of deference requires close attention to the company's public filings and, in certain instances, a push for additional disclosures through shareholder demands to inspect books and records. By discovering any discrepancies between what insiders knew and what companies permitted investors to know, KTMC seeks to determine whether corporate executives and board members such as those at Wayfair exploited unprecedented market volatility to benefit themselves at the expense of their shareholders, or were merely recipients of unexpected good fortune. ■

THE DELAWARE SUPREME COURT REINSTATES CLAIMS OF FORMER TOWERS WATSON STOCKHOLDERS

(continued from page 2)

ValueAct and Ubben aided and abetted Haley's breach by (1) using the Proposal to induce Haley to breach his fiduciary duties and (2) exploiting Haley's conflict with respect to the Proposal during the Merger renegotiations.

In July of 2019, the Chancery Court dismissed plaintiff's claims, finding that the Proposal would not have been material information to Towers' board or stockholders.[3] The trial court reasoned that (1) Towers' board and stockholders already knew Haley was likely to make more money as Willis Towers Watson's CEO and (2) the Proposal "was a proposal only; it reflected a theory of compensation and upside potential in the event of pie-in-the-sky outcomes unconnected to any business plan or forecast."[4] For these reasons, the Court of Chancery found the Proposal was immaterial information and did not need to be disclosed. The trial court did not reach plaintiff's aiding and abetting claims, given the court's finding that there was no underlying breach of fiduciary duty.[5]

Plaintiff appealed the dismissal to the Delaware Supreme Court, arguing that the trial court made improper factual inferences in defendants' favor and failed to consider longstanding Delaware law holding that potential conflicts of a target company's chief negotiator need to be fully disclosed. On June 30, 2020, the Delaware Supreme Court reversed the trial court's decision, finding that the Proposal was in fact material information that needed to be disclosed.[6]

The Court wrote:

> We acknowledge that the Proposal was not binding. But that is not the point. The fact that the Proposal was a not concrete agreement and had milestones requiring 'Herculean' efforts did not relieve Haley of his duty to disclose to the Towers Board the deepening of the potential conflict, particularly in an atmosphere of considerable deal uncertainty . . . Here, Plaintiffs are entitled to an inference that the prospect of the undisclosed enhanced compensation proposal was a motivating factor in Haley's conduct in the renegotiations to the detriment of Towers stockholders.[7]

The Court remanded the action back to the Court of Chancery, and instructed the trial court to consider plaintiff's aiding and abetting claims against ValueAct and Ubben in light of the Supreme Court's ruling.

Plaintiff is currently prosecuting and conducting discovery into its claim against Haley in the trial court and simultaneously defending against ValueAct's and Ubben's renewed motion to dismiss plaintiff's aiding and abetting claims. Briefing on ValueAct's and Ubben's motion is complete, and oral argument is scheduled for December 1, 2020.

This action illustrates Kessler Topaz's persistence in pursuing meritorious claims and achieving meaningful redress for stockholders who are harmed by their fiduciaries' misconduct. ■

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3 *See In re Towers Watson & Co. S'holders Litig.*, 2019 WL 3334521 (Del. Ch. July 25, 2019), *rev'd*, 2020 WL 3529586 (Del. June 30, 2020).

4 *Id.*, at *1, *9.

5 *Id.*, at *12.

6 *Haley*, 2020 WL 3529586.

7 *Id.*, at *14 (citations omitted).

PENDING THIRD CIRCUIT APPEAL ON EQUITABLE TOLLING IMPLICATES CLASS MEMBERS' ABILITY TO BRING INDIVIDUAL ACTIONS

(continued from page 3)

While it is clear that the statute of limitations is tolled for would-be class members who file individual actions *after* a ruling on class certification, there is a circuit split regarding whether *American Pipe* tolling applies to putative class members who bring individual actions *before* the court rules on class certification. The Second, Ninth, and Tenth Circuits have held that a putative class member who brings an individual action prior to class certification would receive the benefit of *American Pipe* tolling,[4] while the Sixth Circuit has held that "a putative class member who brings an individual action prior to class certification 'may not rely [on the] class action to suspend the limitations period on its fraud claims against [the defendant].'"[5] Notably, the Sixth Circuit relied in part on a decision from the U.S. District Court for the Southern District of New York, which was later vacated and remanded when the Second Circuit rejected the Sixth Circuit's position on this issue.[6]

The *Valeant* District Court Adopts the Minority Position

In *Northwestern Mutual Life Ins. Co. v. Valeant Pharm. Int'l. Inc.*, No. 18-15286, 2019 WL 4278929 (D.N.J. Sept. 10, 2019), the Honorable Michael A. Shipp followed the Sixth Circuit in declining to extend the *American Pipe* doctrine to a putative class member who filed an individual action prior to any decision regarding class certification.

The underlying class action, *In re Valeant Pharmaceuticals International, Inc. Securities Litigation*, No. 15-7658 (D.N.J.), was filed in October 2015, with the lead plaintiff's consolidated class complaint filed in June 2016. In October 2018 — more than two years later — putative class member Northwestern Mutual filed an individual action, alleging virtually the same claims that the class action asserted under the Securities Exchange Act of 1934 (the "Exchange Act"). Because the Exchange Act's statute of limitations ends two years after the alleged securities fraud has been discovered, and Northwestern Mutual's complaint was substantially similar to the consolidated class complaint filed more than two years beforehand, Judge Shipp held that Northwestern Mutual's claims were untimely.[7] Specifically, Judge Shipp held that the fraud alleged in Northwestern Mutual's individual action had been "discovered" — that is, "that a reasonably diligent plaintiff would have had enough facts to plead the instant claims with sufficient detail and particularity to survive a motion to dismiss" — no later than June 2016, when the consolidated amended complaint was filed.[8]

Judge Shipp then held — in agreement with the Sixth Circuit, but in disagreement with the Second, Ninth, and Tenth Circuits, as well as several other district courts within the Third Circuit[9] — that the *American Pipe* tolling rule did not apply to Northwestern Mutual's individual claims because the court had not yet ruled on class certification. Though Judge Shipp acknowledged that a majority of circuits to consider the issue had reached the opposite conclusion, he found those circuits' decisions to be unpersuasive because they had predated the Supreme Court's ruling in *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018), where the Supreme Court held that the filing of a class action does not toll the statute of limitations for claims in subsequently filed class actions. Though the *China Agritech* holding facially applied only to duplicative class actions, and not to

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[4] *See In re WorldCom Sec. Litig.,* 496 F.3d 245, 256 (2d Cir. 2007); *In re Hanford Nuclear Reservation Litig.,* 534 F.3d 986, 1009 (9th Cir. 2008); *State Farm Mut. Auto. Ins. Co. v. Boellstorff,* 540 F.3d 1223, 1228 (10th Cir. 2008).

[5] *Wyser-Pratte Mgmt. Co. v. Telxon Corp.,* 413 F.3d 553, 569 (6th Cir. 2005).

[6] *See id.* at 569 (discussing *In re WorldCom, Inc. Securities Litigation,* 294 F. Supp. 2d 431 (S.D.N.Y. 2003), which was vacated and remanded by *In re WorldCom Securities Litigation*, 496 F.3d 245 (2d Cir. 2007)).

[7] 2019 WL 4278929, at *7.

[8] *Id.*

[9] *See Winn-Dixie Stores, Inc. v. E. Mushroom Mktg. Coop.*, No. 15-6480, 2019 WL 130535, at *7 (E.D. Pa. Jan. 8, 2019); *In re Processed Egg Prods. Antitrust Litig.*, No. 08-2002, 2012 WL 6645533, at *7–8 (E.D. Pa. Dec. 20, 2012); *McDavitt v. Powell,* No. 09-0286, 2012 WL 959376, at *2–3 (M.D. Pa. Mar. 21, 2012).

individual actions, Judge Shipp observed that the *China Agritech* Court had also stated that "economy of litigation favors delaying [individual] claims until after a class-certification denial," and that "[t]he watchwords of *American Pipe* are efficiency and economy of litigation."[10]

In assessing the impact on the efficiency and economy of the litigation, Judge Shipp reasoned that the application of equitable tolling to individual actions filed before a decision on class certification would not further the *American Pipe* doctrine because the filing of one or more individual actions prior to class certification may force the court to "deal with dispositive motions rehashing legal and factual issues the Court previously addressed."[11] Additionally, Judge Shipp noted that applying *American Pipe* tolling to would-be class members like Northwestern Mutual "may only encourage future plaintiffs to sit back, await developments in the case as the strength of the parties' positions are tested through Rule 12 motion practice, and if there are favorable determinations, file an otherwise untimely individual action that is saved by the *American Pipe* doctrine."[12] Concluding that these results would not support efficiency or economy of litigation, Judge Shipp declined to apply *American Pipe* tolling to Northwestern Mutual, and dismissed Northwestern Mutual's claims as untimely.

That same day, Judge Shipp also dismissed individual claims brought by other putative *Valeant* class members in *Aly v. Valeant Pharmaceuticals International, Inc.*, No. 18-17393, 2019 WL 4278045 (D.N.J. Sept. 10, 2019). The *Aly* plaintiffs, like Northwestern Mutual, had filed their individual action more than two years after the *Valeant* class complaint was filed. Accordingly, the same legal issues applied, and Judge Shipp adopted his reasoning in *Northwestern Mutual* and declined to apply *American Pipe* tolling to the *Aly* plaintiffs.

The Pending Appeal

The *Aly* plaintiffs appealed the dismissal of their individual action to the Third Circuit, arguing that the district court erred by holding that *American Pipe* tolling does not apply to putative class members who file individual actions prior to a ruling on class certification. They contend that Judge Shipp misapplied *American Pipe*, as *China Agritech* has no bearing on opt-out actions, and that even the Sixth Circuit has subsequently expressed "doubts" about the validity of its minority position regarding *American Pipe*.[13] The *Aly* plaintiffs also note that the Third Circuit previously held that *American Pipe* tolling applies to putative class members who move to intervene in a class action prior to a decision on class certification,[14] and argue that similar reasoning should apply where putative class members file individual actions prior to a decision on class certification.

The *Aly* appeal is currently pending, with oral argument scheduled for October 2020. If the Third Circuit ultimately overturns Judge Shipp's decision, and extends *American Pipe* equitable tolling to the *Aly* plaintiffs, then putative class members in class actions pending within the Third Circuit will be clearly permitted to file individual actions at any time, without waiting for the resolution of class certification — which can take years — and still receive the equitable benefits of *American Pipe* tolling.

However, if the Third Circuit upholds Judge Shipp's decision and declines to apply *American Pipe* tolling to individual claims filed before class certification, would-be class members who wish to file individual actions within the Third Circuit will be required to either file their individual claims before the statute of limitations expires or wait to file their individual claims until after the court rules on class certification.[15] This result would be particularly problematic in situations where class members' claims are not only untimely under the applicable statutes of limitations, but are also untimely under the applicable statutes of repose — which are not tolled by *American Pipe*.[16] Accordingly, if a class member must wait until after class certification to receive the benefits of *American Pipe* tolling, and the repose period ends before the district court rules on class certification, the class member would be barred from bringing individual claims after class certification (even though *American Pipe* tolling would apply)[17]. Additionally, if the Third Circuit were to join the Sixth Circuit's minority position, the Third Circuit would deepen the circuit split and potentially increase the likelihood that the Supreme Court would grant *certiorari* and hear argument on this issue. ■

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[10] *Id.* at *9 (quoting *China Agritech*, 138 S. Ct. at 1802, 1811).

[11] *Id.* at *10.

[12] *Id.* at *12.

[13] *See Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780, 789 (6th Cir. 2016).

[14] See Wallach v. Eaton Corp., 837 F.3d 356, 373-74 (3d Cir. 2016).

[15] While the Aly appeal involves claims under the federal securities laws, the Third Circuit's ruling would likely apply with equal force to other class actions, including class actions asserting claims under the federal antitrust laws and various consumer protection laws.

[16] *See, e.g., California Public Employees' Retirement System (CalPERS) v. ANZ Securities, Inc.,* __ U.S. __, 137 S.Ct. 2042, 2055 (2017) (holding that the three-year statute of repose under the Securities Act is not subject to tolling). Statutes of repose prevent plaintiffs from bringing suit after a certain amount of time has elapsed and, unlike statutes of limitations, ***do not*** take into consideration the timing of when the plaintiffs first learned that their claims could be brought or whether a defendant actively concealed its wrongdoing.

[17] *See Stein*, 821 F.3d at 795 n.6 (expressing repose-related concerns about the Sixth Circuit's *Wyser-Pratte* decision).

FIRST CIRCUIT UPHOLDS ABILITY OF SECURITIES CLASSES TO ADD NAMED PLAINTIFFS

(continued from page 5)

based only on the initial false statements and prior to the later statements asserted in the Complaint (without addressing whether those later statements were actionable).

The district court also denied leave to amend the complaint in order to add a named plaintiff whose purchases of the company's stock would have conferred standing. To the district court, "the essential problem with that approach is that it assumes that [plaintiff] has any authority to ask the court to do anything at all in connection with the claims asserted in this case."[5] It also pointed out that "no court appears to have held that a plaintiff in a class action who does not have standing can simply move to amend the complaint to add someone who does."[6]

On appeal, the First Circuit expressly rejected the district court's conclusion that the lack of standing meant that lead plaintiff had no ability to ask the court to do anything at all, including adding a party (although it upheld the dismissal by examining the later statements not addressed by the district court and finding that they were not actionably false).[7] With respect to an amendment to cure standing issues, the Circuit held that, despite the lead plaintiff's lack of standing, it could still seek leave to amend the complaint to add another named plaintiff that would have standing.

The Court first rejected the "formalistic approach" by the Fifth and Ninth Circuits, which hold that "where a plaintiff never had standing to assert a claim against the defendants, it does not have standing to amend the complaint and control the litigation by substituting new plaintiffs, a new class, and a new cause of action."[8] Instead, the First Circuit agreed with what it termed "[t]he better-reasoned authority," which "allows a court to entertain and grant a motion to amend filed by a plaintiff who lacks standing to pursue the claim pleaded."[9]

These "better-reasoned" cases include the U.S. Supreme Court's "seminal standing case," *Sierra Club v. Morton*,[10] where despite the lack of standing, the Supreme Court "nevertheless invited Sierra Club . . . to better plead standing."[11] The First Circuit noted that its past decisions have "matter-of-factly followed precisely" the *Sierra Club* approach — permitting a plaintiff to amend its complaint to cure standing.[12] Moreover, "the better-reasoned circuit court opinions," such as from the Second Circuit, also permit amendments "where the amended pleading established Article III standing by adding facts not contained in the prior complaint."[13] In addition, the First Circuit noted that "Congress has explicitly endorsed this view," as 28 U.S.C. § 1653 specifically contemplates that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."[14]

The First Circuit also observed that the weight of "better-reasoned" authority permits amendment of factual allegations to cure standing. It therefore "s[aw] no reason why this permissiveness does not extend to motions seeking to add a named party asserting the exact same claim that is already pleaded in the complaint."[15] In other words, if a plaintiff can amend a complaint to add factual detail to shore up deficient jurisdictional or standing allegations, then certainly a plaintiff can add a new plaintiff to remedy those same issues.

Despite this intuitive logic, the First Circuit observed that "[s]ome courts nevertheless seem to think that the foregoing rules somehow do not apply in a class action when the original plaintiff is found to lack standing and timely moves to add a new plaintiff who does have standing."[16] But nothing in the class-action context "even hints at such a bespoke modification of the usual amendment rules."[17] Thus "[a] contrary approach can claim no justification other than a desire to adhere to a degree of pure formalism that would surprise the drafters of the civil rules, achieve nothing but mischief, and run contrary to our own recognition that Rule 15 helps courts and litigants to avoid pointless formality."[18] In conclusion, the First Circuit held that the district court *should* have considered plaintiff's request to amend the complaint according to the criteria used for any other request to amend, such as undue delay, bad faith, repeated amendments, and undue prejudice to the other party.[19]

Given that the First Circuit did not believe that plaintiff could state a claim regardless of amendment, it is particularly striking that the Court went to great lengths to criticize and expressly disagree with the courts that would not have *even* entertained a motion to amend in these circumstances. In any event, the opinion underscores the importance to at least the First Circuit that a motion to add a named plaintiff "must be evaluated just as" any other request to amend a complaint. ■

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5 *Id.* at 158.
6 *Id.* at 161.
7 2020 WL 5014858, at *8-9.
8 *Id.* at *9 (quoting *Summit*, 639 F.2d at 1282).
9 *Id.*
10 405 U.S. 727 (1972).
11 2020 WL 5014858, at *9.
12 *Id.* (collecting cases).
13 *Id.* (citing *AMI*, 106 F.3d at 13).
14 *Id.* at *9.
15 *Id.* at *10.
16 *Id.*
17 *Id.*
18 *Id.* (quotation marks omitted).
19 *Id.* at *10.

JUDGE GRANTS FINAL APPROVAL TO $120 MILLION SETTLEMENT ENDING SEVEN-YEARS OF LITIGATION IN *In re Loestrin 24 Fe Antitrust Litigation*

(continued from page 5)

that Direct Purchasers alleged provided no additional benefit to patients in order to limit generic substitution. The overlapping theories of liability pressed by the Direct Purchasers, and by Indirect Purchasers also asserting antitrust claims against Defendants in coordinated litigation managed together by Judge Smith, implicated alleged conduct that required the development of a particularly extensive factual record and sophisticated expert analysis on a range of issues from patent validity to identification of the relevant market and market power to causation and the measurement of damages.

During the final approval hearing, Judge Smith expressly noted that the case's "complexity was layered and informed really by decisions that were being made in the Supreme Court and the First Circuit in realtime." This reality meant that the lawyers and the Court "were having to deal with a shifting legal landscape that made an already very complex case even more difficult." As a result of these ongoing legal developments, Judge Smith noted: "I don't think you can overstate the degree of complexity of the litigation and really the uncertainty of the legal landscape that we were all working in." Indeed, the importance of that developing landscape was evident from the very start of the litigation when the Court dismissed plaintiffs' complaint only to be reversed on appeal — with plaintiffs obtaining an order from the First Circuit vacating the dismissal and remanding the case for further proceedings.

In the years following remand, Direct Purchasers aggressively litigated their claims, conducting substantial discovery that involved over one-hundred depositions, the production and analysis of voluminous documents and data, and sophisticated expert discovery, as well as motions addressing class certification, summary judgment and myriad pre-trial issues. The intensity with which the plaintiffs pursued their claims was acknowledged by Judge Smith, who commented in the final approval hearing that:

> I can't imagine attorneys litigating a case more rigorously than you all did in this case. It seems like every conceivable, legitimate, substantive dispute that could have been fought over was fought over to the max. So you, both sides, I think litigated the case as vigorously as any group of attorneys could.

In July 2019, the summer before the trial was scheduled to occur, the Court issued a decision certifying the Direct Purchaser class. Defendants' petition to the First Circuit for interlocutory review of that decision was denied on December 3, 2019 — just over a month before the trial was to begin. Meanwhile, as the trial date drew closer, the Direct Purchasers continued to ready for trial preparing witnesses, filing and responding to Daubert motions and motions in limine addressing evidentiary and trial presentation issues, submitting proposed jury instructions, and preparing for jury selection which was set to begin on December 16, 2019.

Also pending during this period were the parties' cross-motions for summary judgment on market power and Defendants' subsequent motion seeking summary judgment on all of the Direct Purchaser's claims, which motions were fully briefed by summer 2019. On December 13, 2019, the Court issued a number of orders dispensing with the pending motions in limine, specifically referencing its "forthcoming summary judgment ruling." That ruling was set forth in a comprehensive and favorable summary judgment opinion published on December 17, 2019 that addressed all of the issues presented in the summary judgment motions. The Court referenced the market power issue confronted in such motions during the final approval hearing, characterizing it as one:

> which may go down in my own personal history as the issue I have struggled with in more ways than you can imagine internally, more than just about any other. And I think that suggests just how difficult the whole market-power issue is in this area of antitrust.

While all of the pretrial work in preparation for the scheduled January 6, 2020 start of trial was ongoing, the Direct Purchasers and Defendants were also exploring the possibility of resolving the case through settlement. With the assistance of an experienced mediator, the parties reached an agreement to settle just two days before jury selection was to begin. The Court commented in the final approval hearing on this phase of the case stating that "it speaks to the amount of effort that was put into the case running right up to trial, how vigorously you litigated the pretrial issues and how much work it was, frankly, to deal with those motions in limine." Indeed, in granting final approval to the settlement, the Court's high regard for the work done was unequivocal as reflected again in the following statement:

> The level of representation of all parties in terms of the sophistication of counsel, was, in my view, of the highest levels. I can't imagine a case in which there was really a higher quality of representation across the board than this one.

The excellent result achieved by the Direct Purchaser Class in obtaining the $120 million settlement approved by the Court and in winning favorable rulings on issues relevant to those proceeding on similar theories of anticompetitive conduct are the product of that formidable effort.

And while lawyers are always glad to receive praise from a federal judge acknowledging their hard work, here the praise must be reciprocated. Judge Smith and his staff presided over this very complex case for seven years and the amount of work the Court did in overseeing this case to its ultimate conclusion was, to put it bluntly, extraordinary. Judge Smith issued many rulings, some of considerable length, on extremely complicated issues — the efforts of all of those involved at the judicial level were extremely impressive and deserve to be acknowledged. ■

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