

Antitrust Advisory

Tenth Circuit Affirms Class Certification and Price Fixing Verdict Against Dow Chemical

10.06.2014

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The Tenth Circuit recently affirmed both class certification and one of the largest verdicts issued in the U.S. this year, denying Dow Chemical Company's ("Dow") appeal in a price fixing case related to polyurethane products. *In Re: Urethane Antitrust Litigation*, No. 13-3215 (10th Cir. Opinion filed Sep. 29, 2014). In contrast to recent decisions from the U.S. Supreme Court, the D.C. Circuit, and other courts that have been viewed as "raising the bar" for class certification, the *Dow* decision confirms that rumors of the death of class actions have been greatly exaggerated. The danger of a multimillion-dollar verdict based on plaintiff-side expert testimony remains as real as ever.

The plaintiffs had initially alleged that Dow and a group of other polyurethane manufacturers conspired to fix prices for polyurethane chemical products. The other defendants settled, while the case continued against Dow, with the district court certifying a class of buyers based on statistical models put forth by the plaintiffs' expert. A jury found that Dow had conspired to coordinate lockstep price increase announcements and agreed to implement these increases in individual contract negotiations from 2000 to 2003. The jury awarded the plaintiffs \$400 million, which was then trebled (as permitted by the Clayton Act) to \$1.06 billion. Dow moved to decertify the class, both on the eve of and after trial, both of which motions the district court denied.

On appeal, Dow argued that (1) class certification was improper; (2) the plaintiffs' expert testimony should have been excluded; (3) there was insufficient evidence regarding liability; and (4) the damages award violated the Seventh Amendment.

Relying on *Wal-Mart Stores Inc. v. Dukes*, 131 S.Ct. 2541 (2011) and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), Dow argued that the district court wrongly certified the class and claimed that (1) the class members lacked a predominant common question because some members had been able to negotiate their own prices; and (2) plaintiffs failed to prove class-wide damages through a common methodology. The Tenth Circuit disagreed, noting that "price-fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated." *In Re: Urethane Antitrust Litigation* at 13. As such, unlike in *Wal-Mart*, the district court could reasonably conclude that liability could be determined in a single "stroke" on the common questions of the existence of a conspiracy and its impact.

The court further disagreed that reliance on plaintiffs' expert resulted in "trial by formula" as warned against in *Wal-Mart* because "liability as to each class member was proven through common evidence [and] extrapolation was used only to approximate damages." *Id.* at 18. Moreover, the court distinguished *Comcast* (where the court had rejected a damages theory propounded by the same expert used by the urethane buyers in *Dow*), noting that the *Dow* plaintiffs (unlike the plaintiffs in *Comcast*) did not concede that class certification required a method to prove class-wide damages through a common methodology. Further, the court continued, *Comcast's* procedural setting was different, involving a question of whether the district court could determine that plaintiffs could provide damages on a class-wide basis *before* trial (unlike *Dow*, which waited until after the trial to raise the issue). In *Dow*, because the expert had already identified at trial that nearly all class members had been impacted or overcharged during the alleged period, and the district court used its discretion to find a fit between the plaintiffs' theory of liability and the theory of class-wide damages, the district court knew that common issues of damages had predominated over individual issues.

The Tenth Circuit also rejected Dow's contention that the testimony of plaintiffs' expert witness should have been



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excluded on the basis of unreliability of the expert's models, concluding that the district court acted within its discretion and Dow's arguments failed to relate to inadmissibility of the expert's testimony. Dow asserted that the expert's testimony was inadmissible because it manufactured supra-competitive prices through "variable shopping" and "benchmark shopping." The court disagreed, finding that this argument bore only on the weight of the expert's testimony, not its admissibility.

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The Tenth Circuit also denied Dow's argument regarding insufficient evidence, pointing to evidence of parallel announcements of price increases and testimony from Dow's executives regarding the existence of a conspiracy.

Finally, Dow contended that the district court judgment failed to reflect the jury's finding that it was not liable for alleged overcharges to the class of urethane buyers prior to November 2000, and that instead of trebling the entire damages award, the court should have trebled the damages for each class member individually.

Dow issued a statement expressing its disappointment in the decision, and announcing its intention to seek review of the decision by the Supreme Court if necessary.

If you have any questions about this topic, please contact the author(s) or your principal Mintz Levin attorney.

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4324-1014-NAT-AFR