

What's Pending on the Supreme Court's Docket for Antitrust?

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Jeffrey May (Wolters Kluwer)

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Earlier this month, the U.S. Supreme Court denied review of a handful of petitions in antitrust cases. Since that time, new petitions for *certiorari* have been filed in competition law cases with the hope that the High Court will add them to its docket.

At this point, only one antitrust case is set to be considered by the Court this term. In June, the Court decided to review a decision of the U.S. Court of Appeals in Washington, D.C., which revived price fixing claims against Visa, MasterCard, and affiliated banks by automatic teller machine (ATM) operators and by consumers who purportedly paid excessive fees when using these machines. The Court will consider whether allegations that members of a business association—such as an ATM network—agreed to adhere to the association's rules and possess governance rights in the association, without more, are sufficient to plead a conspiracy for purposes of a Sherman Act, Section 1 claim (*Visa Inc. v. Osborn*, Dkt. No. 15-961; *Visa Inc. v. Stoumbos*, Dkt. No. 15-962). See my earlier post [here](#).

LIBOR case. In another [petition](#) now pending before the Court of interest to the antitrust community and financial services industry, the nation's leading banks have asked the Court to weigh in on the viability of antitrust claims challenging an alleged conspiracy to manipulate U.S. Dollar (USD) LIBOR. At issue is a [decision](#) of the U.S. Court New York City holding that purchasers of financial instruments that carried a rate of return indexed to the USD LIBOR alleged an antitrust violation and

vacating judgment in favor of the defending banks on the ground that the complaints failed to plead antitrust injury (*Bank of America Corp. v. Gelboim*, Dkt. 16-545).

Professional regulatory board actions. The Court also has been asked to review a Fourth Circuit decision rejecting a chiropractor's antitrust challenge to the Virginia Board of Medicine's sanctions against her. Guidance is sought on the appropriate level of review for professional regulatory board limits on competition (*Petrie v. Virginia Board of Medicine*, Dkt. 16-524).

Jurisdiction over foreign entities. More recently, foreign electronics manufacturers asked the Court to review a decision of the Washington State Supreme Court in a state enforcement action, alleging a conspiracy to fix prices in the market for cathode ray tubes. The manufacturers are questioning the state court's exercise of specific personal jurisdiction over non-resident defendants based solely on the act of placing component parts into the stream of commerce by selling them to third parties who made finished products that foreseeably might come to the forum state (*Koninklijke Philips Electronics N.V. v. State of Washington*, Dkt. 16-559).

Other pending petitions. Word on these petitions will likely come later in the term. However, the Court could act soon on a couple of pending antitrust petitions that were filed during the last term.

In a boycott case, a steel maker has asked whether its decision to no longer deal with a newly-formed distributor following threats from established distributors should be condemned as per se unlawful. At issue is a decision of the U.S. Court of Appeals in New Orleans, upholding a \$150 million judgment against the petitioning manufacturer (*JSW Steel (USA), Inc. v. MM Steel, L.P.*, Dkt. 15-1492) [**UPDATE: Certiorari denied on October 31, 2016.**].

The Court has another antitrust petition that has been pending on the docket for some time. In February, drug makers SmithKline Beecham and Teva asked the Court to review a Third Circuit decision holding that a settlement agreement between the firms resolving a patent dispute over the prescription anti-seizure drug Lamictal was subject to antitrust scrutiny. The companies are questioning whether the appellate court's decision that a patentee's grant of an exclusive license as part of a patent settlement agreement must undergo antitrust scrutiny

was consistent with the U.S. Supreme Court's 2013 decision in *FTC v Actavis, Inc.*, which held that a patentee who settles a patent challenge by making a "large" and "unexplained" reverse payment to the patent challenger is not protected by the antitrust immunity generally afforded to patentees. The federal antitrust agencies recently recommended that the Court deny review in the case (*SmithKline Beecham Corp. v. King Drug Company of Florence, Inc.*, Dkt. 15-1055).

Watch for word on this case next month [**UPDATE: Certiorari denied on November 7, 2016.**].