

# AntitrustConnect Blog

## Antitrust Decision from Supreme Court Unlikely During Current Term

Jeffrey May (Wolters Kluwer) · Wednesday, October 12th, 2011

It is beginning to look like the U.S. Supreme Court will not be taking up any antitrust cases in the current term. Last week, the Court denied six petitions for review in antitrust-related matters. Just yesterday, the Court denied a petition for review in a Federal Trade Commission antitrust enforcement action.

There have been far fewer petitions in antitrust cases than in previous terms, and only one petition for review of an antitrust decision remains pending before the Court. As a result, the October 2011 term will most likely be a repeat of the prior term, in which the High Court issued no antitrust decisions.

### Review Denials

On the first Monday in October, the Supreme Court declined to review four antitrust-related federal appellate court decisions.

It denied two petitions for review of a decision of the U.S. Court of Appeals in New Orleans, rejecting gasoline retailers' price fixing claims (*In Re: Refined Petroleum Products Antitrust Litigation*, 632 F.3d 938, **CCH 2011-1 Trade Cases ¶77,328**). The retailers had alleged that oil production companies—most of which were owned in whole or in part by the member nations of the Organization of Petroleum Exporting Countries (OPEC)—conspired to fix the price for refined petroleum products.

The Court also decided not review a decision of the U.S. Court of Appeals in Philadelphia holding that the second-largest hospital system in Pittsburgh adequately alleged a conspiracy between the area's dominant hospital system and the dominant health insurer to protect one another from competition (*West Penn Allegheny Health System, Inc. v. UPMC*, 627 F.3d 85, **CCH 2010-2 Trade Cases ¶77,248**). The defending hospital system and health insurer had sought review in separate petitions, contending that dismissal should have been affirmed.

In a criminal matter brought by the Department of Justice Antitrust Division, the Court refused to disturb the conviction of the former chief executive officer of the United Kingdom-based Morgan Crucible Company for conspiring to obstruct a grand jury investigation into price fixing in the carbon products industry. The executive had sought review of an unpublished decision of the U.S. Court of Appeal in Philadelphia affirming the conviction (*U.S.v. Norris*, 419 FedAppx 190, **CCH**

## 2011-1 Trade Cases ¶77,390).

In addition, the Court denied a petition for certiorari brought by generic drug manufacturer Mylan Laboratories, Inc. Left standing was a decision of the U.S. Court of Appeals in Washington, D.C. with respect to federal jurisdiction over antitrust class action claims (*In re: Lorazepam & Clorazepate Antitrust Litigation*, 631 F.3d 537, CCH 2011-1 Trade Cases ¶77,440). The appellate court remanded questions about jurisdiction to the district court. The petitioners argued that the appellate court should have remanded with instructions to dismiss the entire case due to the absence of complete diversity of citizenship. The appeal followed a jury verdict and \$76.8 million award in favor of four health insurance companies on their class action antitrust claims against the drug maker and suppliers.

On October 11, the Supreme Court declined a petition for review of a decision of the U.S. Court of Appeals in Cincinnati upholding a determination that the largest multiple listing service (MLS) in Michigan violated Sec. 5 of the FTC Act, upholding a determination that the largest multiple listing service (MLS) in Michigan violated Sec. 5 of the FTC Act (*Realcomp II, Ltd. v. FTC*, 635 F.3d 815, CCH 2011-1 Trade Cases ¶77,409). The appellate court denied the MLS members' petition for review of a 2009 Commission opinion (CCH 2009-2 Trade Cases ¶76,784). The members specifically asked the Supreme Court whether a policy supporting the MLS violated the FTC or Sherman Act where the procompetitive justifications for that policy far outweighed any ancillary restraints related to that policy.

### One Pending Antitrust Petition

Currently, one petition for review of an antitrust case remains pending before the Supreme Court. At issue is a not-for-publication decision of the U.S. Court of Appeals in Washington, D.C., rejecting price fixing claims against producers of natural gas (*City of Moundridge v. Exxon Mobil Corp.*, No. 09-7153, February 25, 2011). The appellate court held that, even assuming there was evidence of parallel pricing, a conspiracy could not be inferred based on industry participation in a National Petroleum Council report, promoting false concerns about the adequacy of the U.S. natural gas supply.

In their petition, the complaining municipalities asked the Court whether the appellate court violated their right to a jury trial under Sec. 1 of the Sherman Act and whether it was error for the district court to reject the report of their expert witness, which purportedly contained evidence that the producers jointly and intentionally increased natural gas prices by withholding supplies of gas from the market. The petition, *City of Moundridge v. Exxon Mobil Corp.*, Dkt. 11-412, was filed on July 6, 2011.

As petitions for review continue to be filed, it is possible that the Court might agree to review an antitrust case during the current term. However, there is little likelihood that the Court would issue a decision before the next term.

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