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Litigation of the Year – Cartel Defence

German Automotive Manufacturers Antitrust Litigation

The *German Automotive Manufacturers* antitrust litigation won the award for Litigation of the Year – Cartel Defence. A group of five German automakers in October 2020 secured a dismissal with prejudice from Judge Charles Breyer of the US District Court for the Northern District of California. Volkswagen, Audi, BMW, Porsche and Daimler-Mercedes stood accused of conspiring to fix prices for certain automotive parts and innovations, echoing similar claims made by the European Commission.

Judge Breyer previously dismissed the claims in June 2019 and March 2020, although in both instances he allowed the proposed classes of auto dealers and consumers the chance to amend their claims. In the final dismissal, Judge Breyer said he only needed to evaluate new allegations that the defendants had agreed not to innovate their diesel emissions systems and that they participated in a conspiracy to fix prices for steel. He rejected the diesel emissions system claim because it was "factually indistinguishable" from previous similar claims, while also opposing the steel price-fixing claims for failing to plausibly allege any injury or an agreement to pass on surcharges.

Counsel to BMW

Latham & Watkins

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Partners Sharon Nelles, Steven Holley and Suhana Han in New York and Amanda Davidoff in Washington, DC, assisted by Samantha Hynes

Q&A

Daniel Wall at Latham & Watkins, who was counsel to BMW

What were the most challenging parts of this case and convincing the judge that there was no conspiracy to fix prices?

The unusual feature of this case is that no one ever denied the German automakers were collaborating. That meant we did not have to take on the question that dominates most efforts at dismissing conspiracy cases on the pleadings – whether there are well-pleaded facts that tend to rule out independent action. Instead, we focused on a narrower question of whether the plaintiffs had anything to prove illicit, unlawful coordination arising from the acknowledged and appropriate collaborations, and one that had a connection to their arguments about AdBlue tank sizes and the speed at which one can open or close convertible tops. They really had nothing on that, so they tried to pivot to this idea of a "whole car" conspiracy that was entirely implausible. We more or less "chased them" wherever they tried to go, either arguing they had no facts to plead that conspiracy or that it was not a per se case in any event. Eventually, they ran out of room.

Is it harder defending a client against private claims where a government agency – in this case the European Commission – has already made similar allegations, including issuing a statement of objections?

Generally, the answer is absolutely, but I think we might have benefitted from the stark differences between what the Commission was doing and what the US civil plaintiffs wanted to do. The EU's public statements about the matter were quite clear that its concerns were specific and limited, focused mainly on issues that would only affect European vehicles, and furthermore that the general pattern of collaboration was not objectionable. That allowed us to argue that the EU's proceeding did not support this case and, if anything, undermined it.

What are some of the hurdles when the judge allows for the plaintiffs to amend their complaint multiple times?

Fundamentally, plaintiffs learn and adapt. Whatever the court says in the first order teaches the plaintiffs what they need to try to say in the amended complaint, and they try to find the facts to say it. From the defendants' perspective, the strategy is to make that hard to impossible. For example, here we challenged the market definition around German cars, fairly confident that they could not fix it. In fact, the plaintiffs' second market around diesel vehicles only was just as implausible as the first.

There is some debate about how to approach innovation in the context of antitrust laws. Were there any challenges in this case in responding to the claims that there was a conspiracy to fix the price of certain innovations?

Yes and no. We were not about to challenge the idea that antitrust protects innovation, and overall the collaboration among the automakers undoubtedly advances innovation. So, we just tried to keep the focus on whether plaintiffs really had hard facts that we had strayed into improper coordination that might have affected US consumers. They did not.