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COMPETITION MATTERS

Fostering Fair Competition in the Marketplace



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[States Expand Case Against Generic Drug Makers](#)

An ongoing lawsuit filed by Ohio Attorney General Mike DeWine and 45 other state attorneys general had a new development this fall. The attorneys general asked a federal court for permission to add 12 new drug-maker defendants to the lawsuit accusing several generic drug manufacturers of conspiring to reduce competition and inflate prices for certain pharmaceutical drugs.

The expanded complaint would increase the number of drug-manufacturer defendants from six to 18 and the number of drugs at issue from two to 15.

Last year, Attorney General DeWine and 19 other state attorneys general filed a federal antitrust lawsuit against six pharmaceutical companies for conspiring to reduce competition and inflate prices for an antibiotic and a diabetes drug. Since then, 26 other attorneys general joined the litigation.

The expanded complaint contends that the drug makers made illegal agreements to fix prices and allocate customers for additional generic drugs, including ones used to treat high blood pressure, rheumatoid arthritis, anxiety, epilepsy, and diabetes. The states further allege that this was part of a broad, overarching industry code of conduct that enabled the drug manufacturers to divvy up the market for specific generic drugs in accordance with an established, agreed-upon understanding for assigning each competitor its share of the market.

The attorneys general allege that the defendants' conduct has artificially increased prices for generic drugs reimbursed by federal and state healthcare programs, such as Medicaid, and raised the coverage costs for employer-sponsored health plans and out-of-pocket costs for consumers.

The lawsuit currently is pending as part of multidistrict litigation in the U.S. District Court for the Eastern District of Pennsylvania.

[The Legal Side of the Moon](#)

Anti-competitive agreements can take many forms. Conspirators may agree to bid only in a certain geographic region, or they may alternate winning bids by year. One group of conspirators, however, took a far more astral approach: they let the phases of the moon determine the bid winner.

“The great electrical conspiracy” relied on this lunar approach to fix prices for the sale of heavy electrical equipment to the government. The electrical industry in the 1950s operated under a collusive oligopoly. The firms in the electrical industry created a cartel to set the prices, and an anti-competitive agreement formed.

Between November 1958 and October 1959, rival firms General Electric, Westinghouse, I-T-E Circuit Breaker, Allis-Chalmers, and Federal Pacific met 25 times. During these meetings, the cartel reached an anti-competitive agreement to set the market price for industrial electrical equipment.

The cartel colluded to keep its prices high. The conspiring companies would quote nearly identical prices to private industrial corporations, contractors, electric utilities, and government entities. Each of the conspiring firms would know what the other firms were bidding for each prospective sale. The winning firm would bid the low price, and the others would bid slightly higher amounts.

The phases of the moon determined who would bid the low amount, and thus win the contract. The cartel agreed to rotate the low bidders based on the phase of the moon on the date of the bid. This lunar approach helped the conspirators avoid detection. In fact, the formula was so calculated that it gave the appearance of actual price competition among the firms, when in reality no competition existed.

The “phases of the moon” anti-competitive agreement lasted an estimated seven years and rigged bids worth over \$175 million per year. The Tennessee Valley Authority caught on to the anti-competitive agreement when it realized that the submitted bids were identical, even though they were supposed to be secret. Ultimately, 44 executives from the collusive firms received a fine totaling almost \$2 million. Their anti-competitive agreement had spun out of its orbit.

[The Informed Purchaser – “Collusive Oligopoly”](#)

A few powerful manufacturers dominating the market and going to great lengths to conceal their lucrative price-fixing conspiracy is an example of a “collusive oligopoly.”

The term “collusive” or “collusion” describes a situation in which parties conspire with each other. Any price-fixing or bid-rigging scheme is collusive.

The term “oligopoly” is a bit more difficult to define but important to understand when trying to stay alert for signs of anticompetitive activity by vendors. An oligopoly is a market that is dominated by a few large sellers. Because there is not much change in the sellers in the market over time, they can easily anticipate each other’s pricing moves and often parallel each other in pricing and other business behavior. For this reason, oligopolies can give the appearance of collusion, even when the participants are actually acting independently.

However, oligopolies can be breeding grounds for price-fixing or other anticompetitive agreements. With the same few players in the market year after year, it takes few communications to form such an agreement and to convert the oligopoly into a collusive oligopoly. Thus, when you purchase products or services in an industry that is controlled by the same few large sellers each year, be especially alert for signs of price-fixing, bid-rigging, or other anticompetitive agreements.

[The Antitrust Risk of Competitor Information Exchanges](#)

Seeking out and exchanging information with competitors is a normal business activity for many companies, and there are often legitimate reasons for competitors to do so. However, the exchange of sensitive information that leads to collusion, hurts competition, or harms consumers may violate antitrust laws.

Public purchasers should be alert to situations where they have reason to believe their vendors may be pricing their products according to an exchange of information with their competitors.

The potential for antitrust liability increases if the nature of the information exchanged is:

1. Not available to the public;
2. About the company’s current or future operations;
3. Specific to the company and disaggregated; and
4. Competitively sensitive information related to price, output, customers, or strategic planning.

On the other hand, an information exchange is unlikely to raise antitrust concerns if the information is publicly available, more than three months old, and aggregated so that no company can discern the data of any other company.

A recent case illustrates what kind of information sharing is appropriate among competitors. In 2012, the Federal Trade Commission (FTC) alleged that McWane Inc. engaged in anticompetitive actions, including the exchange of sensitive sales information, with Sigma Corp. and Star Pipe Products Ltd., its biggest competitors. Together, the three companies supplied over 90 percent of the ductile iron pipe fittings used in municipal water distribution systems in the United States. After prices for ductile iron pipe fittings spiked twice in 2008, the FTC found that the companies had exchanged monthly shipment data and alleged that the exchange facilitated the competitors' ability to coordinate and raise prices.

However, the court dismissed the claim that McWane improperly exchanged information, saying that the information was sufficiently aggregated, ranged from several weeks to months in age (and did not specify dates), and was disseminated publicly. The dismissal of the FTC's claim demonstrates that companies can avoid antitrust liability as long as certain safeguards are employed.

The Ohio Attorney General's Antitrust Section works to foster competition by enforcing antitrust laws. If you suspect that a vendor or competitor has hurt consumers or competition through this type of information exchange, report it to the Ohio Attorney General's Antitrust Section. By helping catch anticompetitive information sharing, you can help ensure that public entities and other consumers don't fall victim to artificially high prices.

[We Welcome Your Questions](#)

We encourage you to suggest a topic, or ask a question of the legal staff of the Ohio Attorney General's Antitrust Section. Questions will be addressed in future issues of "Competition Matters." (No individuals' or organizations' names will be published.) Please submit your questions or suggested topics to Beth Hubbard at Beth.Hubbard@OhioAttorneyGeneral.gov.

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