

Chemical Industry Update - January 2020

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Antitrust Liability Allocation and the Problem of “Oversharing”

As with other mature industries, many sectors of the chemical industry have become relatively concentrated over the years. Under these circumstances, current U.S. antitrust laws often create perverse incentives that lead to significant exposure for industry defendants, even where violations are de minimis or non-existent. With antitrust reform being much in the air of late, some modest changes to how liability is apportioned among defendants would seem in order to both improve the level of fairness overall and encourage new entrants by removing barriers to entry.

In any federal civil antitrust case, private antitrust damages awarded by a jury are automatically trebled. And, in a case with more than one defendant, liability is “joint and several”—meaning that a successful plaintiff can recover three times the amount of harm it suffered as a result of anticompetitive activity, and it may recover that amount from any non-settling defendant it chooses, regardless of that defendant’s market share or relative degree of responsibility for the alleged conspiracy. This means that each defendant faces potential liability of three times the industry-wide damages that the antitrust violation allegedly caused. This is of particular note in industries, including the chemicals industry, that are relatively concentrated and are therefore likely to see greater antitrust scrutiny. Two features of the antitrust liability allocation rules mean that a defendant cannot shift any of its liability to other defendants that may be more culpable.

First, a defendant has no right to make its co-defendants pay their fair share—that is, no right of “contribution.” That distinguishes antitrust from other types of cases, where a defendant that loses a trial can typically at least avoid paying a disproportionate share by claiming contribution from those defendants that it can show are more culpable.

Second, when a case is tried to judgment, a settlement reached earlier in the case with one defendant is deducted from the trebled damages, not from the actual damages—and without regard to the relative share of damages for which the settling defendant ought to

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be responsible. In other words, there is no right of claim reduction proportionate to settling defendants' share of liability.

Together, these two allocation rules contribute to a race for even innocent or mostly innocent defendants to settle early, leaving the remaining defendants on the hook for an unfairly large share of damages. As a result, a company named as a defendant in any kind of antitrust conspiracy case has no good choices: it can either pay a substantial amount of money to settle the claims, or it can take on the risk that it may ultimately be held responsible for paying three times the actual damages caused by the conspiracy, reduced only by the actual amount of any settlements by other defendants. If the company has actually participated in the conspiracy, then those choices may be fair enough (and in those circumstances, companies may try to negotiate "judgment sharing" agreements with their co-defendants). But even if the company concludes, after a thorough self-investigation, that it has done nothing wrong, the choices remain the same. That is true even if the company has a relatively small market share or participated in the alleged conspiracy for only a short period of time (or believes it did not do so at all).

There may be some appetite for reform. After all, the bipartisan Antitrust Modernization Commission recommended in 2007 that the federal antitrust laws be amended both to allow for a right of contribution among non-settling defendants and also to permit non-settling defendants to obtain reduction of a plaintiff's claims by the amount of any settlements or the allocated share(s) of liability of settling defendants, whichever is greater. And antitrust has already received more attention in the current campaign for the Democratic nomination for the presidency than in any national election in decades. Perhaps addressing these damages-allocation rules could form part of a bipartisan reform package. But for the time being, even a company that is completely innocent or that at worst played a minor role in an anticompetitive agreement may reasonably feel compelled to rush into settlement for fear of being left exposed to pay industry-wide damages that are disproportionate to the company's responsibility.

For more information, contact [Michael Lindsay](#) and [Anthony Badaracco](#).

NOTES FROM ALL OVER

General Counsel Faces Prospect of Duty of Care Violations for SEC Disclosure Violations. A recent Delaware motion to dismiss ruling leaves a company's general counsel facing the prospect of liability for duty of care violations due to the company's material omissions in an SEC filing. Summary and commentary [here](#).

PFAS Legislation. Last week, the U.S. House of Representatives [passed HR 535](#) that would impose significant restrictions on the use of PFAS chemicals and heavy clean-up fines for manufacturers. Senator John Barrasso of Wyoming has stated the bill [has no chance in the Senate](#).

Joint Venture Governance. The JV structure is a popular and important deal structure for the chemical industry. [This article](#) runs interesting comparisons of JV governance against public company governance.

Exxon Climate Change Case Ends in a Whimper. Bringing an end to the supposedly groundbreaking case by the New York Attorney General's office over whether Exxon misled its investors with respect to the potential impact of climate change on its business, in December, the trial court judge ruled against the AG's office on all counts. Earlier this week, the AG's office announced it would not appeal.

CORPORATE LAW

Delaware Continues to Refine MAE Standards

In our November 2018 edition, we commented on the special relevance of the laws surrounding material adverse change (MAC) provisions for the chemical industry. With the cyclical nature of some sectors in the industry, questions over MACs can become more complex than in other spaces, as evidenced by the Delaware decision in *Hexion Specialty Chems. Inc. v. Huntsman Corp.*, 965 A.2d 715 (Del. Ch. 2008). In 2018, we then reviewed the landmark decision *Akorn, Inc. v. Fresenius Kabi AG*, which marked the first time that the Chancery Court upheld a buyer's use of a MAC clause to terminate a merger agreement.

However, the Court's reasoning in that case suggested that the favorable ruling was based on the particularity of the facts and that the general standard for successfully invoking such a clause remains high. The Court's recent decision in *Channel Medsystems v. Boston Sci. Corp.* confirms the continuation of that high standard and reaffirms the Delaware Court's stance that a MAC clause cannot be invoked to alleviate the effects of "buyer's remorse" or undesirable business decisions.

We cover the Channel decision in more detail in this e-update, but in brief, *Channel v. Boston Scientific* reaffirms that despite the Chancery Court's decision in *Akorn* in 2018, the bar for invoking a MAE clause to terminate a merger agreement is still high. Material inaccuracies in the representations and warranties are not enough to trigger a Material Adverse Effect. Rather, the buyer must show that at the time of termination that there is a future expectation of a long-term adverse effect on the earning power of the target business.

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Blackrock and ESG Risks

In its November 2019 10-K, Scotts Miracle-Gro broke new ground (at least in the chem industry) with a risk factor warning of risks associated with its corporate citizenship and sustainability efforts. The risk factor notes that "*There is an increasing focus from certain investors, customers, consumers, employees, and other stakeholders concerning corporate citizenship and sustainability matters*" and "*we could fail, or be perceived to fail, in our achievement of such initiatives or goals.*"

It's easy to see how these risks can have a material impact on companies. Last year, despite being an early and vocal proponent of corporate responsibility, Blackrock Inc.

saw itself receiving criticism from a number of directions for not doing enough, particularly with respect climate change. Perhaps in response, earlier this month, in its annual letter to clients, Blackrock's CEO announced significant capital reallocation that would lower exposure to fossil fuel companies and move out of thermal coal stocks altogether. That's all well and good, but it is a stark reminder that companies can face serious headwinds in the capital markets by not fitting into investors' sustainability goals.

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