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BASF, Dow Can't Escape Polyurethane Price-Fixing MDL

By **Matthew Santoni**

Law360 (March 10, 2020, 4:47 PM EDT) -- A number of companies accused of conspiring to manipulate the prices of two chemicals used to make polyurethane can't slip a proposed antitrust class action, a Pennsylvania federal judge ruled Monday.

Senior U.S. District Judge Donetta Ambrose denied the defendants' joint motion to dismiss the class action complaint accusing companies of using plant closures and limited supplies to drive up the prices of methylene diphenyl diisocyanate, or MDI, and toluene diisocyanate, or TDI, ruling that the allegations in the complaint were sufficiently supported to move the case ahead in the Pittsburgh-based multidistrict litigation.

"Plaintiffs' (class action complaint) avers coordinated parallel conduct, price increases, plant closures and supply disruptions, defendants' communication and presence at industry meetings prior to pricing announcements, actions potentially inconsistent with competitive market behavior, and a highly concentrated relevant market that was susceptible to price fixing," Judge Ambrose wrote. "Additionally, plaintiffs' CAC sufficiently avers a motive, that defendants acted against their interests, and evidence implying traditional conspiracy."

The court also denied a motion to dismiss for lack of jurisdiction brought by foreign-based corporations BASF SE, Covestro AG, Mitsui Chemicals, Inc., MCNS, and Wanhua Chemical Group Co. Ltd.

Though Judge Ambrose rejected arguments that she could exercise jurisdiction over the foreign companies based on their actions as "co-conspirators" in a global conspiracy and the argument that they were controlling the actions of their local subsidiaries, she ruled that there was enough in the pleadings to conduct limited discovery on the companies' business contacts in the United States under the "national contacts" doctrine.

The plaintiffs **generally alleged** that companies including BASF, Covestro LLC and Dow Chemical Co. reacted to a period of low MDI and TDI prices in 2014 and 2015 by limiting production and artificially inflating the prices for manufacturers of polyurethane plastic products, including plaintiffs such as Rhino Linings Corp. and Elliott Co. of Indianapolis.

According to the complaints, the defendant companies **conspired** through trade groups and took advantage of the difficulty that competitors would face when entering the market for the chemicals, known as diisocyanates and isocyanates, along with their control over most of the supply and the fact that the chemicals can't be replaced with substitutes.

Judge Ambrose ruled Monday that those accusations were sufficient to survive the defendants' joint motion to dismiss.

"Defendants' contentions regarding the possible inference of legitimate, independent business-related conduct do not undermine the sufficiency of these allegations under minimum pleading standards, and the bulk of defendants' assertions are more appropriate for resolution at a later stage in this litigation," she wrote. "Plaintiffs need not explain why some defendants took many actions and others took few, or the potential market effects of weather events. In addition, the lack of direct evidence of

conspiracy has no bearing, at this stage, on the sufficiency of plaintiff's allegations that rely on indirect evidence."

Though the evidence the plaintiffs cited for a conspiracy to fix the prices of TDI was slimmer, it was still sufficient to move ahead, the court said.

"Defendants' contention that plaintiffs failed to adequately plead a TDI conspiracy claim (based on a single conspiracy that includes TDI and lack of standing to bring a TDI conspiracy) is rejected," Judge Ambrose wrote. "When read in toto, plaintiffs' CAC has sufficiently pled that they purchased both TDI and MDI and paid inflated prices."

Judge Ambrose said that while the foreign companies tried to argue that they couldn't be haled into the Pennsylvania court, there were grounds to explore whether they did enough business in the U.S. to let the court exercise personal jurisdiction under the Clayton Act, which says antitrust suits can be brought in any district where the defendant has business.

"Under the so-called 'national contacts doctrine,' personal jurisdiction in federal antitrust litigation is assessed based on a defendant's aggregate contacts with the United States as a whole," she wrote.

Though most of the foreign defendants said they were served under the Hague Convention and a Southern District of Florida ruling in General Cigar Holdings Inc. v. Altadis SA, said defendants have to be served under the Clayton Act for that law's national-contacts test to apply, Judge Ambrose noted that the Third Circuit had never explicitly adopted that view.

"In Clayton Act cases, our Court of Appeals has used language suggesting that the pertinent inquiry involves the nature of the plaintiff's claim and the breadth of service authorized by statute, rather than the mechanism of service actually used to serve a particular defendant," Judge Ambrose wrote. "In the absence of guidance or suggestion to the contrary from our Court of Appeals, I will assess personal jurisdiction in light of defendants' nationwide contacts."

The judge did reject the plaintiffs' arguments that the foreign companies could be pulled in merely as co-conspirators for allegedly fixing the price of a global commodity, since they had not sufficiently pled that the companies did so knowing that they would fetch higher prices in the United States. Likewise, she rejected theories that the foreign companies acted as "alter egos" or agents of their domestic subsidiaries, or vice versa.

"As defendants point out, plaintiffs seek primarily to establish jurisdiction under theories that would impute to defendants the conduct of other entities. I agree with defendants that at this juncture, plaintiffs have not demonstrated the existence of minimum contacts through a conspiracy, alter-ego, or agency theory," Judge Ambrose wrote. "Plaintiffs, however, request the opportunity to conduct jurisdictional discovery. With respect to at least some of the theories propounded, plaintiffs have adequately demonstrated the possible existence of the requisite contacts."

Attorneys for the parties did not immediately respond to requests for comment Tuesday.

The plaintiff companies are represented by Susman Godfrey LLP, Pietragallo Gordon Alfano Bosick & Raspanti LLP, Finkelstein & Partners LLP, Hartley LLP, Marcus & Shapira LLP, Cooper & Kirk PLLC, Kaplan Fox & Kilsheimer LLP, Nussbaum Law Group PC, Boni Zack & Snyder LLC, Cafferty Clobes Meriwether & Sprengel LLP, Barrack Rodos & Bacine, Carlson Lynch LLP, Cohen Milstein Sellers & Toll PLLC, Frohsin Barger & Walthall, Grant & Eisenhofer PA, Pittman Dutton & Hellums PC, The Miller Law Firm PC, Hagens Berman Sobol Shapiro LLP, Criden & Love PA, Paul LLP, Lieff Cabraser Heimann & Bernstein LLP, Berger Montague PC, MoginRubin LLP, Joseph Saveri Law Firm Inc., Edelson & Associates LLC, Grabar Law Office, Hausfeld LLP, Cory Watson Attorneys PC and Minto Law Group LLC.

The defendant companies are represented by Reed Smith LLP, Mayer Brown LLP, Simpson Thacher & Bartlett LLP, Paul Weiss Rifkind Wharton & Garrison LLP, Maynard Cooper & Gale PC, Morgan Lewis & Bockius LLP, Dickie McCamey & Chilcote PC, Williams & Connolly LLP, Buchanan Ingersoll & Rooney PC, Sidley Austin LLP, Welsh & Recker PC, James A. Backstrom, Farmer Brownstein Jaeger & Goldstein LLP, and Vinson & Elkins LLP.

The case is In Re: Diisocyanates Antitrust Litigation, case number 2:18-mc-01001, in the U.S. District Court for the Western District of Pennsylvania.

--Editing by Peter Rozovsky.
