

Eighth Circuit Upholds Preliminary Injunction Blocking Merger Between Sanford Health and Mid Dakota Clinic

Stephanie M. Mirrow

In a recent decision, the Eighth Circuit upheld a preliminary injunction blocking the proposed merger between Sanford Health, Sanford Bismarck (“Sanford Health”) and Mid Dakota Clinic, P.C. (“Mid-Dakota Clinic”). The Federal Trade Commission and State of North Dakota alleged that the proposed merger would substantially lessen competition in four types of physician services in the Bismarck-Mandan area. The merging parties argued that the district court did not account for the dominant position of Blue Cross Blue Shield of North Dakota (“Blue Cross”). However, after considering the role of Blue Cross, the Eighth Circuit upheld the district court’s determination of the relevant market and concluded that the district court did not err in its review of defendants’ rebuttal arguments.



Vice President Stephanie M. Mirrow has worked on numerous healthcare issues, including hospital and physician group mergers and acquisitions.

The Eighth Circuit found that Blue Cross’ alleged dominant position was not relevant to market definition, because “the hypothetical monopolist test evaluates whether an insurer could avoid a price increase by contracting with physicians who offer services that are outside of the proposed services market or who are located in a region outside of the proposed geographic market.” The Eighth Circuit specifically noted that even if Blue Cross could be considered a power buyer, this would not impact its ability to find substitute physician services to those in the alleged relevant market. Further, Blue Cross, like other health plans, would need to include physicians from the four types of services located in the Bismarck-Mandan area in order to offer a competitive health plan in that area. Simply, the Eighth Circuit found that the merging parties’ power buyer argument did not address how insurers would switch from the services in the alleged relevant market to alternative services in response to relative price changes.

The merging parties also argued that the presumption that increased concentration will lead to increased prices does not apply, because Blue Cross is a dominant buyer that sets reimbursement rates using a statewide pricing schedule. However, the Eighth Circuit noted a prior example of Blue Cross modifying its contract terms due to the demands of a near-monopoly provider in another part of North Dakota and found that the district court did not err in its consideration of this evidence.

This decision underlines the continued importance of market specific facts when considering a power buyer argument -- including the power buyer’s ability to switch to alternative services and its history of price negotiations.

Also In This Issue

When Evaluating Standing, Economic Relationships Matter: Lessons from the Aluminum Antitrust Litigation

Philip B. Nelson discusses the recent Second Circuit decision in *Eastman Kodak Co. et al v. Henry Bath LLC et al* (“*Kodak v. Bath*”), which vacated the district court’s ruling that the plaintiffs lacked standing. Dr. Nelson compares this decision to the Second Circuit’s earlier decision in *In re Aluminum Warehousing Antitrust Litigation* and finds that the recent decision is rooted in differences in the economics of the two cases. Specifically, the Second Circuit found that the anticompetitive conduct alleged in *Kodak v. Bath* would directly affect the prices paid by plaintiffs. While the Second Circuit’s decision gives the plaintiffs standing, Dr. Nelson indicates that this does not complete the economic analysis and plaintiffs likely will need to address several additional economic questions if they are to prevail at trial.

Measuring the Impact of Sensitive Questions on Survey Response Rates

Stuart D. Gurra and Jonathan A. Neuberger discuss how the survey design and formulation of sensitive questions may impact survey response rates. There are several possible approaches, including the use of controlled or natural experiments, to assess empirically the impact that a sensitive question may have on response rates. Further, it is possible to use a *difference-in-differences* technique to isolate the effect of a sensitive question from the effect of other survey characteristics. In sum, empirical techniques may be implemented to assess the impact of the introduction of a sensitive survey question on response rates. This understanding can inform the design and implementation of adequate mitigation efforts to reach desired response rates.

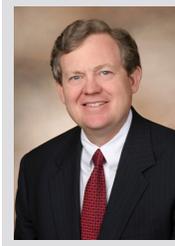
When Evaluating Standing, Economic Relationships Matter: Lessons from the Aluminum Antitrust Litigation

Philip B. Nelson

In the most recent round of the “Aluminum Antitrust Litigation,” the Second Circuit vacated the district court’s judgment that the plaintiffs lacked standing in three consolidated cases (*Eastman Kodak Co. et al v. Henry Bath LLC et al* (“*Kodak v. Bath*”). Specifically, the Second Circuit found that the circumstances of the plaintiffs in this review were “materially different” from the circumstances in an earlier case (*In re Aluminum Warehousing Antitrust Litigation* (“*Aluminum III*”)) that the Second Circuit reviewed in 2016. The Second Circuit’s recent decision is rooted in differences in the economics of the two cases.

Plaintiffs in *Kodak v. Bath* allege that the defendants conspired to inflate prices in the “primary aluminum market” (which involves aluminum in the form produced at a smelter or primary aluminum plant by original producers, as opposed to “secondary aluminum” that is made from aluminum scrap). The plaintiffs are manufacturers that use primary aluminum to fabricate products and include Eastman Kodak and Fujifilm, among others. The defendants include both financial defendants, such as Goldman Sachs and JP Morgan Chase, that traded in primary aluminum contracts and warehousing defendants that owned and operated aluminum warehouses that were certified by the London Metals Exchange (LME) and that were owned by one of the financial defendants. The plaintiffs allege that the financial defendants acquired large positions in primary aluminum at low prices during the economic downturn that followed the 2008 market collapse and that these defendants then conspired to manipulate the “Midwest Premium” reported by Platts. The Midwest Premium is added to the LME Cash Price to obtain the spot metal price for primary aluminum in the United States and reflects the incremental costs associated with making aluminum deliveries in the Midwest, such as transportation, insurance, and warehouse storage costs. Plaintiffs argue that defendants’ manipulation of the Midwest Premium increased the price that the plaintiffs paid for aluminum.

The Second Circuit’s conclusion in *Kodak v. Bath* considered economic factors. Specifically, the Second Circuit noted that “[u]nder conventions of the industry” the spot metal price that plaintiffs paid is determined by two components: the LME Cash Price and the Midwest Premium. The Second



Principal Philip B. Nelson has consulted on numerous metals market mergers, including the Alcoa/Reynolds merger and mergers in the steel industry. He also has analyzed collusion, both for cases involving evidence of explicit collusion and for cases that allege collusion based on the analysis of “plus factors.”

“However, the Second Circuit ... further considered the economics of the marketplace, including pricing.”

Circuit also noted that plaintiffs alleged that the Midwest Premium increased from 6.45 cents per pound in 2011 to 20 cents per pound in 2014 and that this increase was attributable to defendants’ conduct. Plaintiffs allege that this increase in the Midwest Premium was attributable to an increase in delivery delays at warehouses controlled by defendants (i.e., an increase in delivery lags from six weeks prior to 2011 to nearly two years by 2014) and to defendants’ control of 80 percent of the LME warehousing capacity in the United States. Finally, the Second Circuit also found that plaintiffs’ primary aluminum contracts referenced spot aluminum prices that included the Midwest Premium and “all were first in line to pay prices affected by the defendants’ alleged inflation of the Midwest Premium.”

This finding differs from the district court’s ruling, as well as the Second Circuit’s own ruling, in the earlier *Aluminum III* case. Both the district court and the Second Circuit in the *Aluminum III* case found that the anticompetitive conduct alleged by the plaintiffs occurred “first and foremost” in the LME warehousing services market, not the primary aluminum market, and that the plaintiffs did not allege injury in the LME warehousing market. However, the Second Circuit did not view this as determinative in *Kodak v. Bath* and further considered the economics of the marketplace, including pricing. In particular, the Second Circuit found that the anticompetitive conduct alleged by plaintiffs, a conspiracy to increase the Midwest Premium, inflated the price in a market in which the plaintiffs participated (i.e., the market for the purchase and sale of primary aluminum, as reflected in plaintiffs’ supply contracts). The Second Circuit contrasted the economics of this case with the economics underlying the *Aluminum III* case. In the earlier *Aluminum III* decision, the Second Circuit concluded that the plaintiffs had “disavow[ed] participation in any of the markets in which the defendants operate.” The plaintiffs in the *Aluminum III* case were end users, both commercial

Measuring the Impact of Sensitive Questions on Survey Response Rates

Stuart D. Gurrea and Jonathan A. Neuberger

Survey design and the formulation of sensitive questions may reduce response rates to a survey. For example, the potential impact that the inclusion of a citizenship question in the 2020 U.S. Census would have had on response rates was at the center of recent litigation against the United States Department of Commerce. This litigation highlights the importance of survey and questionnaire design and the challenges involved in predicting the potential impact of certain questions on response rates. There are empirical techniques that can help quantify potential reductions in response rates, as well as help isolate this effect from other potential competing factors also driving survey response rates.

So-called *sensitive* questions in surveys are questions respondents are less likely to respond to or to respond to truthfully. Possible explanations for respondent's reaction to these questions include the perception that the questions are intrusive and fear that responses will be used improperly. The inclusion of sensitive questions in a survey questionnaire may reduce response rates to individual questions (*item nonresponse*) and also may reduce the response rates to the entire survey questionnaire (*unit or total nonresponse*). If these reactions are anticipated and quantified, it may be possible to mitigate these effects by allocating more resources to promoting participation through advertising and education, reassuring respondents that their responses will be used only for the intended purposes, and committing sufficient resources to non-response follow-up activities. The impact of a sensitive question also may be reduced through survey design itself – for example, by carefully wording the question.

There are several possible approaches to assessing empirically the impact that a sensitive question may have on response rates. These typically involve comparing response rates to a survey that includes the sensitive question to response rates in a counterfactual survey that does not include the sensitive question. In these analyses, it is important to separate the effect of the inclusion of the question at issue from other potential confounding effects that also may impact the observed outcome of interest, in this case, the response rate to individual questions or to a survey as a whole.

“There are several possible approaches to assessing empirically the impact that a sensitive question may have on response rates.”



Senior Vice President Stuart D. Gurrea has been qualified in Federal Court as an expert witness in economics, quantitative analysis of survey data, and impact evaluation. Principal Jonathan A. Neuberger has experience in survey design and implementation.



One approach to assessing the impact of the inclusion of a sensitive question in a survey is to conduct a controlled experiment in the form of a survey designed to this effect. The survey can be designed to infer from a sample of respondents out of the population of interest the impact of the inclusion of the sensitive question on the overall population's willingness to respond to the questionnaire. The sample of respondents can be directly asked how their will-

ingness to respond to the questionnaire or to particular questions would change with the inclusion of the sensitive question. Alternatively, the effect can be identified by comparing responses to questions with and without the sensitive information requests. As with any other survey, the reliability of this approach

is itself dependent on the reliability of the survey's design, implementation, and interpretation.

Another approach, rather than relying on a controlled experiment designed for this specific purpose, may be to rely on a natural experiment in which response rates from prior surveys with and without the sensitive question are compared. This approach, however, presents its own challenges when other factors may explain differences in response rates across different prior surveys. Unlike a randomized test in which the respondents to the survey with the sensitive question (intervention group) are interchangeable with the respondents to the *same* survey without the sensitive question (control group), other factors may explain differences in outcomes between the two different prior surveys. Indeed, factors driving differences in respondent's propensity to respond include individual characteristics (e.g., socioeco-

Lessons from the Aluminum Antitrust Litigation

and consumer. The Second Circuit noted that these end users were indirect purchasers who did not participate in the market for warehousing services and who did not claim an injury that was “inextricably intertwined” with the objective of the alleged conspiracy.

While the Second Circuit’s decision gives the plaintiffs standing, it does not resolve the case or complete the economic analysis. For plaintiffs to prevail at trial, several additional economic questions likely will need to be addressed. These questions include: Was there really a significant increase in the delivery lags? If so, is there a non-collusive explanation for the Defendants’ conduct that led to the increase in these delivery lags? If there were increased delivery lags due to

a conspiracy, did these delivery lags increase the price of aluminum under the contracts? If there is evidence of an adverse competitive effect due to collusion, was this competitive effect muted (if not eliminated) by other economic factors that determine the spot price of primary aluminum (such as the availability of recycled aluminum)?

In sum, the Second Circuit’s recent decisions show that the mustering of economic evidence which demonstrates that a plaintiff class is impacted by alleged collusive behavior can be key to determining if a plaintiff has standing. Moreover, in “plus factor” cases where there is no explicit evidence of collusion, economic analysis will continue to play a significant role as the focus of the court turns to determining whether the defendants undertook anticompetitive collusive conduct.

Sensitive Questions on Survey Response Rates

economic and demographic characteristics), the structure of the survey (*e.g.*, wording, length or complexity), and efforts to promote higher response rates (*e.g.*, media campaigns and monetary rewards). Respondent’s individual characteristics, however, will not drive differences in participation rates across the two surveys if the questions are addressed to the same respondents in both surveys.

Survey characteristics such as length and complexity also may explain differences in response rates. To isolate the effect of interest from the effect of survey characteristics, it is possible to use a *difference-in-differences* technique. This quasi-experimental approach can be used in this context to isolate the impact of the sensitive question by comparing changes in outcomes between a group that is sensitive to the question (effectively an *intervention* group) to the outcomes of a group of respondents that is understood to be insensitive to the inclusion of the question (effectively a *control* group). The difference in response rates for the insensitive group across surveys can be explained by factors such as the

survey length and complexity. The change in response rates for the sensitive group above the baseline change observed for the insensitive group (the *difference in differences*) approximates the effect of the impact of the sensitive question on the sensitive group. By applying the *difference-in-differences* approach, the effect of the sensitive question can be estimated net of the differences attributable to variation in survey characteristics.

The grouping of respondents into two groups (sensitive and insensitive), however, is not random, and differences in outcomes between the two groups may be explained at least in part because the groups are distinct. To address this problem, the *difference-in-differences* analysis can be enriched by controlling for other explanatory variables in a regression model of response rates.

In sum, empirical techniques may be implemented to assess the impact of the introduction of a sensitive survey question on response rates. This understanding can inform the design and implementation of adequate mitigation efforts to reach desired response rates.

EI News and Notes

Antitrust Economists Join EI

Jason L. Albert and Jéssica Dutra recently joined EI's Washington DC office. Prior to joining EI, Dr. Albert was a staff economist with the Department of Justice's Antitrust Division ("DOJ"). Dr. Albert worked on both civil and criminal antitrust matters at DOJ and has expertise across a wide range of industries, including healthcare, media, and cybersecurity. Dr. Albert earned his Ph.D. degree from Georgetown University.

Dr. Dutra's expertise is in the area antitrust and competition analyses, including the estimation of unilateral effects, merger simulations, and applied microeconomics. Dr. Dutra has analyzed mergers in the oil and gas industry in Brazil, Columbia and Uruguay and has conducted analyses of the U.S. hospital industry. Prior to joining EI, Dr. Dutra worked as a senior pricing analyst at Ultragaz AS. Dr. Dutra earned her Ph.D. degree from the University of Kansas.

Court Awards Wye Oak Over \$89 Million in Damages for Breach of Contract

EI Vice President John M. Gale provided expert testimony for Wye Oak Technologies, a military contractor operating in Iraq in 2004. Judge Royce Lamberth of the US District Court for the District of Columbia awarded Wye Oak over \$89 million in damages in addition to interest and costs from the Republic of Iraq for breach of contract. The Court relied upon Dr. Gale's lost profits analysis and found Dr. Gale's determination of the discount rate and reliance on public and third-party evidence was well supported. Wye Oak was represented by Whiteford Taylor & Preston, LLP, Pavich Law Group, and Quinn, Racusin & Gazzola Chartered.

EI Economists Assist Sonoco in Acquisition of Corenso

EI Senior Vice Presidents Michael G. Baumann and Paul E. Godek assisted the law firm of BakerHostetler with the Department of Justice's ("DOJ") review of Sonoco Products Company's acquisition of Corenso Holding America. The DOJ's review focused on the effect of the acquisition on the North American recycled paperboard industry. After an initial inquiry and following written and oral presentations to the DOJ, the merger was cleared in July 2019 without a second request.

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