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THE TOP 100 VERDICTS OF 2013

The National Law Journal's VerdictSearch affiliate scoured the nation's court records in search of 2013's biggest verdicts, also consulting with practitioners and reviewing reports by other ALM Media LLC publications. The amounts listed here represent jury awards—they do not account for judicial reductions, offsets or appeals.

RANK	AMOUNT	TYPE	NAME/COURT/DATE	LEAD PLAINTIFFS' ATTORNEY(S)/FIRM(S)	LEAD DEFENSE ATTORNEY(S)/FIRM(S)
1	$1,200,147,117	Antitrust	In re Urethane Antitrust Litigation, D. Kan., 04-1616-JWL, 2/20/2013	Joseph Goldberg, Freedman Boyd Hollander Goldberg Urias & Ward, Albuquerque; Donald L. Perelman, Fine, Kaplan and Black, Philadelphia	David M. Bernick, Boies, Schiller & Flexner, New York; Hamilton Loeb, Paul Hastings, Washington

PRICE FIXING — BUSINESS LAW — CONSPIRACY

Antitrust action alleged price-fixing by industrial foam makers

VERDICT $1,200,147,117

ACTUAL $1,061,147,117

CASE In re: Urethane Antitrust Litigation, No. 2:04-md-01616-JWL
COURT U.S. District Court, Kansas City, KS
JUDGE John W. Lungstrum
DATE 2/20/2013

PLAINTIFF ATTORNEY(S) **Joe Goldberg (lead),** Freedman Boyd Hollander Goldberg Urias & Ward P.A., Albuquerque, NM

DEFENSE ATTORNEY(S) **David M. Bernick,** Boies, Schiller & Flexner LLP, New York, NY
Hamilton Loeb, Paul Hastings LLP, Washington, DC

FACTS & ALLEGATIONS The plaintiffs that comprise the class underlying this antitrust action are manufacturers and industrial-products distributors that purchased polyether polyols and related chemicals commonly referred to as "urethanes" from a number of large chemical companies, including The Dow Chemical Company, between January 1999 and December 2004.

The chemical products at issue are used to make both soft foams and hard foams; applications include padding in car dashboards and seats of office chairs, and insulation for refrigerators. In roughly 2004, the U.S. Department of Justice commenced an antitrust investigation regarding price-fixing in the marketplace for another product, polyester polyols, which are frequently used to make plastic materials for a variety of consumer goods. Resulting civil antitrust class action suits against several large chemical companies eventually were consolidated in federal court in Kansas City.

Prior to a subsequent government probe into the polyether polyols market -- a probe that, unlike the polyester polyols investigation, ultimately did not result in the filing of charges by the government -- private-practice attorneys began to investigate possible price-fixing as to polyether polyols. This investigation resulted in the filing of the instant action, in federal court in New Jersey. (One of the originally named defendants in this action was also named as a defendant in the polyester polyols action.)

A contested motion in the instant action that it be consolidated with the polyester polyols action and litigated in the U.S. District Court for the District of Kansas was successful, though Judge John Lungstrum, to whom the urethane antitrust litigation was assigned, later concluded that the two actions should proceed separately.

The plaintiffs alleged that Dow and other chemical companies engaged in a conspiracy to fix prices in the polyether polyols market; it was originally contended that the conspiracy ran from 1999 to 2004, but that allegation was later amended to cover the years 1999 to 2003. The plaintiffs' conspiracy allegations initially focused on Dow and four other chemical companies, but those latter four defendants settled prior to trial, with the settlements totaling $139 million.

The plaintiffs' expert in antitrust-related economics, opined that his application of a commonly used method of analyzing marketplace structure resulted in the conclusion that the polyether polyols marketplace had been conducive to price-fixing manipulation during the years in question.

Plaintiffs' counsel also relied on testimonial and documentary evidence at trial, in support of the contention that price-fixing-related communications had taken place between higher-ups at Dow and other companies named as defendants in the action. A former executive for the urethane department of one of the settling defendants testified that in order to secretly engage in communications with counterparts at other chemical companies, he on two occasions drove from his office to a nearby gas station, purchased a pre-paid calling card, and used the card to make calls on the station's payphone. In addition, a former executive at Dow testified that she had been present at meetings during which colleagues talked about oral interactions they had had with counterparts at supposed competitors in the polyether polyol marketplace.

It was not disputed in the litigation that during the years at issue, prices and thus profits in the urethane marketplace were declining; plaintiffs' counsel argued that executives at Dow and other major chemical companies were under extreme pressure to reverse those declines, by any means necessary.

Defense counsel for Dow argued that evidence of declining prices during the years in which the alleged conspiracy was in place -- a period of time in which the cost of manufacturing urethanes was rising -- contradicted the assertion that a conspiracy between Dow and other chemical companies to keep prices for urethane products elevated had ever existed.

Dow's expert in antitrust-related economics pointed to evidence that, he argued, was inconsistent with a price-fixing conspiracy among Dow and the other chemical companies allegedly party to the conspiracy. This evidence, according to Dow's expert, included fluctuations in the levels of market share enjoyed by particular companies allegedly involved in the conspiracy, and instances of desirable customers moving from one company to another in response to a price concession. (Plaintiffs' counsel cross-examined the expert about the phenomenon of "cheating" within a price-fixing conspiracy.)

Defense counsel for Dow called to the stand witnesses from Dow and other chemical products manufacturers who denied that there had been any price-fixing agreements in place during the years at issue, and, where applicable, denied that specific conversations described by the plaintiffs' witnesses had ever taken place. These defense-called witnesses testified that when discussions with counterparts at competitors did occur, those discussions concerned joint ventures and supply agreements that are common in the chemical industry.

Defense counsel for Dow argued that documents generated at the time of these lawful interactions between the competitors, in addition to the evidence of stagnant prices, supported the contention that these discussions did not relate to any anti-competitive conspiracy between Dow and the other companies.

INJURIES/DAMAGES The plaintiffs' expert in monetary damages resulting from antitrust violations had been commissioned to prepare in anticipation of trial a statistical analysis that would illustrate for the jury what competitive prices in the polyether polyols market would have been, but for the defendants' alleged conspiracy. The amount of damages identified by the plaintiffs' expert as to the five-year period between 1999 and 2003 was $1.1 billion. Due to statute-of-limitation considerations, a damages figure reflecting the roughly three-year period from November 2000 through December 2003 also was presented to the jury; that figure was $496 million.

The day before the trial began, defense counsel for Dow filed a motion to decertify the class on the ground that, even assuming the validity of the plaintiffs' damages expert's model, the expert's statistical analysis indicated that a number of the class's members had not suffered any damages as a result of the alleged conspiracy. The court deferred final consideration of that motion until after the trial.

At trial, defense counsel cross-examined the plaintiffs' expert as to what defense counsel characterized as his model's failure to connect any price differences identified with any specific wrongful conduct.

The defense's damage-models expert criticized the plaintiffs' damages expert's selection of the economic variables used in his statistical models, and argued that the plaintiffs' expert's ultimate decision to disregard a portion of the alleged-conspiracy period as it originally had been delineated -- i.e., excluding 2004 from the alleged-conspiracy period analyzed -- presumably came about because application of his methods to the lengthier alleged-conspiracy period would not yield a positive numerical figure with respect to damages realized by the class's members.

The defense did not present an alternative damages figure for the jury's consideration. Defense counsel for Dow reiterated that the evidence seemed to prove that prices were declining throughout the period of the alleged conspiracy.

RESULT The jury concluded that Dow had participated in a price-fixing conspiracy. The jurors further found that the conspiracy resulted in overpayments, but that those overpayments did not include overpayments prior to Nov. 24, 2000. The jurors further determined that the plaintiffs had suffered damages totaling more than $400 million.

Post-trial, the court denied Dow's decertification motion, holding that, notwithstanding the fact that it had been filed on the eve of trial, the motion was substantively unpersuasive, in that it has often been held -- perhaps most notably by the U.S. Circuit Court of Appeals for the Seventh Circuit -- "that the presence of a few 'zero-damages' class members [does not] necessarily [warrant de]certification."

During the post-trial motion practice regarding decertification, the defense cited to the U.S. Supreme Court's decision in Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013), which was issued roughly one month after the verdict against Dow had been rendered. In that decision, the Supreme Court reversed a district court's certification due to causal-link shortcomings in the damage model relied on by the plaintiffs in that case -- a damage model that had been created by the plaintiffs' expert in the instant action.

In his post-trial decision as to the defense's decertification motion, Judge Lungstrum reasoned that because the plaintiffs' expert's methodology had not been attacked on causation grounds prior to trial, the validity of his methodology was defined by his testimony at trial. And at trial, the judge concluded, the expert had put forward an argument concerning the causal link between the alleged conspiracy and the financial impact upon class members.

In rendering final judgment, Judge Lungstrum, pursuant to statutory mandate, trebled the amount of damages as determined by the jury, and then off-set from the trebled amount $139 million, reflecting the pre-trial settlements agreed to by the defendants that did not go through to trial.

POST-TRIAL Dow has appealed to the U.S. Court of Appeals for the Tenth Circuit.

EDITOR'S NOTE This report is based on court documents and on information that was provided by plaintiffs' and defense counsel.

–Asher Hawkins