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ANTITRUST TRADE AND PRACTICE

Expert Analysis

Wrapping Up an Active 2014 In Antitrust Enforcement and Litigation

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The year 2014 was an active year in antitrust and competition law, both for governmental enforcement and private litigation. Governmental regulators continued to pursue a pattern of aggressive antitrust enforcement, ranging from merger challenges to criminal investigations. With respect to private litigation, key antitrust concepts continued to play out in federal district and appellate courts regarding the international reach of domestic antitrust law, liability for manipulating global financial benchmarks and the legality of reverse-payment settlement agreements.

Merger Enforcement

For the U.S. Department of Justice's Antitrust Division and the Federal Trade Commission (FTC), 2014 marked a continuation of the regulators' aggressive approach to merger enforcement. Both the Justice Department and FTC achieved particular success with challenges to unwind consummated transactions that were not reportable under Hart-Scott Rodino.[1]

The Justice Department began the year securing a victory in its challenge to technology company Bazaarvoice's consummated $168 million acquisition of PowerReviews. Bazaarvoice, the "unquestioned market leading provider of Ratings and Reviews platforms" for eCommerce companies, acquired PowerReviews in 2012, but the Justice Department quickly alleged the transaction violated Section 7 of the Clayton Act.[2]

On Jan. 8, 2014, after a three-week trial, the court concluded Bazaarvoice violated Section 7 by acquiring "its closest and only serious competitor."[3] The court dedicated a significant portion of the opinion to Bazaarvoice's rationale for the acquisition, focusing extensively on internal pre-acquisition communications that reflected anticompetitive motivations for the merger. The court noted the company's defenses were "undermined" by these internal documents, as "[Bazaarvoice's] portrayal of PowerReviews as a weak and unworthy competitor was belied by the plethora of documents showing that… Bazaarvoice's management believed that the purchase of PowerReviews would eliminate its only real competitor."[4]

The FTC achieved similar success when the U.S. Court of Appeals for the Sixth Circuit affirmed an FTC order unwinding a 2010 nonreportable hospital merger between ProMedica and St. Luke's, two Ohio-based hospitals. The Sixth Circuit agreed the merger would "further concentrate markets that are already highly concentrated," particularly as the addition of St. Luke's left ProMedica with over 50 percent market share for general acute-care services and more than 80 percent market share for inpatient obstetrical services.[5]

Similar to *Bazaarvoice*, the court specifically highlighted anticompetitive statements found in the parties' pre-acquisition communications. The court surmised that a St. Luke's presentation acknowledging the merger could "'[h]arm the community by forcing higher hospital rates on them'" unintentionally resulted in the "merging parties themselves" becoming the "Commission's best witnesses."[6]

This ProMedica decision follows two other recent successfully litigated FTC hospital merger challenges,[7] which, coupled with FTC Chairwoman Edith Ramirez's 2014 statement that "[w]hile hospital mergers can generate important efficiencies that benefit consumers, [the agency] will continue to look carefully at acquisitions that are likely to enhance market power," indicates health care combinations may continue to be a peak area of interest in 2015.[8]

More generally, *Bazaarvoice* and *ProMedica* both reflect the willingness of the Justice Department and FTC to challenge nonreportable transactions in 2014. In April, a Justice Department official emphasized that nearly 20 percent of all merger investigations by the Antitrust Division between 2009 and 2013 derived from nonreportable transactions.[9] Given the success of the 2014 challenges, this may be an area of increased attention in 2015.

Government Cartel

The year 2014 marked another strong year for cartel enforcement, with the Justice Department imposing $861 million in fines throughout the fiscal year.[10] Embarking on new territory, the Justice Department also achieved a milestone this year by successfully extraditing a foreign national on antitrust charges.

In April 2014, Italian citizen Romano Pisciotti was extradited from Germany to face criminal antitrust charges stemming from participation in a global bid-rigging conspiracy among manufacturers of marine hoses.[11] While the Justice Department lauded Pisciotti's extradition as "demonstrat[ing] the Antitrust Division's abil-

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ity to bring to justice those who violate antitrust laws, even when they attempt to avoid prosecution by remaining in foreign jurisdictions,"[12] it is unclear what impact this will have on future foreign extradition attempts. Pisciotti was extradited under the U.S.-Germany extradition treaty, which, like most extradition treaties, provides for a "dual criminality" requirement. Under "dual-criminality" an individual may only be extradited where the alleged offense is punishable under both countries' laws.

While criminalization of the antitrust laws is a growing trend, the number of jurisdictions with criminal sanctions for antitrust violations remains relatively small.[13] Nonetheless, Pisciotti's extradition may signal a more aggressive U.S. approach to extradition in 2015, which in turn may lead to increased cooperation from foreign countries with extradition requests, as well as the foreign nationals who are the subject of these antitrust investigations.

Private Litigation

Significant antitrust developments also occurred via private antitrust actions in 2014, particularly involving the international reach of domestic antitrust law, as well as the potential liability for major banking institutions amid allegations of rate-rigging. Additionally, in light of new Supreme Court precedent, the lower courts continued to debate the potential antitrust ramifications of patent infringement settlements within the pharmaceutical context.

Foreign Trade Antitrust Improvements Act. This year, two appellate court decisions addressed long-standing issues surrounding the application of U.S. antitrust law to foreign conduct under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA). FTAIA excludes activity involving foreign commerce from the reach of the Sherman Act. The act, however, contains a "domestic effects" exception, which allows antitrust claims to be maintained in the United States, provided the foreign conduct has a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce and such effect "gives rise to a claim" under the Sherman Act.[14]

In March 2014, the U.S. Court of Appeals for the Seventh Circuit decided *Motorola Mobility v. AU Optronics Corp.*, 746 F.3d 842 (7th Cir. 2014), which considered whether the company could bring a U.S. antitrust action against foreign LCD manufacturers for allegedly fixing prices of LCD screens manufactured abroad, purchased and incorporated into mobile phones by Motorola's foreign subsidiaries, but then sold in the United States.[15]

The court appeared to categorically hold that the "direct" effect requirement precludes price-fixing suits for components sold abroad that are eventually incorporated into final products and imported into the United States. Judge Richard Posner noted that although there was "doubtless *some* effect" on commerce in the United States, it was too remote as the LCD display components were initially purchased abroad.[16]

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This decision departed from an earlier Seventh Circuit decision, *Minn-Chem v. Agrium*, 683 F.3d 845 (7th Cir. 2012), which held a "direct" effect requires only a "reasonably proximate causal nexus."[17] After granting Motorola's request for a rehearing, the Seventh Circuit rejected Motorola's argument for a second time in November 2014. The opinion reaffirmed dismissal of the claims, but this time the court "assumed" the plaintiffs satisfied the "direct effect" requirement of FTAIA, instead concluding the claims failed the second prong, requiring the U.S. domestic effects "give rise to" a civil plaintiffs' antitrust claim.[18]

The Second Circuit also weighed in on this debate in 2014, reaching a result opposite to the initial Motorola opinion. In *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395 (2d Cir. 2014), the Second Circuit, notably relying on *Minn-Chem*, adopted the "reasonably proximate causal nexus" test for determining whether an effect is "direct" under FTAIA, concluding that reading an "immediate" requirement into the statute would rob the "reasonably foreseeable" language in FTAIA "of any meaningful function."[19]

Motorola again moved for rehearing on Dec. 18, 2014, leaving some uncertainty as to how these decisions will stand in 2015. If the decision remains, it may impact private antitrust actions against foreign entities. The Motorola opinion did not disturb the government's authority under FTAIA, but it confirmed plaintiffs may have greater difficulty navigating around FTAIA's second prong when bringing antitrust lawsuits challenging foreign conduct. If other courts adopt similar limits on private actions, plaintiffs may consider seeking redress in foreign jurisdictions.

Benchmark Cases. After the financial crisis led government agencies to investigate many of the world's largest banks for alleging manipulating global financial benchmarks, it was no surprise that private lawsuits quickly followed. The year 2014 proved to be an interesting year for benchmark cases as district courts grappled with imposing antitrust liability for alleged rate-rigging. Notably, the Supreme Court may have fast-tracked appellate review in this area, granting certiorari and hearing oral arguments in late December to determine whether plaintiffs in the Libor multidistrict litigation (MDL) may immediately appeal dismissal of their action when it has been consolidated with other lawsuits.

In the Libor MDL, plaintiffs alleged, among other things, that defendants conspired to artificially suppress a daily interest rate benchmark by understating their borrowing costs.[20] In March 2013, the court dismissed all of the antitrust claims as plaintiffs failed to suggest the alleged harm "resulted from any anticompetitive aspect of defendants' conduct," noting in particular that the process of setting LIBOR was never competitive, but rather a "cooperative endeavor."[21]

It is unclear, however, how quickly this decision may be appealed. One set of plaintiffs in the Libor MDL brought only a single antitrust claim, but the Second Circuit refused to hear their appeal until the district judge disposed of all claims in the MDL.[22] The Supreme Court granted certiorari and heard arguments in December 2014 over whether the antitrust plaintiffs should be able to immediately appeal the district court's decision.[23] If the Supreme Court reverses, 2015 may bring a key decision from the Second Circuit on the viability of antitrust claims for this type of alleged rate-rigging, which would undoubtedly impact other financial benchmark cases.

Reverse-Payment Litigation. Approximately a year and a half after the Supreme Court's landmark decision in *FTC v. Actavis*, 133 S.Ct. 2223 (2013), the issue of the legality of so called "reverse-payment" settlements remains unset-

tled. Reverse payment settlements may occur when a brand pharmaceutical manufacturer and generic pharmaceutical manufacturer, engaged in litigation over the validity of the patents covering a specific product, elect to settle these claims, and there is a transfer if value from the brand manufacturer to the generic manufacturer. In *Actavis*, the Supreme Court resolved a circuit split by determining that courts should apply the rule of reason when evaluating these reverse-payment settlements.[24] The Supreme Court held in *Actavis* that pharmaceutical patent settlements can potentially be anticompetitive where a brand manufacturer makes a "large" and "unjustified" payment to a generic competitor to allegedly refrain from marketing a generic product.[25]

In the time since *Actavis* came down, courts have largely split over whether the "payment" contemplated by Actavis requires a transfer of cash from the brand manufacturer to the generic competitor, or if a non-cash value transfer is sufficient to trigger antitrust scrutiny. By the close of 2014, at least two district courts concluded arrangements between branded and generic pharmaceutical companies that do not involve cash cannot as a matter of law constitute unlawful payments under *Actavis*.[26] Other courts reached the opposite conclusion, broadly reading Actavis to encompass other forms of payment.[27]

The U.S. Court of Appeals for the Third Circuit is set to be the first appellate court to weigh in on the cash debate in 2015, after hearing oral arguments in the *In re Lamictal* appeal in late November. Given the number of pending reverse payment cases around the country, the upcoming year may bring substantial development of case law at the Circuit Court of Appeals level.

With respect to reverse-payment cases that proceeded past a motion to dismiss, 2014 concluded on a favorable note for pharmaceutical companies, as a federal jury returned a verdict in December for the defendants in the first reverse-payment trial post-*Actavis*. The jury found that a settlement agreement between AstraZeneca and Ranbaxy over the launch of a generic version of Nexium heartburn pill did not violate the antitrust laws. The jury concluded the settlement at issue was large and unjustified, but found that even without the deal, the brand manufacturer would not have allowed the generic company to sell a generic version of the product prior to the expiration of the brand company's patents.[28] This trial decision indicates that for future reverse-payment trials, causation may be a key factor in the jury's consideration, forcing the plaintiffs to convince a jury that in a but-for world, earlier generic entry would certainly exist absent the settlement agreement.

The Motorola opinion did not disturb the government's authority under FTAIA, but it confirmed plaintiffs may have greater difficulty navigating around FTAIA's second prong when bringing antitrust lawsuits challenging foreign conduct.

Conclusion

The past year undoubtedly brought significant antitrust developments through both regulation and private antitrust actions. At first glance, 2015 promises to do the same. The upcoming year likely will again include vigorous antitrust enforcement by U.S. regulators across all areas. With respect to private litigation, the antitrust issues discussed above will likely receive increased attention at the circuit court level, providing further guidance and clarity in key areas.

1. See 15 U.S.C. §18(a).
2. Id.
3. Id. at *1, *76.
4. Id. at *4. In April 2014, the parties finalized a settlement agreement requiring Bazaarvoice to sell PowerReviews. See Stipulation and Proposed Order, *United States v. Bazaarvoice*, No. 13-CV-00133 (N.D. Cal. filed April 24, 2014) (Dkt. 257).
5. *ProMedica Health Sys. v. FTC*, 749 F.3d 559, 570, 572 (6th Cir. 2014).
6. Id. at 563, 571 (alteration in original).
7. See *F.T.C. v. Phoebe Putney Health Sys.*, 133 S. Ct. 1003, 1017 (2013) (concluding hospital authority was not entitled to state-action immunity from federal antitrust laws). Subsequent to the Supreme Court decision, the FTC continued to challenge the transaction at issue in *Phoebe Putney* via the FTC's administrative process. See Federal Trade Commission, Press Release, In Phoebe Putney Hospital Merger Case, FTC Rejects Proposed Consent Agreement; Parties to Return to Litigation (Sept. 5, 2014) available at http://www.ftc.gov/news-events/press-releases/2014/09/phoebe-putney-hospital-merger-case-ftc-rejects-proposed-consent. See also *F.T.C. v. OSF Healthcare Sys*., 852 F.Supp.2d 1069 (N.D. Ill. 2012) (granting FTC's motion for a preliminary injunction to stop the merger of two not-for-profit health care systems).
8. Ronan P. Harty, Interview With Chairwoman Edith Ramirez, The Threshold: Newsletter of the Mergers & Acquisitions Committee (ABA Section of Antitrust Law), Spring 2014, at 3, available at http://www.ftc.gov/system/files/documents/public_statements/294181/140326thresholdspringissue_0.pdf.
9. Leslie C. Overton, Deputy Assistant Attorney Gen. for Civil Enforcement, U.S. Dept. of Justice, Antitrust Div., Remarks as Prepared for the 14th Annual Loyola Antitrust Colloquium, Institute for Consumer Antitrust Studies, Non-reportable Transactions and Antitrust Enforcement 2 (April 25, 2014), available at http://www.justice.gov/atr/public/speeches/305472.pdf.
10. Melissa Lipman, "Libor, Auto Parts Push DOJ Antitrust to New Fine High," Law360 (Oct. 2, 2014, 6:52 p.m.), available at http://www.law360.com/articles/583578/libor-auto-parts-push-doj-antitrust-to-new-fine-high.
11. Dept. of Justice, Press Release, Former Marine Hose Executive Who Was Extradited to United States Pleads Guilty for Participating in Worldwide Bid-Rigging Conspiracy (April 24, 2014) available at http://www.justice.gov/opa/pr/former-marine-hose-executive-who-was-extradited-united-states-pleads-guilty-participating.
12. Id.
13. James A. Wilson, "Extradition: The New Sword or the Mouse that Roared?" The Antitrust Source, April 2011, at 3 available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr11-wilson_4-20f.authcheckdam.pdf.
14. 15 U.S.C. §6(a).
15. *Motorola Mobility v. AU Optronics Corp.*, 746 F.3d 842, 844 (7th Cir. 2014).
16. Id. (emphasis in original).
17. *Minn-Chem v. Agrium*, 683 F.3d 845, 856-57 (7th Cir. 2012). Judge Posner distinguished the finding of a direct effect in *Minn-Chem* by the added layer of foreign subsidiary purchases in *Motorola*, which was not an issue in *Minn-Chem*. *Motorola*, 746 F.3d at 844.
18. *Motorola Mobility v. AU Optronics Corp.*, No. 14-8003, 2014 WL 6678622, at *3 (7th Cir. Nov. 26, 2014). The decision also expressly notes that the government is not required to satisfy this second prong, clarifying its decision will not hinder the Justice Department's ability to prosecute foreign component cartels criminally. Id. at *9 ("All…the government wants from us is a disclaimer that a ruling against Motorola would interfere with criminal and injunctive remedies sought by the government against antitrust violations by foreign companies.…If price fixing by the component manufacturers had the requisite statutory effect on cellphone prices in the United States, the Act would not block the Department of Justice from seeking criminal or injunctive remedies.").
19. *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 398, 411 (2d Cir. 2014).
20. Id.
21. Id. at 677, 688.
22. *In re LIBOR-Based Fin. Instruments Antitrust Litig*., No. 13-3565-L, 2013 WL 9557843, at *1 (2d Cir. Oct. 30, 2013) cert. granted sub nom. *Gelboim v. Bank of Am. Corp*., 134 S. Ct. 2876, (2014).
23. Melissa Lipman, "Justices Skeptical Of Limits On Appeals In Libor MDL," Law360 (Dec. 9, 2014, 6:18 p.m.) available at http://www.law360.com/articles/574463/justices-skeptical-of-limits-on-appeals-in-libor-mdl.
24. *FTC. v. Actavis*, 133 S. Ct. 2223, 2237 (2013).
25. Id.
26. See *In Re Lamictal Direct Purchaser Antitrust Litig*., 18 F.Supp.3d 560, 569 (D.N.J. 2014); *In re Loestrin 24 FE Antitrust Litig*., MDL No. 12-2472, 2014 WL 4368924, at *11 (D.R.I. Sept. 4, 2014). The Lamictal decision is currently on appeal in the Third Circuit. The Loestrin plaintiffs filed a Notice of Appeal to the First Circuit on Oct. 14, 2014.
27. See, e.g., *In re Nexium (Esomeprazole) Antitrust Litig*., 968 F.Supp.2d 367 (D. Mass. 2013); *In re Niaspan Antitrust Litig.,* MDL No. 2460, 2014 WL 4403848 (E.D. Pa. Sept. 5, 2014).
28. Ed Silverman, "AstraZeneca and Ranbaxy Win a Closely Watched Pay-to-Delay Case," Wall St. J., Dec. 5, 2014 , available at http://blogs.wsj.com/pharmalot/2014/12/05/astrazeneca-and-ranbaxy-win-a-closely-watched-pay-to-delay-case/?KEYWORDS=Nexium.