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Non-Merger Civil Enforcement: An Overview of Recent DOJ and FTC Federal Court Litigation

BY SONIA KUESTER PFAFFENROTH

RECENT YEARS HAVE SEEN THE Department of Justice and the Federal Trade Commission appearing with regularity in federal district court, with the agencies demonstrating a willingness to litigate in both the merger and non-merger context and with a number of high-profile trials now in the rearview mirror.

While the majority of civil conduct enforcement actions continue to be filed concurrently with settlements—which provide significant insight into the government's theories—both agencies have seen an uptick in the number of contested cases filed in federal district court since the beginning of 2009 than over the similar time period immediately preceding. Put differently, both agencies had approximately twice as many contested actions filed in federal district court in the 2009–2017 time period as compared to 2001–2008. Although the absolute number of contested cases is limited—typically no more than one or two cases per year—this reflects a noticeable increase in the number of contested cases filed by the DOJ and a shift for the FTC toward filing a larger proportion of its contested actions in federal court rather than through its administrative process.[1]

This article focuses specifically on the agencies' non-merger federal court litigation during the last eight years.[2] Challenges have involved a wide variety of industries. The DOJ has actively litigated cases relating to conduct affecting competition in high tech, health care, airline, and financial services markets while the FTC has continued its ongoing focus on the pharmaceutical space. Both agencies have brought challenges involving telecommunications. These cases provide visibility into the agencies' priorities, views, and approaches.

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As a result, there are now a significant number of career attorneys and economists with recent federal trial court experience, which they will bring to future cases at the investigative phase with an eye towards potential litigation.

DOJ Litigation

Because the DOJ has no administrative adjudicative process, its civil enforcement cases, whether they are settlements or contested litigation, are filed directly in federal district court. In recent years, the DOJ has litigated a number of cases alleging Section 1 violations and one case alleging a Section 2 violation. The Section 1 cases can be divided into those like *United States v. Apple*, which involved an alleged restraint of trade that was primarily horizontal in nature, and others, like the ongoing litigation against the Carolinas Health Care System, which are primarily vertical in nature. The final case, challenging a sale of take-off and landing slots by Delta to United at Newark Airport, was noteworthy as a rare case alleging a Section 2 violation.

Section 1: Horizontal Restraints. The DOJ's recent challenges to horizontal agreements include cases involving allegations of price fixing, market allocation, and information sharing. Three of the cases—alleging price fixing and market allocation—asserted that the restraints in question were per se unlawful, illustrating the DOJ's consistent position that agreements between competitors which the government views as having no purpose other than to restrain competition will be treated as per se unlawful. This focus on per se conduct seems likely to continue—with a current senior DOJ leader recently pointing to past enforcement actions—like the e-books case discussed below—while emphasizing the importance of bright line rules in providing guidance to the business community.[3] Only the last case, alleging information sharing, was alleged to be a violation under the rule of reason, which followed the DOJ's stated position that information sharing agreements between competitors—standing alone—are not subject to per se treatment.

Per Se. In April 2012, the Antitrust Division filed suit against Apple and five publishers alleging that they had conspired, in response to the threat posed by the rapid increase

in e-book sales and Amazon's practice of price discounting, to raise the price of e-books and limit retail competition by changing the business model governing the relationship between the publishers and retailers. Specifically, Apple and the publishers moved from a "wholesale model" to an "agency model." Under the traditional wholesale model, retailers purchased books from publishers and set price independently. Under the new agency model, retailers would act as agents for the publishers, who would set the retail price. Apple vigorously defended the case, arguing that its behavior should be analyzed through the rule of reason framework because (1) its relationship to the other defendants is vertical rather than horizontal—that is, Apple was a distributor and not a content provider, and (2) the DOJ's "hub and spoke" theory was inappropriate as Apple was not a dominant market actor, which was generally the case with traditional "hub" defendants.

After a three-week trial, the court found that there was a horizontal price-fixing conspiracy among the publishers to raise the price of e-books and that Apple was a "knowing and active member of that conspiracy."[4] The court concluded that, notwithstanding Apple's vertical relationship to its co-defendants, Apple participated in the conspiracy to set horizontal prices, which is treated as per se unlawful. Moreover, the court found that case law does not require the hub of a "hub and spoke" conspiracy to be a dominant player.[5] The court's ruling was affirmed by the Second Circuit, and the Supreme Court denied Apple's petition for certiorari.

Only a few months after filing its suit against Apple, the Antitrust Division sued eBay, alleging that its agreement not to recruit or hire employees from Intuit Inc. constituted a violation of Section 1. The lawsuit followed a joint settlement with several other companies accused of similar conduct. eBay argued that under the *Copperweld* doctrine, which requires two "independent centers of decision making" to form an antitrust conspiracy, eBay and Intuit could not form an actionable conspiracy because the DOJ's allegations rested entirely on the actions of a single shared director between the two companies. However, the court determined that it was plausible based on the complaint that the shared director was acting on behalf of Intuit when negotiating with eBay. eBay also argued that an agreement not to solicit employees did not constitute a "classic" horizontal agreement. Again, the court rejected this argument, stating that an employment market would be treated as any other input market under the antitrust laws. Thus, the district court denied eBay's motion to dismiss the case, finding that it was not possible to determine as a matter of law that the government would not be able to prove up its allegations that eBay's conduct was per se unlawful.[6]

eBay ultimately settled the case, agreeing to a consent decree that is substantially the same as the settlement with the other companies, in which it was prohibited from entering into agreements not to recruit or hire another company's employees.[7] As a coda to the *eBay* litigation and other recent no-poach cases, in October 2016, the antitrust agencies announced that, notwithstanding the fact that *eBay* and other "no-poach" cases had been brought civilly in the past, the DOJ henceforth "intends to proceed criminally against naked wage-fixing or no-poaching agreements."[8]

Finally, in June 2015, the Antitrust Division and the Michigan Attorney General sued Allegiance Health and three other Michigan health systems, challenging agreements between defendants not to advertise in each other's markets.[9] All of the health systems other than Allegiance settled. Allegiance moved for partial summary judgment against the quick look and per se allegations, arguing that its alleged actions did not constitute the "garden variety" "naked restraints" that are traditionally judged under per se and quick look frameworks.[10] The DOJ responded with a summary judgment motion of its own. After oral argument, the cross-motions for summary judgment were denied. The court found genuine dispute over the fundamental question of whether there is an agreement and that it could not opine on the proper framework under which to analyze the case.[11] The trial is scheduled to begin March 6, 2018.

Rule of Reason. On November 2, 2016, the Antitrust Division filed its most recent litigated case under Section 1, alleging that DIRECTV violated the Sherman Act by entering into unlawful information-sharing agreements with three competitors relating to L.A. Dodgers telecast rights. The complaint alleged that DIRECTV engaged in a series of bilateral information-sharing agreements with its competitors regarding its negotiations with Time Warner Cable to carry the "Dodgers Channel," which was a partnership between Time Warner Cable and the L.A. Dodgers that held the exclusive right to telecast most live Dodgers games in the L.A. area.[12]

Unlike the per se cases discussed above, there was no allegation by the government that DIRECTV had entered into an agreement with any of its competitors not to carry the Dodgers Channel—only that DIRECTV had agreed with its competitors to share information regarding negotiations. In March, after briefing on the defendants' motion to dismiss was complete, but before the court ruled, the Department of Justice announced that a settlement had been reached in the case. The defendants, without admitting to any of the conduct in the complaint, agreed to certain restrictions relating to the sharing of competitively sensitive information regarding video programming distribution services with competitors.[13]

Section 1: Vertical Restraints. The DOJ has also recently litigated two Section 1 cases involving vertical restraints in health care markets, one involving an allegedly dominant provider and the other a dominant insurer, and one Section 1 case involving vertical restraints in a financial services market. Only the most recent of these cases remains in active litigation.

In 2010, the Antitrust Division and a number of states filed suit against American Express, alleging that its non-dis-

crimination policies violated Section 1 by preventing merchants from encouraging the use of competing credit and charge cards with lower merchant fees. Following a seven-week trial, the district court concluded that American Express had market power based on its 26 percent share of the general purpose credit and charge card market, coupled with the high degree of loyalty of its cardholder base and a historical ability to raise price without merchant attrition. The district court further concluded that American Express's non-discrimination provisions had caused actual anticompetitive harm.[14] On appeal, the Second Circuit reversed and remanded with instructions to enter judgment for American Express, finding that the district court had failed to appropriately analyze the two-sided market because it had focused solely on the effect of the non-discrimination provisions on merchants and omitted consideration of the effects on the cardholder side of the platform. The court of appeals concluded that the government had failed to meet its burden to establish net harm to both cardholders and merchants.[15] After an unsuccessful petition for rehearing en banc, DOJ did not seek a further appeal, but a number of state attorneys general filed a petition for certiorari. The DOJ opposed the petition, arguing that although the petition correctly argued that the decision by the Second Circuit was erroneous, the matter was not yet ripe for the court's consideration.[16] The petition for certiorari was granted on October 16.

In the health care arena, in June 2016, the Antitrust Division, together with the state of North Carolina, sued Carolinas Healthcare System (CHS), for its use of "anti-steering" contract provisions in its contracts with health insurers to prevent insurers from providing patients with financial incentives to use lower-cost alternative healthcare providers. The government alleged that CHS held an approximately 50 percent share of the market for the sale of general acute care inpatient hospital services to insurers, making it the dominant hospital system in the Charlotte area.[17] CHS filed an answer and moved for judgment on the pleadings, arguing that the government had not alleged facts sufficient to show that the steering provisions in question had an adverse effect on competition.[18] The court denied CHS's motion, opining that while CHS had raised important questions, they were not issues that were appropriate for determination at the pleadings stage, and required discovery and potential future determination by a finder of fact.[19] The parties are entering discovery now, with dispositive motions set for August 2018 and trial set for November 2018.

The Carolinas litigation involves the inverse situation from the one that formed the basis for the DOJ's 2010 litigation against Blue Cross Blue Shield of Michigan (BCBS). The Antitrust Division together with the State of Michigan filed suit against Blue Cross Blue Shield of Michigan (BCBS), alleging that BCBS had used "most favored nation" clauses in its contracts with hospitals to prevent those hospitals from negotiating competitive contracts with competing insurers. The DOJ alleged in its complaint that BCBS insured more than 60 percent of the commercial insurance market in Michigan, with an insured population more than nine times greater than its closest competitor. The government alleged that BCBS was entering into agreements with hospitals requiring hospitals to provide services to BCBS either at prices no greater than its competitors ("equal-to MFNs") or at lower prices ("MFN-plus") and that these agreement violated Section 1 of the Sherman Act. The government alleged that in many cases, BCBS negotiated the MFNs in exchange for increases in the prices paid for hospital services, which, the government argued, had the effect of driving up prices for BCBS's competitors as well.

The FTC has in recent years filed several noteworthy cases in federal court under its Section 5 authority in civil conduct cases, all but one of which involved challenges to conduct by pharmaceutical manufacturers. Most remain in active litigation.

BCBS moved to dismiss on a number of grounds, including failure to adequately allege relevant product and geographic markets and state action immunity grounds. The court denied BCBS's motion to dismiss, and discovery proceeded.[20] On March 18, 2013, the State of Michigan passed laws that made it unlawful to use the type of MFNs that were the subject of the lawsuit. This legislative action rendered the lawsuit moot and the parties jointly moved to dismiss.[21]

Section 2. In late 2015, the Antitrust Division filed suit against United and Delta, seeking to enjoin United's acquisition of 24 airport takeoff and landing slots at Newark Liberty International Airport. Since 2008, Newark had been designated as a slot-controlled airport by the FAA, which limited the number of flights that were permitted to take off and land at the airport every hour. The FAA had imposed the constraints to address congestion and delay issues at Newark.[22] The government alleged that United already held 73 percent of the slots at Newark and that it was, on a daily basis, not using all of the 902 slots it already held.

The case was noteworthy because it represented a relatively rare instance in recent years where the Antitrust Division alleged that United was using the proposed transaction to maintain and enhance its monopoly in Newark in violation of Section 2.[23] The defendants moved to dismiss the case, arguing that all anticompetitive effects are speculative and could not sustain a Sherman Act claim, especially in light of the procompetitive effect of Delta being able to increase frequency to existing routes. United also argued that the relevant market—Newark Airport—was too narrow.[24] Opposition motions were filed, but no ruling was made because on April 1, 2016, the Federal Aviation Administration announced

plans to lift slot controls at Newark. The FAA cited new entry and increased competition as some of the benefits of lifting the slot constraints.[25] A few days later, the parties abandoned the proposed transaction, and the DOJ filed a stipulation dismissing the case.[26] Because the actions by the FAA prevented an adjudication of the Section 2 claim on the merits, it remains to be seen what approach the Division will take in future cases that have facts with the potential to support a Section 2 claim.

FTC Litigation

The FTC brings civil non-merger enforcement actions pursuant to its authority under Section 5 of the FTC Act. This includes not only cases alleging conduct that would violate the Sherman Act, which the FTC does not directly enforce, but also conduct that would otherwise violate the Act's prohibition against "unfair methods of competition." Section 13(b) of the FTC Act provides the FTC with the authority to seek preliminary injunctive relief to stop conduct during the pendency of FTC administrative action and further provides that in "proper cases" the FTC may seek a permanent injunction. Although the FTC more typically uses its authority under Section 13(b) to seek preliminary injunctive relief in connection with proposed mergers which might otherwise be consummated prior to the resolution of the FTC's administrative process, the FTC at times opts to seek permanent injunctive relief in federal court with respect to alleged anticompetitive activity.

The FTC has in recent years filed several noteworthy cases in federal court under its Section 5 authority in civil conduct cases, all but one of which involved challenges to conduct by pharmaceutical manufacturers.[27] Most remain in active litigation.

Most recently, in February 2017, the FTC filed suit against Shire ViroPharma Inc., challenging ViroPharma's alleged abuse of the FDA citizen petition process to maintain its monopoly on Vanocin Capsules and seeking permanent injunctive relief. The FTC alleged that ViroPharma made "repetitive, serial, and meritless filings" without "any supporting clinical data" in an effort to delay the FDA's approval of competing generic products. The FTC alleged that over the course of six years, ViroPharma made at least 43 submissions to the FDA and filed several federal court proceedings to delay the FDA's approval of a generic equivalent to Vanocin Capsules.[28] Shire ViroPharma has moved to dismiss the case, arguing both that the FTC lacks authority to seek permanent injunctive relief in this case because it is challenging past actions of ViroPharma and that ViroPharma's challenged actions were *Noerr Pennington* protected petitioning activity.[29] Shire ViroPharma's motion has been fully briefed and is awaiting decision.

Just a month earlier, in January 2017, the FTC filed suit against Qualcomm, Inc. in the United States District Court for the Northern District of California, alleging that Qualcomm had used anticompetitive means to maintain a monopoly in the supply of baseband processors, a component that allows a handset to communicate with an operator's cellular network. The FTC alleged that Qualcomm is the dominant supplier of two types of baseband processors or "modem chips"—those compliant with CDMA standards and chips used in premium tier handsets, such as the Apple iPhone and Samsung Galaxy-S, which comply with advanced LTE standards, with a worldwide market share for both exceeding 80 percent.

The FTC proceeded on three theories. First, it alleged that Qualcomm used its monopoly in baseband processors, or "modem chips," to extract non-FRAND rates on patents essential to cellular standards under a "no license no chips" policy.[30] Second, the FTC alleged that Qualcomm refused to license SEPs to its competitors in the market for baseband processors in violation of its FRAND commitments. Finally, the FTC maintained that Qualcomm had used its monopoly power to extract exclusive supply agreements from Apple. The FTC alleged that Qualcomm had violated the FTC Act by violating both Section 1 and Section 2 of the Sherman Act and also laid out a claim that Qualcomm's practices constituted a violation of Section 5 of the FTC Act "regardless of whether they constitute monopolization or unreasonable restraints of trade . . . ."[31] The case was filed on a 2 to 1 vote, with a dissent from then-Commissioner, now Acting Chairman, Maureen Ohlhausen. Acting Chairman Ohlhausen described the Commission's legal theory as "flawed" and "lack[ing] economic and evidentiary support," further objecting that it was brought "on the eve of a new presidential administration" and would "undermine U.S. intellectual property rights in Asia and worldwide." Ohlhausen disagreed with the Commission's decision to proceed on not only a Section 5 claim theory based on violations of the Sherman Act, but also a standalone Section 5 claim.[32]

The FTC secured an interim victory when the court denied Qualcomm's motion to dismiss on June 17, 2017. The court held that the FTC had adequately pled each of its three theories and adequately stated a claim under both Section 1 and Section 2 of the Sherman Act, thus obviating the need for a standalone Section 5 claim.[33] Qualcomm has answered the complaint, and the case is progressing through discovery.

Reverse Payment Patent Settlements. The FTC has been challenging reverse payment patent settlements in the pharmaceutical industry or "pay for delay" agreements for many years. The earliest cases proceeded through the FTC's administrative process, with the first case filed in federal court in 2008.

The first case the FTC filed in federal court was a suit against Cephalon, Inc., alleging that Cephalon had sought to block generic competition for its product Provigil by settling patent litigation initiated by potential generic competitors with payments to the generics and agreement by those generic competitors not to enter the market for an additional six years.[34] A second challenge in 2009 involved agreements settling patent litigation relating to AndroGel in which the

FTC alleged that Solvay Pharmaceuticals, Inc. had paid generic manufacturers to delay entry with a generic equivalent. After FTC losses in the district and appellate courts, the case was appealed to the Supreme Court, resulting in *FTC v. Actavis*, in which the court held that reverse payment patent settlements are subject to a rule of reason analysis.[35]

The FTC subsequently announced in 2015 that it had settled the *Cephalon* case for $1.2 billion dollars. This was the first FTC settlement in a reverse payment patent case since the Supreme Court's ruling in *FTC v. Actavis*. Trial in the case was scheduled to begin on June 1, 2015.[36]

The FTC has followed up on those early cases with two additional actions filed in federal district court in the last three years. Both cases saw the FTC seeking to expand the boundaries of *Actavis*, challenging in the first case an agreement that involved "compensation" in the form of a separate authorized generic agreement relating to a different drug and in the second case an agreement that involved a commitment by the brand manufacturer not to enter with an authorized generic of the drug in question. Both cases remain pending.

In 2014, the FTC filed suit alleging that AbbVie, Inc. and Besins Healthcare, Inc. had filed sham patent infringement suits against generic drug manufacturers to delay approval of a generic version of their product AndroGel. The FTC further alleged that the brand manufacturers subsequently paid the generic manufacturers to drop their counter suits and delay bringing a generic product to market. The complaint alleged two counts in violation of Section 5—one for monopolization against AbbVie and Besins relating to the filing of the alleged sham patent litigation and a second for restraint of trade against all defendants relating to the settlement agreement.[37] Commissioner Ohlhausen dissented, arguing that it would be preferable to pursue the case in Part III proceedings.[38]

The FTC suffered a blow in *AbbVie* when the district court ruled in the defendants' favor on their motion to dismiss, agreeing that no antitrust violation arose from the settlement of the patent litigation. The court reasoned that because the settlement of the patent litigation allowed Teva to enter with a generic prior to expiration of the patent in question but did not involve any payment to Teva by the brand manufacturers, under the Supreme Court's decision in *Actavis*, there was no violation of the Sherman Act or Section 5 relating to the settlement agreement. Discovery with respect to the sham litigation was allowed to proceed.[39] Acting Chairman Ohlhausen expressed frustration following the court's ruling that the FTC had not proceeded via Part III administrative litigation where the FTC would have had the opportunity to consider the implications of the questions raised in *AbbVie* on a more rapid timeline than the federal court proceeding.[40]

The parties filed cross-motions for summary judgment on the remaining claim in June 2017. In September, the court granted the FTC's motion for partial summary judgment, finding that the patent lawsuits in question were objectively baseless and that the FTC was therefore entitled to partial summary judgment on that element of their illegal monopolization claim. The court denied the defendants' motion for summary judgment as to the monopoly power prong of the monopolization claim, ruling that the issue would have to go to trial.[41]

Most recently, in March 2016, the FTC filed suit against Endo Pharmaceuticals Inc. and other pharmaceutical manufacturers in the U.S. District Court for the Eastern District of Pennsylvania alleging that separate patent litigation settlements relating to Opana ER and Lidoderm included reverse payments in violation of Section 5 of the FTC Act. Notably, the FTC described the case as its first challenge to a patent settlement provision providing a generic company with a commitment that the branded manufacturer would not launch an authorized generic version for a period of time.[42] Commissioner Ohlhausen dissented, noting that, although she believed that the agreements in question violated Section 5 of the FTC Act, she did not agree with the decision to seek disgorgement and would have preferred to see the case pursued through the FTC's administrative Part III process.[43]

The defendants successfully moved to sever the allegations relating to Opana ER and Lidoderm on the grounds that they are different settlements with different generic manufacturers. Shortly thereafter, the FTC voluntarily dismissed its complaint.[44] The following day, the defendants filed for a declaratory judgment alleging that the FTC Act does not authorize the FTC to challenge past conduct in federal court—which is similar to the argument later advanced by the defendants in the *Shire ViroPharma* case—and also that the FTC Act does not authorize the FTC to seek disgorgement.[45] Several months later, the FTC announced that it had settled with Endo. The settlement places certain restrictions on its patent settlement agreements for 20 years, but does not include a disgorgement of profits.[46] It also refiled its Lidoderm case seeking disgorgement in the U.S. District Court for the Northern District of California, where a related class action was already pending. The district court has stayed the FTC's Lidoderm action pending resolution of the action for declaratory relief that remains pending in the Eastern District of Pennsylvania.[47]

Conclusion

Senior leaders from both agencies have emphasized the importance of stability and continuity in antitrust enforcement. As of the current time, the Department of Justice has initiated no litigation in civil non-merger enforcement cases since the change in administration and the Federal Trade Commission has initiated no federal court actions since former Chairwoman Ramirez resigned, leaving the FTC with only two commissioners. With the recent confirmation of Assistant Attorney General for Antitrust Makan Delrahim and the still vacant commissioner seats, the full contours of antitrust enforcement in the new administration remain to be

seen. But there has been recognition that the business community values predictability in antitrust enforcement and that change is best approached with careful consideration. ■

[1] The overall number of contested FTC competition-related enforcement actions is very similar in both time periods.

[2] Only cases where the complaint was not filed concurrently with a settlement are included.

[3] Andrew Finch, Acting Ass't Att'y Gen., Remarks at Global Antitrust Enforcement Symposium (Sept. 12, 2017), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-andrew-finch-delivers-remarks-global-antitrust.

[4] United States v. Apple, Inc., 952 F. Supp. 2d 638, 691 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1376 (2016).

[5] *Apple*, 952 F. Supp. 2d at 691, 706–07. The publisher defendants settled the government's claims relating to the conduct in question. Only Apple proceeded to trial. *Id.* at 645.

[6] United States v. eBay, Inc., 986 F. Supp. 2d 1030, 1040 (N.D. Cal. 2013).

[7] Final Judgment, *eBay*, No. 12-cv-5869 (N.D. Cal. Sept. 2, 2014).

[8] U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

[9] Complaint, United States v. Hillsdale Community Health Ctr., No. 5:15-cv-12311 (E.D. Mich. June 25, 2015).

[10] Allegiance Health's Motion for Partial Summary Judgment and Supporting Memorandum of Law, *Hillsdale*, No. 5:15-cv-1231 (E.D. Mich. Dec. 20, 2016).

[11] *Hillsdale*, No. 15-cv-12311, 2015 WL 10013774 at *13 (E.D. Mich. May 31, 2017).

[12] Complaint, United States v. DIRECTV Group Holdings LLC, No. 2:16-cv-08150 (C.D. Cal. Nov. 2, 2016). AT&T acquired DIRECTV in 2015, subsequent to the conduct alleged, and was named as a defendant as the corporate successor to DIRECTV. *Id.* ¶¶ 2–3.

[13] Proposed Final Judgment at 4–5, *DIRECTV*, No. 2:16-cv-08150 (C.D. Cal. Mar. 23, 2017).

[14] United States v. Am. Express Co., 88 F. Supp. 3d 143 (E.D.N.Y. 2015).

[15] *American Express*, 838 F.3d 179, 204–07 (2d Cir. 2016).

[16] Brief of the United States in Opposition, Ohio v. American Express Co., No. 16-1454 (Aug. 8, 2017).

[17] Complaint at ¶ 2, United States v. Charlotte-Mecklenburg Hosp. Auth., No. 16-cv-0311 (W.D.N.C. 2017).

[18] *See* Defendant's Memorandum in Support of Motion for Judgment on the Pleadings, *Charlotte-Mecklenburg*, No. 16-cv-0311 (W.D.N.C. Aug. 8, 2016).

[19] *See* Order, *Charlotte-Mecklenburg*, No. 16-cv-0311, 2017 WL 1206015 (W.D.N.C. Mar. 20, 2017).

[20] United States v. Blue Cross Blue Shield of Mich., 809 F. Supp. 2d 665 (E.D. Mich. 2011).

[21] Stipulated Motion and Brief to Dismiss Without Prejudice, *Blue Cross Blue Shield*, No. 10-cv-14155 (Mar. 25, 2013).

[22] Press Release, Fed. Aviation Admin., FAA Announces Slot Changes at Newark Liberty International (Apr. 1, 2016), https://www.faa.gov/news/updates/?newsId=85309 [hereinafter FAA Press release].

[23] Complaint, United States v. United Cont'l Holdings, Inc., No. 2:15-cv-07992 (D.N.J. Nov. 10, 2015). Similarly, the DOJ challenged United Regional Health Care System under Sherman Act § 2 in 2011 for exclusionary contracts with commercial health insurers used to further its monopoly power, but this case was filed as a settlement rather than a litigated case. *See* United States v. United Regional Health Care Sys., No. 7:11-cv-00030 (N.D. Tex. Feb. 25, 2011).

[24] Memorandum of Law in Support of Defendant United Continental Holdings, Inc.'s Motion to Dismiss Plaintiff's Claims Pursuant to Fed. R. Civ. P. 12(b)(6) at 3, *United*, No. 2:15-cv-07992 (D.N.J. Jan. 12, 2016).

[25] FAA Press release, *supra* note 22.

[26] *See* Stipulation of Dismissal, *United*, No. 15-cv-7992 (D.N.J. Apr. 6, 2016).

[27] During the same time period, the FTC filed six additional cases that were substantively litigated through the FTC's Part III process.

[28] Complaint, FTC v. Shire ViroPharma, No. 17-cv-0131 (D. Del. May 25, 2017).

[29] Opening Brief in Support of Motion to Dismiss by Shire ViroPharma Inc. at 11, 20, *Shire ViroPharma*, No. 1:17-cv-00131 (D. Del. Apr. 10, 2017).

[30] Standard-setting organizations will frequently require holders of patents that are essential to a standard (standard-essential patents or SEPs) to commit to license those patents on terms that are fair, reasonable, and non-discriminatory (FRAND).

[31] Complaint ¶¶ 2, 14–28, 31, FTC v. Qualcomm Inc., No. 5:17-cv-00220 (N.D. Cal. Jan. 17, 2017).

[32] Dissenting Statement of Commissioner Maureen K. Ohlhausen at 1, Qualcomm, Inc., FTC File No. 141-0199 (Jan. 17, 2017).

[33] Order Denying Motion to Dismiss, *Qualcomm*, No. 17-cv-0220, 2017 WL 2774406 (N.D. Cal. Jun. 26, 2017). Qualcomm did not dispute the FTC's allegations regarding market share. *Id.* at 19.

[34] *See* Complaint, FTC v. Cephalon, Inc., No. 08-cv-2141 (D.D.C. Feb. 13, 2008).

[35] FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013); FTC v. Watson Pharms., 677 F.3d 1298 (11th Cir. 2012); FTC v. Watson Pharms., Inc., No. 09-CV-00955 (N.D. Ga. Feb. 22, 2010).

[36] Press release, Fed. Trade Comm'n, FTC Settlement of Cephalon Pay for Delay Case Ensures $1.2 Billion in Ill-Gotten Gains Relinquished Refunds Will Go to Purchasers Affected by Anticompetitive Tactics (May 28, 2015), https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill.

[37] Complaint, FTC v. AbbVie, Inc., No. 14-cv-5151 (E.D. Pa. Sept. 26, 2014).

[38] Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, Dollars, Doctrine, and Damage Control. How Disgorgement Affects the FTC's Antitrust Mission (Apr. 20, 2016).

[39] FTC v. AbbVie Inc., 107 F. Supp. 3d 428, 436 & n.6 (E.D. Penn. 2015). The court rejected the FTC's argument that a separate settlement agreement relating to a different drug constituted a reverse payment relating to AndroGel. The court expressly opined that the separate agreement was itself procompetitive.

[40] Ohlhausen, *supra* note 38.

[41] Memorandum, *AbbVie*, No. 14-cv-5151 (E.D. Pa. Sept. 15, 2017).

[42] Press Release, Fed. Trade Comm'n, FTC Sues Endo Pharmaceuticals Inc. and Others for Illegally Blocking Lower-Cost Generic Versions of the Branded Drugs Opana ER and Lidoderm (Mar. 31, 2016), https://www.ftc.gov/news-events/press-releases/2016/03/ftc-sues-endo-pharmaceuticals-inc-others-illegally-blocking-lower.

[43] Dissenting Statement of Commissioner Maureen K. Ohlhausen, Endo Pharmaceuticals Inc., FTC File No. 141-0004 (Mar. 31, 2016).

[44] Notice of Voluntary Dismissal Without Prejudice, FTC v. Endo Pharmaceuticals, Inc. No. 16-cv-1440 (E.D. Pa. Oct. 25, 2016).

[45] Order Granting Motion to Stay, FTC v. Allergan PLC, No. 17-cv-00312 (N.D. Cal. April 5, 2017).

[46] Joint Motion for Entry of Stipulated Order for Permanent Injunction, FTC v. Allergan PLC, No. 17-cv-00312 (E.D. Pa. Jan. 23, 2017).

[47] Order Granting Motion to Stay, *Allergan*, No. 17-cv-00312 (N.D. Cal. Apr. 5, 2017). The FTC initiated an administrative action against Impax with respect to Opana ER. Press Release, Fed. Trade Comm'n, Endo Pharmaceuticals Inc. Agrees to Abandon Anticompetitive Pay-for-Delay Agreements to Settle FTC Charges' FTC Refiles Suits Against Generic Defendants (Jan. 23, 2017), https://www.ftc.gov/news-events/press-releases/2017/01/endo-pharmaceuticals-inc-agrees-abandon-anticompetitive-pay-delay.