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Overview

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In the past year, there have been substantial developments in the US relating to monopolisation actions, merger control, 'pay-for-delay' pharmaceutical cases and the use of economic experts in competition litigation. Key developments have been driven not only by the US Department of Justice (DoJ) and Federal Trade Commission (FTC), but also by privately initiated competition litigation.

Monopolisation cases

The DoJ's action against Blue Cross/Blue Shield of Michigan regarding the health insurer's use of most-favoured nations (MFN) contracts to support anti-competitive prices, came to a conclusion after nearly three years. Blue Cross was accused of setting prices greater than the competitive level, and then compelling (due to its large size) hospitals and other providers to accept MFN contracts that prevent the providers from giving better rates to any other insurance company in Michigan. In 2010, the DoJ sued, arguing that competitors could not challenge Blue Cross' position and that the MFN supported anti-competitively high prices. In early 2013, the Michigan legislature passed a law that prohibits health insurers in that state from using MFNs in their contracts with hospitals and other providers. Given that law, the DoJ had the case dismissed. Of course, the conclusion of this case does not settle the question of whether the use of MFNs in this or a similar context would be anti-competitive.

More recently, the trial judge determined that Apple and a number of book publishers illegally conspired to monopolise the e-book market. The judge found that Apple agreed with the publishers (who had settled before trial) to switch the industry to an 'agency pricing' model, in which Apple retained 30 per cent of the sales price while the publishers received the remainder. Apple and the publishers were found to have agreed to charge a higher price for e-books than the previous market leader, Amazon, and to have adopted an MFN clause to ensure that no reseller received better prices or terms than Apple. Apple has indicated that it will appeal the ruling.

Merger control

Merger enforcement continued to be an important aspect of competition policy action in the US. In June 2012, Anheuser-Busch InBev (AB InBev), brewer of Budweiser and other popular beers, agreed to purchase Modelo, the Mexican company which brews Corona beers. The DoJ sued in an attempt to block the merger over concerns that it would allow AB InBev and its remaining competitors to more easily coordinate leader-follower pricing strategies that would increase beer prices. The parties settled the litigation by agreeing to sell Modelo's US assets to Constellation Brands, Inc. These assets included Crown Imports, the only company licensed to import Modelo's beer brands in the US. The deal gives Constellation perpetual rights to import Modelo's brands. The settlement agreement sought to preserve the status quo ante with regards to the number of independently competing beer brands by preserving control of pricing of Modelo's brands in the US with an independent firm.

Additionally, the FTC received a favourable ruling from the Supreme Court in its challenge of Phoebe Putney Health Systems' acquisition of Palmyra Park Hospital in Atlanta, Georgia. The US Supreme Court overturned an Eleventh Circuit ruling that held that while the merger would likely create a monopoly, the merger was immune from federal antitrust laws since Phoebe Putney was created and owned by a government entity, the local hospital board. The Supreme Court said that the Eleventh Circuit ruling was in error because the Georgia legislature, at the time it passed the relevant state laws governing the state's hospital authority system in 1941, had not contemplated replacing competition between hospitals with regulation. Additionally, the Georgia law had other purposes besides governing hospital acquisitions and consolidations, further supporting the contention that the intent of the legislature was not to reduce or regulate competition. Consequently, the case was returned to the district court for a trial on whether the merger actually reduced competition and harmed consumers of hospital services in the relevant markets.

The coming year promises additional opportunities in merger enforcement. First, there is a proposed

merger between US Airways and American Airlines. American is hoping that the merger will allow it to emerge from bankruptcy proceedings as a strong and viable competitor. However, there are a number of markets in which the two airlines compete head-to-head. Further, the merger would mark the continued consolidation of the US airline industry to a degree that some observers find worrisome.

Another proposed merger that will be closely watched is the acquisition of Office Max by Office Depot, two of the three largest office superstore chains. Fifteen years ago, a federal court granted the FTC a preliminary injunction blocking a similar merger between Staples and Office Depot, then the top two office superstore chains. That decision compelled Staples and Office Depot to withdraw their merger plans. It also led to a wide debate on the use of scanner data, and the roll of econometric analysis and natural experiments in answering the question of market definition. Whether the newly proposed merger will succeed will likely depend upon the degree to which competition from online and other providers have changed office superstore competition over the years.

'Pay-for-delay' cases

In recent ruling, the Supreme Court held that so-called 'pay-for-delay' settlements (also known as 'reverse payment' settlements) in patent infringement lawsuits should be analysed for antitrust violations using a rule-of-reason standard. In these cases, branded pharmaceutical companies settle patent infringement disputes by paying the generic manufacturers to refrain from entering the market prior to a certain date. By the terms of the Hatch-Waxman Act, such settlements prevent third-party generic manufacturers from entering the market for a period of time. The FTC and private plaintiffs have challenged such settlements, arguing that they delay generic entry and cause patients to pay inflated prices compared to the typical prices a generic entrant would charge.

The Court's ruling resolves a split in the lower appellate courts. The Eleventh Circuit had held that pay-for-delay settlements were legal provided that the patent litigation settlement did not exceed the scope of the patent. In contrast, the Third Circuit had ruled that the existence of a pay-for-delay settlement creates a presumption of an unreasonable restraint of trade (which the defendants may try to rebut). The Third Circuit further ruled that the merits of the patent dispute between the branded and generic manufacturers are irrelevant to this presumption. The Federal Trade Commission had been seeking a decision declaring these settlements presumptively illegal.

The Supreme Court decision arguably carves out a middle ground between the two circuits' rulings. Even settlements that fall within the scope of the patent may still be in violation of the antitrust laws. However, the settlements are not presumptively illegal. Plaintiffs seeking to challenge a pay-for-delay settlement bear the burden of proving the settlement violated the antitrust laws, although the Court found that a large payment relative to court costs may create the presumption of a weak patent and anti-competitive behaviour. The various cases have been remanded to the respective district courts for trials on the merits of the antitrust claims that are consistent with the Supreme Court's ruling. The ruling does not definitively resolve that status of any individual case, and Congress may still choose to take up legislation which would make these settlements illegal.

Standards for experts

In the US, economic expert analysis and testimony are critical in virtually all competition and class action cases. Economists analyse markets and competitive effects from proposed mergers to monopolisation cases. In private class actions, economists are used to determine whether class-wide or individual issues predominate and to calculate damages, and provide a critical step in moving the private class action cartel cases forward. However, expert witnesses such as economists are being held to increasingly higher standards to even qualify to testify, and these challenges are taking place earlier in the litigation process, before even the summary judgment and class certification stages.

Much of this scrutiny stems from different interpretations of the Supreme Court's Daubert and other rulings on the admissibility of expert testimony. Recently, the Supreme Court issued a ruling in *Comcast v Behrend* which further defined the responsibilities and duties of expert witnesses. This case involved a private class action in which plaintiffs accused Comcast of monopolising the market for cable television in the Philadelphia metropolitan area. The plaintiffs' economic expert had issued a report claiming that a methodology existed using evidence common to the class members for estimating damages based upon four claimed antitrust violations. The district court ruled that only one of those four violations could be litigated on a class-wide basis – the other three claims could not be proven using evidence common to the class members. However, the district court

allowed the plaintiffs' expert economist's opinion into evidence despite the fact that the expert's damages methodology did not disaggregate damages caused by the four claimed violations. The Supreme Court held that this was not acceptable because the expert's methodology did not specifically address the remaining claim. While the need to disaggregate damages has long been required at the merits phase of a case, the Court's ruling establishes that disaggregation is necessary even at the class certification stage, where the key damages issue is whether a methodology exists that is common to all class members (as opposed to determining the actual amount of damages per class member). The ruling is also significant in that it is part of a series of rulings which are viewed as limiting class action litigation.

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Dr James Langenfeld is a managing director and head of the antitrust and competition practice at Navigant Economics and an adjunct professor at Loyola University School of Law. He provides economic analyses in the context of litigation, regulation and economic policy that relate to competition and antitrust, intellectual property, class certification, damages and the impact of government actions. Dr Langenfeld testifies for private parties and government agencies engaged in litigation and regulatory proceedings at the federal and state levels in the US and in Europe, Canada and other countries. In over 25 years as a professional economist, Dr Langenfeld has done extensive work in many industries, including health care, pharmaceuticals, insurance, petroleum, motor vehicles, aerospace, tobacco, and a variety of other consumer and industrial products.

Dr Langenfeld's professional experience includes 10 years with the Federal Trade Commission, the last six of which he served as director for antitrust in the Bureau of Economics. In that role, he managed 45 PhD economists and was one of the main contributors to the 1992 Department of Justice and Federal Trade Commission Horizontal Merger Guides and the 1993 Statements of Antitrust Enforcement Policy in Health Care. He also served as a senior economist at General Motors.

Dr Langenfeld has published numerous articles in journals and books on many topics in applied economics and econometrics, including analyses of antitrust issues, mergers, intellectual property, the interface of antitrust and intellectual property and damages. He holds a PhD in economics from Washington University and an AB in economics and English literature from Georgetown University.

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Dr Stephan M Levy is a director at Navigant Economics with expertise in industrial organisation, antitrust and econometrics. Dr Levy has extensive experience providing economic analyses in antitrust and intellectual property litigation in numerous industries, including pharmaceuticals, health care, computer software, and aerospace and defence. He has assisted clients with steering mergers through the antitrust clearance process before the Federal Trade Commission or Department of Justice. He has also assisted clients in non-merger antitrust litigation, examining issues of antitrust liability, impact and damages.

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