



2018 ANTITRUST YEAR IN REVIEW

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Introduction



Wilson Sonsini Goodrich & Rosati (WSGR) is pleased to present its 2018 Antitrust Year in Review, which summarizes the most significant antitrust matters and developments of the past year. In this report, we examine the Trump Administration’s antitrust enforcement approach and analyze actions by both U.S. antitrust agencies across a range of civil and criminal enforcement matters. We note that the tech sector continues to be in the spotlight. To date that has not resulted in a high number of enforcement actions against tech companies in spite of President Trump’s admonition that certain large tech companies are a “very

antitrust situation”¹—but it is an area to watch.

We also examine international civil enforcement trends at the European Commission (EC), where tech is also top of mind, and in China. The criminal enforcement section provides an overview of trends in the Department of Justice’s (DOJ’s) criminal enforcement program, including changes in leadership at the DOJ; the DOJ’s increased focus on prosecuting individuals; and a trend towards using a variety of tools to detect criminal conduct and policy developments. We also highlight cartel

investigations in active jurisdictions outside of the U.S., including in Canada, China, the EU, Hong Kong, Japan, South Korea, and the United Kingdom. This report concludes with an update on private antitrust litigation, which remained active this year.

We hope you find our 2018 Antitrust Year in Review to be a useful resource. As always, should you have any questions or comments on any of the matters, trends, or controversies discussed in the report, please contact your regular WSGR attorney or any member of the firm’s antitrust practice.

Mergers

DOJ and FTC Leadership

When President Trump took office in 2017 it was unclear how he would shape the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (collectively, the agencies). However, President Trump's populist rhetoric on antitrust signaled a more aggressive approach than would typically be expected from a Republican Administration and Congress, state enforcers, policymakers, and advocates appeared aligned in their view that there is a need for stronger and more active merger enforcement—and the agencies have followed suit.

The DOJ Antitrust Division, under the leadership of Assistant Attorney General (AAG) Makan Delrahim, has made many public statements that it is closely scrutinizing mergers and has brought a number of high profile challenges. Most notably, the DOJ continued its efforts to challenge AT&T's \$108 billion acquisition of Time Warner. In 2017, the DOJ sought to block the transaction but lost at trial.² The DOJ subsequently filed an appeal and oral arguments were heard by the United States Court of Appeals for the District of Columbia in December.³

The DOJ also took action in several other high profile transactions, including Bayer/Monsanto, Disney/Fox and Cigna/Express Scripts—in each case requiring the merging parties to resolve the DOJ's concerns through a divestiture of a line of business; this is in keeping with the DOJ's current skepticism about the effectiveness of “behavioral” or “conduct”

remedies to address competitive harm.⁴ The \$9 billion divestiture in response to Bayer's proposed \$66 billion acquisition of Monsanto was particularly notable in that the DOJ required “the largest negotiated merger divestiture ever” before clearing the transaction.⁵

The FTC, a bipartisan, five-person commission⁶, started the year under the leadership of just two commissioners—Acting Chairman Maureen Ohlhausen (R) and Commissioner Terrell McSweeney (D). In mid-April, Commissioner McSweeney announced her resignation, effective on April 28, 2018.⁷ Shortly thereafter, the U.S. Senate confirmed President Trump's nominees Joseph Simons (R) as FTC Chairman, as well as Noah Phillips (R), Rohit Chopra (D), Rebecca Kelly Slaughter (D), and Christine Wilson (R) as FTC Commissioners.⁸ Chairman Simons is a mainstream conservative Republican with a strong background in antitrust and antitrust economics, and served as the FTC Director of the Bureau of Competition under President George W. Bush. As Chair he has adopted an aggressive tone, stating “[R]ecent economic literature concludes that the U.S. economy has grown more concentrated and less competitive over the last 20 to 30 years, which happens to correlate with the timing of a change to a less enforcement-minded antitrust policy, beginning in the 1980s. These concerns merit serious attention.”⁹ Whether or not this translates into more enforcement activity under his leadership will become more apparent in 2019.

In 2018, the FTC sued to block five mergers.¹⁰ Of these five transactions, two were abandoned after the FTC initiated litigation,¹¹ one was abandoned after

the District Court granted a preliminary injunction,¹² and two challenges continue to be litigated.¹³ One significant area of focus at the FTC has been ensuring that any merger settlement involving a divestiture is successfully executed. In his confirmation testimony, Simons noted an FTC study that found a 30 percent failure rate in some merger remedies and stated, “That rate is too high and needs to be lowered substantially or, ideally, zeroed out altogether.”¹⁴

Another concerning trend under the current leadership at both agencies is significant jurisdictional battles over which agency will have jurisdiction to review any particular merger transaction. While both the FTC and the DOJ have jurisdiction to review mergers under the applicable antitrust laws, mergers are “cleared” to only one agency for review based on prior expertise and precedent. For certain industries cases (e.g., airlines, hospitals, semiconductors, and pharmaceuticals) it is relatively clear which agency will review a particular transaction. However, as industries converge or where the precedent is not defined, as is the case with many technology transactions, the agencies may both seek to review a transaction and dispute “clearance.” This can cause significant delays in merger transactions, as the agencies wait to begin their review until clearance is resolved. In recent months we have seen longer delays in a wide range of matters, including in matters where jurisdiction should be clear. The FTC Chair and the AAG have acknowledged this problem and said they are working together to improve this process.¹⁵ In the meantime, it will be a factor for merging parties to consider as they consider timing constraints on deals.

Spotlight on Tech

As with many other policymakers, antitrust enforcers continue to shine a spotlight on tech at least in the public discourse, if not in actual enforcement activity. This has included a focus on acquisitions of start-ups by large tech companies. For example, Chairman Simons has stated that “[t]hese types of transactions are particularly difficult for antitrust enforcers to deal with . . . But harm to competition can nonetheless be significant.”¹⁶ Similarly, the FTC’s Director of the Bureau of Competition has stated that the idea of large technology firms using acquisitions to “foreclos[e] the development of emerging rivals that might ultimately unseat them. . . is a completely legitimate and real theory of competitive harm” while also noting the difficulty in bringing such cases.¹⁷ Some commentators have even suggested that past acquisitions by large tech companies should be reexamined and possibly unwound.¹⁸

Despite this rhetoric, we have not yet seen a meaningful uptick of merger enforcement in the tech sector relative to other industries. In 2018 the agencies cleared a number of high profile transactions by large tech companies without issuing a second request, including Amazon’s \$1B+ acquisition of smart doorbell company Ring¹⁹ (vertical acquisition in the smart home space), Microsoft’s \$7.5B acquisition of GitHub²⁰ (vertical and horizontal acquisition in the source code repository space), and Apple’s \$400M acquisition of Shazam²¹ (vertical acquisition in the music app space).

That said, there were few merger challenges in the tech sector, with the most notable not involving any large and high-profile tech company. In March 2018, the FTC challenged the merger of CDK Global and Auto/Mate—two

firms that provide business software for car dealerships.²² Despite Auto/Mate’s relatively small market share, it was winning a significant share of sales opportunities from CDK. The FTC alleged that the transaction would entrench CDK’s dominant position as the largest provider of Dealer Management Software (DMS) and was likely to reduce innovation, increase prices, and reduce quality of service in the DMS market. The companies abandoned the transaction following the FTC’s challenge. FTC leadership has described this case as an important example of the agency taking action where an incumbent was acquiring a nascent competitor and “the evidence showed that looking solely at current market shares would miss a major issue—that Auto/Mate appeared to be on the cusp of becoming a much more important and vibrant competitor.”²³

Hart-Scott-Rodino (HSR) Act: Gun Jumping and Failure to File

The HSR Act mandates that transactions that meet specific thresholds be notified to the antitrust agencies for review. If after a 30-day waiting period the pertinent agency still has doubts about the antitrust impact of the transaction, the agency will issue a second request, opening an in-depth review.

Importantly, the HSR Act applies regardless of any substantive antitrust issues and can apply even where a single investor is acquiring voting securities of an issuer. In 2018, the FTC issued a reminder that HSR obligations may be triggered even where no payment is involved, including exchanges of one type of interest in a company for another; reorganizations; or certain types of employee compensation.²⁴

The agencies frequently bring cases for failure to comply with HSR obligations and 2018 was no different. In December 2018, the FTC fined James L. Dolan, Executive Chairman of the Madison Square Garden Company (MSG), \$609,810 for failing to report his September 2017 acquisition of voting securities in MSG.²⁵ Dolan had failed to file HSR for two similar acquisitions of voting securities (in March and November 2010), but successfully avoided civil penalties by arguing that the failure to file was inadvertent.²⁶ For more details about what triggers an HSR obligation, please see WSGR’s October 29, 2018 [alert](#), *I Have to File for That?—Why Investors Should Remain Attentive to HSR Reporting Obligations*.²⁷

The HSR Act also prohibits buyers from exercising beneficial ownership over the target company before expiration of the mandatory HSR waiting period, even where the parties do not compete. The agencies view the improper exchange of competitively sensitive information as gaining such unlawful beneficial ownership or “gun jumping.” The fine for such “gun jumping” violations is \$41,484 (adjusted annually) for each day the parties are in violation of the HSR Act. Gun jumping investigations during a merger review are costly and burdensome.

In April 2018, the FTC issued guidance to help parties reduce antitrust risk during the pre-closing period.²⁸ While not novel, the guidelines are a reminder of best practices in a merger review and include: (1) adopting protocols to govern the content and timing of the disclosure of competitively sensitive information; (2) instituting a “clean team” for competitively sensitive information; and (3) only sharing historical or aggregated price and cost data where possible.

Agency Merger Review Reforms

In 2018 both the DOJ and the FTC announced reforms to their merger review process and specifically the processes that will govern in-depth second request reviews that occur after the end of the HSR 30-day waiting period.

The DOJ's announcement was focused on streamlining its review process, including through reforms to allow resolutions of most merger investigations *within 6 months* from the date of the parties' HSR filings. Other DOJ announced reforms were focused on reducing the burdens associated with second request compliance by, for example: (1) limiting the number of custodians to 20 in most cases, and (2) limiting the number of depositions to 12 in most cases. In exchange for these reduced burdens, the DOJ expects the merging parties to: (1) voluntarily produce²⁹ key documents and data early in the process (before or shortly after HSR is filed); (2) in the event of a second request, begin rolling documents and data into the DOJ shortly after the second request is issued; and (3) enter into a timing agreement³⁰ that gives the DOJ 60 days (in most cases) to complete its review after the parties certify compliance with the second request (versus 30 days proscribed by the HSR Act).

While the DOJ merger review reforms likely will streamline investigations, AAG Delrahim has, in some cases, made it more difficult for merging parties to resolve potential DOJ concerns. Since taking over as AAG, Delrahim repeatedly has stated that he strongly disfavors behavioral remedies to resolve a transaction's potential competitive harm—that is, under his watch, the DOJ is unlikely to approve any settlement that would require ongoing monitoring of business conduct after a

transaction closes. This marked a shift from the Obama Administration which had resolved a number of merger challenges via such conduct remedies and which had issued a *Policy Guide to Merger Remedies* in 2011—reaffirming the DOJ's support of behavioral decrees in certain cases. In September 2018, AAG Delrahim formally withdrew the 2011 *Policy Guide*.³¹

The FTC also announced merger process reforms although, unlike the DOJ, appears to have extended the average review period. For example, the DOJ has stated that 60 days is a sufficient review period for post-second request compliance in most cases. The FTC's newly released model timing agreement requires parties to agree not to close a proposed transaction until 60 to 90 calendar days following compliance with a second request. The FTC also will require that the parties provide 30 calendar days' notice before consummating a proposed transaction (versus 10 days at the DOJ)³² and the FTC did not adopt any presumptive limits on the number of custodians or depositions.

The FTC's structure also can extend the period of review, particularly where a settlement is involved. In a recent blog post, the FTC explained that it takes at least four weeks to review a consent (or settlement) package after FTC staff and the parties formally submit the settlement package to the Bureau of Competition.³³

On behavioral decrees, the FTC appears to allow for more a flexible approach. While noting the FTC's preference for structural remedies, Bruce Hoffman, Director of the FTC's Bureau of Competition, remarked that "in some cases a behavioral or conduct remedy can prevent competitive harm while allowing the benefits of integration."³⁴ However, FTC Chairman Joe Simons noted the FTC accepts behavioral remedies in "rare, very limited" circumstances and usually

in defense-industry transactions where the Department of Defense and national security may be implicated.³⁵ The Bureau notes these "special characteristics of the defense industry" in its statement describing the Commission's recent decision to accept a behavioral remedy in the Northrop Grumman/Orbital ATK merger.³⁶

Continued Focus on Vertical Mergers

As we noted last year, vertical mergers are also receiving renewed attention. Vertical mergers involve businesses operating at different levels of a supply chain. Vertical mergers most often raise competition concerns when the buyer's competitors are reliant on the asset being acquired, and the buyer has the incentive and ability to withhold the asset. While both the DOJ and the FTC have always reviewed and challenged vertical mergers—from a policy perspective they are receiving renewed attention. Indeed, AAG Delrahim has stated publicly that the DOJ is considering updating its outdated vertical merger guidelines.

The DOJ's challenge to the AT&T/Time Warner merger, filed in late 2017 and litigated in 2018, was the first vertical merger case that has gone to judgment in 40 years.³⁷ The DOJ claimed that the merger would enable AT&T to leverage its ownership of Time Warner's "must-have" programming to get higher fees from traditional video programming distributors, ultimately raising prices for consumers. Following a six-week trial, the district court ruled in favor of the companies, finding that the DOJ failed to meet its burden to show that the combination was likely to substantially lessen competition. The court was not convinced by the government's economic model, noting that it lacked "both reliability and factual credibility".³⁸

The DOJ appealed the decision and litigation is expected to continue into 2019.³⁹ The outcome of this case can be expected to shape future vertical merger enforcement challenges in the years to come.

In the meantime, both agencies continue to bring vertical merger challenges. Their resolution of these matters has diverged somewhat due to a divergence in thinking on the appropriateness of behavioral remedies, which are often used to resolve vertical merger concerns. In the *Bayer/Monsanto* merger, which raised vertical and horizontal concerns, the DOJ secured the largest divestiture package ever negotiated by a U.S. antitrust agency.⁴⁰ The DOJ's settlement requires Bayer to divest the businesses that gave rise to the vertical concerns.

In contrast, the FTC demonstrated a continued willingness to resolve vertical concerns via behavioral remedies. In June 2018, the FTC imposed conditions on the merger of Northrop Grumman, a leading provider of missile systems to the Department of Defense, and Orbital ATK, a key supplier of solid rocket motors (SRM).⁴¹ The FTC's concern was that post-merger, Northrop would have the incentive and ability to harm competition for missile contracts by either withholding access to Orbital's solid rocket motors or increasing SRM prices to competitors. The FTC contended that this would decrease competitive pressure on Northrop by forcing competitors to raise the prices of their missile systems, invest less aggressively to win missile programs, or decide not to compete at all. The FTC was also concerned about the possibility that proprietary, competitively sensitive information of a rival SRM supplier supporting Northrop's missile system business could be shared with Northrop's vertically integrated SRM business.

Accordingly, the FTC proposed an order imposing non-discrimination requirements and a firewall to preserve competition.⁴² As noted above, the FTC's willingness to rely on a behavioral decree may have resulted from the fact that the transaction involved the defense industry.

Litigating the Antitrust Covenants Merger Agreement

Two of the most notable developments on the antitrust regulatory front occurred outside of the agency review process. In particular, there were two significant cases—*Akorn v. Fresenius* and *Tribune v. Sinclair*—that resulted in private litigation over antitrust covenants merger agreements.

Akorn v. Fresenius involved an April 2017 agreement by German pharmaceutical company Fresenius Kabi AG to acquire U.S. generic drug manufacturer Akorn, Inc. for \$4.75B. The merger agreement included a “hell or high water” (“HOHW”) provision⁴³ and a “Strategy Provision” that gave Fresenius sole control over the antitrust regulatory process.⁴⁴ In October 2017, the parties submitted to the FTC a divestiture package for Akorn's overlapping products to address concerns raised by the FTC. In November 2017, the FTC responded with a demand for *Fresenius* products to be divested. Fresenius then identified two strategic options for moving forward: (1) Option 1: divest Fresenius products as the FTC requested; or (2) Option 2: divest Akorn's Decatur plant, which would have resolved all of the FTC's concerns without the need to divest other products and also avoid “multiple longstanding disputes with the FTC about Option 1.”⁴⁵ Fresenius began pursuing both strategies in parallel but quickly abandoned Option 2 upon realizing it could

not get a good offer for selling the Decatur plant and thus Option 2 would delay clearance beyond the outside date.

In April 2018, Fresenius notified Akorn that it was terminating the merger agreement. Akorn sued Fresenius alleging that, among other things, Fresenius had breached the HOHW clause by pursuing a regulatory clearance strategy that Fresenius knew would delay antitrust clearance. The Delaware Court of Chancery disagreed. The court described the merger agreement's Strategy Provision as “inherently recogniz[ing] that there is no single and obvious answer as to how to pursue antitrust approval.”⁴⁶ The court also stated: “By choosing Option 2, which would delay antitrust clearance by two months, Fresenius technically breached the [HOHW].”⁴⁷

Nonetheless, the court held that Fresenius did not “materially” breach the HOHW because the company quickly pivoted back to Option 1.⁴⁸ These observations suggest that the court found the fact that the Fresenius only *considered* Option 2 for a week, and did not continue to pursue it, relevant. The court noted that Fresenius could have secured FTC clearance by the original outside date had the FTC not “wavered on aspects of the original divestiture package.”⁴⁹

Another case, *Tribune v. Sinclair* involved a “reasonable best effort covenant.” In May 2017, media broadcasting companies, Sinclair Broadcast Group and Tribune Media, entered into a merger agreement whereby Sinclair agreed to acquire Tribune. The transaction was later abandoned when the parties failed to obtain regulatory clearance.

The merger agreement, which expired on August 8, 2018, gave Sinclair control over the regulatory strategy, but required Sinclair to take reasonable best efforts to

consummate the merger as promptly as possible and avoid entry of any order that would prevent or delay consummation; take action to avoid or eliminate challenges asserted by the government to enable the transaction to close as soon as possible; and divest certain stations required if necessary to avoid any proceedings that may prevent or delay consummation.⁵¹ In the disclosure letter to the merger agreement, Sinclair further acknowledged that FCC and DOJ approval would require divestiture of certain stations and listed ten markets with divestiture stations.⁵¹

Minutes after the expiration of the Merger Agreement, Tribune terminated the agreement and filed a complaint for breach of contract seeking damages for all losses incurred, including approximately \$1B of lost premium.⁵² Tribune's complaint alleges that Sinclair breached the "reasonable best effort" requirement in the merger

agreement by taking an over-aggressive negotiation strategy with the FCC and DOJ.⁵³ The complaint describes in detail several interactions between Sinclair's lawyer and DOJ, which Tribune alleged to be part of Sinclair's over-aggressive negotiation with DOJ over the divestiture.⁵⁴ Tribune alleges that Sinclair adopted the same negotiation approach with the FCC, including refusing to identify divestiture stations at the start, proposing an unrealistic divestiture approach, proposing related parties as potential divestiture buyers, concealing material information about these related parties from the FCC, and refusing to divest stations that FCC demanded. Tribune contends that because of Sinclair's unnecessary antagonistic negotiation approach with the DOJ and FCC, Sinclair failed to obtain DOJ clearance of the merger by the end date (even though there was a "clear path" to approval through the divestiture

of stations in the identified markets), and the FCC referred the merger to an administrative hearing, including for issues relating to "whether Sinclair engaged in misrepresentation and/or lack of candor in its applications with the Commission."⁵⁵

Sinclair filed an answer and brought a counterclaim against Tribune, alleging that Tribune materially breached its obligations under the Merger Agreement by failing to use its reasonable best efforts to obtain regulatory approval of the transaction.⁵⁶ According to Sinclair's counterclaim, Tribune ceased to put its efforts toward obtaining approval for the merger when it became evident that the FCC would issue an HDO.⁵⁷ Sinclair contends that rather than defend the merger, Tribune focused on its own litigation strategy, citing to the fact that Tribune filed its complaint in this matter just minutes after the merger agreement expired.⁵⁸

International Merger Enforcement Updates

EU Competition Enforcement

Data is Key

As in the United States, technology transactions have been in the spotlight in Europe with a particular focus on data. As recently as November 7, 2018, the European Commissioner for Competition (Commissioner), Margrethe Vestager, stressed that the European Commission (EC) needs to "keep an eye on" mergers which entail one company getting "exclusive control of a really powerful, unique set of data".⁵⁹ This is not entirely new. For example, as part of its 2016 conditional clearance in *Microsoft/LinkedIn*,

the EC assessed whether Microsoft could potentially foreclose rivals by restricting access to LinkedIn's data on its users.⁶⁰

This year, in *Apple/Shazam*, the EC again examined concerns over the acquisition of data sets.⁶¹ Apple's acquisition of the U.K.-based Shazam, a music recognition app, did not meet the thresholds of the EU Merger Regulation, but was referred to the EC by Austria (where thresholds were met) with the support of six other member states. Against the backdrop of the EC's consultation on changes to the European turnover-based thresholds to "catch" potentially problematic deals that would otherwise bypass EC review, the decision underlines the effectiveness of the national referral system in ensuring potentially

high value deals in the technology or pharmaceutical industries do not fall through any perceived gap.

Apple and Shazam largely offer complementary services, rather than services that compete with each other but nonetheless the transaction raised concerns. In its Phase II in-depth review, the EC expressed concerns that Apple could gain access to commercially sensitive data about customers of rival music streaming services such as Spotify and Deezer and use that data to encourage them to switch platforms to Apple Music. The EC also flagged concerns about whether Shazam was an important gateway to music subscription services and, if so, whether Apple could

shut out rival steaming services by discontinuing referrals from the Shazam app to Apple Music's competitors.

Ultimately the transaction was cleared in September 2018, with the EC concluding that Shazam's data was not unique and competitors would have the opportunity to access such data elsewhere. It also found that any conduct aimed at making customers switch would only have a negligible impact, and that Shazam was of "limited importance as an entry point" in driving traffic to rival streaming services.

Still the six month review illustrates that companies considering a merger involving the acquisition of important data sets, including potentially commercially sensitive ones, should be prepared for close scrutiny. However, merging companies can take comfort from the EC's clear message that the acquisition of data by itself will not be automatically viewed as harmful to competition. Rather, the EC will assess the nature of the data being acquired, how "unique" such data is (i.e., whether the data set can be easily replicated or competitors can otherwise obtain access to similar data) and whether such data enables the foreclosure of rivals.

Back to Basics—A Clear Mandate

The tie-up between Bayer and Monsanto also was notified to the EC on June 30, 2017 following protracted pre-notification talks—almost ten months after signing.⁶² The review of the deal—which creates the largest global integrated seeds and pesticide player—immediately generated considerable opposition from environmentalists and other civil society groups. Within one month the EC received more than 50,000 emails, 5,000 letters, and countless tweets.⁶³ In response, Commissioner Vestager exceptionally published an open letter to petitioners stressing that the EC's mandate is solely

limited to competition issues (i.e., whether the transaction would lead to competition concerns due to negative effects on prices, quality, choice, or innovation) and that EC merger assessments do not include broader concerns relating to human health, consumer protection, the environment, or climate.

In the following months, the EC assessed more than 2,000 different product markets, reviewed around 2.7 million internal documents,⁶⁴ and 'stopped the clock' twice in its investigation while it sought information from the parties. Data—and competition in the digital economy—was again to the fore in this in-depth review, with the focus this time on the future of digital agriculture (the harnessing of big data to provide farmers with tailored advice on when it is optimal to plant, or how much pesticide to use, etc.).

On March 21, 2018, the EC conditionally cleared the merger subject to an extensive remedies package worth more than EUR 6 billion and with BASF as an up-front buyer. The remedies focused on Bayer's divestment of a large portion of its seeds business, related R&D, and the licensing of its digital agriculture product portfolio and pipeline products, highlighting the EC's increased focus on innovation competition in industries where R&D is a key parameter and the emphasis on competition in digital markets—even in more traditional industries such as agriculture.

Spotlight on Conglomerates

The EC's review of *Essilor/Luxottica* highlighted the increasing focus on conglomerate effects in merger assessments.⁶⁵ The transaction involved the combination of the largest supplier of ophthalmic lenses, both worldwide and in Europe, through Essilor, and the largest supplier of eyewear (including prescription frames and sunglasses), both worldwide and in Europe, through Luxottica. The EC's

main competition concern was thus the possibility of foreclosure arising from the combination of the parties' complementary product portfolios, with the fear that Luxottica's strong brands—such as Ray-Ban and Oakley—could be used to entice opticians to buy Essilor's lenses to the exclusion of rivals.

As part of its review, the EC conducted a thorough market test which included feedback from nearly 4,000 opticians throughout Europe. Based on the responses received, the EC concluded that Essilor and Luxottica would not gain the market power to harm competition. In particular, the EC considered that the merged company would have limited incentives to engage in practices such as bundling and tying because of the risk of losing customers. The EC, like the U.S. FTC, waived the deal through unconditionally in March 2018. The unconditional clearance may have been helped by the fact that the merger lacked more traditional concerns such as interoperability issues, acquisition of large data sets, or other plus factors.

In-Depth Investigation Does Not Preclude Unconditional Clearance

Unconditional clearances following an in-depth review by the EC are rare in practice. As of December 13, four—including Apple/Shazam and Essilor/Luxottica—have been issued in 2018. Notably, in November, the EC granted unconditional clearance to the combination of the third (T-Mobile) and fourth (Tele2 NL) largest retail mobile telecoms operators in the Netherlands. This is the first such clearance of a four-to-three telecoms merger under Commissioner Vestager, who has overseen the effective blocking of two similar deals. While the clearance shows that there is no magic number when it comes to the EC's assessment of telecom deals, the decision appears to have turned on the facts,

with the European regulator pointing to uncertainties around Tele2's "standalone" future in the Dutch market.

China

In March 2018, the Chinese government announced that its three competition agencies—the Ministry of Commerce (MOFCOM), the National Development and Reform Commission (NDRC), and the State Administration for Industry and Commerce (SAIC)—would be combined into a single regulator, the State Administration for Market Regulation (SAMR), which will carry out all antitrust enforcement for the country.⁶⁶ Prior to consolidating the agencies, merger reviews were carried out by MOFCOM, the NDRC was responsible for price-related conduct, and the SAIC was responsible for non-price conduct. Though antitrust

agencies will be organized under a new structure, personnel will largely remain the same; therefore, no drastic changes in enforcement are anticipated.

SAMR consists of 27 bureaus with various functions, of which the Anti-Monopoly Bureau (AMB) is tasked with carrying out antitrust enforcement. As of September 2018, the predecessor antitrust agencies have been consolidated under the AMB. The AMB will have three divisions devoted to merger review that will be staffed by MOFCOM enforcers.

China's antitrust enforcers have aggressively investigated and pursued remedies to mergers in 2018. In July, Qualcomm abandoned its \$44B proposed acquisition of NXP after SAMR blocked the transaction.⁶⁷ SAMR was the only antitrust agency that did not approve the transaction. Similarly, SAMR was the only antitrust agency to require conditions

in the Luxottica/Essilor merger.⁶⁸ SAMR also imposed conditions in the Bayer/Monsanto⁶⁹ and Linde/Praxair mergers.⁷⁰ All three of these conditional clearances included behavioral remedies.

Compared to the U.S., Chinese antitrust enforcers have, historically, been more amenable to behavioral remedies—including imposing behavioral conditions on horizontal transactions. Further, China's behavioral remedies can be imposed without an expiration date, leaving the duration of their enforceability open ended. SAMR has recently increased staffing for supervision of its behavioral remedies and has been active in conducting on-site compliance visits. These factors should be carefully considered in the merger planning phase as monitoring and compliance for behavioral remedies can impose high cost burdens on companies.

Civil Agency Investigations

On the civil non-merger enforcement front, there were fewer public developments in the United States, although the FTC had some notable litigation wins. The FTC also devoted significant resources to a series of hearings focused on a wide range of competition (and consumer protection) policy issues. Those hearings will be ongoing in 2019 and may set the stage for future enforcement activity at both agencies. For its part, the DOJ devoted resources towards sunseting old consent decrees that imposed continuing obligations on parties to DOJ settlements. In Europe, the focus was on tech with brought high profile cases being brought against Qualcomm and Google, and an investigation launched against Amazon. These will be developments to watch in the new year.

U.S. FTC and DOJ Developments

Decision Reached in FTC's Antitrust Case Against 1-800 Contacts

In November, the FTC issued a decision in its long-running case against 1-800 Contacts for agreeing with rivals not to target each other's businesses on search engine advertising.⁷¹ Upholding an earlier decision by the FTC's Administrative Law Judge, the decision found that 1-800 Contacts' agreements with competitors not to bid on each other's trademarked search keywords represented an unfair method of competition under Section 5 of the FTC Act (e.g., a rival would agree not to bid on the keyword "800-contacts"

on search engines). The resulting order requires 1-800 Contacts to cease and desist from enforcing the "no-bid" provisions in its existing agreements with competitors, and prohibits 1-800 Contacts from agreeing with other contact lens retailers to restrict search advertising or to limit participation in search advertising auctions in the future.⁷²

The FTC's majority opinion, authored by Chairman Joe Simons, held that the "no-bid" agreements between 1-800 Contacts and its rivals, which 1-800 Contacts had obtained through threat of litigation, fell into the category of agreements "inherently suspect owing to [their] likely tendency to suppress competition."⁷³ Specifically, by agreeing not to compete vigorously for placement in Google and other search engines, 1-800 Contacts was able to "eradicate an important form of price

competition as a means to protect the intellectual capital embedded in their trademarks,” resulting in harm to both the search engines and to consumers.⁷⁴ The FTC rejected 1-800 Contacts’ argument that “commonplace” litigation settlements like the ones at issue are immunized from scrutiny under the Supreme Court’s *Actavis* decision involving pay-for-delay settlements in pharma⁷⁵ and instead held that whatever pro-competitive benefits 1-800 Contacts might obtain from the protection of its intellectual property did not outweigh the harm caused to consumers.⁷⁶

The FTC’s Order was issued by a vote of 3-1-1, with Commissioner Rebecca Slaughter concurring and Commissioner Noah J. Phillips dissenting. Commissioner Slaughter stated that she “strongly support[ed]” the outcome of the case, but that she “would not have supported pursuing this case based on harm to search engines alone” had she not also been convinced that 1-800’s actions “rob[bed] consumers of competition that results in lower prices, and rob[bed] competitors of the ability to challenge a dominant player.”⁷⁷ Commissioner Phillips’ dissent criticized the FTC’s decision for failing to find “actual, sustained, and significant or substantial” effects from the challenged agreements, and argued that the FTC should have applied a full rule of reason analysis rather than the “truncated” version the decision actually employed; particularly since the conduct by 1-800 at issue was “the settlement of legitimate (i.e., non-sham) trademark infringement claims.”⁷⁸ 1-800 Contacts is appealing the decision.

FTC’s Continued Effort to Challenge “Sham Litigation”

The FTC has continued its campaign to challenge sham patent infringement lawsuits by branded pharmaceutical companies designed to delay the

introduction of low-priced generic alternatives. Under the Supreme Court’s decision in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* (“*PRE*”), litigation is a sham if (1) the lawsuit was “objectively baseless” and (2) that the defendant subjectively intended to interfere with competition through filing the lawsuit.⁷⁹

In June 2018, the FTC filed in amicus brief in *Takeda Pharmaceutical Co. Ltd. v. Zydus Pharmaceuticals (USA) Inc.*, which is pending before the U.S. District Court for the District of New Jersey.⁸⁰ Earlier this year, Takeda filed a patent infringement lawsuit as authorized by the Hatch-Waxman Act in response to Zydus’s Abbreviated New Drug Application (“ANDA”) for a generic version of Takeda’s patented Prevacid SoluTab ulcer medication.⁸¹ Zydus lodged counterclaims alleging that Takeda’s lawsuit was an anticompetitive sham litigation.⁸² Takeda moved to dismiss in part on the ground that a lawsuit brought pursuant to a statutory right, such as Takeda’s Hatch-Waxman Act claims, cannot be a sham.⁸³

The FTC’s brief, filed in connection with Takeda’s motion to dismiss Zydus’s antitrust counterclaims, argues that statutory authorization to file a lawsuit does not preclude a finding that the lawsuit is an anticompetitive sham.⁸⁴ The FTC contends that there is no basis in the statute, the principles underlying the *Noerr-Pennington* doctrine (which protects certain litigation and other activity from antitrust scrutiny), or the relevant case law that would support special treatment for Hatch-Waxman lawsuits.⁸⁵ Instead, the FTC argues that Hatch-Waxman lawsuits should be subject to the same case-specific inquiry as would apply in any other sham litigation challenge.⁸⁶

The FTC also had a victory in its own case challenging sham litigation—*FTC v. AbbVie Inc.* In that case, the U.S.

District Court for the Eastern District of Pennsylvania ruled in favor of the FTC on sham litigation claims against AbbVie Inc. and Besins Healthcare Inc. in June. The FTC had sued in September 2014, alleging that the companies initiated sham lawsuits against Teva Pharmaceuticals USA and Perrigo Company alleging violation of patents covering the Androgel 1 percent testosterone replacement drug.⁸⁷ The FTC also challenged a settlement agreement whereby Teva would delay introduction of its generic alternative in exchange for an authorized generic deal for a different product.⁸⁸ In May 2015, the court dismissed all claims related to the settlement with Teva, leaving only the sham litigation allegations against AbbVie and Besins.⁸⁹

The court held in a September 2017 summary judgment ruling that AbbVie’s and Besins’ lawsuits were objectively baseless,⁹⁰ and a bench trial on subjective intent followed.

The FTC and the defendants disagreed as to the standard and burden of proof required to show subjective intent—issues not reached by the Supreme Court in *PRE*. The FTC argued that it needed to prove by a preponderance of the evidence that the litigation would not be economically viable but for the collateral impact that engaging in potentially burdensome legal process might have on the target’s ability to compete.⁹¹ The court instead adopted defendants’ position that clear and convincing evidence of actual knowledge that the lawsuits were baseless is required to overcome *Noerr-Pennington* protection.⁹² The court nonetheless found that this was the “exceptional case” where the evidence clearly showed that the defendants knew their lawsuits had no chance of success on the merits.⁹³

In response to the decision, FTC Chairman Joe Simons stated: “This decision is a double victory, both for patients who

rely on Androgel and for competition more broadly. It sends a clear signal that pharmaceutical companies can't use baseless litigation to forestall competition from low-cost generics.⁹⁴

FTC—Hearings on Competition and Consumer Protection in the 21st Century

In June, FTC Chairman Joe Simons announced the commencement of a new series of FTC hearings intended to study the state of U.S. antitrust law in the 21st century.⁹⁵ The hearings are modeled on the 1995 “Global Competition and Innovation Hearings” under then-Chairman Robert Pitofsky and will extend through early 2019. The topics include a wide variety of antitrust and consumer protection topics within the FTC’s jurisdiction, including innovation, privacy, intellectual property, issues unique to digital platforms, and the need (if any) for modifications to the consumer welfare standard.⁹⁶ The hearings are open to the public, with selected speakers and panelists representing a wide range of industries, law firms, and academic institutions.

The FTC has so far held nine distinct hearings stretching more than 16 days of testimony. The hearings began on September 13, 2018 with a discussion of recent trends in economic concentration, and continued on to cover merger policy (September 21), digital platforms, nascent competition and labor issues (October 15-17), innovation and intellectual property (October 23-24), vertical merger analysis and the role of the consumer welfare standard (November 1), privacy and big data (November 6-8), algorithms and artificial intelligence (November 13-14), common ownership (December 6), and data security (December 11-12).⁹⁷ A further hearing on consumer privacy has been scheduled for February 12-13.

The FTC has solicited public comments for each individual hearing and for the hearings as a whole; the FTC will also invite public comment upon completion of the entire series of hearings.⁹⁸

DOJ Consent Decree Review

On April 25, 2018, the DOJ announced an initiative to review and propose termination of roughly 1,300 legacy consent decrees in antitrust cases.⁹⁹ Prior to the DOJ’s policy change in 1979, DOJ consents generally did not have end dates and there are many such decrees on the books in district courts around the country. The DOJ has since announced consent decrees proposed for termination in numerous district courts, and offered the public a chance to comment on any considerations that may counsel for or against termination of those decrees.¹⁰⁰ The DOJ’s first request to terminate a series of consent decrees in the U.S. District Court for the District of Columbia was approved without controversy on August 15, 2018,¹⁰¹ and it is expected that many more such decrees will be terminated through this program.

Certain of the legacy decrees pose more difficulties than others. The consent decrees in *United States v. Paramount* prohibit certain restrictive distribution practices by movie studios in the distribution of their films to theaters.¹⁰² While the decrees have been on the books since 1949, the DOJ’s review process attracted several comments saying the decrees were still necessary and should remain in place.¹⁰³ Also controversial are the decrees in *United States v. ASCAP* and *United States v. BMI*, with many stakeholders having strong views on whether or not the decrees should be amended or sunsetted.¹⁰⁴ The *ASCAP/BMI* decrees have been in place since 1941 and mandate judicial oversight of music licenses and rates. Congress passed legislation in 2018 that requires the DOJ to

consult with Congress before terminating the decrees and in recent congressional testimony, Delrahim stated that the DOJ is “meeting with every interested party and [has] not made any conclusions.”¹⁰⁵

DOJ—Broadcast TV Information Sharing

In November 2018, the DOJ reached a settlement with six broadcast television companies—Sinclair Broadcast Group, Rayon Media Inc., Tribune Media Co., Meredith Corporation, Griffin Communications, and Dreamcatcher Broadcasting—for violations of Section 1 of the Sherman Act.¹⁰⁶ The DOJ’s investigation stemmed from its review of the proposed \$3.9 billion merger between Sinclair Broadcast Group and Tribune Media.¹⁰⁷ The DOJ alleged that the defendants (and other broadcasters) shared competitively sensitive information including “pacing” information— which compares revenues generated through spot advertising in past and incoming years—through sales representative firms and broadcast station employees in certain designated market areas.¹⁰⁸

According to the DOJ, by sharing pacing information that provided insight on remaining spot advertising sales, stations were better able to understand, in real time, the availability of advertising inventory on competitors’ stations—a key factor in negotiating price with purchasers of these spot advertising slots.¹⁰⁹ This, in turn, allowed broadcasters to anticipate whether other broadcast companies would raise, maintain, or lower spot advertising prices.¹¹⁰ The settlement prohibits direct or indirect sharing of competitively sensitive information and requires the defendants to implement compliance and reporting measures, but the DOJ did not impose any civil penalties.¹¹¹

Europe

Qualcomm Rebate Contracts

On January 24, 2018, the European Commission (EC) fined Qualcomm €997 million for an alleged abuse of its alleged dominant position in LTE baseband chipsets.¹¹² The EC's decision demonstrates that it continues to take a hard line stance against exclusive (and *de facto* exclusive) supply agreements, despite the European Court of Justice's (EJC) ruling in the *Intel* case.¹¹³ The *Intel* decision, which was issued just four months prior to the EC's decision in *Qualcomm*, held that exclusive arrangements entered into by dominant companies are not *per se* unlawful.¹¹⁴ In other words, the EC must evaluate evidence of competitive effects in determining the legality of an exclusive agreement.

The exclusive agreement at issue in *Qualcomm* involved an arrangement between Qualcomm and Apple under which Qualcomm agreed to make payments to Apple for the privilege of being Apple's exclusive supplier of chipsets in its iPhone and iPad devices. Qualcomm had argued that Apple, not Qualcomm, insisted on these payments, and that the exclusivity clause was necessary to protect the substantial investments Qualcomm was required to make into developing chipsets for Apple. Qualcomm also introduced evidence that its agreement with Apple was not capable of producing anticompetitive effects. The EC rejected these arguments.¹¹⁵ Qualcomm has appealed the decision.¹¹⁶

Google Android

The EC imposed its largest-ever antitrust fine this year against Google, fining the

company €4.34 billion for alleged abuses of dominance with respect to its Android mobile operating system. The EC found that by bundling its Search app and Chrome browser together with its Play app store, prohibiting partner OEMs from offering devices based on Android "forks," and providing payments to selected handset manufacturers for exclusive portfolio-wide search pre-installation, Google had "denied rivals the chance to innovate and compete on the merits."¹¹⁷

Two aspects of the decision were especially notable. First, the EC restricted its market definition to "licensable smart mobile Oss," thereby excluding from consideration competition from Apple's iOS operating system in the iPhone.¹¹⁸ The EC found Google dominant in the market for licensable smart mobile Oss, as well as in the markets for general internet search and Android app stores.¹¹⁹

Second, the EC heavily emphasized the "special responsibility" of dominant firms not to "abuse their powerful market position" without pointing to any evidence of harm to end users. The EC focused almost entirely on the theoretical effects of Google's conduct on the "incentives of manufacturers to pre-install competing search and browser apps, as well as the incentives of users to download such apps." The EC found especially significant the fact that on Windows Mobile devices, "[m]ore than 75% of search queries happened on Microsoft's Bing search engine, which is pre-installed," which the EC characterized as strong evidence that preloading is a crucial aspect of competition for producers of search and browser apps.¹²⁰

As a consequence of the decision, Google is required to stop offering the Play app store in a bundle with Search or Chrome, and to stop prohibiting handset

manufacturers from offering devices based on Android forks.¹²¹

Google has appealed the decision to the European General Court, and has begun the process of formally complying with the EC's decision.¹²²

Electronics Resale Price Maintenance

In July 2018, four consumer electronics manufacturers were fined for fixing online resale prices (a practice also known as "resale price maintenance" or "RPM").¹²³ While U.S. antitrust law analyzes such clauses under the more flexible "rule of reason" because of their potential for pro-competitive outcomes,¹²⁴ EU competition law treats them as presumably unlawful.¹²⁵

The EC found that Asus,¹²⁶ Denon & Marantz,¹²⁷ Philips¹²⁸ and Pioneer¹²⁹ engaged in RPM by restricting the ability of their online retailers to set their own retail prices for various consumer products, such as notebooks or hi-fi products.¹³⁰

An interesting aspect of this case is that the manufacturers used pricing algorithms which automatically adapted retail prices to those of competitors and developed and implemented a pan-European strategy to encourage, coordinate, and facilitate the close monitoring of the resale prices. The use of sophisticated monitoring tools allowed the manufacturers to effectively track resale price setting in the distribution network and to intervene swiftly in case of price decreases. According to the EC, the pricing restrictions imposed had a broad impact on overall online prices for the respective consumer electronics products.¹³¹

The EC gave fines in total amount of €111 million, granting substantial reductions in the fines for cooperation.¹³²

Amazon and the Digital Single Market

In September 2018, it was reported that Amazon was under scrutiny from the EC on its data collection from rival retailers.¹³³ The investigation apparently concerns the misuse of the data collected by Amazon from smaller merchants selling on its website in order to favor its own products in Amazon's marketplace. The investigation

appears to focus on Amazon's dual position as a platform operator and a seller on its own platform.¹³⁴ In addition, as of November 2018, the German antitrust agency is scrutinizing whether Amazon is abusing its dominant position to the detriment of sellers who use its marketplace platform.¹³⁵

The EC is reportedly in the process of establishing a permanent unit called

Antitrust: E-commerce and Data Economy. It remains to be seen whether this new unit will be following the data analytical path taken by the U.K.'s Competition and Markets Authority, which recently established a new technology team made up of data scientists, computer experts, and economists,¹³⁶ or whether it will solely limit itself to traditional antitrust law analysis.

Criminal Cartel Investigations

In 2018, antitrust cartel enforcement remained a focus of the DOJ and several other enforcement agencies around the world. The DOJ experienced an uptick in corporate fines, aggressively pursued its priority of holding individuals accountable, and initiated several new investigations, using various means to discover potential collusion. That said, total corporate fines remained low compared to prior recent years, prosecutors faced notable challenges in prosecuting individuals, and enforcement around the world slowed as agencies shifted focus to smaller, domestic investigations. In this section of our *Antitrust Year in Review*, we provide more detail of last year's cartel enforcement. Specifically, we (i) identify a few notable developments in the DOJ's criminal enforcement program in 2018; (ii) summarize the DOJ's significant criminal prosecutions of corporations and individuals in the last year; (iii) describe recent policy initiatives, milestones, and priorities in the DOJ's criminal enforcement program; and (iv) highlight some significant developments in cartel enforcement outside the U.S.

Notable Developments in the DOJ's Criminal Antitrust Enforcement Program

First, in 2018, there were notable changes to the leadership of the DOJ's criminal antitrust enforcement program.

- Assistant Attorney General (AAG) Makan Delrahim marked one full year in office, having joined the DOJ's Antitrust Division at the end of September 2017. As anticipated, Delrahim continued to prioritize criminal cartel enforcement throughout his first full year, making several speeches relating to cartel enforcement. In many of these speeches, Delrahim made clear that the Antitrust Division will continue to invest in discovering and prosecuting collusion, and he further echoes prior AAGs in warning that the Antitrust Division will continue to aggressively pursue individual prosecutions.

- In March 2018, Richard Powers was appointed Deputy Assistant Attorney General (DAAG) in charge of criminal enforcement. DAAG Richard Powers has significant antitrust experience, having served as a trial attorney in the Antitrust Division's New York field office, where much of his time focused on prosecuting conduct in the financial services industry. Powers most recently served as a trial attorney in the DOJ's Criminal Division, prosecuting healthcare fraud claims in conjunction with the Medicare Fraud Task Force and the U.S. Attorney's Office for the Eastern District of New York.
- In 2018, there were also significant changes to many of the regional offices of the criminal enforcement program. In Washington, D.C., Ryan Denks became the lead of the criminal section following the departure of Lisa Phelan, who held the position for 16 years.¹³⁷ Denks brings significant antitrust experience to the post, having held several positions within the DOJ in civil

and criminal enforcement. In San Francisco, Manish Kumar, a career prosecutor at the DOJ, was promoted to acting chief after the departure of Kate Patchen.¹³⁸ In Chicago, we understand that the head of that office will retire soon, leaving the position open for new leadership.

These transitions may result in a lull in enforcement as new leadership gets up-to-speed on matters, establishes their practices and policies, and gains confidence in the position to make enforcement decisions.

Second, there was a small uptick in criminal corporate fines imposed in 2018, with the DOJ securing more than \$244 million in such fines. This was the result of the DOJ reaching plea deals with seven¹³⁹ corporate entities in 2018 for criminal antitrust violations, although the fine amount for one defendant has yet to be determined. The 2018 total is up from the \$67 million secured in 2017, although it still marks a smaller amount than in more recent years.¹⁴⁰ The lower amount is largely due to a corresponding reset, given that many larger investigations came to a close in 2015 and 2016, the DOJ initiating new investigations in recent years, and the aforementioned transitions in personnel. Another factor could be a heightened focus on holding individuals accountable.

Third, the DOJ's heightened focus on the pursuit of individuals was exemplified in 2018 with a significant number of individuals being charged and tried, and the DOJ seeking the extradition of non-U.S. citizens. In FY 2018, 18 individuals were charged with cartel offenses, while five were tried for such offenses—an unusual total given that most individual cases are resolved before trial.¹⁴¹ In FY 2017, the DOJ tried a record number of nine individuals and anticipated six in FY 2018. And in 2018, the average prison sentence for antitrust defendants remained

at the all-time high of 20 months.¹⁴² The DOJ sought extradition of an executive from Europe with respect to an ocean shipping investigation—a request that is still pending. The DOJ's Criminal Division also sought to extradite a former HSBC currency trader, charged with fraud, as part of the broader FOREX investigation involving collusion that the Antitrust Division jointly conducted with the Criminal Division. Notably, a U.K. appeals court blocked the extradition of the U.K. trader. Both investigations are discussed in more detail in Part II, below.

Finally, 2018 was notable because it reflected an increased willingness on the part of the DOJ to use a variety of means to detect and police collusive conduct. Traditionally, the substantial majority of cartel investigations stemmed from the leniency program. While the leniency program remained the DOJ's primary tool of detecting collusion in 2018, more and more investigations had origins elsewhere. Notably, a number of investigations started from the DOJ's review of documents produced to a civil section of the Antitrust Division in connection with a merger review. Other investigations started from customer complaints. Meanwhile a number of investigations started from individual whistleblower lawsuits outside of the leniency program.

Further, in 2018, the DOJ policed collusive conduct by bringing not only antitrust charges under Title 15, Sherman Act, but also by alleging violations of mail and wire fraud statutes under Title 18, either as standalone charges or in conjunction with antitrust criminal charges under the Sherman Act. As discussed below, the Antitrust Division has apparently collaborated with the DOJ Civil Division in seeking recovery under the False Claims Act in connection with the long-running investigation into generic pharmaceuticals, as well as in the investigation of military fuel supply. In the fuel supply investigation,

the DOJ also relied on Section 4A of the Clayton Act to seek treble damages. AAG Delrahim has highlighted the DOJ's effort to spearhead a “revitalization of the government's Section 4A authority”¹⁴³ to secure treble damages on behalf of taxpayers when the U.S. government has been the victim of collusive conduct. We expect the DOJ will continue to rely on these other means of detecting and policing collusive conduct given its success in doing so in the last year.

Notable Prosecutions in 2018: Corporations and Individuals

In 2018, the DOJ continued investigating and prosecuting collusive conduct across a variety of industries, wrapping up some long-running investigations and advancing investigations in new industries. As noted above, the DOJ's criminal enforcement netted seven corporate pleas with more than \$244 million in corporate fines. An eighth corporate entity is charged with mail and wire fraud. Twenty-one individuals were also charged. Some of the more significant DOJ prosecutions are discussed below.

- **Real Estate Auctions and Foreclosure Schemes.**

Among the DOJ's most prominent 2018 criminal antitrust investigations was surely its prosecution of bid rigging at public real estate foreclosure auctions and fraud associated with foreclosed properties. In 2018, the DOJ secured guilty pleas and filed indictments against individuals and corporations in Minnesota, Florida, Mississippi, and California.

- In February, two real estate investors became the first individuals to plead guilty to conspiring to rig bids at public real estate foreclosure auctions

in Mississippi.¹⁴⁴ The DOJ alleged that the two conspired with others to suppress auction prices and that their scheme involved making and receiving payoffs in exchange for agreements not to bid.¹⁴⁵ The two investors are scheduled to be sentenced in January 2019.

- In April, five additional Mississippi real estate investors pleaded guilty to a conspiracy to rig bids at public real estate foreclosure auctions.¹⁴⁶ In June, a sixth individual pleaded guilty in connection with bid rigging in Mississippi.¹⁴⁷ In July, the DOJ announced that a seventh individual had pleaded guilty to the same bid-rigging conspiracy.¹⁴⁸ Those co-conspirators made and received payoffs in exchange for their agreement not to bid against each other at real estate foreclosure auctions. In November, two more investors pleaded guilty to the same bid rigging conspiracy in Mississippi.¹⁴⁹ Sentencing hearings are scheduled for January and February 2019.
- In March, a Northern California real estate investor was sentenced to 30 months in prison and ordered to pay a criminal fine of \$1.39 million for his role in rigging bids at public real estate foreclosure auctions.¹⁵⁰ The investor had been indicted in 2014 and the DOJ noted his position as the CEO of two real estate investment entities and the fact that he used employees to submit some of the rigged bids on his behalf. His sentence also includes three years of

supervised release. Four other individuals were sentenced for their involvement in a bid rigging conspiracy affecting foreclosure auctions in San Mateo and San Francisco counties. In May, three of the five California defendants received prison sentences, ranging from 6 months to 18 months. All five individuals were ordered to pay criminal fines ranging from \$500,000 to \$2 million in addition to restitution.

- In early August, a real estate investor pleaded guilty to a bid rigging conspiracy at online public foreclosure auctions in Florida.¹⁵¹ Sentencing has been scheduled for February 1, 2019. This was the second investor to plead guilty in connection to the conspiracy. In early November, a third investor pleaded guilty to the same bid rigging conspiracy.¹⁵²
- In late August, Detloff Marketing & Asset Management and two employees were indicted for mail and wire fraud in connection with foreclosed properties in Minneapolis.¹⁵³ The DOJ filed the mail and wire fraud and conspiracy charges in connection with an alleged scheme to steer housing repair contracts to home repair contractors in exchange for kickbacks. AAG Delrahim articulated that the Antitrust Division is committed to protecting the American housing market from fraud, even when there is not an alleged Sherman Act violation. The case is scheduled for trial in 2019.

Several of these cases illustrated how investigations have expanded in two noteworthy respects. First, until 2018, the

real estate foreclosure bid rigging cases allegedly involved bid rigging affecting onsite public foreclosure auctions; 2018 saw the DOJ's reach extend to public real estate foreclosure auctions conducted online.¹⁵⁴ Second, the DOJ's investigation into real estate foreclosure schemes in Minnesota led to criminal charges not only for antitrust offenses but also for mail and wire fraud.¹⁵⁵

- **Foreign Exchange.** In 2018, there were significant developments in the DOJ's investigation into the foreign currency exchange spot market (FOREX).
 - In January, a sixth bank, BNP Paribas USA, pleaded guilty to one count of violating the Sherman Act for collusion in currency exchange. The DOJ alleged that two traders from BNP Paribas conspired to coordinate bids and rig currencies from Central and Eastern European, Middle Eastern, and African (CEEMA) countries. BNP Paribas agreed to pay a \$90 million criminal fine. This follows five banks—Citigroup, J.P.Morgan Chase & Co., Barclays PLC, Royal Bank of Scotland PLC, and UBS AG—that pleaded guilty to price-fixing charges with respect to FOREX in 2015.
 - In May, a former currency trader from J.P.Morgan was indicted for his alleged role in the conspiracy to manipulate prices in the FOREX market for CEEMA currencies. The indictment alleged that the trader colluded with traders from Barclays and Citigroup from October 2010 to July 2013 to coordinate prices, bids, and offers in foreign currency markets. The trader

pleaded not guilty to the single-count indictment and is expected to go to trial in October 2019.

- o In October, the DOJ tried a case against three London-based traders formerly employed by J.P.Morgan Chase, Citigroup, and Barclays for their roles in an alleged conspiracy in the exchange of EUR-USD currency pair. After a three-week trial, the jury acquitted all three defendants on October 26.¹⁵⁶ The acquittals highlight the potential challenges that the government faces in convicting individuals for anticompetitive collusive conduct, not only in the foreign exchange spot market but also more generally.

- **LIBOR.** In October, following a one-month jury trial, the DOJ secured convictions of a former supervisor at Deutsche Bank's Pool Trading Desk in New York and a former derivatives trader based in London, who participated in a scheme to manipulate LIBOR (London Interbank Offered Rate). The conspiracy involved submitting false LIBOR contributions and requests to other employees within the bank, which were skewed in favor of the bank as opposed to unbiased costs of trading. Evidence presented at trial showed that the LIBOR submitters accommodated these LIBOR manipulation requests by adjusting their rates in favor of the defendants' derivative trading positions. The adjustments were designed to increase Deutsche Bank's profits on derivatives contracts tied to USD LIBOR. Both individuals await sentencing after being convicted on one count of conspiracy and wire fraud charges.¹⁵⁷

- **Military Fuel Supply Contracts.** In November, the DOJ announced the first guilty pleas in its investigation into bid rigging and price fixing related to contracts for the supply of fuel to U.S. military bases located in South Korea. Three South Korean companies, GS Caltex Corporation, SK Energy Co. Ltd., and Hanjin Transportation Co. Ltd., pleaded guilty to criminal antitrust charges and agreed to pay \$46.6 million, \$34 million, and \$1.3 million in criminal fines, respectively.¹⁵⁸ The DOJ charged the companies with participating in a conspiracy from 2005 to 2016 to coordinate prices and bids for fuel supply contracts with the U.S. military. The fuel supply contracts were for Army, Navy, Marine Corps, and Air Force bases located throughout South Korea.

Moreover, the DOJ also filed a civil lawsuit against the three defendants on the same day, alleging civil antitrust violations and seeking treble damages under Section 4A of the Clayton Act. That lawsuit also sought to resolve potential claims the U.S. government had under the False Claims Act. All three defendants agreed to settle the civil lawsuit. SK Energy agreed to pay \$90 million, GS Caltex agreed to pay \$57 million, and Hanjin agreed to pay \$6.1 million in civil damages.

- **Packaged Seafood.** The DOJ's investigation into the packaged seafood industry advanced in 2018 when the President and CEO of Bumble Bee Foods LLC was indicted in May.¹⁵⁹ The CEO pleaded not guilty to participating in a conspiracy to fix prices in the market for packaged seafood. This indictment comes on the heels of guilty pleas from three other defendants, including two Bumble Bee Foods senior vice presidents and Bumble Bee Foods

itself. Last year Bumble Bee Foods agreed to pay a \$25 million criminal fine as part of its plea agreement. In October, Bumble Bee competitor StarKist Co. pleaded guilty for its role in the conspiracy from November 2011 to December 2013.¹⁶⁰ StarKist agreed to pay a criminal fine and to cooperate in the investigation. To date, the DOJ has filed a total of six charges in connection to its packaged seafood investigation.¹⁶¹

- **Auto Parts.** The DOJ's long-running investigation into collusive conduct affecting automotive parts appears to be nearing a conclusion. This year saw resolution of a 2016 indictment of Japanese manufacturer Maruyasu Industries Co. Ltd., its U.S. subsidiary, and three executives. Maruyasu pleaded guilty to conspiring to fix prices, rig bids, and allocate customers in the market for automotive steel tubes.¹⁶² Maruyasu agreed to pay a criminal fine of \$12 million and the DOJ agreed to move to dismiss the indictment as to the subsidiary and three executives, on the condition that they cooperate in any future prosecutions with respect to the charged conspiracy. Over the course of the auto parts investigation, the DOJ has secured approximately \$2.9 billion in fines and convictions of 46 corporations and 32 executives.

- **Electrolytic Capacitors.** In 2018, there were multiple developments in the DOJ's investigation into the capacitors industry. In June, a second executive from the Japanese-based capacitor manufacturer Elna Co., Ltd. pleaded guilty for his involvement in a price fixing and bid rigging conspiracy affecting electrolytic capacitors sold to customers in the U.S. Like the previous Elna executive who pleaded guilty, this second executive agreed to

serve a prison sentence of one year and a day, and to cooperate with the DOJ's ongoing investigation.

Furthermore, in October 2018, Judge James Donato in the Northern District of California sentenced Nippon Chemi-Con Corporation (NCC) to pay a criminal fine of \$60 million in connection with a plea deal NCC reached with the DOJ. In 2017, NCC was indicted for its role in the capacitors conspiracy, and a trial was scheduled for October 2018. In the interim, however, an apparent conflict-of-interest emerged when NCC learned that a lawyer that previously represented NCC in the investigation had later taken a position at the DOJ and was involved in the investigation. For this reason, NCC argued that the attorney's involvement was prejudicial to NCC and tainted the investigation. Partly due to this conflict issue, NCC and the DOJ reached a plea agreement under which NCC agreed to pay a criminal fine in the range of \$40-\$60 million. At sentencing, Judge Donato noted that NCC otherwise could have faced the statutory maximum fine of \$100 million if convicted at trial but, taking into account the risks associated with DOJ litigating the conflict issue, he agreed to a \$60 million criminal penalty. This marks the highest criminal fine imposed by Judge Donato in the capacitors investigation.¹⁶³

● **Water Treatment Chemicals.**

In connection with the DOJ's investigation into water treatment chemicals, an executive pleaded guilty for his role in a conspiracy to rig bids, allocate customers, and fix prices from 2005 to 2011 in the market for liquid aluminum sulfate.¹⁶⁴ The defendant executive and co-conspirators agreed not

to pursue each other's customers and coordinated quotes made to customers. Two other individuals and one company, GEO Specialty Chemicals, previously pleaded guilty to charges arising out of this investigation.¹⁶⁵

● **Public School Buses.** In an investigation into the public school transportation industry, four owners of school bus transportation companies were sentenced in February for bid rigging and fraud related to public school transportation contracts in Puerto Rico.¹⁶⁶ Evidence presented at trial in 2017 showed that the co-conspirators submitted false certifications and allocated contracts to service certain transportation routes awarded by a local municipality. Each defendant was further convicted of mail fraud and conspiracy to commit mail fraud for the scheme, which lasted nearly three years. Three individuals were sentenced to prison for a year and one day; a fourth will serve a two-year probation sentence.

● **Ocean Shipping.** The DOJ continued its investigation into the ocean shipping industry in 2018. In July, a CEO and a manager of a freight forwarder were arrested for an alleged year-long price-fixing conspiracy in international freight forwarding services.¹⁶⁷ According to the affidavit filed in support of a criminal complaint, the conspirators met at several locations in Honduras and the U.S., where they agreed to raise prices charged to U.S. customers by establishing and coordinating "commissions" that were charged at different ports. The collusive conduct was memorialized in documents, which also demonstrated that both executives were aware of the illegality of their conduct.

Further, both individuals encouraged co-conspirators to avoid leaving written evidence of the conspiracy. In November, both pleaded guilty; the CEO remains in jail pending trial while the manager was conditionally released after posting a \$500,000 surety bond.¹⁶⁸

● **"No Poach" Agreements.** In 2018, the DOJ remained focused on "no-poach" or wage-fixing agreements between employers. The DOJ has reiterated on several occasions¹⁶⁹ that such agreements would be viewed as criminal antitrust violations if entered into after October 2016. Notably, however, the sole case the DOJ brought in 2018 was a civil antitrust lawsuit against two leading railway equipment suppliers—Knorr-Bremse AG and Westinghouse Air Brake Technologies Corp. (Wabtec).¹⁷⁰ These two companies along with a third, Faiveley, allegedly used no-poach agreements from 2009 to 2015; their conduct thus concluded before the DOJ announced that it would pursue such cases criminally. In settling the case, Wabtec and Knorr-Bremse AG must terminate the no-poach agreements and cooperate with the DOJ's ongoing investigation. Though the companies' alleged agreement ended prior to the issuance of the October 2016 Antitrust Guidance for Human Resource Professionals¹⁷¹—explaining why the DOJ brought a civil lawsuit rather than a criminal action—this case marks the first no-poach action initiated by the DOJ since the guidelines were released.

● **Generic Pharmaceuticals.** Notably, 2018 did not see any case filings by the DOJ in the generic pharmaceutical industry despite dawn raids in 2017 and executives previously pleading guilty for collusive

conduct with respect to two generic drugs. Nevertheless, the DOJ made clear in a hearing in a related civil class action that it is continuing to investigate the industry.¹⁷² Whether the investigation will lead to new criminal charges remains to be seen. In the meantime, and similar to the investigation into military fuel suppliers discussed above, the government has been exploring civil actions and remedies. AAG Delrahim has noted that the government has potential recourse under the False Claims Act¹⁷³ and indeed a number of generic pharmaceutical manufacturers have reported in securities filings that they have received Civil Investigative Demands from the DOJ in connection with potential False Claims Act violations.¹⁷⁴

Clearly, 2018 has been a busy year for criminal antitrust enforcement, with a particular focus on individual accountability and a renewed willingness by the DOJ to rely on a variety of approaches—from mail or wire fraud charges to False Claims Act damages and civil antitrust lawsuits—to police and deter collusive activity. We anticipate 2019 will continue these trends.

2018 Cartel Policy Initiatives and Developments

This also year saw a number of important milestones and policy developments in U.S. antitrust enforcement efforts against collusion.

DOJ Hosts Corporate Compliance Roundtable

In April, the DOJ hosted a roundtable on corporate compliance programs and

compliance issues. The daylong session featured speakers not only from the DOJ's Antitrust Division, but also from the U.S. Sentencing Commission, foreign competition agencies, and corporate counsel.¹⁷⁵ In opening remarks, AAG Delrahim noted that the DOJ understands that corporate compliance programs are not infallible, and that violations may still occur, but that at the very least a compliance program should provide for early detection.¹⁷⁶

The roundtable also debated whether the U.S. Sentencing Guidelines should be adjusted to account for a company's implementation of antitrust compliance programs *before* violations occur, noting that currently there is no such consideration offered. Many attendees noted that companies can receive compliance credit in other areas, such as for FCPA or trade offenses, and that antitrust should be no different. The following month, Principal DAAG Andrew Finch noted in remarks that the DOJ had already begun considering if "pre-existing compliance programs might merit . . . consideration, whether at the charging stage or at sentencing."¹⁷⁷ This would mark a departure from the DOJ practice, which up to this point only offered credit at sentencing to a cooperating defendant who instituted an effective compliance program *after* the antitrust violation was uncovered—and only in a few instances.¹⁷⁸ Most recently, in 2018, the DOJ indicated that the compliance efforts of BNP Paribas was taken into account in determining that bank's criminal fine in FOREX, discussed above.¹⁷⁹ The possible expansion of compliance credit fits within a longer running emphasis on corporate compliance at the Antitrust Division.¹⁸⁰

DOJ's Leniency Program Celebrates Its 25th Anniversary

In 2018, the DOJ celebrated the 25th anniversary to its corporate leniency

program. The program offers full immunity to the company first to report its participation in unlawful cartel activity.¹⁸¹ During the last 25 years, the program has become the DOJ's primary tool for discovering and prosecuting collusive conduct. Indeed, the program has long been hailed as "the single greatest investigative tool available to anti-cartel enforcers."¹⁸² It is therefore no wonder that the DOJ has relied on this tool for initiating the substantial majority of its investigations, up to 90 percent in some recent years.

But the leniency program is not without critique. Most recently, critics have argued that the program does not do enough to shield an applicant from liability, as there remains exposure to significant civil damages and other collateral consequences of seeking and receiving leniency. Indeed, applying for leniency invites (and nearly guarantees in most cases) civil damage exposure given that the company must admit to the collusive conduct to qualify under the program. While certain legislation has attempted to limit this exposure of a leniency applicant,¹⁸³ the critique is that the costs are still too high. The concern is further compounded by the fact that there are an increasing number of leniency programs worldwide with different requirements and timelines, which can further burden a company.

In this past year, the DOJ took note of these criticisms and began studying how to address them. In a speech in June, for example, DAAG Richard Powers noted that the DOJ has redoubled its efforts to work with other agencies or jurisdictions to coordinate timing and location of witness interviews, tailor document requests, and coordinate investigation timing and deadlines to reduce the burdens of applying for leniency.¹⁸⁴ Also in June, DAAG Powers also suggested that the DOJ is continually monitoring the effect that civil follow-on actions (damages) has

on the incentive for companies to apply for leniency.¹⁸⁵ But the DOJ has also been quick to defend the leniency program, observing that there has been “no perceptible downturn in applications” in recent years despite these drawbacks.¹⁸⁶ Indeed, he said that the program remains the DOJ’s “most effective investigative tool in the fight against cartels” and will likely continue being so for the next 25 years.¹⁸⁷

DOJ Advocacy for *Per Se* Standard as Applied to Cartel Conduct

In 2018, the DOJ continued to advocate for using the *per se* legal standard to prosecute collusion between competitors—a standard requiring the DOJ to prove only the existence of a collusive agreement between competitors without needing to prove anti-competitive effects of the agreement.¹⁸⁸ The *per se* standard has traditionally applied when conduct is so inherently anticompetitive and damaging to the market that it warrants condemnation without further inquiry into its precise effects on the market. The *per se* standard has been applied to horizontal agreements to fix prices, allocate markets, and rig bids among competitors.¹⁸⁹

The issue arose in the DOJ’s prosecution against heir locator services in Utah. In that case, the defendants argued that the *per se* standard should not apply given the unique circumstances of the industry and the alleged agreement itself; in other words, courts did not have enough experience with the industry and specific agreement at issue to apply this standard. The defendants instead advocated that the rule of reason standard should apply, which would require proof of the anti-competitive effects. In August 2017, a federal judge agreed with defendants, and the DOJ promptly appealed. In 2018, the DOJ advocated strongly against the application of the rule of reason, concerned such a ruling would open the

door to future challenges to the *per se* standard applicability to collusive conduct.

On appeal, the Tenth Circuit unanimously reversed that dismissal, but it did not specify which standard should apply on remand, finding that issue was not ripe for appeal.¹⁹⁰ As a result, should the DOJ continue to prosecute the case, it would still be subject to the lower court’s original holding that the rule of reason applies, unless it can convince the judge to reconsider, a possibility at which the appeals court hinted strongly in its November ruling. Regardless of the outcome in this particular matter, what remains clear is that the DOJ is poised to aggressively defend the use of the *per se* standard on alleged naked restraints of trade.

No-Poach Employment Agreements

In 2018, the DOJ continued to emphasize that it would view no-poach employment agreements as a “criminal enforcement priority” noting that the DOJ had active criminal investigations into so-called “naked” agreements among employers pledging not to recruit or hire employees from each other.¹⁹¹ Indeed, in January, Principal DAAG Andrew Finch reiterated that the DOJ will criminally pursue no-poach agreements that began or continued after October 2016 when the DOJ and FTC released “Antitrust Guidance for Human Resources Professionals,” which announced that no-poach agreements could rise to criminal antitrust violations.¹⁹² In fact, Finch listed the pursuit of no-poach agreements criminally as one of the main themes of the Trump Administration’s emerging antitrust policy.¹⁹³ As noted above, the DOJ has yet to file criminal charges based on no-poach agreements or conduct; but we understand the DOJ is working to identify and bring such a case. In 2018, the DOJ explained that criminal charges

would pertain only to cases where the agreements not to hire are blatant and anticompetitive, i.e., have “no redeeming value.” When an agreement not to hire relates to joint ventures or other legitimate collaborations, the DOJ could still challenge the conduct civilly, subject to the rule of reason standard.

Enforcement Against Collusive Conduct Outside the U.S.

Competition agencies worldwide continued to prosecute collusive conduct that affected commerce in their respective countries in 2018. While some authorities do not pursue such conduct criminally, most view the conduct similarly to the DOJ and impose harsh civil penalties or administrative sanctions where companies engage in anticompetitive conduct. Below are some of the more notable policy developments and enforcement actions taken by worldwide competition authorities against collusive conduct in 2018.

Brazil. The Administrative Council for Economic Defense (CADE) in Brazil reported that it reached five leniency agreements in 2018, down from the 21 it struck in 2017. There has been some suggestion that CADE may have relied less on its leniency program in 2018 and instead turned to data to detect cartel conduct in the market using econometrics and analytics. Nevertheless, some of CADE’s 2018 enforcement actions trace their origins directly to its leniency program and past leniency applicants. For example, in August, CADE resolved two price-fixing investigations into the market for cathode ray tubes, inquiries driven primarily by evidence obtained from past leniency applicants. CADE charged manufacturers of color picture tubes (CPT) and color display tubes (CDT) incorporated into televisions sold in Brazil. An administrative

tribunal unanimously concluded that Toshiba Corporation and MT Picture Display participated in a conspiracy from 1995 to 2007 by agreeing to fix prices, allocate markets, and restrict output for CPTs through a series of meetings held in Brazil and abroad. As a result, the tribunal fined the two companies more than 4.9 million Brazilian Real (approximately \$1.2 million). The tribunal found insufficient evidence that MT Picture Display engaged, however, in the conspiracy with respect to CDTs.¹⁹⁴

Canada. Canada's Competition Bureau revised its leniency program in 2018 by issuing new guidelines and making a number of procedural and substantive changes to the leniency process.¹⁹⁵ Under the revised program, there are two stages. The first stage is an interim immunity and leniency stage, in which the bureau obtains information from the applicant before making a final determination of whether to recommend immunity or leniency to the Public Prosecution Service of Canada.¹⁹⁶ Applicants must make disclosures in this interim period in order to reach the second stage of the process, a final grant of immunity or leniency. The bureau will make a recommendation for immunity or leniency only after an applicant fully discloses and the bureau has concluded that the disclosed conduct constitutes an offense under the Competition Act. That conclusion must be supported by credible and reliable evidence that demonstrates all elements of the offense. Final leniency is granted once the bureau is satisfied that it no longer needs the applicant's cooperation. This could potentially occur after a concluded prosecution and trial.

Every applicant under Canada's revised program is eligible to receive up to a 50 percent reduction in fines.¹⁹⁷ A reduction in fines is determined on a sliding scale basis dependent on the value of an applicant's cooperation, regardless of the

order the applicants come forward.¹⁹⁸ Since June 2015, the program has offered a compliance credit where leniency applicants demonstrate they had a "credible and effective" compliance program when the conduct occurred; in three years, however, no applicant sought that credit.¹⁹⁹ Under the new guidelines, credit will still be offered for compliance programs, but the percent reduction is to be determined on a case-by-case basis. Moreover, individual employees of a leniency applicant will no longer receive guaranteed immunity. Instead, these individuals will need to demonstrate knowledge of the unlawful conduct and agree to cooperate with the bureau. Procedurally, the revised program no longer requires attorney proffers to the bureau to be recorded, although witness interviews during the full disclosure stage may be audio or video recorded, and may be taken under oath.

The bureau currently has 50 open cartel investigations and 2018 saw several notable enforcement actions in key Canadian industries.²⁰⁰ Though the leniency program has had a marked impact on the bureau's enforcement work, roughly half of the bureau's cases come from other sources, such as from a federal procurement tip line.²⁰¹ Among the bureau's notable 2018 actions, following a leniency application from Canadian grocer Loblaw and Weston Bakeries in December 2017, the bureau accused co-conspirators Canada Bread and retailers Walmart, Sobeys, Metro, and Giant Tiger of forming a "bread cartel" to fix the prices of a variety of bread products.²⁰² Also in 2018, executives from three engineering companies were charged with bid rigging municipal contracts; these executives are currently facing criminal charges for their involvement in the conspiracy.²⁰³

China. Early in 2018, China announced a major structural reform of its antitrust

enforcement agencies. China's three antitrust agencies—the Price Supervision and Antimonopoly Bureau of the National Development and Reform Commission (NDRC), the Antimonopoly Bureau of the Ministry of Commerce (MOFCOM), and the State Administration of Industry and Commerce (SAIC)—were consolidated into a single antitrust body, the State Administration for Market Regulation (SAMR).²⁰⁴ Previously, NDRC oversaw price-related antitrust matters, SAIC oversaw non-price related antitrust issues, and MOFCOM oversaw merger regulation. SAMR absorbed SAIC, while NDRC and MOFCOM continue to exist without antitrust enforcement responsibilities. This reorganization coincided with the 10th anniversary of China's antimonopoly law, which went into effect in 2008. The new head of SAMR, Zhang Mao, announced a policy of strengthening Chinese antimonopoly law by focusing on investigating and supervising the entire chain of production.²⁰⁵ In the first half of 2018, SAMR reviewed 218 cases on centralized management, a 40 percent increase.²⁰⁶ Commentators in China have noted that in the first decade of China's antimonopoly law, Chinese authorities levied \$1.68 billion in fines and launched hundreds of investigations.²⁰⁷ Industries currently under investigation by SAMR include gas, electricity, water supply, telecommunications, and consumer products.

European Union. The EC has continued to be active in its investigation of collusive conduct in 2018. A few notable developments in key European industries are discussed below.

- **Freight Forwarding.** In March 2018, the European Court of Justice (ECJ), the European Union's (EU's) highest court, dismissed appeals against an infringement decision fining several freight forwarding companies. In

2012, the EC fined the companies €269 million for colluding and passing on regulatory surcharges to their customers, through the use of various pricing mechanisms between 2002 and 2007. In 2016, the European General Court (GC) dismissed all but one appeal, lowering the fine imposed on one cartelist, UTI Worldwide. Several companies appealed the GC's judgment on a number of grounds including that the EC incorrectly calculated the amount of the fine by taking the total value of sales in the overall market of international freight forwarding services as a benchmark instead of taking only the value of the surcharges. On this point, the ECJ ruled that the EC did not err in the calculation of the fine as the fixing of pricing mechanisms was ultimately designed to set the ultimate price for the freight forwarding services.²⁰⁸

- **Power Cables.** In July 2018, the GC confirmed a 2014 EC infringement decision in which Goldman Sachs Inc. (GS) was fined €37.3 million by being held jointly and severally liable for the participation of its subsidiary, Prysmian, in the *Power Cables* cartel. This flows from a well-established European competition law principle that parent companies with a 100 percent (or close) shareholding are liable for the competition law violations of their subsidiaries because parent companies are assumed to have exerted a decisive influence over the commercial conduct of their subsidiaries unless they can prove that the subsidiary decided on its market conduct independently. In its appeal, GS submitted that the parental liability was incorrectly applied as its investment was that of a purely financial investor. Moreover, GS argued that its 100 percent shareholding fluctuated during the

time of the infringement which meant that the EC should not have relied on the presumption for the entirety of the time period. The Court rejected GS' appeal on the grounds that it was able to exert decisive influence over Prysmian during the entirety of the illegal conduct as it had *all* the voting rights in combination with a very high shareholding. The judgment is important as it expands the presumption of parental liability under European competition law to situations where the parent has 100 percent of the voting rights, even if it does not have 100 percent of the shares, and emphasizes that compliance with European competition rules has to be taken seriously, even regarding portfolio companies.

- **Clean Emission Technology.** In September 2018, the EC announced the opening of a formal investigation into the business practices of German car manufacturers BMW, Daimler, and Volkswagen regarding possible collusion in the development and roll-out of clean emission technology. Following several dawn raids, the EC turned its attention to information allegedly exchanged during "circle of five" meetings. The EC is investigating whether the car manufacturers colluded to limit the development and roll-out of a number of car emissions control systems. Thus far, the EC has reportedly not found any apparent link between these meetings and the use of devices to cheat regulatory emissions testing, which constitutes a separate investigation. This ongoing investigation is relatively novel because it seems to regard behavior that restricts innovation as cartel-like conduct. It can therefore be distinguished from the global wave of "classical" auto parts investigations.

Since 2013, the EC has taken 10 infringement decisions against collusive practices in the automotive industry—five in 2017 alone.²⁰⁹

Hong Kong. Hong Kong's competition authority remained active in 2018, increasing enforcement actions against collusive conduct and making important policy announcements. This year, Hong Kong's Competition Commission solicited comments from practitioners while drafting a new leniency policy.²¹⁰ A revised leniency program is expected by the end of 2018. To date, the commission has received more than 3,200 complaints and inquiries, and there is a growing awareness in Hong Kong concerning antitrust compliance, despite the commission's relative youth.²¹¹ A number of complaints have been lodged about no-poaching and wage-fixing agreements between employers. In response, the commission issued an advisory bulletin warning that no-poach deals and wage-fixing agreements could violate the territory's competition law.²¹² This is the second authority, after the U.S. DOJ, that has expressed the view that no-poach deals can amount to potential antitrust violations.

Japan. The Japan Fair Trade Commission (JFTC) continued to pursue cartels and collusive conduct aggressively in 2018. In March, the JFTC announced criminal charges against four construction companies—Taisei Corporation, Kajima Corporation, Obayashi Corporation, and Shimizu Corporation—the so-called "Super 4" largest construction companies in Japan. Two sales executives were also charged in connection with the alleged bid rigging conspiracy and unlawful information exchanges intended to allocate winners for construction projects at major railway terminals in Japan.²¹³

Also in 2018, the JFTC announced that Deutsche Bank and Merrill

Lynch International violated Japan's Antimonopoly Act (AMA) when the JFTC found that traders engaged in cartel conduct while bond trading for a Japanese client. This marked the first time the JFTC found a violation of the AMA for conduct that implicated only non-Japanese companies. Notably, however, the JFTC was unable to impose fines or otherwise take administrative action against the banks because the violation took place in 2012 and was thus barred by the AMA's statute of limitations. Nonetheless, this announcement signals JFTC's view toward extraterritorial enforcement of the AMA particularly where domestic competition or Japanese customers are affected.²¹⁴

South Korea. South Korean regulators at the Korea Fair Trade Commission (KFTC) also had an active year in 2018 as the KFTC imposed sanctions for cartel conduct in numerous industries including shipbuilding, waterworks maintenance, steel manufacturing, and capacitors.²¹⁵ From a policy perspective, significant changes to South Korea's cartel

enforcement regime may be on the horizon as well. In August, the KFTC released a proposal for the "General Revision of the Monopoly Regulation and Fair Trade Act." If adopted, the proposal would abolish the KFTC's "exclusive complaint program" for hardcore cartels involving price-fixing, output restriction, market allocation, and bid-rigging. The KFTC's proposal was published just days after it reached an agreement with the Korean Ministry of Justice (KMOJ). The KFTC-KMOJ agreement proposed that the two agencies share jurisdiction over cases involving hardcore cartel enforcement, rather than the KFTC having exclusive jurisdiction. If enacted, the agreement would allow the KMOJ to bring cartel enforcement actions without a referral from the KFTC. The split jurisdiction over cartel matters could result in increased cartel investigations into conduct affecting Korean competition and possible amendments to the KFTC's leniency program.²¹⁶

United Kingdom. Following a decision by the U.K.'s Competition and Markets

Authority (CMA) fining several estate agencies £370,000 for an agreement to fix their minimum rates charged to customers, the CMA secured undertakings from two involved individuals, Julian Frost and David Baker, not to act as U.K. company directors for a period of three to three-and-a-half years.²¹⁷ This is only the second time that the CMA disqualified individuals involved in illegal collusion directly. The first undertaking concerned Daniel Aston, who in 2016 was disqualified for five years to act as a U.K. company director for participating in the posters and frames cartel, which was uncovered and sanctioned following a joint investigation by the CMA and the U.S. DOJ. Apart from being disqualified, Aston is also currently awaiting extradition in a Spanish jail to face price-fixing charges by the DOJ. This shows the determination of antitrust enforcers such as the CMA and the DOJ in tracking down illegal cartel activity and highlights the severity of the civil and criminal sanctions that can be imposed on individuals for competition law violations.²¹⁸

Civil Litigation

Competitive Restraints of Trade

Cases involving alleged collusion or anticompetitive agreements under Section 1 were prevalent in U.S. courts this year. The trend of follow-on class action litigation continues, and some of the most significant developments arose in private civil cases brought after enforcement actions or investigations by federal or state government antitrust regulators. This

year set the stage for some important outcomes expected over the next twelve months, including the potential conclusion of the Vitamin C case on remand from the U.S. Supreme Court and further developments in electronic component and generic drugs price-fixing cases.

Price-Fixing Litigation

Section 1 Before the Nine. Earlier this year, the U.S. Supreme Court granted

certiorari to review an appellate decision in the long-running Vitamin C case, in which a class of consumers brought Section 1 claims against two Chinese manufacturers for allegedly conspiring to fix the prices and output of Vitamin C. WSGR partner Jonathan Jacobson represented the Chinese Vitamin C manufacturers before the Supreme Court and argued that the Court should affirm the appellate decision vacating the \$150 million jury verdict in favor of the consumers. Jacobson argued that the Court of Appeals for the Second

Circuit correctly granted deference to the Chinese government's official statement that Chinese law compelled the conduct at issue and properly dismissed the action on the basis of international comity. The direct purchasers disagreed and called for "respectful" deference to the Chinese government's statements, but consideration of additional evidence. The U.S. government supported the consumers' position.

In a unanimous decision authored by Justice Ruth Bader Ginsburg, the Court found in favor of the consumer class and remanded the case back to the Second Circuit.²¹⁹ The Court stated that "a government's expressed view of its own law is ordinarily entitled to substantial but not conclusive weight" and that "a federal court is neither bound to adopt the foreign government's characterization nor required to ignore other relevant materials."²²⁰ The Supreme Court did not address the merits of the case, only the degree of deference that federal courts should give to foreign government's legal submissions. Briefing for the remand proceedings before the Second Circuit has been completed, and the parties await a decision.

Rather than affirm the Second Circuit's clear deference standard, the Supreme Court's ruling will likely create some uncertainty for lower courts to determine the amount of deference to give to a foreign government's interpretation of its own laws and what other competing evidence to evaluate. Additionally, foreign companies conducting business in the U.S cannot escape liability under American law simply because their government states that the conduct at issue was compelled by foreign law.

Antitrust Litigation at 36,000 Feet. Airlines are no strangers to antitrust litigation. In recent years, 28 airlines paid more than

\$1.8 billion in criminal fines and \$1.2 billion to settle price-fixing litigation regarding their cargo shipping fees.²²¹ And the four major U.S. airlines (Delta, American, Southwest, and United) were recently sued by consumers claiming that the airlines colluded to limit plane capacity and increase airfares.²²² Nonetheless, 2018 was a relatively successful year for airlines in U.S. courts.

The Court of Appeals for the Ninth Circuit affirmed dismissal of class action claims against Delta, American, and United alleging that the airlines, which control more than 70 percent of the domestic air travel market, conspired to fix prices of multi-city flights.²²³ The Ninth Circuit found no evidence of a conspiratorial agreement, but rather "conscious parallelism in an interdependent oligopoly."²²⁴ "[I]n an interdependent oligopoly it may be in a company's interest to raise prices in the hope that its competitors play 'follow the leader.'"²²⁵

In another airline case, the Court of Appeals for the Eleventh Circuit affirmed summary judgment in favor of Delta and AirTran in a case asserting that the airlines colluded to fix fees on first-checked bags.²²⁶ In affirming summary judgment, the panel accepted Delta's argument that its independent decision to implement baggage fees was influenced, in part, by its observation of competitors charging similar fees without experiencing passenger loss.

These two appellate decisions reaffirm the principle that plaintiffs have a significant burden in maintaining Section 1 cases if they do not point to concrete evidence of an actual agreement between competitors. Often, plaintiffs rely on nothing more than circumstantial evidence of a conspiracy, such as parallel pricing, in drafting their complaints. While that may—but not

always—be enough to withstand a motion to dismiss, plaintiffs generally must prove more to ultimately prevail on their claims.

Memories Are Made of This. Over the past decade, electronic component manufacturers have faced price-fixing allegations regarding capacitors, LCDs, lithium-ion batteries, DRAM, and other products. These cases have resulted in hundreds of millions of dollars paid in criminal fines and civil settlements. But in a series of important decisions in the optical disk drive price-fixing litigation in the U.S. District Court for the Northern District of California, several disk drive manufacturers secured summary judgment against an indirect purchaser class and several opt-out parties, including Acer and Circuit City. First, the defendants successfully argued that the indirect purchaser plaintiffs failed to establish an industry-wide conspiracy. Indeed, the evidence showed that the conspiracy targeted only a few disk drive purchasers and thus, the claims should be limited to harm deriving from those sales.²²⁷

The manufacturers prevailed against the opt-out parties by demonstrating the plaintiffs' failure of proof regarding alleged harm. In the absence of an industry-wide conspiracy, the opt-outs needed to establish that they were specifically targeted and paid higher prices for disk drives. Yet, they failed to do so and summary judgment was accordingly granted.²²⁸ Separate appeals filed by Acer and Circuit City to the Ninth Circuit are currently pending.²²⁹

If the disk drive manufacturers prevail before the Court of Appeals, the decision could serve as important precedent that opt-out plaintiffs cannot rest on unsubstantiated claims of harm. In the absence of a conspiracy impacting all sales, non-class plaintiffs would have to

proffer evidence showing that they were particularly injured by the conduct at issue.

Section 1 Litigation in Pharmaceuticals and Life Sciences

Pharmaceutical and life science industries continue to be active areas for significant antitrust claims. This trend is expected to continue, due to the increasing importance of biologics and the anticipated rise of biosimilar entry, increased pricing pressure from government regulators and the public, and continued consolidation within the entire healthcare sector.

Stayin' Alive. The *In re Generic Pharmaceuticals Pricing Antitrust Litigation*, which involves allegations that approximately 30 generic drug manufacturers conspired to fix the price for dozens of drugs, continues to proceed into discovery. In October 2018, the U.S. District Court for the Eastern District of Pennsylvania largely denied motions to dismiss Sherman Act claims relating to six generic drugs: clobetasol, digoxin, divalproex ER, doxycycline, econazole, and pravastatin.

The court first compiled the allegations across the six complaints at issue, and then held generally that the complaints sufficiently alleged plausible conspiracy claims, in part because the plaintiffs adequately pled parallel pricing conduct and “plus factors” including motive, actions against economic self-interest, and other factors such as opportunities to conspire and the existence of government investigations.²³⁰ However, the court found that the econazole plaintiffs did not sufficiently allege plus factors as to defendant Teligent, so the court dismissed the econazole claims as to Teligent with leave to amend.²³¹ The court will separately resolve the defendants’ motions to dismiss regarding plaintiffs’ myriad

state law claims, and motions to dismiss will be briefed on additional drugs and overarching conspiracy claims in early 2019.

WSGR is currently representing defendant Mylan in this litigation and was appointed as Liaison Counsel for the defendants as a whole.

Jagged Little Pill. This year, lower courts continued to grapple with patent law issues in the context of antitrust cases. A review of this year’s key decisions reveals a lack of consistency across district court and administrative cases. In *In re Androgel Antitrust Litigation* (the follow-on class action litigation after the Supreme Court’s landmark *Actavis*²³² decision), the U.S. District Court for the Northern District of Georgia denied defendants’ summary judgment motion regarding the lack of evidence demonstrating that the private plaintiffs suffered antitrust injury. Plaintiffs offered three theories explaining why the generics manufacturers would have entered the market earlier but-for the alleged reverse payment: (i) the generics manufacturers ultimately would have prevailed in the underlying patent litigation; (ii) the generics would have launched at-risk; and/or (iii) the parties would have reached an alternative settlement with an earlier entry date.

Citing *Actavis*, the district court noted that the Supreme Court held that the FTC need only “prove that the Defendants entered into the settlements for the purpose of avoiding the risk, however small, of competition” without showing causation, and opined that it would be incongruous if “the FTC should win its case on those grounds, while the Private Plaintiffs lose because the Defendants are able to show the patent would have been declared valid and infringed.”²³³ The court rejected the at-risk launch theory because this would rely on the validity and, likely, litigation

outcome of the underlying patents. The court accepted the plaintiffs’ concept of alternative settlements, noting that the other courts have accepted this argument under similar circumstances.²³⁴

In another case, *In re Namenda Direct Purchaser Antitrust Litigation*, the district court in the Southern District of New York accepted the plaintiffs’ alternative theory of causation that the generics manufacture would have prevailed in patent litigation. Indeed, the district court held that “[t]he viability of Plaintiffs’ Section 1 claim ‘will depend on the presence of “evidence suggesting that the settlement agreements did, in fact, delay generic entry,” which will presumably require proof that the ’703 Patent would likely have been found invalid or not infringed by the Generic Competitors.’”²³⁵ The court denied the defendant’ summary judgment motion.

Conversely, in an FTC administrative proceeding in *Impax*, FTC Administrative Law Judge (ALJ) Michael Chappell dismissed the FTC’s administrative complaint against Impax under Section 5 of the FTC Act.²³⁶ The FTC alleged that Impax entered into a pay-for-delay agreement with Endo (the brand firm) regarding the drug Opana ER, whereby Endo made a reverse payment to Impax to delay entry to January 2013, eight months before the expiration of the patents at issue. The ALJ found that while the settlement was a large, unjustified reverse payment, its procompetitive benefits outweighed any anticompetitive harm. Mainly, the settlement enabled consumers to have uninterrupted and continuous access to generic Opana ER since January 2013, and that Impax’s ability to enter eight months before expiration of the original patents was a procompetitive benefit. The ALJ also determined that the FTC failed to show that the broad scope of the license could have been achieved with a less restrictive agreement. Defendants

appealed to the full commission, and oral argument was held on October 11, 2018.

Another One Bites the Dust. In *In re Solodyn Antitrust Litigation*, defendant Impax settled the litigation during one of the rare trials in a pay-for-delay case. Plaintiffs alleged that the brand firm Medicis and several generic companies entered into pay-for-delay settlements, delaying the entry of generic drug Solodyn. The generic manufacturers, including Impax, allegedly would have entered at risk (i.e., before final resolution of the patent litigation) but-for the agreements. Defendant Medicis previously settled with plaintiffs after the district court denied its motion for summary judgment and the First Circuit denied defendants' motion for interlocutory appeal of the class certification order. Just before trial, Impax settled with direct purchaser plaintiffs for \$35 million.²³⁷ During the course of the trial, Impax also settled, under undisclosed terms, with individual retailer plaintiffs: Albertson's, CVS Pharmacy, HEB Grocery, Rite Aid, Safeway, Kroger, and Walgreens. After specific evidence was presented against Impax during the third week of trial, Impax agreed to settle with the remaining end-payor plaintiffs for \$20 million, fully resolving the case.²³⁸ The district court recognized that the remaining settlements were reached, in part, because the jury heard evidence demonstrating Impax's misconduct.²³⁹

Other Section 1 Litigation

Do You Want Fries with That? Following the lead of federal and state regulators,²⁴⁰ class action attorneys filed a number of Section 1 complaints against some of the biggest fast food chain restaurants—including McDonald's, Burger King, Jimmy John's, and Dunkin' Donuts—alleging that the companies' "no-poach" provisions contained in franchise agreements are

anticompetitive²⁴¹ The harm alleged in these cases is that by limiting franchisees from soliciting or hiring employees from other franchisees, the company as a whole was able to suppress wages. To date, courts dealing with these cases have generally denied motions to dismiss and allowed the cases to proceed to discovery, but some courts have expressed skepticism that plaintiffs will be able to make out a sustainable case following discovery.²⁴²

In these cases, like many Section 1 cases, the courts' decision regarding the proper standard for analyzing the conduct—*per se* or rule of reason—will have significant impact on the outcome. Plaintiffs typically advocate for their claims to be analyzed under the *per se* standard, which means that once an agreement between competitors has been established, a court must find that a violation has been proven. Defendants are not able to advance business justifications as a defense when the *per se* rule applies. Under the rule of reason or quick look standard, a defendant is allowed to explain the procompetitive benefits arising from the conduct at issue. The court then weighs these benefits against the anticompetitive harm, if any, and determines whether competition has ultimately been harmed. In this way, the rule of reason is a more permissive standard for defendants. Courts addressing these recent employee no-poach cases have indicated that they will allow the defendants to justify and contextualize these provisions.

Start Spreading the News. In a nearly decade-long case alleging an unlawful conspiracy in the single-copy²⁴³ magazine industry, the Second Circuit affirmed summary judgment in favor of magazine publishers, distributors, and wholesalers.²⁴⁴ In March 2009, Anderson News, a magazine wholesaler, claimed that a number of magazine publishers,

distributors, and wholesalers engaged in an unlawful "group boycott" under Section 1. Anderson alleged that it was boycotted by all publishers after it implemented rules requiring each magazine publisher to pay certain surcharges. Shortly thereafter, Anderson went out of business.

As evidence of the alleged conspiracy, Anderson cited a number of meetings and communications between newspaper publishers. But the Southern District of New York found that the evidence, at most, amounted to information exchanges, but not an agreement reached between the defendants.²⁴⁵ Moreover, Anderson's own actions in enacting surcharges directly led to its injury, not the defendants' conduct.²⁴⁶ The Second Circuit affirmed in a unanimous decision and held that Anderson's evidence of a conspiracy did not rule out the possibility that the defendants' actions may have been independent and permissible. "To permit an inference of conspiracy based on ambiguous evidence—that is evidence that is equally consistent with independent conduct as with illegal conspiracy—would deter or penalize perfectly legitimate and procompetitive conduct."²⁴⁷

The Second Circuit's opinion here reinforces the Supreme Court's *Matsushita* principle, i.e., that a plaintiff alleging a Section 1 violation must present evidence that "tends to exclude the possibility" that the alleged conspirators acted independently.²⁴⁸ If the evidence allows for two equally compelling, yet conflicting, interpretations, a court should find in favor of the defendants.

In Your Eyes. Earlier this year, a Utah federal judge permitted discovery to proceed in a class action litigation that has parallel claims with an FTC administrative action. *Thompson v. 1-800 Contacts, Inc.* is a Section 1 case where contact lens consumers claim that 1-800 Contacts

entered into a series of anticompetitive bilateral agreements with other online contact lens retailers, including WSGR clients Walgreens and Vision Direct, related to paid search restrictions. The agreements at issue, generally resulting from separate trademark lawsuits between 1-800 Contacts and other contact lens retailers, prohibit the retailers from causing their advertisements to appear when consumers searched for the other party's names or trademarks on search engines like Google or Bing. In her motion to dismiss order, Judge Campbell found that the plaintiffs' allegations were sufficient to withstand challenges to the plaintiffs' antitrust standing, alleged relevant market definition, and statute of limitations at the pleadings stage.²⁴⁹ Class certification briefing is currently scheduled to be completed in the first half of 2019.

Clean Up in Aisle Five. Five classes of retail grocers alleged that grocery wholesalers C&S and Supervalu agreed to allocate customers and geographic regions resulting in higher grocery prices. In 2017, Supervalu settled with plaintiffs for \$8.75 million but C&S continued to litigate.²⁵⁰ In April 2018, after nine days of trial, a jury found in favor of C&S holding that the retail grocers failed to show that C&S agreed not to compete with Supervalu for customers.²⁵¹ The class plaintiffs' appeal before the Eighth Circuit is currently pending, and oral argument is expected in 2019.²⁵²

Monopolization and Single Firm-Conduct Litigation

This year was monumental for Section 2 litigation, with the Supreme Court's potentially far-reaching decision in *AmEx* and its grant of *certiorari* to hear the Apple App Store case. The rulings from these cases will likely have significant implications for WSGR's technology and other industry clients and should factor

into future litigation analyses. This year also featured many important developments in the pharmaceutical industry.

Don't Leave Home Without It (Both Sides Of It). In June 2018, the Supreme Court affirmed the Second Circuit's 2016 decision in the long-running *American Express* (*AmEx*) case and found that the anti-steering provisions in *AmEx*'s merchant contracts, which prohibit merchants from encouraging the use of other cards, did not violate antitrust laws.²⁵³ Plaintiffs had argued that the anti-steering provisions prevent competition among cards at the point of sale, allowing *AmEx* to raise prices to merchants without losing share to other cards. WSGR submitted an *amicus* brief on behalf of 24 scholars supporting American Express.

In a 5-4 opinion authored by Justice Clarence Thomas, the Court found that when considering allegations of anticompetitive conduct concerning two-sided transaction platforms, like credit cards, a court must consider the interaction between both sides of the platform in defining the relevant market.²⁵⁴ Relying on economic literature about the unique features of two-sided platforms, the Court found that the value of a two-sided platform to customers on one side depends on the number of participants on the other side, and that a restraint on one side of the market (e.g., the anti-steering provisions in contracts with merchants) may be necessary to attract customers on the other side (e.g., cardholders). As a result, proof of a price increase to merchants on one side of the market is not enough and there must be evidence of harm in the market as a whole.²⁵⁵

The *AmEx* ruling has potentially far-reaching implications for companies that operate multi-sided platforms, especially in the financial services sector. In addition, while the decision may be read narrowly

as applying only to "transaction platforms," the economic analysis contained in the opinion may also apply more broadly to other "non-transaction platforms," such as technology companies operating multi-sided platforms (e.g., Uber). The opinion does note that not all two-sided markets need to be viewed the same way and points to newspapers as an instance where advertisers and readers would not be analyzed together because network effects operate in one direction only. While advertisers care about the amount of newspaper readers, the readers are generally indifferent to the amount of advertising contained in a newspaper.

Further, the opinion also found that the merchant agreements cannot be found anticompetitive merely based on evidence of higher merchant fees because they are vertical in nature (i.e., between firms at different levels of distribution). As such, *AmEx* clarifies the high bar for potential antitrust plaintiffs seeking to challenge vertical agreements, policies, or mergers. The plaintiffs will now need to prove the existence of market power in a specified relevant market, rather than merely showing price effects, and will need to support their allegations of harm with rigorous economic evidence. Future complainants will also need to consider seriously the role of indirect network effects (i.e., where the platform's value on one side materially depends on the number of participants on the other side) in defining the relevant market, including whether such effects are sufficiently strong as to render a given two-sided platform a single market for market definition purposes.

There's an App for That. On November 26, 2018, attorneys for Apple and iPhone purchasers presented arguments before the Supreme Court about whether an antitrust class action lawsuit could be brought against Apple for inflated app

pricing.²⁵⁶ This case was originally filed in 2011 in the Northern District of California, where iPhone consumers claimed that Apple established an unlawful monopoly over apps that run on its software platform (iOS) and inflated the prices of those apps by charging developers a 30 percent commission fee and limiting distribution through its App Store only. The district court dismissed the consumers' claims after finding that the plaintiffs were indirect purchasers under *Illinois Brick*²⁵⁷ and thus, did not have standing to bring this action under the federal antitrust law.²⁵⁸ *Illinois Brick*, a Supreme Court decision from 1977, established that indirect purchasers cannot seek damages under the federal antitrust laws.²⁵⁹ The court identified the conduct at issue as arising from an arrangement where independent app developers agreed to directly pay Apple a 30 percent commission, which may have been passed-on to the consumers. Any assumption that app developers would have charged 70 percent of the purchase price but-for Apple's commission was too speculative to pass muster.²⁶⁰ In January 2017, the Ninth Circuit reversed and held that the plaintiffs have standing because Apple is a distributor from whom consumers purchased apps directly.²⁶¹

Early commentators note that the majority of the justices were skeptical of Apple's argument and are likely to rule in favor of the consumers.²⁶² During oral argument, Justice Elena Kagan noted, "I pick up my iPhone. I go to Apple's App Store. I pay Apple directly with the credit card information that I've supplied to Apple. From my perspective, I've just engaged in a one-step transaction with Apple."²⁶³

Justices Samuel Alito and Neil Gorsuch even suggested that *Illinois Brick*, the precedent on which Apple relies, may no longer be good law and could be revisited.²⁶⁴ Thirty-one states, including

the District of Columbia, rejected *Illinois Brick* and passed legislation allowing all consumers—direct or indirect—to bring damages claims under state antitrust law. But indirect purchasers living in the other states cannot recover damages under federal or state antitrust laws. Overturning *Illinois Brick* would expose defendants to increased litigation from indirect purchasers and state attorneys general who were previously barred from bringing suit. Additionally, indirect purchaser classes would likely be able to extract higher settlements since they would be able to represent consumers living in all states. The Court's decision in *Pepper* is expected to be issued in the first half of 2019.

Monopolization in the Pharmaceutical Industry

An observable trend in pharmaceutical cases alleging Section 2 violations (and sometimes in combination with allegations under Section 1, such as pay-for-delay or other agreements in restraint of trade) is that virtually all cases allege an overarching monopolization scheme. In practice, this allows the courts to consider the course of conduct as a whole even if individual elements of the alleged scheme are not deemed unlawful and/or are dismissed. For example, in 2017, the Eastern District of Pennsylvania in *In re Suboxone Antitrust Litigation* denied a motion to dismiss the claim alleging an overarching scheme despite finding that certain conduct was not, by itself, unlawful because doing otherwise "would unfairly compartmentalize the underlying conduct into separate causes of action."²⁶⁵ Notably, taking an opposite approach, the court in *In re Namenda Antitrust Litigation* dismissed an overarching scheme as duplicative of the components therein, which the court allowed to proceed.²⁶⁶ The cases below discuss additional developments in 2018 with respect to

the different types of conduct alleged to foreclose generic/biosimilar entry in violation of Section 2.

One Way or Another. "Product hopping" in the pharmaceutical industry refers to the strategy of a brand-name drug manufacturer introducing formulation changes, modification of dosage, or other alterations in order to avoid competition from typically lower-priced generic drugs. This can involve a "soft switch," where the brand firm does not withdraw the old version of the drug from market but discourages its use, or a "hard switch," where the brand firm withdraws the old version from market, thus giving consumers and payers no choice but to buy the new version of the drug. Because generic manufacturers must show that their version of the drug and the currently marketed brand-name drug are bioequivalent (i.e., have a similar formulation and effect), a brand manufacturer's alterations to a drug can force generics to incur costly delays in development and approval (especially when done just prior to generic entry). Typically, generics are automatically substituted for the more expensive brand version by pharmacists, so brands are incentivized to delay competition for as long as possible.

As discussed earlier, the Southern District of New York largely denied summary judgment in *Namenda*. This class action case follows the New York Attorney General's lawsuit in which the court granted an injunction to prevent the defendant brand firm from withdrawing the drug Namenda IR from market, thereby effectuating a hard switch from Namenda IR to Namenda XR. The district court denied summary judgment with respect to the class action plaintiffs' product hopping allegation, rejecting defendants' argument that defendant Forest's announcement

of a hard switch did not cause antitrust injury to class members. The court based this decision on the plaintiffs' economic expert's testimony showing that "the hard switch was effective in converting more Namenda IR prescriptions to Namenda XR than otherwise would have been the case."²⁶⁷ The court also certified the direct purchaser class.

Can't Touch This. Risk Evaluation and Mitigation Strategies (REMS) are safety protocols that the FDA requires certain manufacturers undertake as part of the approval of particular drugs that pose substantial risk to certain patients and others that handle the drugs. Often these protocols can include restricted distribution, additional labeling, or specialized patient management databases.

In *Mylan v. Celgene*, the District of New Jersey granted in part and denied in part defendant Celgene's motion for summary judgment.²⁶⁸ Mylan alleged that by refusing to sell samples of the brand drugs Thalomid and Revlimid to Mylan under the pretext that the REMS in place forbid or limited the such sale, Celgene prevented Mylan from conducting testing required by the FDA to potentially bring a generic drug to market. Without access to the samples, which were not available through normal distribution channels due to the REMS in place, Mylan alleged that Celgene unlawfully extended its monopoly over these blockbuster, life-saving drugs. Under a rule of reason analysis, the court held that Celgene's conduct was reasonable until the time that the FDA approved Mylan's testing protocols, and dismissed Mylan's claims of harm prior to that point. But the court found there to be a triable issue on whether Celgene's continued refusal to provide the samples after the approvals was reasonable, as

well as whether Mylan should be entitled to injunctive relief on Revlimid, the newer analog of Thalomid. Trial has not yet been scheduled. WSGR is currently representing Mylan in this litigation.

During the last year, regulators and legislators have continued to recognize the potential anticompetitive harm that can stem from REMS abuse. For example, FDA Commissioner Scott Gottlieb has issued several statements since 2017 decrying the conduct as "shenanigans" to "'game' the system,"²⁶⁹ and in May 2018 the FDA publicly listed companies for which the agency had received inquiries and complaints about lack of access to samples of drugs subject to REMS.²⁷⁰ In addition, the FDA also published draft guidances on "Development of a Shared System REMS" and on "Waivers of Single, Shared System REMS Requirement" as part of its policies to "reduce the ability of brand drug makers to use REMS programs as a way to block timely generic drug entry, helping promote competition and access."²⁷¹ Federal legislative efforts to address this issue are on-going, and in 2018 at least one state has passed legislation to address the issue regarding generic access to brand drug samples.²⁷²

Beyond Belief. The U.S. District Court for the District of Massachusetts denied defendants' Momenta and Sandoz's motion to dismiss in *Amphastar v. Momenta*. The case is on remand from the Court of Appeals for the First Circuit after its ruling that the *Noerr-Pennington* doctrine does not shield defendants from liability for their alleged conduct, which included misleading a standards-setting organization called the United States Pharmacopeia Convention (USP) into adopting a method for testing the drug at issue (the 207 Method).²⁷³

Amphastar alleged, and the court upheld, that defendants failed to disclose that they owned intellectual property covering the testing standard, and that they then used that intellectual property to obtain an injunction keeping Amphastar off the market because Amphastar used what it had believed to be an unencumbered standard.²⁷⁴ In particular, the court found that "Amphastar has articulated a cognizable claim that defendants wrongfully acquired monopoly power by deceiving the USP into adopting the 207 Method that defendants later asserted was covered by the '886 patent. The complaint contains allegations establishing that the USP adopts standards that are enforced by the FDA and plausibly alleges that the 207 Method is mandatory."²⁷⁵ With respect to Amphastar's allegations of a conspiracy between Sandoz and Momenta in violation of Section 1, the court found that "Amphastar plausibly alleges that the collaboration agreement between Sandoz and Momenta created financial incentives for the companies to exclude other producers of generic Enoxaparin from the marketplace."²⁷⁶ Summary judgment motions will be filed in the first quarter of 2019. WSGR is currently representing Amphastar in this litigation, as well as a related patent case in which Amphastar won a defense jury verdict.

...And Justice for All. Generally, the *Noerr-Pennington* doctrine would shield a patent holder from antitrust liability if it seeks to enforce its patents. Exceptions to this general rule include fraud before the U.S. Patent and Trademark Office (USPTO) to obtain to patent in the first place—called "*Walker Process*" fraud after the Supreme Court's seminal case on this issue²⁷⁷—and when the patent litigation is a mere "sham" to cover a purely anticompetitive attempt to interfere with a competitor's business.²⁷⁸

In *United Food and Commercial Workers Unions and Employers Midwest Health Benefits Fund v. Novartis Pharmaceuticals Corp.*, which involved the drug Gleevec, defendant Novartis prevailed at the First Circuit, which upheld the Massachusetts district court's dismissal of direct and indirect purchaser complaints for failure to allege fraud or sham litigation.²⁷⁹

Regarding the fraud claim, the First Circuit emphasized that Novartis did eventually submit the prior art in question to the patent office as part of the prosecution of the patent, and therefore its previous failure to submit the prior art cannot be characterized as "material." As a result, Novartis' enforcement of the patent cannot give rise to antitrust liability.²⁸⁰ The First Circuit also rejected the plaintiffs' efforts to characterize Novartis' conduct as "egregious misconduct" akin to the filing of false affidavits, which would have rendered the misrepresentations material.²⁸¹ Finally, regarding the sham litigation claim, the First Circuit rejected the plaintiffs' arguments and agreed with the district court that a party's awareness that it faces a difficult patent infringement case does not make that case "objectively baseless."²⁸²

By contrast, the FTC prevailed after a trial in the Eastern District of Pennsylvania regarding the sham patent litigation allegation in *FTC v. AbbVie Inc.* In particular, the FTC alleged that defendants AbbVie and Besins filed sham patent litigations against generic firms to impede competition for the drug Androgel. The court had entered summary judgment for the FTC in 2017 that the patent lawsuits were objectively baseless, and after a bench trial in 2018 found that (i) the FTC has shown by clear and convincing evidence that the defendants had filed the sham patent lawsuits with subjective bad faith, and (ii) the defendants had market power.²⁸³ The court granted the FTC's request for disgorgement of \$448 million of ill-gotten profits, but denied the FTC's

request for an injunction to bar future similar conduct.²⁸⁴ The FTC subsequently filed a notice of appeal to the Third Circuit to reinstate the previously dismissed pay-for-delay claim, as well as to appeal the district court's refusal to enjoin the alleged sham litigation.²⁸⁵ The defendants also filed notices of appeal against the district court's decision. The appeals are pending.

Too Much to Ask. *In re Restasis Antitrust Litigation* is an example of a group of class action cases involving allegations of an overarching monopolization scheme with several components, including filing serial and meritless citizen petitions, defrauding the Patent and Trademark Office, wrongful patent listing in the Orange Book, sham patent litigation, and the improper assignment of patents to the Native American St. Regis Mohawk Tribe to avoid invalidation.

IP, pharma, and antitrust practitioners have followed this litigation with great interest, in particular the allegations regarding assignment of patents. Defendant Allergan transferred its patents to the tribe and agreed to pay the tribe \$13.75 million upfront. In exchange, the tribe agreed to claim sovereign immunity as grounds to dismiss the generics' challenge of the patents' validity before the Patent Trial and Appeal Board (PTAB), lease the patents back to Allergan, and receive \$15 million in annual royalties as long as the patents remain valid. However, the U.S. District Court for the Eastern District of Texas held that, regardless of the transfer, the patents were invalid, and the decision was subsequently upheld by the Federal Circuit. The PTAB also denied the Tribe's motion to dismiss the inter-partes review of the patents at issue based on sovereign immunity, and the Federal Circuit also affirmed this holding. WSGR represented Mylan in the matter before the Eastern District of Texas, PTAB, and the Federal Circuit.

In the Eastern District of New York, where the antitrust class actions were consolidated, the court denied Allergan's motion to dismiss on causation grounds. First, the court rejected Allergan's argument that the *Noerr-Pennington* doctrine shielded Allergan's filing of citizen petitions from antitrust liability. Citizen petitions are a process that allows individuals and organizations to request the FDA to make certain changes to its policies or practices. The court held that it is plausible that Allergan's serial filing of citizen petitions was objectively baseless, such that the *Noerr-Pennington* doctrine did not apply, and the case should proceed to discovery to determine whether the evidence supports the claim.²⁸⁶

Next, the court ruled on the key question whether Allergan's allegedly anticompetitive conduct—especially the serial citizen petitions filed with the FDA and the sham patent litigation—caused a delay in FDA's approval of the generics' ANDAs, depriving consumers of the benefits of lower generic drug prices during this delay. The court found that plaintiffs had plausibly alleged that Allergan's conduct caused delays to generic entry. In particular, the court held that the patent infringement litigation diverted the FDA's resources from the ANDAs at issue.²⁸⁷ With respect to the sham citizen petitions allegation, the court held that the ANDAs would likely have been approved months or even years earlier if the FDA did not need to address the citizen petitions.²⁸⁸ Finally, consistent with the general trend of permitting claims alleged as an overarching scheme, the court concluded that "the likelihood that Allergan's citizen petitions and its efforts to protect fraudulent patents resulted in plaintiffs' injury increases when these actions are viewed in the aggregate."²⁸⁹

The FDA has also recognized the potential for citizen petitions to be misused to delay generic approval. For example, FDA Commissioner Scott Gottlieb explained:

“While the record shows that citizen petitions have rarely delayed specific generic drug approvals, there’s no doubt that the process requirements associated with 505(q) petitions [petitions asking FDA to take certain actions on a pending ANDA] can add to resource burdens on the generic drug review process and the FDA’s regulatory decision making. This increased burden on the FDA can take resources away from the daily work of application review.”²⁹⁰ The FDA also issued a revised Draft Guidance on 505(q) petitions to address this issue, which stated the FDA’s intent to refer anticompetitive citizen petitions to the FTC and bring them to the attention of Congress.²⁹¹ The FTC recently submitted a comment to the FDA’s Draft Guidance confirming its commitment to working with the FDA on this issue.²⁹²

Follow You, Follow Me. Competition between biologics and biosimilars is a new frontier in pharmaceutical antitrust practice. Biologic drugs refer to “any therapeutic product derived from a biological source, including vaccines, antitoxins, blood products, proteins, and monoclonal antibodies.”²⁹³ Unlike traditional, or “small molecule” drugs, biologic drugs are far more complex and can be comprised of up to hundreds of thousands of atoms. These structural complexities cause it to be extremely challenging to create precise replications. As such, potentially competing versions of biologic drugs therefore attempt to duplicate the licensed drug’s manufacturing process instead of its chemical composition and are not referred to as “generic biologics,” but rather “biosimilars.”

In *Pfizer v. Johnson & Johnson*, one of the first cases to test antitrust jurisprudence in the biologic/biosimilar context, Pfizer alleged that defendant Johnson & Johnson (J&J), brand manufacturer of the biologic Remicade, used exclusive agreements

and bundled rebates to foreclose Pfizer’s biosimilar product, Inflectra, from competing. The U.S. District Court for the Eastern District of Pennsylvania denied J&J’s motion to dismiss, finding that Pfizer provided detailed allegations regarding J&J’s exclusionary terms with insurers and the incentive structure forcing end-payors to accept those terms.²⁹⁴ The court rejected J&J’s argument that Pfizer’s lack of success is a result of factors unconnected to J&J’s conduct, leaving the issue for resolution after fact discovery.

Additional Section 2 Litigation

On the Road Again. The Second Circuit affirmed a district court decision dismissing antitrust claims by more than 450 used car dealers, which alleged that Carfax’s exclusive agreements with used car websites and car manufacturers suppressed competition for vehicle history reports. The panel found that the used car dealers did not show sufficient evidence that the agreements at issue were anticompetitive, noting that the plaintiffs’ evidence of a limited sampling of customers’ preferences is insufficient to demonstrate market-wide competitive harm.²⁹⁵

Baby, You Can Drive [in] My Car. Hundreds of Boston-area taxi companies brought antitrust actions alleging that Uber charged predatory prices for its UberX ride-hailing services in order to monopolize the market.²⁹⁶ The District of Massachusetts dismissed these claims, finding that plaintiffs failed to show that Uber’s prices for these services were below its actual costs.²⁹⁷ The court also found that plaintiffs failed to show that consumers were harmed; they merely alleged that competitors may have been harmed as a result of increased competition, which does not constitute an antitrust injury.²⁹⁸ As the Supreme Court recognized more than 55 years ago, the antitrust laws were

designed for “protection of competition, not competitors[.]”²⁹⁹

Pick Your Poison. The District Court for the Northern District of California granted Huawei’s motion for summary judgment on Samsung’s monopolization claims under Section 2 of the Sherman Act, which were premised on Samsung’s contention that Huawei never had any intention of licensing its standards-essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms and conditions, but nonetheless induced ETSI into including Huawei’s technology into its cellular communications standards to exclude alternative technologies and then filed injunction actions in China to coerce Samsung into accepting Huawei’s demand for excessive royalties.³⁰⁰ Samsung argued that this conduct constituted an anticompetitive refusal to deal and also unlawful monopolization under the Third Circuit’s *Broadcom v. Qualcomm* decision.

Regarding Samsung’s claim that Huawei’s “exorbitant” licensing offers amounted to an anticompetitive refusal to deal, the court held that the refusal to deal cases are inapplicable to the standards-setting world, and that Huawei’s negotiating conduct and pursuit of injunctions did not constitute exclusionary conduct because there was no evidence that Huawei had “outright refused to deal” with Samsung.³⁰¹ On Samsung’s *Broadcom*-based claim that Huawei had made intentionally false promises to ETSI to license its standards essential patents on FRAND terms, thereby inducing ETSI to include Huawei’s patented technologies in the standard, and then breaching those promises by filing injunction actions in China to coerce Samsung into accepting Huawei’s demand for excessive royalties, the court found that Samsung had not offered any evidence of Huawei’s fraudulent intent, but that even if it had, it would have still been insufficient to establish unlawful exclusionary conduct.³⁰²

The court also held that Samsung had not offered any evidence of antitrust injury—that is, that Huawei’s conduct injured competition in the market as a whole rather than only injured Samsung as a competitor.³⁰³

Class Certification

Class certification is a key stage in antitrust class action litigation. In ruling on class certification, a court may define the scope of the class, and with it, the possible extent of damages. Defeating a class certification motion may significantly reduce a defendant’s exposure in a class action lawsuit. Key developments this year included denials of class certification based on the presence of uninjured consumers in a proposed class, and one case involving certification of what may be the largest class in history.

Uninjured Plaintiffs as a Bar to Class Certification

The presence of uninjured class members in a proposed class of antitrust plaintiffs was addressed in multiple cases this year. These cases found that a significant portion of uninjured class members raised concerns about due process, efficient case administration, and compliance with Rule 23 of the Federal Rules of Civil Procedure, which sets the requirements for class action litigation.

In order to certify a class under Rule 23(b)(3), plaintiffs must demonstrate that common questions of law or fact predominate over individual issues. This requirement tests whether all class members’ claims could be dealt with by answering the same set of questions about liability and damages, or whether legal and factual questions relevant to individual plaintiffs in the class would overwhelm the issues that plaintiffs have in common. Where some members of a proposed class

are uninjured, courts may find that the individual inquiries required to determine which class members are injured and which are not may cause individual issues to predominate over common issues, making class certification inappropriate.

A Bitter Pill to Swallow. In October 2018, the First Circuit overturned a decision by the District of Massachusetts in *In re Asacol Antitrust Litigation* granting class certification to a class of consumers who purchased the drug Asacol, used to treat digestive tract ailments.³⁰⁴ Defendant Warner Chilcott took Asacol off of the market shortly before its patent on the drug expired, and simultaneously put a similar drug with longer patent protection onto the market.³⁰⁵ The plaintiffs alleged that Warner Chilcott’s intent in removing Asacol from the market was to prevent pharmacists from substituting generic versions of the drug for Asacol once its patent protection ended, preventing competition from generics.³⁰⁶ The district court certified the class despite finding that around 10 percent of class members had not been harmed by Warner Chilcott’s conduct because they would not have switched to a generic drug even if it had come onto the market.³⁰⁷

The First Circuit rejected the district court’s determination that uninjured class members could be removed after certification by a claims administrator, whose decisions could be reviewed by the court.³⁰⁸ The court found that the proposed procedure would not sufficiently protect the defendants’ due process rights, since it would provide “no meaningful opportunity [for the defendant] to contest whether an individual would have, in fact, purchased a generic drug had one been available.”³⁰⁹ The panel reversed the granting of class certification and remanded to the district court for further proceedings.

The First Circuit noted that the presence of uninjured class members “has been

the source of much debate among the circuits[.]”³¹⁰ The Seventh Circuit, for example, has made clear that uninjured class members are not a bar to class certification, so long as the number is not too substantial.³¹¹ The ongoing debate among circuit courts could signal that the Supreme Court will address the issue of uninjured class members as a bar to class certification in the coming years.

Somebody Get Me a Doctor. Shortly after the *Asacol* decision, the District of New Jersey denied class certification to a consumer class suing Celgene for delaying the entry of generic versions of its drugs Thalomid and Revlimid.³¹² Similar to the litigation brought by WSGR client Mylan against Celgene, the consumers also alleged that Celgene sought to prevent generic drugs from entering the market by withholding samples of its products necessary for generic testing and approval, resulting in prices above a competitive level.³¹³ The defendants argued that the proposed classes failed to meet Rule 23’s predominance requirement because they contained large numbers of uninjured consumers who, as brand loyalists, would never have switched from Celgene’s brand drug to a generic and that figuring out who these customers were would require extensive inquiry into individual class members’ circumstances. The court agreed and found that individual questions would predominate over common questions, making class certification inappropriate.³¹⁴ The court further ruled that the class certification was inappropriate where plaintiffs failed to put forward a reliable method of determining class membership.³¹⁵

Challenging the Largest Class Ever

The Call. In September 2018, the District Court for the Northern District of California granted a motion for class certification in *In re Qualcomm Antitrust Litigation*.³¹⁶ The

plaintiffs allege that as many as 250 million cellphone buyers paid overcharges on cell phones because of the licensing rates Qualcomm charged phone manufacturers for the use of its modem chips.³¹⁷ The consumers claim that Qualcomm requires phone manufacturers to license chips at costs above FRAND rates required for IP holders, whose patents are essential to standards set for telecommunications by standards-setting organizations and that these overcharges are passed on by the manufacturers to consumers.³¹⁸ Despite the considerable number of potential class members, the court found that all elements of Rule 23 were satisfied and certified a nationwide class of consumers who may recover damages under California's antitrust law and injunctive relief under the Sherman Act.³¹⁹

Qualcomm has petitioned the Ninth Circuit to overturn the grant of class certification, arguing that the size of the plaintiffs' class makes a class action unmanageable, and that allowing a nationwide class to recover under California law would contravene the public policy choices of states that do not allow recovery for indirect purchasers.³²⁰ In response, plaintiffs stressed that other courts have approved methods for dealing with classes containing more than a million members, and that the decision did not warrant immediate appeal since it raised no novel legal issues.

Additional Key Class Certification Decisions

Money, It's a Crime. There were several key developments this year in the ongoing class action litigation alleging a global conspiracy by some of the world's largest banks to manipulate the London InterBank Offered Rate (LIBOR). In February 2018, the U.S. District Court for the Southern District of New York granted certification of a class of over-the-counter (OTC)

purchasers of certain LIBOR-based financial instruments, but refused to certify other proposed classes of exchange-based investors and U.S. lenders.³²¹ The Second Circuit denied the exchange-based investors' motion to appeal the district court's order.³²²

Shortly after the class certification decision, the court approved a \$100 million settlement between OTC plaintiffs and HSBC bringing the total settlement amount in the case to \$590 million: Barclays (\$120 million), Citigroup (\$130 million), Deutsche Bank (\$240 million).³²³

In a separate case in the financial industry, the Eastern District of New York denied class certification to a group of merchants suing major credit card companies Visa, Mastercard, American Express, and Discover.³²⁴ The plaintiffs allege that credit card companies conspired to shift liability for fraudulent charges from issuing banks to merchants when EMV chips were introduced.³²⁵ The court ruled that the class period—the plaintiffs' definition of *when* the alleged anticompetitive conduct took place—was not definite enough to determine which merchants were actually part of the class, and denied class certification accordingly.³²⁶

Behind Blue Eyes. A Florida district court recently certified a class of plaintiffs alleging that manufacturers and distributors of disposable contact lenses conspired with eye care professionals to set unilateral pricing policies (i.e., minimum retail prices) for disposable contact lenses.³²⁷ Although different groups of plaintiffs are suing under the laws of different states, the court found class treatment appropriate because "the [plaintiffs'] claims . . . arise out of the same illegal conduct by defendants, and are based on the same related antitrust theories of conspiracy in restraint of trade."³²⁸ However, the court declined

to certify a class aimed at obtaining an injunction, since the defendants had already discontinued the policies at issue and the plaintiffs are primarily seeking money damages.³²⁹

Call Me Maybe? In *Ward v. Apple*, the Northern District of California denied class certification to a group of plaintiffs alleging that Apple and AT&T entered illegal agreements that locked customers into using AT&T's voice and data services, preventing them from switching carriers even after their contracts expired.³³⁰ The court found that the plaintiffs had submitted an expert report "essentially lacking in data-driven analysis," which prevented the court from determining that the plaintiffs would be able to prove damages on a class-wide basis.³³¹

Electric Feel. In November 2018, the Northern District of California certified a class of direct purchasers in the long-running capacitors price fixing litigation.³³² The court found that the expert methodologies offered to determine class-wide harm, along with evidence purportedly showing a market-wide conspiracy, supported class-wide treatment of these claims. However, the capacitor manufacturer defendants claimed that the court's decision ignored arguments and opposing economic analysis showing that the plaintiffs' experts failed to account for customers who may not have been harmed and correspondingly filed a Rule 23(f) appeal with the Ninth Circuit.³³³ WSGR client Hitachi Chemical previously settled with the direct and indirect purchasers, but remains in litigation against several opt-out plaintiffs.

Batteries Not Included. In *In re Lithium Ion Batteries Antitrust Litigation*, the Northern District of California denied class certification for a second time to a

group of plaintiffs alleging that a group of manufacturers conspired to fix the price of lithium ion batteries.³³⁴ The district court had previously denied class certification in the same case based on the plaintiffs' failure to establish overcharges to indirect purchasers of the batteries and lack of

a reliable method for determining the class's damages.³³⁵ On the plaintiffs' renewed motion for class certification, the court concluded that the plaintiffs' expert had failed to account for how focal point pricing—pricing that multiple firms settle on *without* coordination—affected

overcharges to consumers.³³⁶ The court found that this gap in the expert's analysis left the plaintiffs unable to establish injury and damages on a class-wide basis, and denied certification a second time.³³⁷

Conclusion: Outlook for 2019

The year ahead will bring new challenges and continued change, in the United States and globally. We can also expect 2019, as in prior years, to have significant antitrust developments, particularly at the antitrust regulatory agencies that will be mid-way through the Trump Administration. Technology companies will continue to be under close scrutiny, with the agencies looking for ways to show they

are being responsive to calls for action in the sector. Both antitrust litigation and cartel enforcement in key markets around the world should continue at a steady pace and remain active.

WSGR will continue to keep the firm's clients and colleagues updated on the latest developments, particularly as we expect WSGR's antitrust attorneys to

continue to play a significant role in matters of importance throughout the year. We invite you to contact your regular WSGR attorney or any member of the firm's antitrust practice.

Finally, we would like to acknowledge and thank the attorneys and staff of WSGR's antitrust practice for their contributions to this report.

Endnotes

To view the complete listing of endnotes for this report, please visit
<https://www.wsg.com/WSGR/Display.aspx?SectionName=practice/antitrust/2018-yir.htm>.

About WSGR's Antitrust Practice

WSGR's antitrust attorneys are uniquely positioned to assist clients with a wide range of issues, from day-to-day counseling and compliance to crucial bet the-company matters. Our accomplished team consistently is recognized among the leading antitrust practices worldwide by such sources as *Global Competition Review*, *Chambers Global*, and *Law360*. In fact, *Global Competition Review* hailed the group as "perhaps the best antitrust and competition practice for high-tech matters

in the world," while *Chambers USA* characterized them as "a dominant firm for matters involving the hi-tech sphere, acting for many of the most prominent technology firms," with a "deep and diverse bench of outstanding practitioners." Based in New York City, Washington, D.C., San Francisco, Silicon Valley, and Brussels, our highly regarded antitrust attorneys advise clients with respect to mergers and acquisitions, criminal and civil investigations by government agencies,

antitrust litigation, and issues involving intellectual property. We also advise clients on a full range of commercial issues, including pricing, distribution, vertical restrictions, standard-setting activities, joint ventures, and patent pooling. Working with Fortune 100 global enterprises as well as venture-backed start-up companies, our attorneys have expertise in virtually every significant industry sector, including technology, media, healthcare, services, transportation, and manufacturing.



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