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Second Edition

Editors

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Preface

Global Competition Review is a leading source of news and insight on competition law, economics, policy and practice, allowing subscribers to stay apprised of the most important developments around the world..

Alongside the daily content sourced by our global team of reporters, GCR also offers deep analysis of longer-term trends provided by leading practitioners from around the world. Within that broad stable, we are delighted to include this publication, *US Courts Annual Review*, which takes a very deep dive into the trends, decisions and implications of antitrust litigation in the world's most significant jurisdiction for such cases.

The content is divided by court or circuit around the US, allowing our valued contributors to analyse both important local decisions and draw together national trends that point to a direction of travel in antitrust litigation. Both oft-discussed developments and infrequently noted decisions are thus surfaced, allowing readers to comprehensively understand how judges from around the country are interpreting antitrust law, and its evolution. New for our second edition of the publication are some high-level analysis chapters, looking at key trends across the country such as class certification, no poach and reverse payment cases.

In producing this analysis, GCR has been able to work with some of the most prominent antitrust litigators in the US, whose knowledge and experience has been essential in drawing together these developments. That team has been led and indeed compiled by Eric P Enson and Julia E McEvoy of Jones Day, whose insight, commitment and know-how have been fundamental to fostering the analysis produced here. We thank all the contributors, and the editors in particular, for their time and effort in compiling this report. Thanks also go to Paula W Render, formerly of Jones Day, as co-editor of the inaugural edition.

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Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws during the coming year.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact insight@globalcompetitionreview.com.

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Part 2

Court Decisions

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Second Circuit: Southern District of New York

Lisl Dunlop and Evan Johnson
Axinn, Veltrop & Harkrider LLP

Overview

This chapter highlights the key decisions of the United States Court of Appeals for the Second Circuit in appeals from decisions of the District Court for the Southern District of New York (SDNY). Additionally, it addresses some of the most significant SDNY antitrust decisions.

Although there were no new significant Second Circuit antitrust decisions in 2020, there were more than a dozen cases presenting antitrust claims decided in SDNY, representing the full breadth and variety of government and private antitrust enforcement, both civil and criminal. The cases outlined below illustrate issues arising from a criminal cartel jury verdict; a motion to dismiss antitrust claims against a branded pharmaceutical company brought by the Federal Trade Commission (FTC) and several state attorneys general; complex questions of antitrust standing in civil cases alleging 'umbrella effects' of collusion in benchmarking activities; and the termination of the long-standing consent decrees that have governed the United States' motion picture industry since 1949.

SDNY decisions

Criminal cartel defendant fails to overturn guilty verdict

In *United States v. Aiyer*,[1] the court considered whether to overturn a jury verdict convicting a foreign currency trader of a conspiracy to fix prices and rig bids under section 1 of the Sherman Act. This criminal case is part of a broader investigation by the US Department of Justice's Antitrust Division into foreign currency trading, which has resulted in several guilty pleas, corporate fines, and follow-on civil litigation.

1 470 F. Supp. 3d 383 (S.D.N.Y. 2020).

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The defendant is a former currency trader at JPMorgan Chase, who was indicted in 2018 on charges that he participated in a price-fixing conspiracy among foreign currency traders at large financial institutions. Two of the alleged co-conspirators pleaded guilty pursuant to plea deals with the Antitrust Division, which required them to testify against the defendant. After a trial, the jury convicted the defendant of participation in a price-fixing conspiracy among foreign currency traders.

At trial, the co-conspirators testified that the members of the conspiracy coordinated their currency trades by sharing offers and prices to obtain more favorable prices. Specifically, traders in the conspiracy coordinated situations in which one trader would show a slightly higher or lower bid to customers in order to push bids to a specific trader. Traders would alternate who won the business to share the profits of the price-fixing conspiracy. Additionally, traders would work in concert to move the market prices to their advantage, such as by spoofing (i.e., placing bids to create the illusion of additional supply or demand, thereby pushing the market to a position that is more favorable to the traders).

Following the jury verdict, the defendant moved for judgment of acquittal notwithstanding the jury verdict. The court rejected the defendant's argument that the court should have undertaken 'a sophisticated economic inquiry' prior to applying the per se rule, confirming that the per se rule functions to forbid price-fixing and bid rigging without the need to consider any potential procompetitive justifications.[2] The court also rejected the defendant's argument that the conspiracy was not horizontal because skill differentials put him in a vertical relationship with other traders. The court also held that the defendant did not meet the 'very heavy burden' to overturn the jury verdict based on insufficient evidence, citing the testimony of the two co-conspirators and communications between the co-conspirators, such as chat room conversations between the co-conspirators and the defendant.[3]

In denying *Aiyer*'s motions for acquittal, notwithstanding the jury verdict and in the alternative a new trial, the court confirmed the very heavy burden faced by defendants in criminal cartel prosecutions under the per se standard applying to cartel violations. The case is currently on appeal to the Second Circuit.

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2 *Id.* at 400.

3 *Id.* at 403.

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FTC action against pharma company survives motion to dismiss

In *Federal Trade Commission v Vyera Pharmaceuticals, LLC*,[4] the court addressed a motion to dismiss a case brought by the FTC and seven state attorneys general against a branded pharmaceutical company (Vyera) and two of its executives (including Martin Shkreli). The complaint alleged that Vyera engaged in anticompetitive contracting practices to prevent generic competition to its branded drug Daraprim in violation of the Federal Trade Commission Act (the FTC Act), sections 1 and 2 of the Sherman Act, and various state antitrust laws. With the exception of one state antitrust claim, the court held that the plaintiffs sufficiently pleaded their antitrust claims to survive a motion to dismiss.

The case revolved around Vyera's conduct in relation to Daraprim, a drug used to treat toxoplasmosis in immunocompromised individuals. Following its acquisition of Daraprim in 2015, Vyera immediately increased the price of the drug by more than 4000 percent, and then set about establishing a restricted distribution system that effectively blocked generic drug companies from gaining access to sufficient samples of Daraprim to conduct bioequivalence testing that would be necessary for them to be approved by the Food and Drug Administration (FDA) to sell the drug.

The complaint alleged a scheme to depress competition from generic drug manufacturers through three sets of contracts: (1) distribution agreements that prevented purchasers reselling or otherwise providing Daraprim to generic drug manufacturers; (2) exclusive supply agreements tying up the only approved sources of Daraprim's active pharmaceutical ingredient; and (3) data-blocking agreements that prevented dissemination of sales information that could be used by competitors to assess market opportunity for a generic version of the drug.[5] The plaintiffs alleged that generic entry was significantly delayed as a result of these contracts: of four potential entrants, one abandoned its efforts, two are still awaiting FDA approval, and only one has recently received FDA approval (having started the process well before Vyera's acquisition of Daraprim).

Relying on the Third Circuit's 2019 decision in *FTC v Shire ViroPharma, Inc*,[6] the defendants argued that the FTC lacked the legal authority to file suit in federal court under section 13(b) of the FTC Act because the allegations concerned conduct that

4 479 F. Supp. 3d 31 (S.D.N.Y. 2020).
5 *Id.* at 39.
6 917 F.3d 147 (3d Cir. 2019).

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had taken place in the past.[7] The court held that, in contrast to *Shire*, in which the misconduct had ended, in this case the FTC adequately alleged that the defendants' anticompetitive contracting scheme was still in effect and remains sufficiently robust to impede competition to this day. The court dismissed as meritless the argument that the contracts that formed the basis for the scheme had been negotiated and executed prior to the FTC bringing this case.

The defendants also argued that it is a well-established principle that a seller generally has a right to deal, or refuse to deal, with whomever they like, and it was therefore not required to sell Daraprim to generic manufacturers. The court rejected this argument, noting that the right to deal (or not deal) is not unqualified. Here, Vyera did not exercise its right to deal unilaterally, but rather through contractual restrictions on its distributors' (and their customers') sales to block generic competition (creating potential liability under section 1),[8] and the right not to deal does not permit action taken for the purpose of creating or maintaining monopoly power (creating potential liability under section 2).[9] With respect to the exclusive supply agreements, whereas they may be procompetitive in some circumstances, here the contracts had an anti-competitive purpose and effect by freezing out generic competitors by denying them access to the active pharmaceutical ingredient.

The defendants also challenged the various claims for damages under state laws and the FTC Act. The court rejected the defendants' arguments, holding that the state and federal actions seek equitable monetary relief rather than damages, and the states and the FTC are permitted to do so. The FTC recently withdrew its restitution claim for monetary relief in light of the Supreme Court's decision in *AMG Capital Management LLC v FTC*.[10]

'Umbrella' plaintiffs not 'efficient enforcers'

There has been ongoing debate in several circuits concerning the recognition of antitrust claims brought by umbrella plaintiffs (i.e., plaintiffs purchasing products or services from firms that compete with, but are not members of, a cartel). Such plaintiffs argue that their suppliers raised prices under the cover of a cartel's 'umbrella,' and

7 Under section 13(b) of the FTC Act, the FTC may bring injunction proceedings in federal court only when it 'has reason to believe' that a defendant 'is violating or is about to violate' the antitrust laws.

8 479 F. Supp. 3d at 48.

9 479 F. Supp. 3d at 49.

10 No. 19-508 (Apr. 22, 2021).

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so they are harmed by overcharges in the same manner as plaintiffs purchasing directly from a cartel member. To date, the Supreme Court has not addressed the issue. Three circuits – the Third, Fifth and Seventh – have upheld umbrella liability and granted umbrella plaintiffs standing to sue. The Ninth Circuit has rejected umbrella liability in a single context, but has not ruled more broadly.

The Second Circuit encountered the question in *Gelboim v Bank of America Corp*,[11] which involved claims by investors in financial instruments indexed to LIBOR (the London inter-bank offered rate) seeking damages from financial institutions that colluded in setting the benchmark. The court addressed whether plaintiffs who owned LIBOR-based securities issued by third parties had antitrust standing to assert their claims: to do so, plaintiffs must have suffered antitrust injury, and must be 'efficient enforcers' of the antitrust laws.[12] The court remanded the 'efficient enforcer' question back to the district court, but observed that the case may raise the concern of damages disproportionate to wrongdoing. A benchmark like LIBOR affects the pricing of trillions of dollars' worth of financial transactions, but the conspirators controlled only a small percentage of the ultimate identified market.

Two SDNY cases, one in 2020 and the other in early 2021, addressed whether umbrella plaintiffs in benchmark manipulation cases were sufficiently 'efficient enforcers' of the antitrust laws to have standing to bring antitrust cases. In *In re Aluminum Warehousing Antitrust Litigation*,[13] a case alleging manipulation of a benchmark impacting aluminum pricing, the defendants were financial companies that traded in primary aluminum and primary-aluminum derivatives on the London Metals Exchange (LME) (the Financial Defendants), and three owner/operators of LME-certified warehouses for the storage of metal. Relevantly, the plaintiffs purchased directly from aluminum smelters, such as Rio Tinto, Alcan, Alcoa or Rusal, not from the defendants.

11 823 F.3d 759 (2d Cir. 2016).

12 The court identified four factors to be considered in deciding whether a plaintiff is an efficient enforcer: (1) the directness or indirectness of the asserted injury; (2) the existence of more direct victims of the alleged conspiracy; (3) the extent to which the damages claim is highly speculative; and (4) the importance of avoiding the risk of duplicate recoveries or the danger of complex apportionment of damages.

13 No. 13 MD 2481 (PAE), 2021 WL 638059 (S.D.N.Y. Feb. 17, 2021).

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The court noted that the 'independent decision of contracting parties to incorporate [a benchmark price] breaks the chain of causation between defendants' actions and plaintiff's injury.'[14] Accordingly, the court held that the plaintiffs alleging benchmark manipulation by defendants who did not control the relevant market, and with whom they did not transact, were not efficient enforcers, and granted summary judgment to the defendants.

The court reached a similar result in *In re Platinum and Palladium Antitrust Litigation*,[15] a case alleging manipulation of the benchmark price for platinum and palladium. In this case there were two groups of plaintiffs: (1) a plaintiff who traded physical platinum and palladium on an over-the-counter basis (the OTC plaintiff); and (2) traders who transacted futures and options contracts of these metals on exchanges (the exchange plaintiffs). The defendants were large financial institutions, including foreign affiliates, that set the benchmark for platinum and palladium through auctions. The plaintiffs bought and sold physical commodities and options and futures contracts utilizing this benchmark index set by the defendants for pricing.

The court dismissed the plaintiffs' complaint for lack of antitrust standing because they were not efficient enforcers of the antitrust laws. The OTC plaintiff did not allege that it transacted directly with any of the defendants, but that it and a third party chose independently to incorporate the benchmark into a financial transaction without the defendants' participation – this created challenges in proving causation.[16] The court also found that apportionment of damages would be complex. In concluding that the OTC plaintiffs who did not transact directly with defendants are not efficient enforcers, the court noted that the defendants only constituted a small portion of the OTC market, and to permit the OTC plaintiff to recover from them would subject the defendants to liability that would 'not [be] proportional to defendants' ill-gotten gains.'[17]

With respect to the exchange plaintiffs, the court could not draw a line between those that transacted directly with the defendants and those that did not (because traders of futures and options contracts transact through a clearinghouse, the counterparties are not readily identifiable). To overcome this problem, the SDNY has adopted a test that depends on the extent of defendants' control of the market for the product traded on the exchange: if a defendant dominates a market, that acts as a proxy for

14 *Sonterra v. Barclays*, 366 F. Supp. 3d at 533 (quoting *Sullivan*, 2017 WL 685570, at *17).

15 449 F. Supp. 3d 290 (S.D.N.Y. 2020).

16 *Id.* at 305.

17 *Id.* at 309.

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the likelihood that a plaintiff would have transacted with the defendant.[18] Allegations that the defendants controlled at most 45 percent of the relevant market were insufficient to amount to domination, and the exchange plaintiffs were also found not to be efficient enforcers.

Motion picture industry consent decrees terminated

In *United States v Paramount Pictures, Inc*,[19] the court granted a motion to terminate the long-standing consent decrees in the motion picture industry known as the 'Paramount decrees.' The decrees arose from a landmark 1948 case forcing the then seven major motion picture studios to sell their theater chains. Since then, the Paramount decrees have governed the way that studios do business with exhibitors, restricting 'block booking,' or bundling multiple movies into one theater license and setting limits on other practices, such as circuit dealing and setting minimum pricing, and the practice of giving exclusive film licenses for certain geographic areas.

As part of a review of nearly 1,300 legacy antitrust judgments, the Antitrust Division opened a review of the Paramount decrees to determine 'whether they still serve the American public and are still effective in protecting competition in the motion picture industry.'[20] After a period for public comment, the Antitrust Division filed a motion in the SDNY to terminate the decrees.

The court considered whether termination of the Paramount decrees was in the public interest. The court agreed with the Antitrust Division's argument that the decrees were no longer necessary because they successfully ended the previous collusion and altered the market conditions that previously facilitated such collusion. During the 70 years the decrees were effective, there were considerable changes in the motion picture industry, such as the use of multi-screen theaters, growth of alternative movie viewing options, such as internet streaming services, and development of competitors that are not subject to these decrees. Given the changing marketplace, the court found it unlikely that the defendants would collude again to limit their film distribution to a select group of theaters in the absence of the decrees.

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18 *Platinum*, 449 F. Supp. 3d at 312.

19 No. 19 MISC. 544 (AT), 2020 WL 4573069 (S.D.N.Y. Aug. 7, 2020).

20 Dep't of Justice, Press Release, 'Department of Justice Opens Review of Paramount Consent Decrees' (Aug. 2, 2018), https://www.justice.gov/opa/pr/department-justice-opens-review-paramount-consent-decrees.

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The court also considered changes in antitrust law during the intervening 70 years, in particular the standards applying to the evaluation of vertical relationships, pre-merger notification laws, and the legal framework used to evaluate film licensing practices. Although much of the conduct targeted by the Paramount decrees was considered per se unlawful in 1948, today courts would analyze such restraints under the rule of reason. Further, maintaining a consent decree in perpetuity is not consistent with Department of Justice policy limiting consent judgments to 10 years.

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Lisl Dunlop has more than 25 years of experience in antitrust and competition issues, including counseling, litigation and transactions. She has significant experience of advising leading US and multinational companies in a broad range of industries, including the media, technology and healthcare sectors. Lisl guides clients through the antitrust-related aspects of mergers and acquisitions, joint ventures and other combinations, and counsels on a variety of antitrust issues. She also represents clients in antitrust agency investigations, and has represented major corporations in complex antitrust litigations.

Lisl began her career in Australia, and in addition to the United States, has also practiced in the United Kingdom. Her wide-ranging international experience includes appearing before US federal and state antitrust enforcement agencies, the European Commission, and UK and Australian antitrust authorities. Lisl's experience in competition matters in a broad range of jurisdictions brings added value to clients that conduct business internationally and interact with different legal systems and regulators.

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Providing a detailed dive into key antitrust decisions from across the US over the past year, separated by court or circuit, GCR's *US Courts Annual Review* delves into the regional differences in antitrust litigation in the US, as well as the national trends that bring them together.

Edited by Eric P Enson and Julia E McEvoy of Jones Day, and drawing on the collective wisdom of some of the leading antitrust litigators in the country, this Review gives practitioners an essential tool to understand both the nuances and the core trends in antitrust litigation in the US.

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