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Antitrust Scrutiny of Technology Companies Continues to Expand

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Governmental and private antitrust actions against technology companies expanded in 2018 and 2019, particularly relative to electronics and pharmaceutical companies. This post provides an overview of several important decisions relative to those sectors. Consistent with the purpose of the antitrust laws, the decisions below have a common theme of protecting competition, and thus ultimately consumers, from abusive marketplace conduct by those with monopoly power.

Electronics: Monopolistic Retailers and Abusive Licensing Practices

1. *Apple Inc. v. Pepper,* 139 S. Ct. 1514 (2019).This case was a Sherman Act § 2/Clayton Act § 4 private action brought against Apple because of its App Store policies, and the decision concerned Apple's Rule 12(b)(6) dismissal motion.The App Store is the only place where iPhone owners may lawfully buy apps.The plaintiffs were four iPhone owners who alleged that Apple unlawfully monopolized the aftermarket for iPhone apps and charged too much for apps. Apple's motion argued that the iPhone owners could not sue under *Illinois Brick Co. v. Illinois*, 431 U. S. 720 (1977) because they were not direct purchasers from Apple because Apple did not set the app prices (*Illinois Brick* authorizes suits by direct purchasers, but bars suit by indirect purchasers).In its May 13, 2019

decision, the Supreme Court ruled that plaintiffs had purchased the apps directly from Apple and therefore *were* direct purchasers under *Illinois Brick*.

The court noted that *Illinois Brick* did not wipe out consumer antitrust suits against monopolistic retailers from whom the consumers purchased goods or services at higher-than-competitive prices. This decision has a direct impact on Amazon's app store, which restricts access to many Android apps, including those made by Google such as the Chrome app.

2. *FTC v. Qualcomm Inc.*, No. 17-220, 2019 U.S. Dist. LEXIS 86219 (N.D. Cal. May 21, 2019).In this action, the FTC sued Qualcomm under Sherman Act §§ 1 and 2/FTC Act § 5 over its licensing practices. The FTC claimed that Qualcomm harmed competition in two markets for modem chips (the "radios" that connect cellphones to cell towers), through a set of interrelated Qualcomm practices.The May 21, 2019 decision followed the FTC's motion for summary judgment on the question of whether Qualcomm's commitments to two standard setting organizations required Qualcomm to license to other modem chip suppliers on fair, reasonable, and nondiscriminatory terms Qualcomm's patents that are essential to practicing the standards. The court ruled that Qualcomm's "no license, no chips" policy violated the federal antitrust laws.The decision describes Qualcomm's practice of offering steep licensing discounts if phone producers bought most or all of their chips from Qualcomm, while threating to withhold chips if its licensing demands were not met.Qualcomm also charged license fees far in excess of the value of its intellectual property.Qualcomm also had exclusive supply arrangements with the smartphone makers that locked out rival chip companies. Qualcomm also refused to license its standards-essential patents to rival chip companies.

   Qualcomm's licensing practices were not helped by its trial presentation. The court also rejected much of the testimony by Qualcomm execs, deeming their contemporaneous (and contradictory) emails more persuasive than their "practiced narratives" delivered on direct.

   The injunction imposed by the court requires Qualcomm to (a) stop conditioning the supply of modem chips on a customer's patent license status and negotiate (or re-negotiate) license terms with customers under conditions free from the threat of lack of access to or discriminatory provision of chip supply; (b) make exhaustive standards-essential patent ("SEP") licenses available to modem-chip suppliers on fair, reasonable, and non-discriminatory ("FRAND") terms; and (c) stop express or de facto exclusive dealing arrangements for the supply of modem chips. Qualcomm was also ordered to submit to a seven-year compliance and monitoring period with the FTC.

   This decision is the latest setback for Qualcomm for its licensing practices. Qualcomm was fined $1.1B by the European Commission in January 2018 for its rebate-focused exclusive supply agreement relative to modem chips. Similar to the FTC action, the EC case involved Qualcomm agreeing to make payments to Apple for the privilege of being Apple's exclusive supplier of chipsets in its iPhone and iPad devices. These decisions underscore the need for a close antitrust review of patent licenses where SEP patents are involved.

Pharmaceuticals: Sham ANDA Litigation by Branded Pharma Companies and Price-Fixing by Generic Manufacturers

1. *Takeda Pharm. Co. v. Zydus Pharms. (USA) Inc.*, 358 F. Supp. 3d 389 (D.N.J. 2018).This decision concerned antirust liability for ANDA litigation and the "sham" exception to the *Noerr-Pennington* doctrine, which immunizes non-sham litigation from antitrust liability.The drugs at issue were Takeda's ulcer drug Prevacid SoluTab and Zydus' generic version of it.Zydus filed an ANDA with the FDA seeking regulatory approval for its generic.Takeda then sued Zydus under the Hatch-Waxman Act and lost.Zydus then filed an amended ANDA and Takeda sued again.This time, Zydus filed antitrust counterclaims alleging that the new suit was anti-competitive sham litigation and an attempt to monopolize under Sherman § 2.After dismissing its claims, Takeda moved to dismiss the antitrust claims, arguing that its case was per se reasonable because it was filed in response to a Paragraph IV HWA Certification by Zydus (which is treated as technical act of infringement).

   The FTC filed an amicus brief arguing that HWA claims enjoy no special immunity under *Noerr-Pennington*from being challenged as shams. This filing was part of the FTC's efforts to challenge to patent suits filed by pharma companies for the purpose of delaying the introduction of generic drugs. The court denied the motion to dismiss, ruling that "the court may infer that Takeda's decision to file this suit is objectively and subjectively baseless, as well as motivated by anticompetitive purposes." The court also ruled that antitrust injury was adequately pled by the assertions that but for the patent suit, the FDA would have promptly approved the amended ANDA. The importance of this ruling is that the Paragraph IV Certification will provide no *Noerr-Pennington* shield to abusive ANDA suits.

2. *In re Generic Pharms. Pricing Antitrust Litig.*, 338 F. Supp. 3d 404 (E.D. Pa. 2018).Big Pharma certainly has no monopoly on anti-competitive conduct, as this MDL antitrust action was directed at numerous generic drug manufacturers who conspired to fix drug prices in violation of Sherman § 1.The decision concerned the defendants' motion to dismiss based on the supposed bare allegations of conspiracy.Denying the motion, the court ruled that the plaintiffs' allegations were not mere "labels and conclusions," or "bare assertion[s] of conspiracy."The court found the following allegations supported the claim: (a) circumstantial conduct of a plausible conspiracy, including parallel pricing conduct; (b) the "plus factors" of motive and actions against self-interest, i.e., that raising prices would have been irrational in a competitive market; (c) facts that implied a traditional conspiracy such as opportunities to conspire; and (d) DOJ investigations and the resulting guilty pleas.This decision shows that the pharmaceutical industry will continue to be under increased scrutiny for antitrust claims and particularly for pricing issues, as well as the obvious need for a well-crafted complaint.

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