Morgan Lewis

REPORT

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ANTITRUST & COMPETITION

YEAR IN REVIEW AND TRENDS FOR 2025

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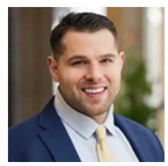

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The past year marked the culmination of the Biden antitrust era. Under assertive leadership, the Federal Trade Commission (FTC) and the United States Department of Justice Antitrust Division (DOJ) adopted a more aggressive stance toward perceived anticompetitive practices. Agency leaders pursued increasingly complex and less traditional theories of harm in both merger and conduct cases. On the transactional front, agency scrutiny expanded beyond conventional horizontal mergers to encompass nonhorizontal and nascent competition theories of harm as well as a new emphasis on the effect of mergers on labor markets. On the conduct front, enforcers grappled with dynamic markets alleging harms to innovation as opposed to more traditional price effects.

In response to this environment, private litigants have adopted more assertive tactics and likewise tested the boundaries of antitrust law. They brought claims involving emerging issues such as algorithmic pricing and data sharing, frequently building on the theories advanced by regulators.

Looking ahead to 2025, the Trump-Vance administration may scale back some of the Biden-Harris administration's more aggressive enforcement strategies. Yet President-elect Trump's recent antitrust appointments also signal that scrutiny is likely to continue. In contrast to the Biden administration, however, businesses may find greater deal close certainty and a renewed willingness to resolve issues through negotiated remedies. Overall, companies can expect a climate where critical decisions on mergers, conduct, and compliance will be shaped by the new administration's enforcement priorities and potentially evolving standards, but should also keep in mind the lessons learned from court decisions in 2024.

This introduction serves as the foundation for a three-part report where we will explore key developments and emerging trends in antitrust and competition litigation. We will provide insight into:

Antitrust Merger Litigation in 2024: A review of the year's most significant merger challenges, including the rise of nonhorizontal theories of harm and the focus on labor market considerations.

Antitrust Conduct Litigation in 2024: An overview of pivotal conduct cases across diverse industries and the role that emerging technologies, product design, and changing regulatory perspectives play in shaping enforcement.

Antitrust in the Year Ahead: A forward-looking analysis of the trends and shifts expected to shape the future of antitrust enforcement under the Trump administration in 2025, focusing on potential legal developments and continued scrutiny in key sectors.

This report is designed to provide an understanding of the critical antitrust outcomes from 2024 and prepare industry for challenges and opportunities in 2025.

Join us for an upcoming webinar covering some of the topics summarized in this report >>

ANTITRUST MERGER LITIGATION

Despite the Biden administration's heightened rhetoric and aggressive stance on merger enforcement, the reality remains that the vast majority of transactions proceed without significant regulatory scrutiny. While the focus of this year-in-review is on cases where the agencies filed complaints, it is important to recognize that these cases represent a small fraction of overall merger activity. Most transactions, including some very large deals, closed without a Second Request or significant delays during the Hart-Scott-Rodino (HSR) review process.

Merger activity continued in 2024 even in sectors under intense scrutiny. High-profile transactions like Cisco's $28 billion acquisition of Splunk and Roark Capital's $9.6 billion purchase of Subway closed without litigation. These examples underscore that while certain transactions draw regulatory challenges, the significant majority move forward smoothly, reflecting a selective approach to enforcement.

The section below reviews the litigation that did arise, acknowledging the inherent selection bias: it focuses only on the subset of deals where enforcement agencies chose to intervene. Understanding these cases provides valuable insights into the government's enforcement priorities and evolving legal standards, even as the broader backdrop of merger activity continues largely unimpeded.

The agencies released a new set of merger guidelines in late 2023 and tested these principles throughout 2024. The agencies' guidelines provide a framework for analyzing the competitive effects of mergers and acquisitions. While they do not carry the force of law, courts often consider the guidelines as persuasive authority because they reflect the agencies' interpretation of the antitrust statutes, economic principles, and prior caselaw. In particular, they help articulate the methods and evidence that the agencies might use to assess market definition, concentration, competitive effects, and procompetitive justifications for a transaction.

The 2023 Merger Guidelines formalize the interventionist approach to merger enforcement of the Biden administration. The new guidelines differed from past guidelines and practice in numerous ways, but two stand out:

- The new guidelines lowered the market concentration thresholds where a transaction is presumptively anticompetitive.
- Several of the guidelines support nonhorizontal theories of harm—where the competitive concern does not hinge on the loss of a direct competitor—incorporating the concerns raised in prior nonhorizontal guidelines while also significantly expanding on such concerns.

The 2023 guidelines may see some revisions under the incoming Trump administration, however, merging parties should expect them to largely stay intact unless the new administration signals otherwise. And as we explain in our last segment on the year ahead, while we expect higher deal close certainty across the board, antitrust scrutiny is expected to persist in 2025.

Nonhorizontal Theories of Harm

Vertical Foreclosure

Vertical mergers involve firms at different levels in a supply chain, such as a manufacturer and a distributor. When properly structured, these transactions can yield significant procompetitive benefits. For example, vertical integration may streamline operations by removing unnecessary intermediaries, improve quality control through closer coordination between production stages, and enable faster innovation by aligning upstream and downstream incentives.

Unlike horizontal mergers, vertical mergers do not inherently reduce the number of competitors at a single market level. Instead, the primary concern is whether the combined firm can disadvantage rivals by restricting access to key inputs or distribution channels. But proving that such "foreclosure" will occur is often challenging. Market conditions, alternative sources of supply or distribution, and contractual safeguards can all mitigate the risk of anticompetitive foreclosure. Firms frequently point out that integrated operations can lead to efficiencies that ultimately benefit consumers, such as cost savings, improved logistics, and accelerated product improvements.

In July 2024, the FTC challenged a vertical transaction in *FTC v. Tempur Sealy*, alleging that Tempur Sealy's $4 billion acquisition of Mattress Firm would harm competition by allowing Tempur Sealy, a leading mattress manufacturer, to control the largest mattress retailer in the United States. The agency argued that the merger could limit competitors from accessing essential retail space, potentially raising their costs and reducing consumer choice.

Tempur Sealy countered that the transaction would generate significant efficiencies, including streamlined operations, better inventory management, expanded product offerings, and reduced delivery times. The company asserted that these benefits will foster innovation, lower costs, and enhance consumer access to high-quality mattresses, ultimately benefiting consumers and competition. The preliminary injunction hearing kicked off in a Texas federal court in November 2024 with a decision expected in 2025.

KEY TAKEAWAYS

- **Continued Scrutiny of Vertical Mergers:** Antitrust authorities are showing a renewed interest in the potential anticompetitive effects of vertical mergers, particularly in industries where control over inputs or distribution channels is critical. This trend arguably began during the first Trump administration and accelerated under the Biden administration. We expect it to continue.
- **Conduct Vertical Analysis Early:** Parties to a vertical transaction should conduct a thorough antitrust analysis, considering potential foreclosure effects, access to sensitive information, and the potential for raising rivals' costs.
- **Proactive Mitigation Strategies:** To mitigate antitrust risks, merging parties can propose remedies such as behavioral commitments to ensure continued access for rivals, firewalls to prevent the flow of sensitive information, or even structural remedies in some cases.
- **Documentation and Advocacy:** Establishing in ordinary-course documents and advocacy the parties' intention and incentive to maintain third-party access to inputs and customers at the same levels as preclosing can temper risk.
- **Preparedness to Litigate:** Vertical cases present a unique set of challenges for the government in litigation, such as the absence of the traditional market share presumption framework present in horizontal cases. Parties should be prepared to litigate if necessary to get to closing.

Nascent Competitors

Nascent competitors are firms with limited current market presence but significant potential to become disruptive forces in the future. In many cases, acquisitions of such early-stage innovators can create substantial efficiencies: the acquiring party's capital, technical expertise, and well-established distribution channels can help accelerate the introduction of groundbreaking products or services. By combining a nascent firm's fresh ideas with the scale and operational capacity of a more established company, these transactions often enable advancements neither entity could achieve independently.

However, regulators have increasingly scrutinized acquisitions of nascent competitors. There are concerns, particularly for markets already arguably characterized by high concentration or monopoly, that such deals could eliminate future competition, reduce the impetus to innovate, and preserve existing market power. Firms counter that these concerns frequently rest on speculative assumptions about what the nascent competitor would achieve if left to grow on its own. From the defense's perspective, predicting how a fledgling technology, treatment, or platform might evolve in a complex, rapidly changing marketplace is inherently uncertain. Moreover, many would say that the very resources unlocked by the transaction are what allow innovative products to come to fruition more quickly and efficiently, benefiting consumers sooner rather than later if at all.

In *FTC v. Sanofi*, the FTC challenged Sanofi's proposed exclusive license of a drug under development by Maze Therapeutics based on nascent competitor concerns. Although the complaint was filed at the end of 2023 as opposed to 2024, the case alleges a theory of harm that may remain an active enforcement priority, making it a valuable illustration of the agencies' approach to challenging mergers under this framework. The FTC alleged Sanofi held a strong position in treatments for Pompe disease, a rare genetic disorder, while Maze had just completed Phase 1 clinical trials for an innovative oral treatment for Pompe disease, which could potentially disrupt Sanofi's market position according to the FTC.

The FTC argued that the deal would harm innovation and preserve Sanofi's alleged market power by eliminating a nascent rival. This case is notable because the FTC typically challenges pharmaceutical transactions involving drugs that are already on the market or at later stages of development, where there is greater certainty about the drug's potential to reach commercialization. *FTC v. Sanofi* marked the first instance where the agency sought to block a transaction involving a pharmaceutical asset without foreign availability that had only completed Phase 1 trials, highlighting the agency's increased scrutiny of early-stage acquisitions. In response to the FTC's complaint, Sanofi decided to terminate the proposed licensing agreement.

While regulators are placing greater emphasis on the possible long-term effects of acquiring nascent competitors, there is no one-size-fits-all answer. Each deal must be carefully analyzed on its own merits, weighing potential concerns about future market structures against the tangible, near-term efficiencies and innovations that such transactions frequently deliver. For merging parties, this environment requires a thorough antitrust strategy and thoughtful demonstration of how partnerships with less-established innovators can ultimately serve consumers by accelerating the pace of change and delivering more—and better—products.

KEY TAKEAWAYS

- **Conduct Forward-Looking Analysis:** Firms must assess transactions not only based on today's market but also on how the market could evolve, including the potential growth and impact of nascent competitors.

- **Anticipate Regulatory Scrutiny of Innovation Markets:** Antitrust authorities are placing greater emphasis on the effects of mergers on innovation, particularly in industries where innovation is a key competitive driver such as technology and life sciences.

- **Assess Pipeline Products:** Firms should conduct thorough due diligence to understand the competitive significance of not only current products but also pipeline products, R&D projects, and potential to disrupt existing markets.

- **Articulate Innovation Benefits:** Merging parties should be prepared to demonstrate procompetitive justifications for the transaction, such as efficiencies or the ability to bring innovative products to market faster.
- **Consider Remedies Early:** In some cases, remedies such as licensing, divestitures, or commitments to continue developing certain products may address antitrust concerns.

Conglomerate Effects

Conglomerate mergers bring together firms that operate in distinct markets, neither as direct competitors nor within the same supply chain. They can be strictly unrelated combinations (pure conglomerate mergers) or involve firms with some product or market complementarities (mixed conglomerate mergers). From a strategic and operational standpoint, these transactions may enable businesses to diversify their offerings, improve resiliency, and innovate by drawing on different pools of expertise and resources. They can also provide consumers with a wider range of products, enhanced service quality, and potentially lower prices as the integrated entity leverages scale, cross-functional knowledge, and improved efficiency.

Still, regulators have increasingly raised concerns that conglomerate mergers—particularly in the digital and life science sectors—might further entrench a dominant firm, reduce the intensity of competition, or lead to anticompetitive tying and bundling strategies (the theory may also be referred to as portfolio effects or an ecosystem theory of harm).

Yet translating these theories into concrete evidence that a merger will harm competition remains challenging. Much of the feared harm is prospective and depends on the assumption that a merged firm can and will use its newly combined resources to hinder competition. Companies and their counsel often emphasize that robust competition, evolving technologies, and multiple distribution channels ensure that no single firm can easily manipulate the market to the detriment of consumers or rivals.

In late 2023, the FTC settled its challenge to the *Amgen/Horizon Therapeutics plc* conglomerate merger under an entrenchment theory of harm. Although the complaint was filed at the end of 2023 as opposed to 2024, the case alleges a theory of harm that may remain an active enforcement priority, making it a valuable illustration of the agencies' approach to challenging mergers under this framework. The FTC alleged that Horizon was a dominant supplier of two rare disease therapies and that, post-transaction, Amgen could bundle its "blockbuster" therapies for other, unrelated conditions with Horizon's allegedly dominant therapies acquired in the deal to secure preferential treatment on payor formularies, thereby insulating the combined entity from future competition. While the parties disputed the FTC's "mistaken legal theory," arguing that market realities would prevent the alleged conduct from being feasible, they ultimately settled with a consent decree under which Amgen agreed not to bundle its products with the Horizon products at issue.

KEY TAKEAWAYS

- **Defending Portfolio Expansions as Procompetitive:** Buyers with a history of portfolio rebate strategies must be prepared to substantiate the procompetitive impact of an acquisition, particularly concerning portfolio expansions.
- **Justifying Portfolio Rebate Practices:** Buyers should be ready to demonstrate that any portfolio rebate practices are output-enhancing, emphasizing consumer benefits such as reduced total costs, which may ultimately lower prices for consumers.
- **Evaluating Digital Market Leverage Risks:** In digital markets, assess whether the merger enables the firm to leverage its position in one area to strengthen its position in a related market

by utilizing user data, technological infrastructure, or network effects in a manner that would harm rather than enhance competition.

Market Definition and Concentration Levels

Narrow Market Definitions

Antitrust enforcement traditionally relies on market definition and accompanying concentration levels to assess competitive harm. Often, merging parties attempt to define the relevant antitrust market broadly. In contrast, the government often seeks to define the narrowest market possible to establish high concentration levels that may result in a presumption of competitive harm. From the defense perspective, overly narrow market definitions may risk oversimplifying market realities and neglecting legitimate evidence of competition from other channels, brands, and technologies.

In *FTC v. IQVIA*, the agency defined a targeted trading partner market as "programmatic advertising targeted specifically at U.S.-based healthcare professionals (HCPs) on a one-to-one basis," focusing on automated digital platforms that deliver personalized ads directly to individual HCPs. Conversely, the merging parties advocated for a broader market definition encompassing all forms of digital advertising aimed at HCPs, including social media platforms, generalist websites (e.g., cnn.com, espn.com), and generalist advertising buying platforms known as demand-side platforms (DSPs).

Ultimately, the court sided with the FTC's narrower market definition, granting a preliminary injunction to block the merger, concluding that the acquisition would likely substantially impair competition in the defined market. By adopting the FTC's narrower framing, the court arguably set aside a broader competitive landscape that includes numerous avenues for reaching the same audience.

Similarly, in *FTC v. Tapestry*, the FTC defined a relevant antitrust market for "accessible luxury" handbags, distinguishing brands such as Coach, Kate Spade, and Michael Kors from both mass-market and true luxury handbags. From the defense's standpoint, such a market definition may overlook important cross-shopping patterns and evolving consumer preferences. While the merging parties maintained that consumers compare and consider a wide array of brands at various price points, the court accepted the narrower view. The parties abandoned the transaction shortly after the court's ruling.

These cases highlight a pressing debate in modern antitrust: how narrow should a market definition be before it ceases to reflect the market's practical competitive realities? Where sufficient data is available, courts and agencies often turn to implementations of an economic tool, known as the hypothetical monopolist test, to help gauge this question together with a more qualitative assessment of documents and testimony about commercial realities.

Effective antitrust counsel, relying on an integrated assessment of economic data, evidence of real-world business dynamics and industry practices, and ordinary-course documents, can help accurately inform the antitrust enforcement agencies during the merger investigation stage about the practical competitive constraints merging parties face, potentially avoiding costly litigation and deal risk while also setting the stage for a more robust litigation defense where appropriate.

KEY TAKEAWAYS

- **Government's Approach to Narrow Market Definitions:** The FTC and DOJ will often define relevant antitrust markets narrowly, focusing on specific trading partner segments or other segments of a broader overall market. This approach requires merging parties to carefully assess potential market delineations early, considering narrower and customer-specific perspectives, especially any segment variations described in ordinary-course documents and research.

- **Court's Acceptance of *Brown Shoe* Factors:** Courts have accepted qualitative factors, as outlined in *Brown Shoe Co. v. United States*, to define antitrust markets even in the absence of extensive economic evidence. This underscores the importance of ordinary-course documents, such as those reflecting industry-recognized market segments and distinct customer bases, when assessing antitrust market definition.

- **Reliance on Internal Assessments and Skepticism Toward Conflicting Economic Evidence:** Courts have at times shown distrust toward economic evidence analyzed or developed solely in the course of litigation and testimony that conflicts with ordinary-course documents. Internal documents reflecting how companies view competition and market dynamics can significantly influence judicial outcomes.

- **Aligning Market Definition with Likely Evidence:** Companies should anticipate rigorous scrutiny of proposed market definitions and be prepared to address both qualitative and quantitative factors. Early involvement of antitrust counsel in any transaction process can help ensure a realistic assessment of the antitrust market definitions likely to be under consideration and ensure a sound and consistent approach to engagement with the antitrust agencies.

Reduced Concentration Thresholds

The 2023 Merger Guidelines introduced reduced market concentration thresholds for a presumption of anticompetitive harm. The 2010 Horizontal Merger Guidelines considered transactions resulting in markets with a post-merger Herfindahl-Hirschman Index (HHI) above 2,500 and an increase in HHI of more than 200 points as presumptively unlawful.

The new guidelines, in contrast, reintroduce a stricter structural presumption based on market share, deeming mergers presumptively unlawful if the combined firm holds a market share exceeding 30% and the HHI increases by more than 100 points. The government contends these thresholds align with prior precedent from *United States v. Philadelphia National Bank*, a 1963 US Supreme Court case. Additionally, the 2023 guidelines reduce the HHI thresholds that trigger a presumption of anticompetitive effects, stating that a post-merger HHI above 1,800 (as opposed to 2,500), with an increase of more than 100 points (as opposed to 200 points), now leads to a presumption of harm. These changes signal a stricter stance on market concentration.

In *FTC v. IQVIA*, for example, the defense maintained that the 30% threshold discussed in *Philadelphia National Bank* was not relevant given the proliferation of new entry, shifting consumer preferences, and the complex interplay of digital marketing channels. The merging parties contended that more nuanced, fact-specific economic analyses—considering substitution possibilities, emerging technologies, and global competition—are now the industry standard. The court sided with the FTC, however, accepting the simpler structural benchmarks (as well as an HHI analysis that the FTC also presented) and granting a preliminary injunction to block the merger.

For businesses, this outcome underscores the current environment of heightened scrutiny of mergers that arguably could cross the 30% share or 1,800 HHI thresholds. It reinforces the importance of thorough and effective pre-transaction planning and the need to marshal comprehensive evidence, in appropriate cases, that will convince the agencies during their investigations (or courts in litigation) that structural presumptions do not necessarily capture the economic realities of competition.

KEY TAKEAWAYS

- **Stricter Market Concentration Thresholds:** The 2023 Merger Guidelines have lowered the HHI thresholds, now considering markets with a post-merger HHI above 1,800 and an increase of more than 100 points to be presumptively anticompetitive. This is a shift from the 2010 guidelines, which set the thresholds at 2,500 and 200 points, respectively.

- **Revival of the 30% Market Share Presumption:** The new guidelines reintroduce a structural presumption based on market share, deeming mergers presumptively unlawful if the combined firm holds a market share exceeding 30% and the HHI increases by more than 100 points.
- **Judicial Endorsement of Revised Guidelines:** Recent court decisions, such as *FTC v. IQVIA* and *FTC v. Tapestry*, upheld the concentration standards reflected in the 2023 guidelines, supporting the applicability of the 30% market share threshold and revised HHI benchmarks. These outcomes indicate some judicial support for the presumptions, suggesting they may persist in future merger evaluations.
- **Increased Scrutiny of Horizontal Mergers:** With reduced thresholds, mergers that were previously considered likely acceptable under the 2010 guidelines may now face heightened scrutiny and potential challenges. Firms should anticipate a more rigorous evaluation process for proposed mergers and consider introducing appropriate advocacy based on objective economic data and documentary evidence early in the process to ensure the agency obtains an informed and realistic understanding of the commercial realities.

Attempts to Deemphasize Market Definition

Antitrust agencies have increasingly sought to establish competitive harm in mergers by focusing on direct competitive effects, minimizing reliance on traditional market definitions as outlined in Guideline 2 of the 2023 Merger Guidelines. This approach aims to show harm through the loss of head-to-head competition between direct rivals rather than through reasoning based on defining markets and measuring their concentration levels.

In *FTC v. Tapestry*, the FTC challenged Tapestry's acquisition of Capri Holdings, arguing that it would reduce direct competition between their primary handbag brands, namely Coach and Michael Kors, in the accessible luxury segment. Although the FTC suggested it could prove harm through loss of head-to-head competition alone, it also defined a relevant antitrust product market of "accessible luxury handbags" based on factors such as price level, craftsmanship, and brand appeal. The court ultimately reinforced the necessity of a relevant product market definition, stating that "a plaintiff must [] define a relevant market" to establish its prima facie case under Section 7 of the Clayton Act.

In contrast, the court in *U.S. v. JetBlue Airways*, the DOJ's successful challenge of JetBlue's proposed acquisition of Spirit Airlines, considered a head-to-head competition theory separately from a market concentration theory, concluding that each was sufficient for the government to have made its case and stating that "[t]he increased concentration that would occur in relevant markets if the proposed acquisition were to succeed, as well as the other anticompetitive effects demonstrated by the Government—each independently sufficient—establishes a prima facie case of harm under Section 7."

While agencies may seek to move beyond traditional market delineations, generally speaking courts have shown reluctance to accept purely effects-based arguments without the guiding structure that market definitions provide. This outcome spotlights the importance of grounding merger advocacy and defense strategy primarily in the traditional market analysis framework while also incorporating into the transaction planning process the types of head-to-head economic and competitive analyses that agencies are increasingly performing during their review and litigation processes.

KEY TAKEAWAYS

- **Anticipate Challenges Deemphasizing Market Definition:** Firms should be aware that the agencies may pursue merger challenges based on a loss of head-to-head competition alone, potentially minimizing the role of traditional market definition in their arguments.
- **Judicial Caution on Minimizing Market Definition:** While agencies may aim to shift focus away from strict market delineation, recent cases demonstrate courts' reluctance to find competitive harm without a well-defined market.
- **Develop Dual-Track Litigation Strategy:** Given the evolving regulatory approach, firms should prepare robust defenses that address both traditional market definition and direct competitive effects arguments, ensuring flexibility in court where either argument may take precedence.

Labor Market Effects

In 2024, labor market considerations took on a more prominent role in antitrust enforcement, reflecting Guideline 10 of the 2023 Merger Guidelines. In these analyses, regulators examine whether mergers might adversely affect wages, benefits, and working conditions.

For example, in *FTC v. Kroger Company*, the FTC took a novel approach by explicitly alleging harm in a defined labor market to challenge Kroger's proposed acquisition of Albertsons. The agency argued that the transaction could harm unionized grocery workers, potentially reducing wages, diminishing benefits, or eroding job quality for hundreds of thousands of employees. From the defense's vantage point, however, such a theory faces substantial hurdles. Merging parties might counter that efficiency gains, increased operational stability, and the necessity of retaining skilled labor in a competitive marketplace naturally constrain any incentive to degrade employment conditions.

In its decision, the court accepted the government's labor market definition, recognizing unionized grocery workers as a plausible market impacted by the proposed merger. The court also acknowledged that harm to this labor market was conceivable. But it ultimately found insufficient evidence to enjoin the transaction based on labor market effects, citing a lack of developed standards and methodologies for courts to follow when assessing alleged labor market harms. The decision underscores the challenges enforcers face in translating theoretical labor harms into actionable antitrust violations under existing legal frameworks.

Similarly, in *FTC v. Tapestry*, the FTC briefly referenced labor market concerns when challenging Tapestry's proposed acquisition of Capri. Although the agency alluded to internal documents suggesting that the companies tracked each other's labor practices, it stopped short of fully articulating a standalone labor theory of harm as it did in *Kroger*. The court ultimately did not address these questions directly, reflecting the parenthetical nature of the FTC's labor-focused antitrust arguments in this case and perhaps the difficulty in translating such arguments into a fully developed legal theory.

Together, these cases highlight a shifting enforcement landscape in which labor market effects factor more prominently into merger reviews. This trend raises critical questions from a defense perspective:

- How precisely can courts define labor markets?
- On what evidence and metrics can agencies rely to demonstrate harm to workers rather than just theoretical risk?

As these debates continue to unfold, merging parties retain opportunities to argue that efficiencies, competitive pressures, and the enduring need to attract and retain talent can guard against the outcomes regulators fear.

KEY TAKEAWAYS

- **Prepare for Labor Impact Analysis:** Merging parties should assess potential labor impacts including wage, benefit, and working condition effects along with product-side considerations.
- **Labor Market Definition Is Advancing But Effects Remain Uncertain:** Courts may be increasingly open to defining labor markets in merger cases, but proving harm remains a high hurdle for the agencies.
- **Judicial Hesitance Without Economic and Legal Guidance:** Courts may be reluctant to move forward on labor market theories in the absence of established standards and methodologies for assessing harm.

Coordinated Effects

In 2024, the FTC took steps to address so-called "coordinated effects" in merger enforcement as described in Guideline 3 of the 2023 Merger Guidelines. Coordinated effects occur when competitors collectively reduce their competitive efforts, for example by raising prices or withholding product innovations, thereby harming customers.

Guideline 3 states that the following primary factors suggest a higher likelihood of coordinated effects: (1) highly concentrated market, (2) prior actual or attempted attempts to coordinate, and (3) elimination of a maverick. Additionally, the guidelines also point to several secondary factors that indicate an increased risk of coordination: (1) market concentration, (2) market observability, (3) competitive responses, (4) aligned incentives, (5) profitability or other advantages of coordination for rivals, and (6) rebuttal based on structural barriers to coordination unique to the industry. In contrast, factors such as significant buyer power, lack of observability, disruptive new entrants, or rapidly shifting technologies tend to undermine coordination by making it more difficult for firms to maintain a mutual understanding or punish deviations.

While the FTC and DOJ did not litigate any traditional coordinated effects merger challenges in the past year, in the *Exxon Mobil/Pioneer* transaction the FTC allowed the merger to proceed while adopting an unusual consent agreement to address what it perceived as elevated risks of coordinated conduct stemming from specific individual executives. For instance, in Exxon Mobil's acquisition of Pioneer, the FTC imposed conditions preventing Pioneer's former CEO from joining Exxon's board post-acquisition. From the defense perspective, these remedies raise important questions about the scope of regulatory authority: by focusing on individual executives rather than firmwide strategies, the agency may be stretching the concept of coordination beyond its traditional boundaries.

FTC commissioners Andrew Ferguson and Melissa Holyoak both voiced concerns over these matters, arguing that relying on consent decrees—which avoid the rigors of judicial testing—may lead to overenforcement. Without a full airing of the agency's theories in court, merging parties are deprived of a neutral forum to challenge the evidentiary basis for the government's concerns.

KEY TAKEAWAYS

- **Prepare for Coordinated Effects Scrutiny:** Firms should conduct a thorough review of potential coordinated effects risks under Guideline 3, especially in industries with a history of antitrust scrutiny.
- **Prepare for Possible Litigation:** While the agencies have avoided court scrutiny of claims premised on the roles of individual executives thus far by entering into consent agreements, defense counsel should develop strategies to defend coordinated-effects theories based on individual executive conduct, if necessary, as judicial validation of these approaches remains crucial for setting binding precedents.
- **Monitor Executive Communications:** While it is unclear whether the agencies will continue to scrutinize coordination risk based on individual executive conduct separate from firmwide incentives, firms should conduct a detailed review of executive-level materials (board minutes, email exchanges, strategic presentations) to detect any potential theories the agencies could potentially explore that may delay otherwise anticipated deal closures.

Out-of-Market Effects

Out-of-market effects refer to benefits or harms that occur outside the specifically defined relevant antitrust market in a merger case. Merging parties often highlight these broader effects to argue that a transaction will enhance competition or deliver consumer benefits across multiple market segments. However, in 2024, courts appeared to reaffirm limitations on out-of-market considerations in merger evaluations, emphasizing that competitive impacts under the Clayton Act should be focused within the relevant market.

In *U.S. v. JetBlue Airways*, JetBlue argued that its acquisition of Spirit would increase "competitive pressure" on the Big Four airlines, potentially lowering prices on a national scale. Despite acknowledging these potential benefits, the court ultimately sided with the DOJ's position that the relevant markets were route-specific. As a result, it concluded that the merger would not prevent a substantial lessening of competition in relevant antitrust markets for certain individual routes even if the merger might yield efficiencies at a national level. In other words, while JetBlue and Spirit provided evidence of potential efficiencies, the court found that these benefits primarily applied to a broader national market and were therefore "out of market" with respect to the relevant route-specific markets.

A similar, though somewhat distinct, dynamic played out in *FTC v. Novant Health*, where public equities outside traditional antitrust analysis weighed heavily in the district court's decision. Novant sought to acquire two financially struggling hospitals, arguing the deal would restore essential services and expand access to care in underserved communities despite increases in concentration. Novant also highlighted that the transaction would improve competition in the region by enabling it to better challenge the dominant regional player. The federal district court in the Western District of North Carolina found these arguments persuasive, ruling that the transaction would likely benefit competition and the public by preserving healthcare access and reinvesting in local facilities. The Fourth Circuit granted the FTC's emergency injunction to temporarily halt the transaction during its appeal of the lower court decision. However, Novant ultimately decided to abandon the merger before the appeal was heard, at which point the Fourth Circuit granted the FTC's unopposed motion to vacate the lower court's decision.

The rulings highlight that competition analysis under Section 7 is primarily focused on harm within the defined antitrust product and geographic markets, but broader arguments can at time be persuasive. That said, the defense's ultimate focus should remain on establishing that the transaction will not substantially lessen competition in the relevant market. By understanding judicial boundaries and the context under which broader arguments may be persuasive, merging parties can develop a more effective and targeted defense.

KEY TAKEAWAYS

- **Focus on In-Market Justifications:** Merging parties should prepare to justify the transaction within the defined antitrust market, as courts have shown limited receptiveness to out-of-market effects in merger assessments.
- **Consider the Strategic Trade-Off in Highlighting Out-of-Market Benefits:** Because courts remain focused on in-market effects, merging parties should carefully weigh whether and how to emphasize broader consumer advantages that extend beyond the defined market. On one hand, highlighting out-of-market efficiencies can help garner public or stakeholder support and may resonate with broader policy objectives. However, out-of-market arguments may risk diluting in-market justifications—potentially distracting from core competitive concerns and limiting the persuasive power of a merger defense in court.
- **Public Equities as Supporting Arguments:** Public equities, while not a primary factor under Section 7, can strengthen a merger's narrative, particularly in cases involving essential community services such as healthcare.

Roll-Up Strategies

In 2024, the FTC maintained its examination of so-called "roll-up" strategies wherein firms—often backed by private equity—acquire multiple companies within a single sector. While the agency contends that such patterns can consolidate market power, defendants maintain that these transactions yield substantial efficiencies, improve service offerings, and enable more competitive pricing structures over the long term. Further, Guideline 8 of the 2023 Merger Guidelines encourages a holistic review of serial acquisitions and industry trends, setting a framework that demands careful, fact-specific analysis.

In *FTC v. U.S. Anesthesia Partners* (USAP), the agency alleged that USAP, supported by private equity firm Welsh Carson, engaged in a roll-up strategy that raised prices and reduced competition in the Texas anesthesia services market. In a 2024 decision by a federal district court in Texas, Judge Kenneth M. Hoyt allowed the FTC's claims against USAP to proceed but dismissed the allegations against Welsh Carson. Significantly, the court found that Welsh Carson's minority ownership stake—absent any showing of direct, active control—was insufficient to trigger liability under Section 13(b) of the FTC Act. For defendants, this ruling underscores that minority investors who lack operational decision-making authority may not be readily swept into an antitrust violation simply by virtue of their financial support.

Taken together, recent enforcement efforts underscore the FTC and DOJ's growing attention to roll-up strategies, but also reflect the challenges the agencies face in extending liability to passive investors. From the defense perspective, these developments highlight the importance of distinguishing between ownership and control as well as reinforcing the idea that not all serial acquisitions lead to anticompetitive effects. Firms considering such strategies can still argue that efficiencies, innovation, and improved service quality benefit consumers, especially where minority investors operate at arm's length and do not dictate business conduct.

KEY TAKEAWAYS

- **Assess Roll-Up Strategies for Antitrust Risk:** Private equity firms engaged in roll-up strategies should evaluate how incremental acquisitions may influence market dynamics, especially if they result in significant consolidation.
- **Consider Ownership Structures to Mitigate Liability:** The court's ruling that Welsh Carson's minority stake did not meet the threshold for liability under Section 13(b) of the FTC Act highlights the importance of ownership structure. Private equity firms may limit certain exposure based on investment structure.
- **Prepare for Increased Scrutiny of Serial Acquisitions:** With the FTC and DOJ's focus on roll-up strategies, and the recent changes to the HSR rules, private equity firms should anticipate more detailed examinations of acquisition strategies in sectors prone to consolidation, reinforcing the need for comprehensive antitrust risk assessments.

State Merger Challenges

In 2024, state-led efforts to challenge national mergers drew increased attention, with several state attorneys general filing lawsuits in their own courts to address perceived local competitive harms. These actions raise complex legal questions about the reach and authority of state courts in matters traditionally decided at the federal level. While states have long argued that they should be able to safeguard their consumers against perceived anticompetitive effects, defendants and many observers have underscored the difficulties of applying state-level remedies to transactions with substantial national and even global dimensions.

In state cases related to *FTC v. Kroger Company*, both Washington and Colorado brought separate lawsuits to block Kroger's proposed acquisition of Albertsons. State officials claimed that the deal would lead to diminished competition and weaker consumer choice in their local grocery markets, despite proposed divestitures designed to maintain competitive conditions. Defense counsel countered by highlighting the merger's potential efficiencies, enhanced consumer offerings, and alignment with federal standards that traditionally govern such large-scale transactions. They also questioned the scope of a state-level injunction when the transaction's economic and operational effects extend far beyond any single state's borders, raising dormant commerce clause implications.

Despite expressing "serious doubts about [its] authority," the Washington State court ultimately enjoined the transaction without stating if the injunction was limited to Washington State. In doing so, the court rejected arguments that a state court injunction was unconstitutional, finding that states never relinquished their legislative authority to restrict mergers and acquisitions that affect competition, even though that role has largely been taken on by federal enforcers. The Washington State court's decision to halt a nationwide merger underscores the jurisdictional uncertainties at play. For defendants, these doubts can serve as a crucial argument: a patchwork of state-level rulings risks conflicting remedies, undermining predictability for businesses that operate across multiple states or nationwide.

Taken together, recent cases highlight the tension between state interests and federal frameworks. While states may vigorously pursue local antitrust enforcement, the expansive geographic reach of modern commerce means that effective, lasting resolutions often require alignment with federal authorities and national standards. From the defense perspective, these jurisdictional ambiguities and the inherent complexities of multistate markets can strengthen arguments for comprehensive federally supervised solutions that are better suited to address nationwide competitive realities.

KEY TAKEAWAYS

- **State Merger Notification Laws:** Complying with state-level disclosure requirements and procedures is essential to secure timely clearance and minimize exposure to legal and regulatory challenges. In many states, notification requirements and timelines may differ from federal standards, requiring firms to prepare early and allocate resources to navigate these complexities.
- **Anticipate and Prepare for State Attorney General Scrutiny:** Recognize that state attorneys general may actively challenge national mergers that could impact local competition. Firms should proactively assess how their transactions might be viewed by individual states and prepare to address concerns early on.
- **Develop Strategies for State-Specific Settlements:** Given the potential for state-level lawsuits, it is crucial to consider tailored settlement approaches that address the unique legal and competitive landscapes of each state.

Joint Venture Scrutiny

In 2024, joint ventures faced antitrust examination, with courts and the DOJ scrutinizing whether these collaborations might function as de facto mergers. Nevertheless, many businesses continue to argue that joint ventures can enhance efficiency, improve innovation, and foster greater consumer choice when properly structured.

In *U.S. v. American Airlines Group*, the DOJ, joined by several states, prevailed in its contention that the Northeast Alliance (NEA) between American Airlines and JetBlue effectively operated as a de facto merger. Although the alliance was intended to streamline operations, the court's analysis, which the First Circuit upheld, found that by enabling coordinated flight schedules, revenue sharing, and unified decision-making in the US Northeast, the NEA risked reducing competition and consumer options in certain routes.

Defense counsel for the airlines, however, emphasized the arrangement's potential to create greater efficiencies, more convenient travel options, and improved service quality—benefits that the court ultimately found were outweighed by competitive harm.

A similar dynamic emerged in *FuboTV v. The Walt Disney Co.*, where a joint venture among Disney, Fox, and Warner Bros. Discovery designed to create a sports-focused streaming service faced legal challenges. While FuboTV argued that this collaboration could consolidate control over live sports content and potentially raise consumer prices, defendants underscored the joint venture's potential to improve distribution and enhance the viewing experience through a single high-quality platform.

The court initially granted a preliminary injunction but did not foreclose the possibility of demonstrating procompetitive justifications under a full merits review. However, just hours before the parties were set to appear before the Second Circuit panel on appeal, Disney and FuboTV announced a settlement agreement to end the litigation and combine Disney's Hulu + Live TV business with FuboTV.

These cases underscore the complex balance that courts and regulators attempt to strike: while they are prepared to address ventures that risk distorting markets, they remain cognizant that many such collaborations arise from legitimate business goals. Joint ventures—properly structured and justified—may offer substantial consumer benefits, including improved quality, efficient delivery of services, and expanded access to products or services. The current antitrust environment places a premium on careful planning, robust compliance measures, and clear demonstrations of the competitive advantages that joint ventures can deliver.

KEY TAKEAWAYS

- **Anticipate Heightened Scrutiny for Joint Ventures:** Regulatory bodies and courts are closely examining joint ventures for anticompetitive risks, especially in concentrated markets. Firms should prepare comprehensive, procompetitive justifications and clear boundaries in operations.
- **Be Prepared for Private Challenges:** Private actors are increasingly willing to litigate joint ventures that combine market participants. Firms should have data-driven defenses to address claims of market foreclosure or price increases.
- **Avoid Market Allocation Risks:** Structure joint ventures carefully to prevent any appearance of market division or output restriction, as these elements have recently led to adverse rulings.

Procedural Questions

In 2024, the FTC faced significant judicial scrutiny regarding its merger enforcement authority, particularly in challenging consummated transactions involving minority investors and establishing standards for preliminary injunctions.

In *FTC v. U.S. Anesthesia Partners*, a federal district court in Texas emphasized that the FTC must demonstrate ongoing or imminent antitrust violations to justify injunctive relief under Section 13(b) of the FTC Act. The court declined to enjoin a private equity firm, Welsh Carson, that merely held a noncontrolling minority stake in USAP, citing a lack of any direct, current involvement or operational control that could cause near-term competitive harm. The decision highlights that passive investment and historical influence are insufficient grounds for Section 13(b) enforcement.

To secure a preliminary injunction, a plaintiff traditionally must demonstrate a likelihood of success on the merits, irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public interest. However, under Section 13(b) of the FTC Act, the FTC has often been required to meet a slightly different standard. Courts have held that the FTC must raise "questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance."

In *FTC v. IQVIA* and *FTC v. Tapestry*, the courts evaluated the FTC's burden of proof at the preliminary injunction stage. In these cases, the courts required the FTC to demonstrate more than speculative harm, setting a high standard for the agency to justify preliminary injunctions pending administrative review. The rulings emphasized that the FTC must present clear evidence of market impact and competitive harm to meet its burden, moving beyond conjecture or indirect implications. These decisions collectively reinforce a stringent interpretation of the preliminary injunction standard, requiring the FTC to sufficiently substantiate its claims.

These rulings deliver a clear message: while the FTC retains broad enforcement powers, courts will not rubber-stamp its efforts to halt or undo mergers without a well-supported showing of actual or imminent anticompetitive effects.

For merging parties and investors, this evolution in judicial expectations provides greater certainty and a more level playing field, ensuring that enforcement actions are grounded in the realities of the current market rather than theoretical or historical concerns.

KEY TAKEAWAYS

- **Heightened Requirements for Section 13(b) Claims Against Minority Investors:** Courts require concrete evidence of ongoing or imminent harm for Section 13(b) injunctions, especially where control has shifted or diminished since the transaction.
- **High Burden of Proof for Preliminary Injunctions:** Courts require the FTC to present clear evidence of potential anticompetitive effects, limiting reliance on theoretical harm to support preliminary injunctions, signaling minimal practical difference between the burden of proof under Section 13(b) of the FTC Act and the traditional preliminary injunction standard.

Litigating the Fix

"Litigating the fix" is a strategy whereby merging parties attempt to defend their merger by proposing remedies, such as divestitures or behavioral commitments, that they argue will resolve anticompetitive concerns identified by regulators or courts. Federal antitrust enforcers under the Biden administration rarely entered into negotiated settlements to resolve competitive concerns with proposed mergers, and there has been an increase in "litigating the fix" merger defenses in recent years.

With the change of administration in 2025, the antitrust agencies may return to a more flexible approach toward negotiating merger settlements in line with the practice under prior administrations. The factors that courts consider in evaluating proposed divestitures and those that agencies consider in determining whether to agree to a settlement incorporating a divestiture proposal are broadly similar.

In 2024, a federal court in *FTC v. Kroger Company* adopted a strict approach to remedy evaluation and found the parties' proposed remedy in that case insufficient to mitigate the merger's anticompetitive effects. Kroger and Albertsons proposed to divest nearly 600 stores to a divestiture buyer to address the FTC's concerns about increased concentration and loss of competition in local grocery markets. The court found that the proposed remedy failed to sufficiently mitigate what the court viewed as the merger's likely anticompetitive effects, concluding that the divestiture proposal was flawed in several respects:

- **Economic Evidence:** The court found that, even with the divestiture, the increased concentration in many markets would remain presumptively unlawful under the 2023 Merger Guidelines. Some markets lacked divested stores, while others faced risks of competitive harm due to likely sales declines or store closures.
- **Scope of the Divestiture:** The court found the divested assets lacked the scale and composition to form a viable standalone competitor, including because it found that necessary rebranding and operational changes to stores would reduce their competitive effectiveness and that some critical products were left unaddressed.
- **Experience of the Buyer:** The divestiture buyer's limited experience in large-scale grocery operations raised doubts for the court about the buyer's ability to manage the acquired stores successfully or compete with established grocery businesses.

- **Independence of the Buyer:** A transitional services agreement created reliance on Kroger and Albertsons for key operational functions, which the court found undermined the divestiture buyer's autonomy and competitive viability.
- **Purchase Price:** The court found the relatively low purchase price suggested deficiencies in the asset package and cast doubt on the buyer's ability to sustain competitive operations.

The *Kroger* court's decision emphasized that divestitures must fully restore competitive intensity, arguably applying a stricter legal standard of evaluation than some other recent "litigate the fix" rulings, such as the Fifth Circuit's 2023 opinion in *Illumina/Grail*, which focused simply on whether a proposed divesture would prevent a substantial lessening of competition.

Beyond the legal standard, the *Kroger* decision serves as an important data point for dealmakers aiming to rely on remedies to clear antitrust hurdles, either by litigating the fix or by seeking to negotiate and agree on a settlement with the antitrust agencies that resolves any competitive concerns without incurring the cost and inherent uncertainty of merger litigation. The ruling provides a valuable window into how one federal court analyzed a remedy proposal in detail and underscores the importance of understanding how the various elements of a proposed antitrust divestiture must be considered individually and collectively and from a strategic and commercial perspective to reach a successful outcome.

KEY TAKEAWAYS

- **Divestiture's Scope Must Be Sufficient:** A divestiture proposal's scope must be sufficient to address competition concerns in the relevant antitrust markets at issue, including potentially multiple relevant geographic and/or product markets.
- **Asset Composition Should Support an Independent Business:** Remedies must include assets sufficient to timely operate as a fully functional business. Courts and agencies may view the need for operational changes or rebranding as creating risk that the divestiture will not succeed.
- **Buyer Qualifications Are Critical:** The experience and track record of the divestiture buyer are crucial to demonstrating the feasibility of the remedy.
- **Operational Independence Matters:** Courts and agencies will scrutinize ongoing agreements, such as transitional services agreements, that suggest prolonged reliance of the buyer on merging parties, emphasizing the importance of creating standalone viable competitors in a timely way.
- **Diverging Judicial Standards:** The *Kroger* ruling highlights a potential split among courts, creating some uncertainty for merging parties as to the legal standard that courts will apply to proposed remedies in litigating-the-fix cases.

ANTITRUST CONDUCT LITIGATION

The past year witnessed a surge in antitrust enforcement and litigation activity as government agencies and private plaintiffs alike pursued ambitious theories challenging the conduct of major players across industries. Courts continued to grapple with the complexities of applying traditional antitrust principles to modern markets. This section surveys key developments and trends in antitrust conduct litigation, beginning with high-profile government and private actions against so-called "Big Tech."

We next explore how the agencies have moved beyond technology into other sectors, highlighting growing concerns around AI-enabled coordination and information exchange and addressing issues involving product design, labor markets, pharmaceutical patent listings, and criminal enforcement. The section concludes by highlighting how courts and agencies are addressing both legal and equitable remedies, aiming to restore competition and protect consumers without unnecessarily stifling innovation or economic growth.

Big Tech Litigation Moves Forward

Antitrust litigation involving major technology companies advanced significantly in 2024, with government and private entities bringing challenges against alleged monopolistic practices in key digital markets. Federal agencies, state attorneys general, and private plaintiffs have pursued cases against tech companies such as Google, Meta, and Apple, focusing on issues such as search and app store practices, ad-tech integration, and platform policies.

While these cases aim to address concerns over market dominance, the companies involved counter that their practices foster innovation, benefit consumers, and are consistent with competitive behavior in dynamic digital markets. As courts examine evolving legal theories around self-preferencing, tying, and acquisitions of emerging competitors, they face the challenge of applying traditional antitrust principles to the complexities of modern technology markets. These disputes underscore the importance of balancing regulatory concerns with the need to encourage innovation and economic growth in the tech sector.

Government Challenges

Government antitrust litigation against major technology companies reached several critical junctures in 2024. Following trial, Google was found to have unlawfully monopolized search and search advertising markets. Other cases progressed through substantial trial phases, with arguments concluded in the government's ad-tech suit against Google and final rulings anticipated soon. Meanwhile, other legal challenges against Big Tech were preparing for future trials, with several cases moving passed the motion to dismiss stage. As these cases unfold, courts will shape the contours of tech antitrust enforcement, assessing whether alleged self-preferencing, tying arrangements, and strategic acquisitions warrant structural changes, nuanced behavioral remedies, or if there is no liability at all.

***U.S. v. Google (Search and Ad Tech)*:** Google is confronting heightened antitrust scrutiny over its business practices in search and digital advertising. In *U.S. v. Google (Search)*, a federal court in Washington, DC ruled that Google violated Section 2 of the Sherman Act by allegedly monopolizing general search services and search advertising. Although the court highlighted default search agreements with device manufacturers like Apple and Samsung as exclusionary, it also acknowledged Google's longstanding success in search engine development, noting that its sustained innovations have helped make it the most widely used and effective search engine available. Google defends its default arrangements as standard industry practices that enhance user experience and financially support manufacturers. A remedies hearing is set for April 2025. The DOJ proposes broad remedies, but the company cautions that overly broad interventions could stifle innovation and erode the user benefits that have long defined its core services. Google has pledged to appeal the decision following the district court's conclusion of the remedy phase. Separately, the DOJ in *U.S. v. Google (Ad-tech)* contends that Google monopolized the digital advertising supply chain through acquisitions and practices such as tying and auction manipulation, allegedly locking publishers and advertisers into its ecosystem. Google disputes these allegations, pointing to formidable competition from Microsoft, Meta, and others and emphasizing that its ad tools promote innovation and benefit consumers and businesses. The trial concluded in December 2024 and a decision is expected in 2025.

***FTC v. Meta Platforms*:** The FTC's monopolization suit against Meta will proceed to trial after a DC federal court denied Meta's motion for summary judgment in November 2024. The FTC alleges that Meta, the owner of Facebook, maintained monopoly power in the personal social networking market through acquisitions of Instagram and WhatsApp, which the agency claims eliminated emerging competitors. The court found that issues like market definition and competitive harm require a trial to resolve. Meta argues that its acquisitions have benefited consumers by enhancing features and services and that it competes vigorously in a broad and dynamic social media landscape, including with platforms like TikTok and Snapchat. The company asserts that personal social networking is part of a larger market where innovation is rapid and consumer preferences are constantly evolving. A trial date is set for April 2025. Meta underscores the need to consider the fast-paced nature of the technology industry and the positive impact of its services on users.

***U.S. v. Apple*:** Adding to the series of government challenges, the DOJ and 16 state attorneys general have filed a lawsuit accusing Apple of monopolizing the smartphone ecosystem and harming competition through its App Store and related practices. The suit alleges that Apple stifles competition by limiting cross-platform messaging, restricting functionality of non-Apple smartwatches, and suppressing rival digital wallets. Apple counters that its policies are designed to protect user security and privacy and that it invests heavily in creating a secure ecosystem that benefits both developers and consumers. The company argues that the DOJ's demands would require it to share proprietary technology, potentially compromising user experience and security. Apple's motion to dismiss remains pending, with any trial likely years away. Apple emphasizes the competitive nature of the smartphone market and the choices available to consumers.

Private Lawsuits

Private plaintiffs have also brought lawsuits against major technology companies. Independent authors, developers, and smaller businesses have filed lawsuits expressing concerns about how certain practices may affect competition and consumer choice. The companies being challenged assert that their policies are designed to enhance user experience, promote innovation, and provide opportunities for creators and businesses.

***Epic Games v. Apple*:** Epic Games sued Apple in 2020 after its game Fortnite was removed from the App Store for implementing its own payment system, intentionally violating its agreement with Apple and bypassing Apple's commission. Following a 2021 trial, the court ruled that Apple did not violate federal antitrust law (a decision affirmed on appeal), but that Apple's anti-steering rules violated California's Unfair Competition Law. The court issued an injunction requiring Apple to allow links to external payment systems. In response to Epic Games' motion to enforce the injunction, Apple has argued that its revised policies comply with the court's order and are essential for maintaining a secure and seamless user experience, and that alternative payment methods could expose users to fraud and reduce the quality of the ecosystem.

***Private Litigation Against Google – App Stores, Search Practices, and Media Dynamics*:** Private plaintiffs have followed government enforcers and brought antitrust claims against Google, reflecting broader debates over platform control, innovation, and user choice. One action is *Epic Games v. Google*, in which Epic Games contends that Google unlawfully monopolizes Android app distribution and in-app payments by restricting alternative app stores and billing systems. In October 2024, a jury sided with Epic Games, but Google has appealed to the Ninth Circuit raising several arguments, both substantive and procedural. Of note, 19 separate amici have filed briefs in support of Google's positions on appeal.

KEY TAKEAWAYS

- **Balancing Security and Competition:** Disputes such as *Epic v. Apple* and *Epic v. Google* highlight the importance of balancing platform control with competition, as companies defend policies as necessary for user security and operational consistency.
- **Defending Consumer Benefits of Business Practices:** Cases such as those above demonstrate how platforms defend practices by showcasing their benefits, including expanded market access, lower costs, and enhanced user experiences.
- **Judicial Skepticism in Complex Markets:** Courts remain cautious in antitrust litigation involving digital platforms, often requiring clear evidence of harm while recognizing legitimate business justifications.

Agencies Move Beyond Big Tech

Federal antitrust agencies expanded their litigation focus beyond Big Tech, turning attention to industries such as entertainment, finance, healthcare, agriculture, and real estate. While these actions aim to address practices alleged to harm competition, they also raise concerns about potential overreach and the chilling effect on legitimate business strategies. Many companies argue that the challenged practices are standard industry approaches designed to improve operations, reduce costs, and enhance consumer experiences. As enforcement efforts broaden, balancing competitive concerns with preserving innovation and economic growth across various sectors becomes increasingly important.

***U.S. v. Live Nation Entertainment, Inc.*:** The DOJ, joined by more than 40 state attorneys general, has filed a monopolization and restraint of trade lawsuit against Live Nation Entertainment, alleging anticompetitive conduct since its 2010 merger with Ticketmaster. The government claims that Live Nation leverages its position in concert promotion, venue operations, and ticketing services to exclude rivals. Key allegations include tying agreements and exclusive contracts. Live Nation disputes these claims, emphasizing that its practices align with industry norms and benefit consumers by streamlining services. The company asserts that its strategies enhance efficiency and provide a better experience for artists and fans alike. As the case progresses, it highlights the complexities of challenging conduct associated with long consummated mergers.

***U.S. v. Visa*:** In September 2024, the DOJ filed a monopolization and restraint of trade lawsuit against Visa, accusing the company of maintaining its allegedly dominant market position in the debit card industry through practices that allegedly stifle competition. The government contends that Visa requires merchants and banks to route transactions primarily through its network, offering discounts while discouraging the use of alternative payment systems. Visa is also accused of forming partnerships with companies like Apple and PayPal under conditions that inhibit the development of rival debit card networks. Visa disputes these allegations, arguing that the market definition is overly narrow and overlooks viable payment methods such as automated clearing house networks. The company maintains that its practices are procompetitive, offering significant benefits to both merchants and consumers through enhanced security and convenience.

FTC PBM Litigation**:** The FTC has filed an administrative complaint against the nation's three largest pharmacy benefit managers (PBMs) alleging they engaged in unfair rebate schemes that inflated insulin prices. The FTC claims these PBMs, which allegedly administer 80% of US prescription transactions, prioritized high-list-price insulin drugs to extract larger rebates from manufacturers, excluding lower-cost alternatives and leaving vulnerable patients to shoulder inflated costs. The PBMs have denied the allegations, arguing that their practices drive down net drug costs and that manufacturers set list prices, not PBMs. In response, the PBMs have filed a lawsuit challenging the FTC's administrative process as unconstitutional, claiming it violates their due process rights and improperly seeks to reshape the drug pricing system. These cases highlight broader tensions over the role of PBMs in managing drug costs, with significant implications for the healthcare industry and regulatory practices.

FTC v. Syngenta Crop Protection AG**:** The FTC, along with 12 state attorneys general, filed a lawsuit against Syngenta and Corteva, alleging that their loyalty programs maintain monopolies over essential crop-protection products. Described as "pay-to-block" schemes, these programs are said to offer financial incentives to distributors that limit the sale of generic pesticides. Syngenta and Corteva deny these allegations, asserting that their loyalty programs are standard industry practices that lower costs and enhance efficiency for distributors and farmers. They argue that such programs support innovation and ensure the availability of high-quality products. The court's decision to allow the case to proceed highlights the need for companies that offer loyalty programs to take measures to ensure their compliance with antitrust laws, particularly in industries critical to food production.

National Association of Realtors v. U.S.**:** The DOJ's antitrust investigation into the National Association of Realtors (NAR) was revived by the US Court of Appeals for the DC Circuit, which ruled that a prior settlement did not prevent the probe from continuing. The DOJ alleges that NAR's policies, including commission-sharing rules and cooperation requirements, inflate real estate transaction costs and suppress competition. NAR contests this action, viewing it as a breach of agreement that undermines the predictability of settlements. The organization maintains that its policies are designed to facilitate cooperation among real estate professionals, ultimately benefiting consumers. This development occurs amid increased scrutiny of the real estate industry and highlights the tension between regulatory enforcement and established industry practices.

KEY TAKEAWAYS

- **Continued Enforcement Beyond Big Tech:** Federal agencies are targeting industries outside Big Tech, reflecting a broader application of interventionist antitrust principles across the economy.
- **Focus on Long-Consummated Transactions**: Cases like *U.S. v. Live Nation* demonstrate a growing willingness by regulators to reexamine and challenge older mergers based on their alleged long-term market impacts.
- **Day-to-Day Consumer Impact:** Enforcement priorities are shifting to industries ranging from healthcare (*FTC PBM Litigation*), agriculture (*FTC v. Syngenta*), to debit card processing (*U.S. v. Visa*), which directly affect everyday consumer prices and fees.
- **Reopening Cases with Shifting Priorities:** DOJ's revival of its NAR investigation highlights regulators' readiness to revisit previously settled cases when enforcement priorities or administrations change.

Artificial Intelligence and Information Exchange

The rapid adoption of artificial intelligence and data-sharing tools has transformed industries by enhancing efficiency and fostering innovation. While these technologies offer significant benefits to businesses and consumers, they also introduce new antitrust considerations. Government enforcers and private plaintiffs are examining how these tools impact competition, particularly regarding allegations that algorithmic pricing and benchmarking services might inadvertently facilitate collusion. Companies employing these technologies maintain that they improve market dynamics and consumer experiences, among other defenses. This section explores key cases where AI and information exchange intersect with antitrust enforcement, highlighting the perspectives of companies that leverage these tools.

Government Challenges

Federal and state enforcers have increased scrutiny of AI-driven tools and data-sharing practices, expressing concerns that these technologies might be misused to coordinate prices or restrict competition. Companies contend that their tools promote transparency, efficiency, and better market insights, ultimately benefiting consumers.

U.S. v. Agri Stats**:** The DOJ, joined by six states, filed a lawsuit against a company providing data-sharing services in the agricultural sector. The government alleges that the company's benchmarking reports, which contain industrywide data on production costs, output, and pricing, were misused by processors to coordinate supply and pricing strategies. The company strongly denies these allegations, emphasizing that its services promote transparency and efficiency across the protein (e.g., chicken and pork) supply chain. It argues that its benchmarking tools have contributed to increased production and lower prices for consumers, helping processors improve operations, reduce waste, and respond effectively to market demands. This case underscores the broader debate over the role of data-sharing in competitive markets, with potential implications for industries relying on similar tools to enhance operations and market insights.

U.S. v. RealPage**:** In another instance, the DOJ and eight states brought a lawsuit concerning rent price recommendation software used by residential landlords. The government claims that the software allows landlords to exchange competitively sensitive information, potentially resulting in higher rents and reduced competition. The company providing the software disputes these allegations, highlighting that its tools assist landlords in setting rental prices based on real-time market conditions. The company argues that its software helps landlords optimize operations, reduce vacancies, and offer competitive rental rates that align with market demand, ultimately contributing to stable and predictable rental markets. This case highlights the challenges of applying traditional antitrust principles to modern AI-driven tools intended to improve market efficiency and consumer satisfaction.

KEY TAKEAWAYS

- **Government Scrutiny of AI and Data-Sharing Practices:** Federal and state enforcers are increasingly focusing on the intersection of AI, data-sharing, and antitrust concerns, targeting tools perceived to enable coordination or restrict competition.
- **Procompetitive Justifications for Data Tools:** Companies like Agri Stats and RealPage emphasize that their benchmarking and revenue management tools enhance efficiency, optimize operations, and provide better market responsiveness, arguing these benefits outweigh speculative competitive harms.
- **New Challenges for Antitrust Enforcement:** Cases such as *U.S. v. Agri Stats* and *U.S. v. RealPage* illustrate the difficulties in applying traditional antitrust frameworks to innovative algorithmic and information sharing tools designed to improve market dynamics.

- **Implications for Other Industries:** These cases could set precedents for industries relying on AI and data-driven tools to inform business decisions, underscoring the need for clear guidance on balancing AI-driven innovations with competition concerns.
- **Potential for Widespread Regulatory Impact:** The outcomes of these cases will influence how companies deploy AI and data-sharing technologies across sectors, shaping the regulatory landscape for innovation-driven markets.

Private Litigation

Private lawsuits have also focused on AI and data-sharing, with plaintiffs alleging that algorithmic tools facilitate collusion and harm competition. Companies involved assert that their technologies provide lawful revenue optimization services that enhance market efficiency and benefit consumers.

In re RealPage, Rental Software Antitrust Litigation: Plaintiffs in a multidistrict litigation allege that RealPage's revenue management software enabled landlords to engage in price-fixing by sharing sensitive pricing and occupancy data, inflating rents and prioritizing price over occupancy. RealPage and its landlord clients argue that the software optimizes pricing based on market conditions without facilitating collusion and that landlords retain discretion over pricing decisions. The court allowed claims to proceed under the rule of reason standard but dismissed related student housing claims due to insufficient allegations.

Cornish-Adebiyi v. Caesars Entertainment: Plaintiffs alleged that Atlantic City casino-hotels used Rainmaker algorithmic pricing software to inflate room rates through coordinated recommendations that discouraged price competition. Defendants contended that the software relied on publicly available data and independently optimized prices for each hotel based on market conditions. The court dismissed the case with prejudice, finding insufficient allegations of collusion or anticompetitive conduct, underscoring challenges in proving harm involving algorithmic tools.

Gibson v. MGM Resorts Int'l: Plaintiffs claimed that Las Vegas hotel operators, including MGM Resorts and Caesars Entertainment, used algorithmic pricing software to coordinate room rates, leading to higher prices. Defendants argued that the software provides lawful revenue management tools, enabling hotels to set rates independently based on market conditions and strategies. The court dismissed the case, citing insufficient allegations of collusion.

Duffy v. Yardi Systems Inc.: A Washington federal court declined to dismiss an antitrust case against Yardi Systems Inc. and several building owners. Plaintiffs allege Yardi's "RENTmaximizer" software facilitated a price-fixing conspiracy by enabling the sharing of sensitive data among landlords to inflate rents. The court found the allegations sufficient to proceed, but emphasized that proving a per se violation under the Sherman Act would require additional evidence. Yardi and the landlord defendants argue that the software enables landlords to independently optimize rental prices using market data and enhances operational efficiency without collusion. They highlight that its rent recommendations are nonbinding and landlords can and do make their own price setting decisions. This case highlights the complexities of applying antitrust principles to AI-based pricing tools and the importance of clarifying their competitive benefits.

Portillo v. CoStar Group: Plaintiffs alleged that CoStar's STR benchmarking reports facilitated price-fixing among major hotel operators by enabling competitors to share sensitive pricing and occupancy data, inflating rates in luxury hotel markets. Defendants contended the reports aggregate anonymized historical data and serve as standard industry tools for market intelligence. The court dismissed the claims, citing a lack of allegations of collusion or agreements among competitors.

In Re MultiPlan Health Insurance Provider Litigation: Plaintiffs in a multidistrict litigation allege MultiPlan's pricing tools facilitated collusion among major insurers, including UnitedHealth and Aetna, to suppress reimbursement rates for out-of-network healthcare providers. Defendants argue the tools provide legitimate cost-reduction services and enhance transparency in pricing, denying any anticompetitive agreements. This case raises questions about algorithmic pricing tools in concentrated industries and their competition implications.

Musk v. Altman: Elon Musk filed an antitrust and fraud complaint against OpenAI and some of its partners, alleging misrepresentation and anticompetitive practices aimed at dominating the AI market. Musk claims OpenAI misrepresented its nonprofit intentions and, in conjunction with its partners, engaged in exclusionary practices to dominate the AI market. Defendants deny the allegations, asserting that their practices promote innovation and benefit consumers. This case highlights regulatory and legal scrutiny of AI market practices.

KEY TAKEAWAYS

- **Balancing Innovation and Regulation:** The integration of AI and data-sharing tools presents opportunities for efficiency and innovation while also raising complex antitrust considerations. It is essential to balance regulatory concerns with the benefits these technologies offer.
- **Application of Antitrust Principles:** Courts and regulators face challenges in applying traditional antitrust laws to modern technological practices. Clear evidence of collusion or anticompetitive agreements is crucial in these cases.
- **Impact on Industry Practices:** The outcomes of these cases could significantly influence how companies develop and implement AI and data-sharing tools, potentially affecting innovation and competition across industries.
- **Need for Clear Legal Standards:** Establishing clear guidelines for the use of AI and data-sharing tools is critical to ensuring that businesses can innovate while maintaining compliance with antitrust laws.

Product Design and Competition

Product design and user interface choices are increasingly under scrutiny, with enforcers and private plaintiffs focusing on allegations that these designs harm competition or mislead consumers. Companies argue that these practices enhance transparency, efficiency, and user experience, offering consumers significant benefits while complying with legal standards. The following cases illustrate this dynamic and the defense arguments surrounding platform design and functionality.

DZ Reserve v. Meta Platforms: Advertisers allege that Meta overstated Facebook ad reach metrics by including fake or duplicate accounts, increasing advertising costs. A Ninth Circuit panel partially upheld class certification for damages but vacated certification for injunctive relief, requiring further review. Meta argues that any discrepancies are minor variances, not deliberate misrepresentations, and disputes whether common issues predominate across diverse advertisers. The case highlights the complexities of applying legal standards to dynamic advertising metrics and platform operations.

FTC v. Adobe: The FTC has accused Adobe of violating ROSCA by enrolling customers in "annual paid monthly" subscription plans with undisclosed early termination fees and a complex cancellation process. Adobe denies these allegations, arguing that its subscription practices meet or exceed ROSCA requirements by providing clear disclosures and multiple cancellation options, including online, phone, and chat. Adobe further contends that the FTC's case improperly seeks to retroactively apply a "click-to-cancel" rule that had not been formalized at the time of the complaint. The case, with a motion to dismiss pending, underscores the need for clarity in enforcement standards around subscription practices.

***REX-Real Estate Exchange v. Zillow and NAR*:** REX sued Zillow and NAR, claiming Zillow's compliance with NAR's "no-commingling" rule disadvantaged REX's non-MLS listings by relegating them to a less visible "Other Listings" tab. Zillow argues the design was necessary to comply with industry standards and improve consumer transparency. While the court dismissed REX's antitrust claims, it allowed false advertising claims over Zillow's tab labeling to proceed. A jury found Zillow violated the Washington Consumer Protection Act but ruled in Zillow's favor on Lanham Act claims. The case underscores the challenges of proving harm in disputes involving platform compliance with industry norms and user interface designs.

KEY TAKEAWAYS

- **Heightened Scrutiny of User Interface Design:** Regulators are increasingly focused on user interface designs and subscription practices, particularly where "dark patterns" or complex processes may impact consumer behavior. Companies should review their interfaces for compliance and transparency to mitigate enforcement risks.
- **Importance of Industry Norms:** Courts and regulators often assess practices in the context of industry standards. Companies can bolster defenses by demonstrating compliance with prevailing norms and articulating procompetitive justifications for design decisions.
- **Challenges in Proving Harm:** Plaintiffs face significant hurdles in proving injury from deceptive practices when designs or metrics involve inherent variances or comply with legal standards. This highlights the importance of robust documentation and clear disclosures.
- **Proactive Compliance Measures:** To minimize litigation risks, companies should regularly audit subscription, cancellation, and advertising practices to align with emerging regulatory expectations and consumer protection rules. Adapting to potential new standards, such as "click-to-cancel" rules, may further mitigate risk.
- **Evolving Legal Landscape for Digital Platforms:** These cases reflect broader trends in antitrust and consumer protection enforcement, signaling increased scrutiny of digital business practices and the need for companies to remain agile in navigating regulatory changes.

Labor Market Harms

Labor market practices are increasingly coming under antitrust scrutiny, particularly those involving restrictive agreements and compensation structures that could affect employee mobility and earnings. Employers are navigating complex legal landscapes to ensure their policies align with antitrust laws while supporting legitimate business objectives. The following cases highlight recent developments and key considerations in this area.

***FTC Non-Compete Rule Litigation*:** The FTC's non-compete ban, finalized in 2024, faced numerous legal challenges. Notably, a Texas federal court struck down the rule, finding that the FTC lacked substantive unfair methods of competition rulemaking authority. The agency asserts, however, that it does have the statutory authority to engage in such rulemaking, and that most non-compete clauses constitute an unfair method of competition. Businesses opposing the rule argue that non-competes serve legitimate purposes, such as protecting investments in employee training and safeguarding proprietary information, raising the question of whether such agreements can be ancillary restraints. The ancillary restraint doctrine allows restrictions that are subordinate to, and necessary for, pro-competitive arrangements. The injunction blocking the rule is currently on appeal at the Fifth Circuit.

NCAA Labor Market Challenges: Ongoing litigation and regulatory scrutiny in the collegiate sports arena has compelled the NCAA to reexamine longstanding principles of amateurism and compensation. In a landmark multidistrict settlement addressing name, image, and likeness (NIL) restrictions, the NCAA agreed to pay $2.8 billion, demonstrating a willingness to adapt its policies to evolving legal and public expectations regarding athlete compensation. Beyond NIL, consent decrees with state attorneys general—such as in *Ohio v. NCAA*—have forced the NCAA to modify transfer rules, eliminating penalties for athletes who switch schools and reflecting the organization's acknowledgment of shifting athlete mobility demands. At the same time, the NCAA continues to defend rules limiting earnings from noncollegiate competitions, as seen in *Brantmeier v. NCAA*, arguing that these measures preserve the core principles of amateurism and fair play. Collectively, these legal developments underscore the NCAA's effort to balance its traditional model with growing pressure to afford greater rights and financial opportunities to college athletes.

World Association of Ice Hockey Players Unions v. NHL**:** In this antitrust suit, the NHL defends its developmental system, including drafts and compensation practices, asserting that these are protected under the nonstatutory labor exemption as integral parts of collective bargaining agreements that are essential to maintaining competitive balance in the league. Claims against the Canadian Hockey League (CHL) were dismissed due to lack of jurisdiction. The NHL was later dropped from the suit after the plaintiffs voluntarily dismissed all claims without prejudice, following a ruling that they lacked standing in New York federal court. However, the plaintiffs recently filed a renewed suit in Washington federal district court. The case highlights the complexities of applying antitrust laws to professional sports, particularly when labor agreements and contractual relationships in leagues with international components play a crucial role in their functioning.

Cung Le v. Zuffa LLC **(UFC Wage Suppression Case):** In this case, the UFC defends against allegations that it suppressed fighter wages through exclusive contracts and other market practices. The UFC maintains that these allegations are unfounded, emphasizing the competitiveness of the mixed martial arts (MMA) market and its adherence to lawful business practices. While a Nevada court certified a class of fighters for claims from 2010 to 2017, a proposed promotional class was denied due to insufficient evidence. In late October, the same Nevada court granted preliminary approval to a revised $375 million settlement after rejecting a prior $335 million proposal. The case highlights the complexities involved in applying antitrust principles to contracts in individual sports settings.

KEY TAKEAWAYS

- **Legitimate Business Justifications for Labor Practices:** Employers should ensure that restrictive agreements and compensation structures are clearly tied to legitimate business interests, such as maintaining brand consistency, competitive balance, or protecting investments in employee training.
- **Importance of Ancillary Restraints Doctrine:** Courts are examining whether labor-related restrictions are ancillary to procompetitive business purposes. Demonstrating that such restraints are necessary for the effectiveness of business models can be a strong defense against antitrust challenges.
- **Protective Role of Collective Bargaining Agreements:** Cases such as the NHL's highlight how collective bargaining agreements and labor exemptions can serve as vital defenses in antitrust litigation, particularly in industries where labor relations are governed by such agreements.

- **Proactive Legal Strategies:** Employers are encouraged to proactively review and, if necessary, adjust labor policies to align with current antitrust laws, ensuring that any restrictions are defensible as necessary for legitimate business objectives, thereby mitigating potential legal risks.

Orange Book Challenges

Orange Book–related antitrust disputes are prominent in the pharmaceutical industry, focusing on the balance between protecting intellectual property rights and promoting competition. These cases often involve allegations that brand-name drug manufacturers improperly list patents in the US Food and Drug Administration's (FDA's) Orange Book or engage in litigation strategies that delay generic competition. Recent cases involving Teva and Sanofi illustrate how courts and regulators are closely examining these practices. Understanding these developments is crucial for pharmaceutical companies.

***Teva Branded Pharmaceutical Products R&D v. Amneal Pharmaceuticals of New York*:** Teva is defending its listing of five inhaler patents in the FDA's Orange Book, asserting that these listings are lawful and meet all statutory requirements. The company argues that the patents, which relate to its respiratory products, are properly listed to protect its intellectual property rights. After a lower court ruled that the patents were improperly listed, Teva obtained a temporary stay from the federal circuit to keep the patents listed during the appeal process. However, on December 20, 2024, the federal circuit affirmed the lower court's ruling that these patents were improperly listed, emphasizing that they did not claim the active ingredient albuterol sulfate but were instead directed to device components of metered-dose inhalers. The court found that Orange Book listings must only include patents directly claiming a drug substance, product, or an approved method of using the drug. Teva has emphasized its ongoing commitment to protecting its intellectual property in ways that advance patient care and foster the continued innovation of life-saving therapies. This case highlights the complexities surrounding Orange Book listings and the critical role these listings play in encouraging investment in life-saving therapies.

***Mylan Pharmaceuticals Inc. v. Sanofi-Aventis U.S.*:** Sanofi is responding to antitrust claims by Mylan, which allege that Sanofi's business practices delayed the entry of Mylan's generic insulin glargine product Semglee. Sanofi contends that its actions, including bundled discounts and defending its patents through litigation, are lawful and procompetitive. The company argues that these practices are standard in the industry and benefit consumers by promoting innovation and providing value. Sanofi also asserts that any delays in Semglee's market entry were due to Mylan's own business decisions rather than any anticompetitive conduct. The FTC has expressed interest in the case, by underscoring the importance of compliance with competition laws. This case highlights the need for pharmaceutical companies to carefully navigate patent listings and litigation strategies.

KEY TAKEAWAYS

- **Ensure Accurate Orange Book Listings:** Pharmaceutical companies should carefully verify, with input from FDA counsel, that all patents listed in the FDA's Orange Book meet statutory requirements and accurately reflect the patent claims, thereby lawfully protecting their intellectual property.
- **Balance Innovation and Competition:** Proper utilization of the Orange Book allows companies to protect their innovations while supporting market competition, aligning business objectives with consumer access to medications.

Criminal Enforcement

Criminal enforcement of antitrust laws remains a priority for the DOJ, with recent cases showcasing its focus on bid-rigging and monopolistic conduct across diverse industries. Recent decisions reflect a balancing act between aggressive enforcement and the need for nuanced legal interpretations, particularly in markets with unique dynamics or hybrid relationships.

***U.S. v. Brewbaker*:** The Fourth Circuit overturned Brent Brewbaker's bid-rigging conviction, finding that the conduct involved a mix of vertical and horizontal elements and required a rule-of-reason analysis rather than the per se approach typically used in criminal antitrust cases. Brewbaker, a former Contech executive, was accused of coordinating with a distributor to manipulate bids for state contracts. While Brewbaker argued that the arrangement was procompetitive, the DOJ maintained it was a straightforward bid-rigging scheme. The Supreme Court declined to review the case, leaving the Fourth Circuit's decision intact. This ruling reflects a more nuanced view of complex business relationships and underscores challenges for the DOJ in pursuing criminal antitrust cases involving hybrid arrangements.

***U.S. v. Martinez*:** The DOJ charged 12 individuals in Texas federal court under Sections 1 and 2 of the Sherman Act for an alleged scheme to monopolize the transmigrante forwarding industry, a niche market that facilitates transportation of vehicles and goods from the United States to Central America. The indictment accuses the defendants of engaging in price-fixing, market allocation, and revenue pooling, enforced through coercive tactics, including threats, extortion, and acts of violence. Prosecutors claim the scheme stifled competition and maintained control over key transportation routes. The case highlights the DOJ's willingness to test novel theories in criminal antitrust enforcement, particularly by targeting alleged monopolistic behavior in smaller, less traditional industries.

***U.S. v. Evans Concrete*:** In 2024, the legal proceedings involving Evans Concrete LLC concluded with significant developments. The defendants, including company executives, faced allegations of price-fixing and bid-rigging in the Georgia ready-mix concrete market from 2010 to 2016. A Georgia federal jury convicted the defendants under the Sherman Act, a decision being appealed to the Eleventh Circuit. The court rejected procedural challenges, including those related to the pandemic's impact on trial fairness. Defendants maintained that their actions reflected standard industry practices aimed at operational stability, but the court found otherwise. The case highlights the DOJ's focus on procurement markets and the challenges businesses face in navigating antitrust enforcement in complex industries.

***U.S. v. F. Allied Construction Company, Inc.*:** In 2024, Asphalt Specialists LLC agreed to pay a $6.5 million fine after pleading guilty to bid-rigging on more than 40 asphalt paving contracts, securing $23 million through noncompetitive practices. The court acknowledged the company's compliance reforms and leadership changes while approving the plea deal. Related convictions included fines and probation for co-conspirators, highlighting the DOJ's focus on deterring bid-rigging schemes**.**

KEY TAKEAWAYS

- **Judicial Nuance in Criminal Antitrust Cases:** The Fourth Circuit's decision in *U.S. v. Brewbaker* signals judicial caution when applying per se antitrust rules to hybrid business arrangements, raising the bar for criminal convictions in complex cases.
- **Expanding Enforcement to Niche Markets:** The DOJ's prosecution in *U.S. v. Martinez* highlights its willingness to target nontraditional industries.
- **Procurement Market Focus:** Cases like *U.S. v. Evans Concrete* demonstrate the DOJ's emphasis on procurement markets, particularly in construction and materials, while also underscoring the challenges businesses face in defending against antitrust claims tied to routine practices.

- **Corporate Accountability and Compliance:** The $6.5 million settlement in *U.S. v. Asphalt Specialists* illustrates how compliance reforms and leadership changes can play a role in mitigating penalties for companies involved in antitrust violations.

Remedies

In the remedies phase of antitrust litigation, the emphasis shifts from determining liability to crafting practical solutions that address alleged anticompetitive behaviors while avoiding undue harm to businesses or market dynamics. Effective remedies aim to restore competition without imposing excessive burdens or stifling innovation. Recent cases illustrate the complexities of balancing legal enforcement with operational realities, especially in industries undergoing rapid technological transformation or characterized by unique business models.

In re National Football League's Sunday Ticket Antitrust Litigation**:** In June 2024, a California federal jury awarded $4.7 billion in damages to two certified classes of DirecTV Sunday Ticket subscribers, finding the NFL, its 32 teams, and DirecTV violated antitrust laws. The jury's damages award could potentially be tripled under antitrust law. Following the verdict, the court overturned the $4.7 billion award, ruling that the plaintiffs failed to provide valid class wide damages models or sufficient evidence of anticompetitive harm. The case is now on appeal before the Ninth Circuit. The NFL has maintained that its broadcasting agreements comply with antitrust laws and enhance consumer access to games, emphasizing the competitive nature of the entertainment and sports markets.

In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation**:** Merchants brought claims against Visa and Mastercard alleging network rules inflated interchange fees and restricted competition. In 2024, a proposed settlement offering $30 billion in fee reductions and rule changes was rejected by the court due to concerns over the adequacy of representation and fairness of release terms. Visa and Mastercard emphasize that their rules are standard industry practices that ensure the reliability and efficiency of payment networks. The decision reflects the heightened scrutiny courts apply to settlements that seek to address complex multiparty disputes while safeguarding business operations.

***Cung Le v. Zuffa LLC* (UFC Wage Suppression Case):** UFC fighters and Zuffa LLC reached a preliminary $375 million settlement in 2024, resolving allegations that UFC suppressed fighter wages through exclusive contracts and market dominance. The updated agreement followed the court's rejection of a prior $335 million settlement, which included concerns over the fairness of its structure. UFC maintains that its practices are lawful and reflect the competitive nature of the MMA market. The resolution underscores the challenges in applying antitrust law to labor practices in professional sports while balancing the need for operational stability.

Epic Games v. Apple**:** Following the Ninth Circuit's ruling that upheld an injunction prohibiting Apple's anti-steering practices in its App Store, disputes have centered on Apple's compliance. The injunction requires Apple to allow developers to include external links to alternative payment options. Epic alleges Apple is violating the order by imposing a 27% fee on external transactions, using technical restrictions to limit functionality, and implementing warning screens that deter users from using alternative payment methods. Apple counters that these measures are consistent with the injunction and necessary to maintain user security, prevent fraud, and ensure fair compensation for platform services. The case underscores the challenges in regulating platform practices and reconciling competition law with operational and security concerns in digital marketplaces.

KEY TAKEAWAYS

- **Tailored Remedies:** Antitrust remedies must strike a balance between addressing specific alleged harms and preserving market innovation and operational efficiencies.
- **Judicial Caution:** Courts are scrutinizing proposed settlements and remedies to ensure they do not impose excessive constraints or fail to address the nuanced needs of affected parties.
- **Global Implications:** Remedies in cases like *Google Search* discussed above raise concerns about global competitiveness, as enforcement decisions may influence how companies operate in broader international markets.

2025: ANTITRUST IN THE YEAR AHEAD

As 2025 begins under a second Trump administration, commentators anticipate some changes to the antitrust landscape, particularly with the FTC and DOJ shifting their focus and strategies. Outside a few areas highlighted by the incoming Trump administration—such as content moderation and ESG initiatives—the signals point toward a more traditional regulatory environment. However, traditional does not mean a laissez-faire view of enforcement: sectors such as technology, healthcare, and ESG-focused initiatives, among others, will remain under scrutiny. Below are the trends and considerations shaping 2025:

- **More Traditional Antitrust Enforcement:** Under the new administration, antitrust authorities are expected to return to more traditional antitrust enforcement, enabling companies to navigate compliance more confidently. This transparency should reduce uncertainty, allowing management teams to plan transactions with greater certainty.

- **Resurgence of Negotiated Remedies:** Diverging from the litigate-first approach of the Biden administration, the new administration is likely to consider negotiated solutions, such as through divestitures, returning to the practices of prior administrations under both political parties. Firms contemplating mergers or acquisitions can anticipate more open channels of communication with the agencies, increasing the probability of achieving outcomes that preserve both competitive markets and strategic business goals.

- **Continued Scrutiny of Big Tech and AI:** While enforcement actions against dominant technology players and their AI ambitions will persist, the AI ecosystem could see clearer criteria and guidelines on what constitutes harmful conduct. With the incoming administration's alleged focus on deregulatory efforts and making sure businesses know what they can and cannot do, we may see an emphasis on well-defined standards that provide tech firms and AI developers practical benchmarks for compliant growth and product development.

- **Focus on Healthcare and Other Industries Affecting Consumer Pricing:** Healthcare, life sciences, grocery, and other industries that are perceived to directly affect out-of-pocket costs for consumers may continue to face regulatory scrutiny over pricing, mergers, and market structures, but regulators are expected to be more willing to discuss compliance measures and remedial steps before resorting to litigation.

- **Addressing ESG Collaborations with Caution:** ESG initiatives, including competitor agreements or information exchanges aimed at addressing environmental or social goals, are expected to face heightened scrutiny at both the federal and state level.

- **Evolving AI and Algorithmic Pricing Issues:** As AI tools become more embedded in various industries, the focus will likely shift toward ensuring that these technologies enhance market dynamics rather than restrict competition. Businesses leveraging AI for pricing or operational efficiencies may see more guidance on avoiding antitrust pitfalls.

- **More Regulatory Restraint:** Businesses may see reinforcement of statutory limits on agency powers, resulting in less protracted legal battles and uncertainty.

- **State Attorneys General:** While federal enforcement may become more traditional, state attorneys general—particularly from jurisdictions with a history of robust antitrust activity—could fill any perceived gaps. Well-prepared businesses will stay engaged with both federal and state enforcers, using the clearer federal guidance as a foundation for compliance discussions at the state level.

- **Private Enforcement Gains Momentum:** Private plaintiffs will remain a presence, exploring novel claims and driving litigation in areas such as digital platforms, labor markets, and pricing algorithms. With federal enforcement standards more transparent, defendants can better anticipate and counter these claims, leaning on established compliance frameworks and credible economic analysis.

Taken together, 2025's antitrust landscape portends a more traditional backdrop for business planning. While antitrust scrutiny is likely to persist—especially in technology, healthcare, ESG, and AI—companies can generally expect increased opportunities for constructive engagement with regulators, the potential for tailored remedies, and a competition regulatory environment that is more business-friendly in some ways compared to the prior Biden administration.

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