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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Biggest Developments Of 2019 In Antitrust Cases

By **Matthew Perlman**

Law360 (December 20, 2019, 7:55 PM EST) -- A California district court handed the Federal Trade Commission a big win in its blockbuster monopolization case against Qualcomm this year, while the D.C. Circuit put an end to the U.S. Department of Justice's AT&T-Time Warner challenge. Here Law360 looks at the biggest developments in antitrust litigation during 2019.

AT&T-Time Warner

A D.C. Circuit panel in February rejected the Justice Department's bid to block AT&T Inc.'s $85.4 billion purchase of Time Warner Inc., affirming the decision of U.S. District Judge Richard Leon on the agency's first fully litigated challenge to a vertical merger in decades.

AT&T provides nationwide mobile service and owns the satellite television company DirecTV Inc., making its purchase of Time Warner and its portfolio of content a "vertical" deal among companies at different points in the video supply chain, rather than between direct competitors. The case was closely watched because of its potential effect on the industry and because enforcers have typically allowed such vertical mergers to proceed with commitments from the parties to behave in certain ways.

Notably, when Comcast Corp. purchased NBCUniversal Media LLC several years ago, the DOJ allowed the transaction to move ahead after the companies made concessions, including agreeing to arbitrate disputes over content licensing. But the DOJ wouldn't sign off on AT&T's deal unless it agreed to sell DirecTV or Time Warner's Turner Broadcasting, even though the company offered to arbitrate disputes modeled on Comcast's commitments.

On appeal, the DOJ pushed a single theory of harm: that AT&T's ownership of Time Warner would give the combined company too much leverage in negotiations with rival distributors for content, largely through the threat of blackouts. But the D.C. Circuit was not persuaded by the government's economic evidence that the merged company would gain greater bargaining leverage in licensing negotiations or by similar warnings the companies made to regulators during past merger reviews .

Instead, the court was convinced by the companies' analysis of real-world data showing no pricing impact from past vertical mergers in the space. It also found that the arbitration offer the companies made includes an agreement not to engage in blackouts of Turner Broadcasting content, which the DOJ's model didn't account for.

Joel Mitnick, a partner at Cadwalader Wickersham & Taft LLP and former FTC trial attorney, called the AT&T case a "disastrous foray" into the business of challenging vertical deals and said it could set the agency back in efforts to challenge similar transactions.

"I think after AT&T, you're not going to be seeing a whole lot of vertical cases," Mitnick said.

Vertical cases present challenges for enforcement not present in horizontal cases, where an increase of market share can be observed and used to presume a merger hurts competition. This left the DOJ reliant on its economic evidence and business documents, which Judge Leon "pretty much gave the back of the hand to," said Joseph Ostoyich, a partner at Baker Botts LLP.

"It is not just a loss, it is a tough loss," Ostoyich said. "It's a loss that should make them think twice before they bring a similar case in the future."

Amy Ray, a partner at Orrick Herrington & Sutcliffe LLP, told Law360 that the circuit court's ruling leaves practitioners with an "unsatisfactory understanding" of when the agencies are going to challenge vertical deals. She said this could encourage both the DOJ and FTC to continue work on promised guidance for nonhorizontal transactions.

But in the meantime, she said, we're not seeing these moves slow down, noting Google LLC's purchase of Looker Data Sciences as a recent example.

"It's clear there are a lot of vertical transactions that continue to take shape," Ray said.

Qualcomm

The FTC enforcement action challenging Qualcomm Inc.'s modem chip licensing practices saw several important developments in 2019.

U.S. District Judge Lucy Koh issued a sprawling opinion in May, siding with the agency and finding that Qualcomm's policies for licensing standard-essential patents covering cellular technology allowed it to illegally maintain a monopoly over certain modem chips. The policies saw Qualcomm refuse to license rival chipmakers despite commitments made to standard setting organizations to provide licenses on fair, reasonable and nondiscriminatory terms.

They also allowed the company to collect payments from phone manufacturers even when they used chips made by others, through a system of royalties and incentives, Judge Koh said.

Ostoyich told Law360 the ruling represents a potential expansion of the U.S. Supreme Court's 1985 Aspen Skiing decision, which spells out a company's duty to deal with rivals. Generally, even companies with monopoly power have no legal obligation to do business with competitors, but in Aspen Skiing the justices found that when a firm is dealing with a rival and then suddenly stops, it suggests the company may be trying to illegally maintain its monopoly.

While the FTC is not relying on the Aspen Skiing case in its presentations to the court, Ostoyich said the agency is basically making the same argument when it says Qualcomm agreed to license its patents on FRAND terms and then refused.

"You were doing business on certain terms, but now you're no longer willing to do business on those terms," Ostoyich said.

Controversial from the start, the case was filed in the final days of the Obama administration accompanied by a strong dissenting statement from Commissioner Maureen Ohlhausen, who argued Qualcomm was merely enjoying the "pro-competitive monetization of legitimate patent rights." Current Commissioner Christine Wilson also wrote a Wall Street Journal column criticizing the enforcement action after Judge Koh issued the ruling in May.

If the commission wanted to stop prosecuting the case, it would need a majority of the five sitting commissioners, and with Chairman Joseph Simons recused, there's likely a 2-2 split over the issue along party lines.

Assistant Attorney General Makan Delrahim, head of the DOJ Antitrust Division, is also recused from the Qualcomm case but has consistently advocated for a policy approach that cuts against the allegations, saying that implementers in the standard-setting process deserve more scrutiny than patentholders like Qualcomm.

The policy divergence reached a new level when the DOJ urged Judge Koh to hold a hearing before she issued an injunction requiring Qualcomm to upend its licensing practices. After losing that bid, the DOJ urged the Ninth Circuit to stay the order while the chipmaker appeals, citing national security concerns raised by the U.S. departments of Defense and Energy, a request granted in August.

The department has since filed a brief in the appeal supporting Qualcomm on the merits.

"It was really a shocking development to see the DOJ insert its views," Ray said.

The Ninth Circuit is also reviewing an order from Judge Koh in a private case against Qualcomm that certified a class estimated to include some 250 million Americans who've purchased a cellphone containing certain modem chipsets since February 2011.

The DOJ has supported Qualcomm in that appeal as well and appeared during oral arguments in December.

Apple v. Pepper

The Supreme Court issued a rare antitrust decision in May, siding with consumers in a case alleging Apple monopolizes the market for apps on its devices.

The case reached the high court on a motion to dismiss, with Apple arguing that the consumers lack standing to sue for overcharges from app purchases because they are not direct customers. Under the 1977 Supreme Court ruling in Illinois Brick, only the direct purchasers of the first product affected by an antitrust violation can seek damages under federal law.

The company contends that developers should be considered the direct purchasers, since they are the ones that pay a commission on the app purchases and set the price consumers pay. But the justices disagreed, finding that consumers buy the software directly from Apple.

Mitnick said the justices made what most people feel was the "common sense, right decision," noting that consumers perceive themselves as buying apps directly from Apple through the App Store. More interesting, he said, is that the court sidestepped calls in an amicus brief from more than 30 states to overturn Illinois Brick.

"That was very significant, because I don't know when another case is going to be presented to them as an opportunity to review Illinois Brick," he said. "It wasn't necessarily squarely before them, but it certainly was the elephant in the room, and they chose to ignore it."

Ostoyich said overturning the 40-year-old ruling would have caused a "major upheaval" in a body of law that's fairly well settled. But, he said, the ruling creates some degree of uncertainty anyway, since it could allow distribution companies — in any industry — to structure transactions to take advantage of the direct purchaser rule by making customers pay manufacturers directly.

"It could potentially create some havoc for a wide range of industries," Ostoyich said. "It will play out over the next few years."

Though the case has been active since 2011, Ray noted that it's still in the early stages of litigation and said the next battleground will likely be class certification.

Complicating matters is a proposed class action filed by developers against Apple over its App Store practices, that has been related to the consumer case. Ray said the developers' suit complicates the analysis of how Apple's alleged overcharges are passed down the distribution chain, and could help the company defeat class certification.

"There's a road map from the dissent, and from the majority opinion, to take those complications at the class certification stage and argue that it would be difficult to certify an ascertainable class," she said.

Impax

The FTC issued an opinion in March in its enforcement action against Impax Laboratories over the alleged delay of a generic form of Endo's opioid pain medication Opana ER. The case was the agency's first fully litigated challenge to a settlement between branded- and generic-drug makers since the Supreme Court's landmark 2013 decision in Actavis , which found the agreements need to be scrutinized for their competitive effects.

The FTC eventually reached settlements with all of the companies in the Actavis case, so there was no final court ruling applying the Supreme Court's decision. Other cases have dealt with the ruling on summary judgment motions and motions to dismiss, but the Impax case offers a rare example of a fully litigated case where the Actavis decision applies.

The commission's in-house administrative law judge dismissed the case in 2018 after finding that the settlement benefits outweighed any potential harm because it allowed Impax to start selling a generic version of the drug while other companies have been prevented by patent litigation.

But on appeal, the full FTC found the effective payment was larger than the judge did — through a provision that ultimately allowed Impax to collect $100 million when Endo caused the market for Opana to deteriorate by pulling the product and launching a reformulated version.

The commission also found Impax had not tied a broad patent license that went beyond the original dispute closely enough to the settlement for it to count as a benefit.

"Finally, we have some clarity with the FTC defining what is a payment," said Carl W. Hittinger, the national team leader for BakerHostetler's antitrust and competition practice. "They're saying it's both cash payments and noncash, contingency forms of value, which is where we thought it was going, but now they said that's the case."

Hittinger said the ruling was not surprising but that it shows a "real aggressiveness" on the part of the FTC to go after generic delay cases.

"It is an aggressiveness and a reason why people need to watch these issues very carefully," he said.

Impax has appealed the FTC's decision to the Fifth Circuit.

Criminal Convictions

The DOJ scored a big win in November when a Manhattan federal jury convicted a onetime JPMorgan Chase & Co. forex trader on criminal Sherman Act charges for scheming to fix currency prices to boost his earnings.

The jury deliberated for about three and a half hours before delivering the verdict against Akshay Aiyer, who's accused of conspiring with other forex traders to not trade against one another and to coordinate their trading in chatrooms to affect daily benchmark rates on forex spot markets.

Aiyer is alleged to have betrayed clients in order to strengthen his own trading positions in direct-to-customer currency trades as well as in bank-to-bank trades from 2010 to 2013. He countered that the case was based on "immature" chatroom banter that was embarrassing but not criminal.

The conviction came after traders from Barclays PLC, Citigroup Inc. and JPMorgan were acquitted in October 2018 on similar charges for manipulating the foreign exchange markets, when a Manhattan jury was seemingly unconvinced that the alleged trading coordination suppressed competition.

Lisa Phelan, a partner at Morrison & Foerster LLP and former chief of the DOJ Antitrust Division's National Criminal Enforcement section, told Law360 that the Aiyer conviction is important following the earlier loss, as well as a loss recently in the auto parts industry.

A California jury also convicted former Bumble Bee Foods LLC CEO Chris Lischewski of criminal price fixing charges in December. That case involves allegations that Bumble Bee, StarKist Co. and Tri-Union Seafoods LLC, which makes Chicken of the Sea tuna, ran an industrywide scheme to fix the prices of canned tuna. The government has also fined StarKist $100 million and Bumble Bee $25 million.

Phelan said that any criminal convictions will help bolster the DOJ in its negotiations next year as enforcers try to encourage people to take plea deals in other investigations.

"They were at risk of really losing credibility," Phelan said, noting there was a question about whether the division had become a tiger without any teeth.

--Editing by Brian Baresch.

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