

The Major Antitrust Conduct Cases Of 2020 So Far

By **Bryan Koenig**

Law360 (July 17, 2020, 5:47 PM EDT) -- It's been a busy year for antitrust matters, with an unusually heavy cluster of monopolization cases brought by the Federal Trade Commission and probes by federal and state investigators into alleged abuses of market power by Facebook, Google and other tech platforms.

Other big cases include litigation that could resolve a split between U.S. competition enforcers over the role antitrust law plays in intellectual property disputes, another addressing the extent to which individuals can be held liable for maintaining illegal monopolies and one examining whether competition law imposes any kind of duty on companies to do business with rivals.

There are also a large number of government and private lawsuits accusing nearly every player in the generic-drug industry of price-fixing, as well as a U.S. Supreme Court action that could decide the FTC's authority to demand disgorgement from companies that violate consumer protection and competition laws.

Here, Law360 looks at the biggest developments so far and asks antitrust professionals what they're watching for the rest of the year.

Waiting for Qualcomm

The Ninth Circuit will make a big splash at the intersection of patent and antitrust law when it rules on Qualcomm's bid to upend a district court win by the FTC over allegedly monopolistic licensing practices.

A panel heard **oral arguments in February** in a dramatic showdown over not just the FTC's win, but also the extraordinary public spat between the commission and the U.S. Department of Justice.

The DOJ has come out in direct opposition to the merits of the FTC's case, which was approved in a 2-to-1 vote in the last days of the Obama administration.

The lawsuit ultimately resulted in a California federal judge holding that Qualcomm violated antitrust law through its "no license, no chips" policy, which requires customers to license Qualcomm patents in order to buy its chips, without which smartphones cannot connect to wireless networks.

U.S. District Judge Lucy Koh's **May 2019 decision** ordered Qualcomm to scrub the policy from its supply

contracts, a ruling partially stayed by the Ninth Circuit. Judge Koh also granted the FTC's request to order Qualcomm to scrap its policy of licensing standard-essential patents, or SEPs, only to phone companies, requiring it to license them to rival chipmakers as well.

Now, antitrust professionals are waiting to see how the court rules on the antitrust implications of patent licensing, which the Trump DOJ under antitrust chief Makan Delrahim — who recused himself from the Qualcomm case — has argued should generally not trigger competition law.

In the Qualcomm case, the DOJ has also argued alongside the Departments of Energy and Defense that the court should protect the dominant U.S. manufacturer of chipsets for next generation wireless technology, or 5G, to ensure American networks don't become reliant on Chinese technology.

Running parallel to the FTC enforcement case is a private lawsuit also on appeal to the Ninth Circuit on the question of whether the district court was right to certify a class of consumers who bought phones with Qualcomm chips, a class estimated at some 250 million people in the U.S.

Monopolizing Monopoly Cases

The Qualcomm case is not the only battle the FTC is waging over allegations of monopolistic conduct. Attorneys say they have seen an unusually high level of cases alleging violations of Section 2 of the Sherman Act, virtually all from the commission.

"You see a fair bit of Section 2 enforcement despite the narrative that it's not being enforced," said Alexis J. Gilman, a partner with Crowell & Moring LLP and a former assistant director at the FTC.

One of those cases is the lawsuit against Surescripts accusing the electronic prescription service of securing monopolies in the e-prescription industry and defending those monopolies with exclusivity contracts that prevent clients from working with a competitor.

A D.C. federal judge refused to toss the case against Surescripts in January, and in May refused to let Surescripts go to the D.C. Circuit on questions of whether low but "non-predatory" pricing can be anticompetitive — and whether a federal law limits the types of cases in which the FTC can sue for an injunction.

The FTC and a contingent of states are also fighting to keep incarcerated former pharmaceutical executive Martin Shkreli and a company he founded from evading claims of monopolizing the market for a lifesaving drug used to treat parasitic infections.

The FTC and New York's attorney general first filed suit against Shkreli and his Vyera Pharmaceuticals in January, also naming Vyera's parent company Phoenixus AG and Kevin Mulleady, Phoenixus' chairman and a former executive for Vyera. Six additional states — California, Illinois, North Carolina, Ohio, Pennsylvania and Virginia — threw their weight behind the allegations in April.

"[It's] interesting that we have federal and state enforcement of Section 2 in that case," Gilman said.

According to the suit, after Vyera and Phoenixus bought the rights to Daraprim in 2015 from the only existing supplier, they created a complex system of restrictions to prevent generic competitors from entering the market.

That was followed by a 4,000% price increase, inciting public outrage against Shkreli and sparking an investigation by the New York Attorney General's Office.

Shkreli's infamy as the "pharma bro" isn't the only thing putting the Vyera case on the map. He has also assailed the allegations against him as "unprecedented" in that they accuse an individual, rather than just a company, of monopolizing a market. He contends individuals do not have the market power to violate the antitrust laws.

An important private enforcement case under Section 2 of the Sherman Act could also make waves as Comcast pursues a planned Supreme Court petition to shut down a \$160 million antitrust lawsuit filed by rival Viamedia, which claims the cable giant illegally monopolized the local television advertising market.

A split Seventh Circuit revived Viamedia's lawsuit against Comcast earlier this year after an Illinois federal court granted summary judgment in Comcast's favor. According to the lawsuit, Comcast monopolized cable "interconnects," groups of cable systems that permit advertisers to purchase time on all cable providers within a market simultaneously.

Comcast allegedly acquired interconnects in 15 of the 25 largest U.S. markets and then began to require advertisers to go through Comcast's own advertising representative, Comcast Spotlight, in order to purchase air time. Viamedia, an advertising representative that also sells ad time for smaller cable operators through interconnects, claims Comcast's actions forced their smaller clients to do business with the cable giant instead.

A key part of that case is the so-called duty to deal, with the Seventh Circuit rejecting Comcast's arguments that antitrust claims cannot be rooted in a refusal to do business with competitors, potentially opening the door wider to those allegations.

"The court was pretty clear" on duty to deal claims, said Lisa Kimmel, a senior counsel in Crowell & Moring's antitrust group and an FTC alum. "It's a viable claim. It can be pled."

Based on the Seventh Circuit ruling alone, Kimmel said it's too early to tell what that might mean for "duty to deal" allegations that are also a part of the Qualcomm and Shkreli cases.

But the Seventh Circuit nevertheless "breathes a little life into the duty to deal claims," she said. Had the appellate court gone the other way, "that really could have put quite a nail in the coffin."

Nothing Generic About Drug MDL

The year has also brought a flurry of activity in the generic-drug space that has seen the DOJ pursue criminal charges and cut deals with several prominent corporations accused of price-fixing in what the agency continues to describe as an "ongoing" investigation.

The DOJ's most prominent mark came in March when Sandoz agreed to pay a \$195 million criminal penalty under a deferred prosecution agreement for price-fixing.

The department signaled as recently as the end of June that it was not done yet, filing criminal charges against Glenmark Pharmaceuticals Inc. USA — the first drugmaker not to cut a deal with prosecutors. Instead, Glenmark has vowed to "vigorously defend" itself against the charges.

The DOJ Antitrust Division's approach to the price-fixing deals has shown a new level of flexibility more in line with the rest of the department, according to Benjamin Sirota, a Kobre & Kim LLP attorney and former DOJ Antitrust Division prosecutor.

"For several years at the Antitrust Division, companies tended to have a binary choice, if they weren't the first to self-report and obtain leniency, which is basically play ball and plead guilty or challenge DOJ in court. And now what you see is companies having these other sort of intermediate choices where they might be able to enter a deferred prosecution agreement or maybe a nonprosecution agreement, which is not the same as pleading guilty," Sirota said.

"But it's obviously admitting to the conduct. This way of doing business is closer to departmentwide practice than the Antitrust Division has typically been," he added.

In the case of Sandoz, the Novartis division entered a deferred prosecution agreement in lieu of facing a four-count felony charge. The U.S. Department of Health and Human Services prohibits companies convicted of certain crimes from participating in federal programs like Medicare, which means that had Sandoz entered a guilty plea or been convicted at trial, its treatments would not qualify for federal health care reimbursement.

The DOJ probe is paralleled by pending civil litigation from dozens of state attorneys general along with private plaintiffs that's even more expansive — targeting virtually the entire generic-drug industry and alleging price-fixing for hundreds of treatments.

That case is inching along, with a federal judge picking one of the complaints — which alleges Teva Pharmaceuticals was at the center of a conspiracy with more than a dozen rivals to fix prices on over 100 generic pharmaceutical products — to serve as a bellwether, along with three private cases centered on individual drugs.

Questioning the FTC's Power

The Supreme Court may also weigh in on the powers the FTC has to punish antitrust violations. The high court agreed July 9 to hear two similar cases from the Seventh and Ninth circuits related to the agency's ability to impose injunctions under the Federal Trade Commission Act.

The FTC Act limits the commission's actions against bad actors to "temporary restraining orders" and "injunctions." Critics of the FTC's restitution practices say the agency takes too expansive a view of its authority in claiming that requiring restitution to victims falls under its power to impose injunctions.

The Ninth and Seventh circuits came up with contrasting opinions on whether Section 13(b) of the FTC Act allows the agency to demand restitution.

The Supreme Court consolidated for review two consumer protection cases stemming from FTC enforcement actions involving monetary relief, but the court turned down a separate petition from one of the companies that sought to prevent the FTC from taking cases directly to district court rather than first using its own administrative process.

Although the cases focus on alleged consumer protection violations, competition law experts are also watching for the possible impact on the FTC's ability to require restitution for antitrust violations.

"You're continuing to see defendants battle the FTC on whether there's a limit to the FTC's authority to obtain relief in these cases," Gilman said. "That's I think another area to watch — whether courts continue to allow the FTC to proceed on these cases or whether they close this avenue for the FTC. The Supreme Court recently took cert in a couple cases that could eventually answer these questions."

Looming Tech Showdown

Major probes into big tech companies could also come to a head later this year, based on the Wall Street Journal's reporting of a likely antitrust enforcement case against Google.

"That's certainly one to watch, not only for what it means for the target of any complaint, but what it means for the rest of the tech industry and for other industries," Gilman said. "A lot of times those theories of harm have applications for nontech industries."

Pressure has been building on major tech platforms for months and is sure to reach a milestone in late July when the top executives from Google, Amazon, Apple and Facebook are set to sit in the House Judiciary Committee's hot seat amid the Democratic-led probe into their market power.

On top of that, virtually every state has joined a coalition to probe the quartet for antitrust violations, and the DOJ and FTC are looking at their market power as well.

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