Competition Cases To Watch In 2015

By Melissa Lipman

Law360, New York (January 02, 2015, 3:59 PM ET) -- Despite the U.S. Supreme Court's landmark pay-for-delay ruling nearly two years ago, antitrust challenges over pharmaceutical patent settlements show no sign of slowing in 2015 with more trials and appellate rulings expected this year.

Add to that a host of cases dealing with the extraterritorial reach of U.S. antitrust law, benchmark manipulation allegations aplenty and the NCAA's appeal of a ruling striking down its student athlete compensation ban, and 2015 will have no shortage of interesting litigation for antitrust lawyers.

Here's a look at the cases to watch this year:

Pay-for-Delay Litigation

The past year may have seen the first pay-for-delay trial since the U.S. Supreme Court paved the way for the challenges in 2013, but the cases show no sign of slowing in 2015. From agency suits to class actions to appellate rulings, cases in 2015 should help flesh out the standards for Hatch-Waxman Act settlement antitrust challenges.

"Notwithstanding the Supreme Court ruling in Actavis or maybe because of it, no one knows what the standard is or how to apply it," Crowell & Moring LLP partner Shari Lahlou said.

The first reverse payment trial since the Supreme Court's decision in Federal Trade Commission v. Actavis went for the defendants in early December, but experts say a host of questions still remain unanswered. And with a slew of private suits moving forward, an appellate decision expected from the Third Circuit and at least one FTC case heading toward trial in 2015, there should be plenty of opportunities for plaintiffs and drugmakers alike to get more guidance.

The Third Circuit heard oral arguments in November over the question of whether the Supreme Court's decision applies only to cash settlements or whether other kinds of considerations, such as promises from a brand not to launch an authorized generic during the first-filer generic's exclusivity window, also qualify as reverse payments.

Meanwhile, the FTC's long-running case accusing Cephalon Inc. of squelching competition for narcolepsy drug Provigil could head to trial this year after the judge wraps up some outstanding summary judgment filings.
"Pay-for-delay will continue to have interesting doctrinal developments in it because it’s really taking us to, in some sense, the cutting edge areas of antitrust, which is where we get into more balancing type questions," said Mark Botti, antitrust co-chair at Squire Patton Boggs LLP. "Things are not as black and white, and there should be all sorts of interesting nuances coming out of that area."

**Foreign Trade Antitrust Improvements Act Litigation**

In 2014, three appeals courts weighed in on the Foreign Trade Antitrust Improvements Act in both criminal and civil cases, but the question of how far U.S. antitrust law reaches overseas remains far from settled.

For starters, two of those cases may not be done yet. AU Optronics Corp. has asked the Ninth Circuit to re hear its challenge to the U.S. Department of Justice's $500 million price-fixing fine and Motorola Mobility Inc. has moved for the full Seventh Circuit to consider whether it can pursue nearly $1.5 billion in damages against AUO and other liquid crystal display panel makers.

Both cases raise the question of when foreign conduct can and can't spur U.S. antitrust liability under the FTAIA. And both suits also deal with the LCD cartel, one of many major DOJ probes in recent years to focus on product components.

Because the FTAIA requires foreign conduct to have a direct effect on domestic commerce to fall under U.S. antitrust law, cases involving components of larger products imported into the country have repeatedly raised questions about whether the FTAIA applies.

"It comes up because many large cartels or alleged acts of collusion are taking place offshore or involve companies based outside the United States," said Cahill Gordon & Reindel LLP partner Elai Katz. "So the kind of cartel activity that the government and plaintiffs lawyers are focused on these days often has a significant foreign component requiring careful line drawing."

And if other courts embrace the kind of limits on private suits that the Seventh Circuit did in Motorola — cautioning that Motorola’s foreign subsidiaries must seek damages abroad while emphasizing that the ruling doesn't limit the DOJ's enforcement — the result could be a boon to private litigation abroad.

"The more that the U.S. courts are not available as the jurisdiction for conduct occurring overseas, that should create greater incentive opportunities for ... the plaintiffs to seek redress in foreign courts," Botti said. "With the developments in the European Commission [making it easier to pursue private antitrust suits], I think these things interact in a way that adds fuel to the development of civil competition litigation in Europe and in other jurisdictions."

**Benchmark Cases**

In the wake of the financial crisis and government enforcement actions fining many of the world's biggest banks for manipulating the London Interbank Offered Rate, suits challenging alleged meddling in benchmark rates have sprung up over everything from foreign exchange trading to platinum.

The district judge overseeing the Libor case nixed the antitrust claims from the MDL after concluding that the process of setting the benchmark was meant to be collaborative, rather than competitive.
But several other suits are still moving forward. That includes an MDL over claims that several banks conspired to fix the rates for the forex market, where motions to dismiss are pending, and a series of cases accusing banks of rigging the prices of commodities like platinum and palladium.

The core question, attorneys say, is whether antitrust claims can stick over efforts to craft benchmarks that are meant to benefit entire industries or whether other laws should be used to pursue any wrongdoing. And with benchmarks common in a host of industries, the answer to that question could have a significant impact.

"Benchmarking occurs extensively across the economy in many additional settings beyond those where we've had these cases arise, so those cases, the learning that comes out of them is important in terms of how all that benchmarking is conducted," Botti said.

And while antitrust claims over Libor have been scuttled from the district court case, an appeal over their dismissal could land before the Second Circuit sooner rather than later. The Supreme Court recently heard arguments over whether the appeals court should have agreed to immediately take on the antitrust appeal. A ruling for the plaintiffs in that suit could send the issue back to the Second Circuit in 2015.

"In the event the Supreme Court reverses, we may well have a substantive decision from the Second Circuit . . . evaluating the propriety of [the district court's] analysis, [which] would likely have a significant impact on other pending financial benchmark cases," said Robins Kaplan Miller & Ciresi LLP's Will Reiss. "All we have is a lone district court opinion, and everyone's hoping and waiting to get some guidance from the Second Circuit."

**The Antitrust and Employment Overlap**

Two high-profile cases at the intersection of antitrust claims and employment issues are both set for major developments in 2015: the NCAA's appeal of a ruling blocking its ban on student-athlete compensation and a potential trial accusing four major tech giants of conspiring not to cold call each other's developers.

"That's an area of added focus: Are the rules different? And should we think differently about what kinds of agreements or discussions competitors may lawfully have with one another as buyers of the services of an employee, expert or professional as opposed to sellers of products or services?" Katz said.

After a three-week bench trial, a California federal judge concluded in August that the NCAA's policy violated federal antitrust law and ordered the organization to begin allowing payment to Division I men's football and basketball players starting in the next recruitment cycle.

Now the NCAA is asking the Ninth Circuit, which has agreed to hear the case on an expedited schedule, to overturn that holding.

Attorneys said given the unusual nature of the district court's opinion, the appeal should be of interest to both college sports fans and antitrust enthusiasts alike.

"The court dictated what the payment should be and how to deal with it, and I'm not sure what that was based on," Lahlou said. "It was really kind of novel."
At the same time, another California federal court rejected a proposed $325 million settlement between Google Inc., Apple Inc., Intel Corp. and Adobe Systems Inc. and employees who claim the companies agreed not to poach each other's programmers is also moving forward in 2015.

The judge reasoned that the deal was too small in comparison with earlier settlements in the case in light of extensive evidence supporting the plaintiffs' claims. If the two sides can't reach a new settlement, the suit is scheduled for an April 2015 trial.

"This is one of, if not the, most important high tech antitrust cases working its way through the federal court system this year, because of the substance of what is being fought over, i.e., how aggressively companies will be permitted to compete for, or decline to compete for, talented employees," said Cozen O'Connor antitrust co-chair Melissa Maxman. "No matter how the case is ultimately concluded, it also will be an important precedent in antitrust class action settlement jurisprudence."

The cases are Edward O'Bannon Jr. v. NCAA, case number 14-16601, in the U.S. Court of Appeals for the Ninth Circuit, and In re: High-Tech Employee Antitrust Litigation, case number 5:11-cv-02509, in the U.S. District Court for the Northern District of California.

**US et al. v. American Express Co. et al.**

The DOJ's six-week bench trial challenging American Express Co.'s anti-steering rules wrapped up in August, but U.S. District Judge Nicholas G. Garaufis still hasn't issued a decision on whether the rules violate federal antitrust law.

The government maintains that AmEx's rules blocking merchants from encouraging customers to use other credit cards squelch competition that could keep interchange fees down, ultimately reducing costs for consumers. AmEx, meanwhile, argued its interchange rates were inextricably linked to the rewards it offered cardholders and that the DOJ's efforts threatened its business.

Beyond the implications for AmEx itself, the case could end up setting key precedent on what standard of review applies to these kind of vertical restraint cases involving two-sided markets. Judge Garaufis himself lamented during closing arguments that “unfortunately it's in this courtroom that we may be going into new territory.”

Indeed, the case could end up yielding key doctrinal developments on that topic, Botti said.

"It's a very important case. This comes back to the idea of antitrust and balancing," Botti said. "AmEx makes an argument that the practices in question enhanced the quality of the product that it offered its cardholders and made it more competitive. The DOJ seemed to say that's outside of the scope of the market that allegedly was harmed."

The case is U.S. et al. v. American Express Co. et al., case number 1:10-cv-04496, in the U.S. District Court for the Eastern District of New York.

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