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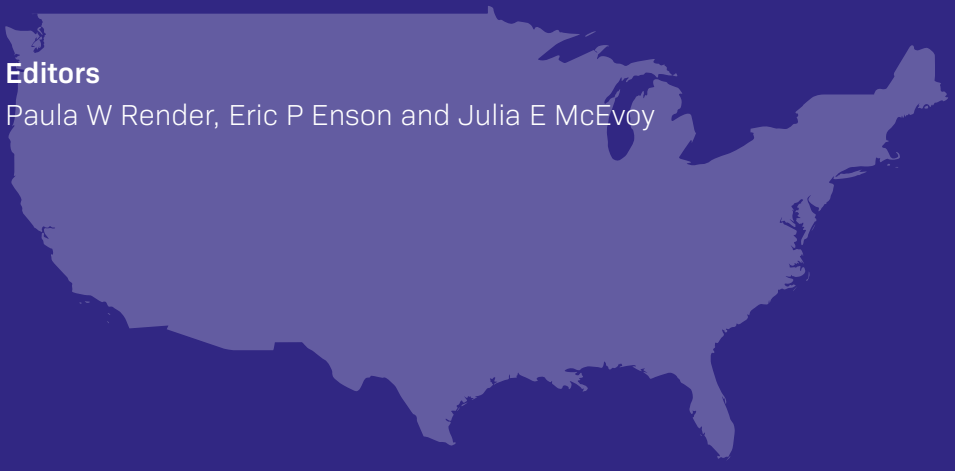

Editors
Paula W Render, Eric P Enson and Julia E McEvoy

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Preface

Global Competition Review is a leading source of news and insight on competition law, economics, policy and practice, allowing subscribers to stay apprised of the most important developments around the world.

Alongside the daily content sourced by our global team of reporters, GCR also offers deep analysis of longer-term trends provided by leading practitioners from around the world. Within that broad stable, we are delighted to launch this new publication, *US Courts Annual Review*, which is our first to take a very deep dive into the trends, decisions and implications of antitrust litigation in the world's most significant jurisdiction for such cases.

The content is divided by court or circuit around the US, allowing our valued contributors to analyse both important local decisions and draw together national trends that point to a direction of travel in antitrust litigation. Both oft-discussed developments and infrequently noted decisions are thus surfaced, allowing readers to comprehensively understand how judges from around the country are interpreting antitrust law, and its evolution.

In producing this analysis, GCR has been able to work with some of the most prominent antitrust litigators in the US, whose knowledge and experience has been essential in drawing together these developments. That team has been led and indeed compiled by Paula W Render, Eric P Enson and Julia E McEvoy of Jones Day, whose insight, commitment and know-how have been fundamental to fostering the analysis produced here. We thank all the contributors, and the editors in particular, for their time and effort in compiling this report.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws during the coming year.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact insight@globalcompetitionreview.com.

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London
June 2020

Fifth Circuit

Lawrence E Buterman, Katherine M Larkin-Wong, Tess L Curet, Caroline N Esser and Caroline Rivera
Latham & Watkins

Fifth Circuit decisions

Jurisdiction to review FTC orders

Louisiana Real Estate Appraisers Board v FTC

In *Louisiana Real Estate Appraisers Board v FTC*,[1] the Louisiana Real Estate Appraisers Board (the Board) asked the Court to review a Federal Trade Commission (FTC) order granting partial summary decision on state-action defenses. The Board is a state agency tasked with licensing and regulating commercial and residential real estate appraisers and appraisal management companies. It adopted a rule that required licensees 'compensate fee appraisers at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised and as prescribed by La. Stat. Ann. § 34:3415.15(A),' and prescribed three ways by which a licensed appraiser management company could establish a rate that is customary and reasonable.[2] The FTC 'issued an administrative complaint against the Board, alleging that it had "unreasonably restrain[ed] competition by displacing a marketplace determination of appraisal fees."'[3] The FTC alleged that because 'Rule 31101 established an exclusive list of ways by which appraisal management companies could determine compensation for appraisers, . . . the Rule "prevents [appraisal management companies] and appraisers from arriving at appraisal fees through bona fide negotiation and through the operation of the free market" . . . [and] that the Board's enforcement of the Rule unlawfully restrained price competition.'[4] The Board argued that it was immune from federal antitrust liability under state-action doctrines. After the Governor of Louisiana added oversight to the Board and the Board re-issued a revised rule following the new

1 917 F.3d 389 (5th Cir. 2019).

2 *Id.* at 390 (quoting La. Admin. Code. tit. 46 § 31101).

3 *Id.* (*citation omitted*).

4 *Id.* (*citation omitted*).

procedures, the Board moved to dismiss the complaint. The same day, however, the FTC moved for partial summary decision on the Board's state-action defenses. The FTC, acting in its adjudicatory role, denied the motion to dismiss and granted partial summary decision.[5]

On appeal, the Fifth Circuit found that it did not have jurisdiction to review the FTC's order because '[t]he jurisdiction of this Court to review an order of the Federal Trade Commission . . . arises only from a cease and desist order entered by the Commission' under the Federal Trade Commission Act (FTCA).[6] Rejecting the Board's argument that the Court had jurisdiction under the collateral-order doctrine, the Fifth Circuit found that 'Congress . . . expressly limited our jurisdiction to review of cease-and-desist orders.'[7] The Court explained that while it 'agree[d] that the collateral-order doctrine may apply to judicial review of some administrative decisions,' such as conclusive agency decisions under the Administrative Procedure Act or the Mine Act, it 'disagree[d] that courts of appeals may intervene in administrative proceedings as a general matter.'[8] The Fifth Circuit made clear that courts 'must look to the text of the statute at hand to determine whether Congress has authorized us to review the agency's decision.'[9] While other circuits had 'taken a different approach when considering whether the collateral-order doctrine applies to similarly restrictive statutes,' the Court noted that they had not specifically considered 'whether the language of the FTCA can be interpreted to allow appellate review of collateral orders.'[10]

This case is significant because it makes clear that, at least in the Fifth Circuit, courts do not have jurisdiction to review FTC decisions under the FTCA unless they are cease-and-desist orders, but leaves open the possibility that courts have jurisdiction to review other types of administrative decisions under the collateral-order doctrine.

Enforcing arbitration clauses in antitrust matters

Archer & White Sales, Inc v Henry Schein, Inc

In *Archer & White Sales, Inc v Henry Schein, Inc*,[11] the plaintiff, a family owned company that distributes, sells and services dental equipment, sought damages and injunctive relief from the defendants, which distribute and manufacture dental equipment, claiming that they 'entered into an anticompetitive agreement to restrict Archer's sales and to boycott Archer' in violation of federal and Texas antitrust law.[12]

5 *Id.* at 391.

6 *Id.* (*citation omitted*).

7 *Id.* at 393.

8 *Id.* at 392–93.

9 *Id.* at 393.

10 *Id.* (distinguishing *Cohen v Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and a number of First Circuit cases).

11 935 F.3d 274 (5th Cir. 2019).

12 *Id.* at 277.

The defendants moved to compel arbitration pursuant to a contract between the plaintiff and one of the defendant's predecessors-in-interest, which contained the following arbitration clause:

> *Disputes. This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of Pelton & Crane), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]. The place of arbitration shall be in Charlotte, North Carolina.*[13]

Initially, the magistrate judge granted a motion to compel arbitration, concluding that the question of arbitrability of the claims itself belonged to an arbitrator. The district court disagreed, holding that the arbitrability question was one for the courts. On appeal, the Fifth Circuit determined that it need not reach the issue of whether the arbitration provision delegated the issue of arbitrability because the 'wholly groundless' exception applied. The exception, which was operative in several circuits at the time, held that a court was not required to submit the issue of arbitrability to an arbitrator where the assertion of arbitrability was 'wholly groundless.' The Supreme Court reversed, holding that 'the "wholly groundless" exception' is not 'consistent with the Federal Arbitration Act . . . . When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract.'[14] In such circumstances, the Supreme Court noted, 'a court possesses no power to decide the arbitrability issue . . . even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.'[15] 'Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator.'[16] The Court did not express a view on whether the contract delegated the arbitrability question, but remanded to the Fifth Circuit to make that determination, noting that 'courts "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so."'[17]

On remand, the plaintiff contended that there was 'no clear and unmistakable evidence that the parties delegated arbitrability disputes to an arbitrator,' because '[t]he way the agreement is written, . . . the AAA rules (and resulting delegation) only apply to disputes that fall outside of the arbitration clause's carve-out for actions seeking injunctive relief.'[18] The defendants, however, argued that the 'agreement's incorporation of the AAA rules ends the inquiry' and 'the carve-out for actions seeking injunctive relief does not trump the parties' delegation.'[19] The Court agreed

13 *Id.*

14 *Henry Schein, Inc. v Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019).

15 *Id.* at 529.

16 *Id.* at 530.

17 *Id.* at 531 (quoting *First Options of Chi. Inc. v Kaplan*, 514 U.S. 938, 944 (1995)).

18 *Archer*, 935 F.3d at 279.

19 *Id.*

with the plaintiff, holding that 'the placement of the carve-out here is dispositive': 'The most natural reading of the arbitration clause . . . states that any dispute, except actions seeking injunctive relief, shall be resolved in arbitration in accordance with the AAA rules. The plain language incorporates the AAA rules – and therefore delegates arbitrability – for all disputes except those under the carve-out.'[20]

After determining that the agreement did not 'evince . . . a "clear and unmistakable" intent to delegate arbitrability,'[21] the Fifth Circuit turned to whether the plaintiff's claims were subject to the arbitration clause. The Court noted that 'the arbitration clause creates a carve-out for "actions seeking injunctive relief." It does not limit the exclusion to "actions seeking *only* injunctive relief," nor "actions for injunction in aid of an arbitrator's award." Nor does it limit the carve-out to *claims* for injunctive relief.'[22] Though the defendants were correct that the clause would permit the plaintiffs to avoid arbitration 'by adding a claim for injunctive relief,' that did not change the clause's plain meaning and the court cannot 'rewrite the unambiguous arbitration clause.'[23] Because the plaintiff's action sought injunctive relief, it fell within the exception.[24]

The defendants raised questions about whether the plaintiff was still entitled to injunctive relief given that the parties' contractual relationship ended during the pendency of the litigation. The plaintiff argued that 'other circuits have upheld injunctive relief in private antitrust actions even where the specific conspiracy alleged has ended.'[25] The Court did not reach this question, holding that 'the arbitrability question turns only on whether the existing action as a whole constitutes an "action seeking injunctive relief."'[26]

The Supreme Court decision in this case resolved a circuit split and made clear that the 'wholly groundless' exception is not consistent with the Federal Arbitration Act. In doing so, the Court focused lower courts on the language of the arbitration provision to determine whether the parties intended to delegate the question of arbitrability to an arbitrator under a clear and unmistakable evidence standard. The remand decisions in *Archer & White Sales, Inc* will serve as important precedent for parties seeking to enforce arbitration provisions in future antitrust cases.

Pleading predatory pricing claims

Clean Water Opportunities, Inc v Willamette Valley Co

In *Clean Water Opportunities, Inc v Willamette Valley Co*,[27] the Fifth Circuit affirmed the district court's order dismissing the plaintiff's federal and state antitrust claims against The Willamette Valley Company. The plaintiff had only recently started manufacturing patch – a polyurethane

20 *Id.* at 281.

21 *Id.* at 281–82.

22 *Id.* at 283 (*emphasis in original*).

23 *Id.*

24 *Id.* at 284.

25 *Id.* at 283 n.42.

26 *Id.*

27 759 F. App'x 244 (5th Cir. 2019).

material used to fill knot holes in plywood – for plywood manufacturers.[28] Until the plaintiff entered the market, the defendant was the sole seller of patch in the market. Shortly after entering the market, the plaintiff entered into a production contract with MARTCO, a Louisiana-based plywood manufacturing company, to supply patch for several of its manufacturing lines for five years.[29] The deal fell through, however, when the defendant offered MARTCO a substantial discount on all the non-patch products it sold to MARTCO in exchange for an agreement to buy all its patch from the defendant. The defendants allegedly thwarted the plaintiff's efforts to secure business from two other plywood manufacturers by offering similar discounts. As a result of this lost business, the plaintiff was no longer financially viable and entered into a contract to sell its assets to the defendant. The agreement included a non-compete clause. The plaintiff brought suit, alleging that the defendant 'had engaged in predatory pricing in violation of the Sherman Act when it offered discounts on non-patch products to' its would-be 'customers, because these discounts resulted in a price for patch that was effectively below Willamette's average variable costs for producing patch. It also alleged that Willamette illegally established a monopoly, in violation of state and federal law, and had purchased [the plaintiff]'s assets to maintain its monopoly.'[30]

With respect to the predatory pricing claim, the Court explained that 'a plaintiff must plausibly allege that "1) the prices complained of are below an appropriate measure of the alleged monopolist's costs and 2) that the alleged monopolist has a reasonable chance of recouping the losses through below-cost pricing."'[31] For the first element, 'a plaintiff must sufficiently plead that the alleged monopolist priced its goods below its average variable costs for producing those goods.'[32] The plaintiff alleged that, although the defendant did not price patch below average variable cost, it effectively did so when it substantially discounted non-patch products to induce customers to purchase its patch. The Court dismissed the claim, finding that the plaintiff's conclusory allegations that the defendant 'offered discounts to several plywood manufacturers that "were substantial and represented a benefit below Willamette's cost to produce patch"' were insufficient to state a claim.[33]

The plaintiff also alleged that the defendant illegally monopolized the patch market in violation of section 2 of the Sherman Act and an analogous Louisiana law. The plaintiff argued that even if the defendant's pricing scheme was not predatory, it nonetheless violated section 2 because it was practiced by a monopolist and had the effect of maintaining that monopoly.[34] The Court found that the plaintiff failed to allege facts to support an inference of exclusionary conduct

28 *Id.* at 245.

29 *Id.*

30 *Id.* at 246.

31 *Id.* (*citation omitted*).

32 *Id.* at 247.

33 *Id.* The Court also dismissed the plaintiffs' unlawful acquisition claims under section 2 of the Sherman Act and sections 4 and 7 of the Clayton Act because the plaintiff alleged that those claims 'rise and fall' with the predatory pricing claim. Given that the Fifth Circuit found the district court did not err in dismissing the predatory pricing claim, it also held that the district court appropriately dismissed the unlawful acquisition claims. *Id.* at 247–48.

34 *Id.* at 248.

because the defendant's conduct had a rational business purpose: it 'was faced with the prospect of losing business to a competitor' and 'to keep that business, it offered discounts on its other products.'[35] The discounts were not 'so substantial as to cross the line into economic irrationality,' because they 'resulted in an effective selling price.'[36] As a result, the Court affirmed the dismissal of the plaintiff's section 2 claim, and its corresponding state law claim.

Given that *Clean Water* is an unpublished decision, it is not binding precedent.[37] It is persuasive authority and guidance on pleading predatory pricing and monopolization claims.

District court decisions

Article III and antitrust standing

Kjessler v Zaappaaz, Inc

Kjessler v Zaappaaz, Inc[38] is a nationwide direct-purchaser antitrust lawsuit involving an alleged conspiracy to fix prices of certain customized promotional products (CPPs) in violation of section 1 of the Sherman Act.[39] The plaintiffs alleged that the defendants formed a cartel to fix the prices of three CPPs: customized silicone wristbands, customized lanyards and customized pin buttons. The defendants moved to dismiss the plaintiffs' lanyard price-fixing claims for lack of article III standing and moved to dismiss under Rule 12(b)(6) for failure to state a claim.[40]

With respect to standing, the plaintiffs acknowledged that none of them bought a lanyard from any defendant, but contended they nonetheless had standing to pursue class claims on behalf of lanyard purchasers because they 'sufficiently pleaded a single conspiracy covering all three relevant CPPs' and the price fixing of all three CPPs implicated the 'same set of concerns.'[41] The court found that while it was 'undisputed that Plaintiffs have standing to assert claims based on their own alleged injuries – i.e., the economic harm from purchasing over-priced wristbands or pin buttons,' because 'no named plaintiff alleges he or she was personally injured by Defendants' alleged lanyard price fixing, "none may seek relief on behalf of himself or any other member of the class" for Defendants' lanyard price fixing.'[42] The court noted that 'class representatives must suffer the "same" injury as class members – not just a similar injury – to have standing to maintain a class claim.'[43] The court refused to adopt the Second Circuit's 'same set of concerns' approach, which provided that 'a plaintiff has class standing if he plausibly alleges (1) that he personally has suffered some actual . . . injury as a result of the putatively illegal conduct of the defendant, and (2) that such conduct implicates the same set of concerns as the conduct alleged to have

35 *Id.*

36 *Id.*

37 See Fed. Rules of Appellate P. with Fifth Cir. Rules and Internal Operating P. 47.5.4.

38 No. 4:18-CV-0430, 2019 WL 3017132 (S.D. Tex. Apr. 24, 2019).

39 *Id.* at *1.

40 *Id.* at *2, 4.

41 *Id.* at *5–6.

42 *Id.* at *6 (*citation omitted*).

43 *Id.*

caused injury to other members of the putative class by the same defendants.'[44] The court instead adhered to Fifth Circuit precedent, which 'is hostile to [the] "same set of concerns" formulation, repeatedly holding that class representatives must "possess the same *interest* and suffer the same *injury*" as the class members.'[45] Because no plaintiff alleged a personal injury from the defendants' alleged lanyard price-fixing, the court dismissed the plaintiffs' lanyard price-fixing claims for lack of article III standing.

The defendants also moved to dismiss the plaintiffs' complaint for failing to 'allege facts suggesting every aspect of the alleged price fixing conspiracy is plausible.'[46] More specifically, they argued that the complaint alleged '"discrete conspiracies," not one vast industry-wide conspiracy among Defendants to fix prices on three different CPPs'; the complaint was focused only on wristbands; their criminal 'plea agreements do not specifically mention pin buttons'; and the complaint did not allege the 'custom wristband defendants' sold pin buttons.[47] The court found, however, that the defendants were contesting '"not whether any conspiracy existed, only how far it reached" – a question "of fact" that "cannot be resolved in the present procedural posture, where the court tests only the sufficiency of the pleadings."'[48] Looking at the plaintiffs' allegations 'holistically,' the court held that 'the Complaint states a plausible price-fixing conspiracy claim covering wristbands and pin buttons against all Defendants.'[49] While the text message and social media platform conversations quoted in the complaint only expressly mentioned customized wristbands, the court noted that 'the Complaint must be liberally construed in Plaintiffs' favor,' and 'allegations sufficient to demonstrate a price fixing conspiracy related to certain products or practices within an industry permit an inference of a larger conspiracy covering other products or practices' at the motion to dismiss stage.[50] Moreover, the defendants' criminal guilty plea agreements, 'where Defendants individually admit to general CPP price fixing with multiple competitors, are evidence of these Defendants' own acknowledgement of the existence of a conspiracy covering both wristbands and pin buttons.'[51] Finally, the court found that the complaint alleged several facts that suggested the existence of a broad and overarching price-fixing conspiracy, including a history of intense price competition that ceased following a civil settlement between the parties, a common motive to conspire given declining profits in the industry, several opportunities to exchange information, and a concentrated market conducive to collusion.[52] As a result, the plaintiffs satisfied their pleading burden and the court denied the defendants' motion to dismiss for failure to state a claim.

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44 *Id.* at *6–7 (quoting *NECA-IBEW Health & Welfare Fund v Goldman Sachs & Co.*, 693 F.3d 145, 162 (2d Cir. 2012)).

45 *Id.* at *7 (*citation omitted and emphasis in original*).

46 *Id.* at *9.

47 *Id.* at *10.

48 *Id.* (quoting *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-2420 YGR, 2014 WL 309192, at *2 (N.D. Cal. Jan. 21, 2014)).

49 *Id.* (*citation and internal quotation marks omitted*).

50 *Id.* at *11.

51 *Id.* (listing cases that found criminal guilty pleas supported an inference of a conspiracy).

52 *Id.*

TravelPass Group, LLC v Caesars Entertainment Corporation

In *TravelPass Group LLC v Caesars Entertainment Corporation*,[53] the plaintiffs – TravelPass Group, LLC and its predecessor or related entities, Reservation Counter, LLC and Partner Fusion, Inc – filed an antitrust case against Caesars Entertainment Corporation, Choice Hotels International, Inc, Hilton Domestic Operating Company, Inc, Hyatt Corporation, Marriott International, Inc, Red Roof Inns, Inc, Six Continents Hotels, Inc and Wyndham Hotel Group, LLC, alleging a horizontal conspiracy among the hotel chains and gatekeeper online travel agencies (gatekeeper OTAs) such as Expedia to eliminate interbrand competition for keyword internet searches. The plaintiffs were affiliates of the gatekeeper OTAs, which obtained access to the defendant hotels' inventory via the gatekeeper OTAs. Hilton, Hyatt, Marriott, Red Roof, Six Continents and Wyndham jointly filed a motion to dismiss asserting that TravelPass did not suffer injury-in-fact as a result of the horizontal agreement among the hotels and lacked antitrust standing to challenge the 'primary' conspiracy; the plaintiffs lacked antitrust standing to challenge the 'secondary' conspiracy between the hotels and the gatekeeper OTAs because if any injury to TravelPass flowed from the enforcement of distribution contracts between the hotels and the gatekeeper OTAs, any such injury is not the type of injury the antitrust laws were intended to prevent; and the plaintiffs failed to allege facts sufficient to support the existence of either the primary or secondary conspiracy.[54]

With respect to standing, the magistrate judge viewed the plaintiffs' allegations 'holistically,' rather than separately addressing the primary horizontal conspiracy among the hotels and the secondary conspiracy among the hotels and gatekeeper OTAs.[55] The court concluded that the plaintiffs sufficiently alleged injury-in-fact because the 'allegations, if true, indicate TravelPass has suffered harm to its "business or property" as a result of Defendants' alleged actions. According to Plaintiffs, TravelPass competed directly with Defendants for years, until Defendants conspired with one another to eliminate branded keyword competition' and the defendant hotels 'cut off TravelPass' access to inventory and decreased TravelPass's value.'[56]

The court similarly found the plaintiffs adequately alleged antitrust injury. The court first explained that while 'the Fifth Circuit has noted consumers and competitors are the parties often injured by the harm of competition caused by alleged antitrust violations,' it has 'not held as a matter of law that antitrust standing is limited to competitors and consumers exclusively.'[57] As a result, even if the defendants were correct that TravelPass is not a competitor, the court found

53 No. 5:18-CV-153-RWS-CMC, 2019 WL 5691996 (E.D. Tex. Aug. 29, 2019), report and recommendation adopted, 2019 WL 4727425 (E.D. Tex. Sept. 27, 2019).

54 *Id.* at *6–7. Caesars and Choice filed separate motions to dismiss for failure to state a claim and incorporated by reference the arguments set out in the joint motion. Caesars' and Choice's separate motions and the court's rulings on the same are not summarized here.

55 *Id.* at *16.

56 *Id.* at *18.

57 *Id.* at *22 (citing *Universal Hosp. Servs., Inc. v Hill-Rom Holdings, Inc.*, No. CIV.A. SA-15-CA-32, 2015 WL 6994438, at *12 (W.D. Tex. Oct. 15, 2015)).

that was not determinative.[58] The court also rejected the defendants' argument that there was no alleged harm to competition that resulted in injury to TravelPass, explaining that while '[i]njury to competition' is 'often a necessary component to substantive liability,' it 'need not be pleaded for a plaintiff's antitrust claims to survive a motion to dismiss.'[59] Rather, 'in the standing context, injury "should be viewed from the perspective of the plaintiff's position in the marketplace, not from the merits-related perspective of the impact of a defendant's conduct on overall competition."'[60] The court concluded that TravelPass's alleged losses and competitive disadvantage fell within the 'conceptual bounds of antitrust injury.'[61] Moreover, TravelPass also alleged that the defendants' conduct 'led to a decrease in information to consumers, an increase in the transaction and other costs for consumers seeking to book a hotel, which inevitably leads to overall higher prices and reduced quality for consumers.'[62]

The defendants also moved to dismiss the complaint for failure to 'plead facts from which any conspiracy can be inferred, contending the complaint does not contain allegations "directly evidencing an actual agreement among Defendants not to bid on each other's branded keywords, relying instead on conclusions and innuendo."'[63] Relying on *Kjessler*,[64] the court emphasized again 'that Plaintiffs' allegations should be viewed holistically.'[65] While the defendants contended the plaintiffs had 'not made any allegations that place the parallel conduct in a context suggestive of conspiracy' and that there were 'independent incentives of each defendant to adopt the challenged provisions absent any agreement with its competitors,' the court concluded that the 'complaint includes numerous non-conclusory factual allegations that go beyond allegations of mere parallel conduct.'[66] The plaintiffs had alleged in detail why the defendants needed to conspire, referenced an email chain discussing the alleged conspiracy, alleged economic motivations indicating acting unilaterally would have been against economic self-interest, and alleged an 'abrupt change in bidding.'[67] The court concluded the plaintiffs had 'offered sufficient additional factual enhancements to move their claims beyond the "conceivable" to the "plausible."'[68]

Hilton, Hyatt, Marriott, Red Roof, Six Continents and Wyndham did not object to the magistrate judge's findings and conclusions, which the district court adopted.[69]

58 *Id.* at *23.

59 *Id.* at *24.

60 *Id.* (quoting *Waggoner v Denbury Onshore, L.L.C.*, 612 Fed. App'x 734, 736 n.3 (5th Cir. 2015)).

61 *Id.* (*citation and internal quotation marks omitted*).

62 *Id.*

63 *Id.* at *26 (*citation omitted*).

64 See *Kjessler v Zaappaaz, Inc*, above (No. 4:18- CV-0430, 2019 WL 3017132 (S.D. Tex. Apr. 24, 2019)).

65 *TravelPass*, 2019 WL 5691996, at *28.

66 *Id.* at *32.

67 *Id.* at *33–34.

68 *Id.* at *35 (*citation omitted*).

69 *Travelpass Grp. LLC v Caesars Entm't Corp.*, No. 5:18-CV-00153-RWS-CMC, 2019 WL 4727425, at *4 (E.D. Tex. Sept. 27, 2019).

Class certification

Maderazo v VHS San Antonio Partners, LP

Registered nurse plaintiffs alleged that owners or operators of hospital systems conspired to depress the wages of registered nurses in San Antonio, Texas, through explicit agreements or exchanges of wage information in violation of section 1 of the Sherman Act and section 4 of the Clayton Act.[70] The plaintiffs sought to certify a class of registered nurses and the court found that they did not satisfy the requirements under Federal Rule of Civil Procedure 23(b)(3) because they failed to demonstrate 'that antitrust impact/injury, which hinges on a causal link to the violation, can be shown with common evidence on a classwide basis.'[71]

The court emphasized that in private party litigation under section 4 of the Clayton Act, the 'causal link between the violation and the injury may not be based on speculation, but rather must be proved "as a matter of fact and with a fair degree of certainty,"' noting that there is 'no road to recovery . . . unless there is evidence of a causal connection between the specific antitrust violation and the alleged injury to the plaintiffs.'[72] The court excluded testimony from the plaintiffs' expert, finding that his opinions did not address the causal link between the conspiracy and registered nurse wages. In rejecting the opinion, the court found the expert made broad assumptions about injury, but 'made no effort to trace the impact of the alleged agreement through any of the actions of any of the defendants' to the alleged impact or injury.[73] The court emphasized that the 'Circuit places great importance on the "impact" element of any antitrust cause of action' in making the determination as to predominance.[74] Despite the plaintiffs' argument to the contrary, a showing of causation is required for both 'rule of reason' and per se antitrust claims.[75] Because the plaintiffs failed to demonstrate antitrust impact or injury, the court denied their motion for class certification and also granted the defendant's motion to exclude the expert testimony of the plaintiffs' expert in part.

Patent-antitrust liability

Chandler v Phoenix Services

In *Chandler v Phoenix Services*,[76] the enforcement of United States Patent No. 8,171,993 ('993 patent) was 'at the heart' of the antitrust litigation.[77] The suit was brought by Ronald Chandler, Chandler Manufacturing, LLC, Newco Enterprises, LLC and Supertherm Heating Services, LLC against Phoenix Services, LLC (Phoenix) and Phoenix CEO Mark H Fisher (Fisher), and was related to

70 *Maderazo v VHS San Antonio Partners, L.P.*, No. CV SA-06-CA-535-OG, 2019 WL 4254633 (W.D. Tex. Jan. 22, 2019).

71 *Id.* at *9.

72 *Id.* at *6 (quoting *State of Alabama v Blue Bird Body Co., Inc.*, 573 F.2d 309, 317 (5th Cir. 1978)).

73 *Id.* at *7.

74 *Id.* (quoting *Blue Bird*, 573 F.2d at 327).

75 *Id.* at *8 (citing *Atl. Richfield Co. v USA Petrol. Co.*, 495 U.S. 328, 335 (1990)).

76 419 F. Supp. 3d 972 (N.D. Tex. 2019).

77 *Id.* at 977.

several patent-infringement suits initiated by Heat On-The-Fly, LLC (HOTF), a Phoenix subsidiary.[78] The Federal Circuit had held that HOTF asserted its '993 patent in bad faith and the '993 patent was unenforceable due to inequitable conduct. Following the Federal Circuit's ruling in the patent litigation, the plaintiffs filed this antitrust suit alleging that the defendants 'committed Sherman Act § 2 attempted-monopolization violations amounting to either (1) *Walker Process* patent fraud or (2) sham patent litigation.'[79] The defendants moved to dismiss all counts.[80]

With respect to the plaintiffs' *Walker Process* patent fraud claim, the defendants argued that the plaintiffs 'failed to plead facts sufficient to support a finding that there was a "dangerous probability" of HOTF successfully obtaining monopoly power' because the defendants at most possessed only 23 per cent of the market in 2013.[81] The court noted, however, that the 23 per cent figure 'represents the market share that HOTF and their licensees *actually occupied* in the in-line frac water-heating market, not the market share they *could occupy* through the allegedly fraudulent enforcement of the '993 patent.'[82] 'By taking actions like calling non-licensed competitors' customers to assert the '993 patent, initiating lawsuits for the infringement of the '993 patent, and posting the '993 patent on Phoenix's website, HOTF could plausibly occupy the full 62–66% of the market that used the invention claimed in claim 1 of the '993 patent.'[83] Moreover, the court found that the complaint also contained factual allegations that HOTF was claiming closer to 100 per cent of the market in 2015.[84] As a result, the court 'reject[ed] the Phoenix Defendants' argument that the pleaded market share is less than 50% and therefore "legally insufficient."'[85] The court also found that the plaintiffs 'pleaded facts sufficient to address other market factors, "such as concentration of the market, high barriers to entry, consumer demand, strength of the competition, or consolidation trend in the market."'[86] While a patent does not itself establish a presumption of market power, the court explained that 'if, as the Chandler Plaintiffs plausibly claim, the patent is fraudulent under *Walker Process*, then monopolistic effects stemming from its enforcement may give rise to antitrust liability.'[87] The court therefore denied the defendants' motion to dismiss the attempted monopolization claims.

78 *Id.*

79 *Id.* at 980.

80 *Id.* at 982. The defendants also moved to dismiss all counts against Mr Fisher because the plaintiffs had not sufficiently alleged facts that stated a claim that would subject Mr Fisher to individual antitrust liability. The court granted this motion in part and denied in part, holding that the plaintiffs 'alleged facts plausibly showing Fisher may be held individually liable for the acts of HOTF' but did not allege 'facts plausibly showing Fisher may be held individually liable for the acts of Phoenix.' *Id.* at 989.

81 *Id.* at 983 (*citation omitted*).

82 *Id.* at 985 (*emphasis in original*).

83 *Id.* (*internal quotation marks and citation omitted*).

84 *Id.*

85 *Id.* (*citation omitted*).

86 *Id.* (quoting *Domed Stadium Hotel, Inc. v Holiday Inns, Inc.*, 732 F.2d 480, 490 (5th Cir. 1984)).

87 *Id.* at 985–86.

Noerr-Pennington doctrine

There were also several district court decisions in the Fifth Circuit that dismissed antitrust claims under the *Noerr-Pennington* doctrine.

Tricon Precast, Ltd v Easi Set Industries, Inc

In *Tricon Precast, Ltd v Easi Set Industries, Inc*,[88] the plaintiff, Tricon, a Texas company that manufactures and sells precast concrete and related products including traffic barriers for the road-construction industry, sued Easi-Set, a Virginia company that licenses precast concrete products, for unreasonable restraint of trade and unfair competition. Tricon alleged that Easi-Set violated the Sherman Act by successfully inducing and encouraging the Texas Department of Transportation to require that traffic barriers use Easi-Set's trademarked V-shape design, which made Easi-Set the sole supplier of precast concrete barriers.[89] The court concluded that 'based on the face of the second amended complaint, the *Noerr-Pennington* doctrine bars Tricon's antitrust claims as a matter of law. Because Easi-Set allegedly succeeded in lobbying [the Texas Department of Transportation] to include the V-shape design in concrete-traffic-barrier specifications, the sham doctrine does not apply, and the *Noerr-Pennington* doctrine bars the antitrust claims against Easi-Set.'[90] The court dismissed Tricon's antitrust claims with prejudice and without leave to amend, noting that 'amendment would be futile.'[91]

Veritext Corporation v Bonin

Similarly, in *Veritext Corporation v Bonin*,[92] two court reporter companies filed complaints against the Louisiana Court Reporter's Association (LCRA) and the Louisiana Board of Examiners of Certified Shorthand Reporter's (the CSR Board) challenging the constitutionality of a state statute that prohibited court reporters from entering into contracts with party litigants, and alleging that LCRA and the CSR Board 'conspired together to restrict trade by disallowing volume-based discounts to court reporting firms, in violation of the Sherman Antitrust Act.'[93] The court found that LCRA demonstrated 'entitlement to *Noerr-Pennington* immunity for their petitioning activities requesting the CSR Board to enforce article 1434. The plaintiff asserts that the defendant LCRA "made baseless repetitive complaints to the Board and caused it to issue subpoenas, show cause orders, and engage in widespread coercion directed at insurance companies, private attorneys, and national court reporting firms over which it had no jurisdiction." Because LCRA is a private citizen, who effectively lobbied the CSR Board, a "regulatory body," to enforce article 1434, LCRA's actions

88 395 F. Supp. 3d 871 (S.D. Tex. 2019).

89 *Id.* at 877.

90 *Id.* at 886.

91 *Id.*

92 417 F. Supp. 3d 778 (E.D. La. 2019), reconsideration denied, No. 16-CV-13903, 2019 WL 6701313 (E.D. La. Dec. 9, 2019).

93 *Id.* at 782–83.

are permissible petitioning activity protected under *Noerr-Pennington*.'[94] The court further found that the sham exception was not applicable 'because the lobbying activities conducted by LCRA were not objectively baseless.'[95] The court therefore found that LCRA was entitled to *Noerr-Pennington* immunity and dismissed the plaintiff's Sherman Act claims.

94 *Id.* at 788 (*citation omitted*).

95 *Id.*

Sixth Circuit

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Sixth Circuit decisions

Ancillary restraints on competition

Medical Center at Elizabeth Place, LLC v Atrium Health System

In *Atrium Health System*,[1] the plaintiff, an acute care, for-profit hospital owned by 60 physicians and one corporate shareholder, alleged that it failed because of the anticompetitive actions of four hospitals, as well as a Dayton, Ohio company called Premier Health Partners. Premier Health Partners had been formed through a joint operating agreement among those four hospitals. The plaintiff brought its claim under section 1 of the Sherman Act.

The plaintiff hospital made several allegations in support of its claim that the defendants' actions were per se unlawful. The plaintiff alleged that the defendants stipulated to payers (insurers and managed-care plan providers) that if they added the plaintiff to their networks, the defendants would be able to renegotiate prices under their contracts, also known as 'panel limitations.' The plaintiff also pointed to evidence of a board meeting held by the defendants to discuss opposition to the plaintiff's opening, as well as a letter written by primary care physicians – many affiliated with the defendants – to physicians in the Dayton area (referred to as 'Dear Physician' letters), stating that they had concerns regarding physician-owned hospitals. Specifically, the letters stated concerns that '[a] physician owned specialty hospital [such as the plaintiff] will take the better-insured and more profitable patients away from Premier (along with ancillary services), leaving our local hospitals with only the more complex and underinsured patients.'[2]

Further, the plaintiff pointed to the fact that the defendants terminated the leases of multiple plaintiff-affiliated doctors who rented space in the defendants' hospitals. The plaintiff also pointed to the defendants' non-compete agreements with physicians in the Dayton area, specifically a contract entered into between one defendant hospital, Good Samaritan Hospital, and a hospital it

1 *Med. Ctr. at Elizabeth Place, LLC v Atrium Health Sys*., 922 F.3d 713 (6th Cir.), cert. denied, 140 S. Ct. 380 (2019).

2 *Id.* at 720.

purchased. The contract stipulated that a condition of purchase was 'not to invest in [the plaintiff], and . . . if they already owned shares, they would divest if [the plaintiff] began to offer cardiac services over the next five years.'[3] This conduct, the plaintiff argued, was per se illegal under the Sherman Act, because it 'blocked [plaintiff] from gaining meaningful access to the Dayton market through a series of anticompetitive acts that amounted to a group boycott of [the plaintiff].'[4]

The case came before the Sixth Circuit after the district court granted summary judgment for the defendants. The district court held that contrary to the plaintiff's arguments, the defendants' actions were not per se illegal under the Sherman Act, because the record showed that Premier's actions had plausibly pro-competitive features. The plaintiff appealed. The Sixth Circuit affirmed that the plaintiff's per se claim failed, making no determination as to whether Premier's conduct was on balance pro- or anticompetitive.

In reaching its decision, the Court noted the general presumption against the per se rule, and the fact that Premier's contracts were part of a joint venture, which the Supreme Court has recognized 'hold the promise of increasing a firm's efficiency and enabling it to compete more effectively.'[5] Since the conduct of the joint venture was at issue, the Court said that the proper inquiry was 'to see if the conduct is reasonably related to the joint venture's pro-competitive features (and therefore should be judged under the rule of reason) . . . .'[6] Because the Supreme Court distinguishes three categories of restraints – those that are core to, those that are ancillary to, and those that are nakedly unrelated to the purpose of the joint venture – the Court's decision turned on whether the defendants' conduct was ancillary to the purpose of the joint venture and, therefore, should be analyzed under a rule of reason standard instead.

The Court took notice of the split among Circuits in assessing what is ancillary to a joint venture. The Eleventh Circuit standard is whether the restraint is necessary to achieve the joint venture's purpose, whereas the Second, Seventh, Eighth and Ninth Circuits apply a standard of 'whether there exists a plausible pro-competitive rationale for the restraint.'[7] The Sixth Circuit sided with the majority of Circuits, and held that 'a joint venture's restraint is ancillary and therefore inappropriate for per se categorization when, viewed at the time it was adopted, the restraint may contribute to the success of a cooperative venture.'[8] Thus, to determine whether the plaintiff's per se claim could survive summary judgment, the Court needed to make a determination as to whether the restraints at issue were 'reasonable' and, therefore, inappropriate to assess under a per se standard. While noting that the defendants would have the ultimate burden to prove that a challenged restraint is pro-competitive, the Court did not reach the question because the plaintiff only brought a per se claim.

3 *Id.* at 731 (*internal quotations omitted*).

4 *Id.* at 720.

5 *Id.* at 724 (quoting *Copperweld Corp v Indep. Tube Corp.*, 467 U.S. 752, 768 (1984)).

6 *Id.*

7 *Id.* at 726.

8 *Id.* at 727 (*internal quotation omitted*).

Ultimately, the Court found that the defendants' conduct had plausible pro-competitive rationale. First, the Court held that the defendants' panel limitations were potentially pro-competitive 'methods directed toward the common goal of keeping patients (customers) coming through the doors . . . . A panel limitation . . . forces payers to confront the risk of renegotiating their contract with Hospital Defendants if they choose to send their insureds (customers) to a competing provider.'[9] Second, the Court found that the Dear Physician letters written at the direction of the defendants could not qualify as illegal conduct under antitrust laws because the plaintiff failed to show that they were untrue, and the plaintiff was able to counter them with 'Dear Colleague' letters of its own. Third, the Court found that the defendants' termination of leases of multiple plaintiff-held affiliated doctors who rented space in the defendants' hospitals was potentially pro-competitive, in that the defendants did not want lessees to 'free ride on the reputation and facilities of that hospital, and then refer patients out to [the plaintiff].'[10] Lastly, the Court held that the defendants' non-competition covenants in certain of its contracts prohibiting investment in the plaintiff's business were in line with 'long recognized [case law] that legitimate reasons exist to uphold non-competition covenants even though by nature they necessarily restrain trade to some degree.'[11]

This case resolves the Sixth Circuit's position on a circuit split, aligning it with the majority view that the standard for determining whether a joint venture's restraint is ancillary and therefore inappropriate for per se categorization is 'whether there exists a plausible pro-competitive rationale for the restraint.'[12] The case further illustrates conduct that courts in the Sixth Circuit may determine is ancillary to the purpose of a joint venture, most notably efforts to prevent third parties from engaging in business with a competitor, such as the inclusion of non-competition clauses and other restrictive covenants in contracts with third parties.

District court decisions

Settlement and fee awards in class action antitrust litigation

Shane Group, Inc v Blue Cross Blue Shield

Shane Group, Inc[13] is a consolidated class action brought by various individual and corporate plaintiffs against defendant Blue Cross Blue Shield of Michigan. The plaintiffs alleged an unlawful agreement in violation of section 1 of the Sherman Act under the rule of reason, and unlawful agreements in violation of section 2 of the Michigan Antitrust Reform Act, based on the defendant's use of most-favored nation (MFN) clauses in its agreements with hospitals, some of which are the largest hospital systems in Michigan, in which Blue Cross agreed to raise its reimbursement rates for each hospital's services, as long as the hospital agreed to charge other health insurers

9 *Id.* at 729.

10 *Id.* at 730.

11 *Id.* at 731 (*internal citations omitted*).

12 *Id*. at 726.

13 *Shane Grp., Inc. v Blue Cross Blue Shield*, No. 10-CV-14360, 2019 U.S. Dist. Lexis 168191 (E.D. Mich. Sep. 30, 2019).

rates at least as high as the hospital charged Blue Cross. The class sought to recover overcharges paid by purchasers of healthcare services directly to hospitals in Michigan. The court entered an order granting preliminary approval to proposed class settlement.

Responding to objections filed by certain plaintiffs, the court found that the complexity, expense and likely duration of the litigation weighed in favor of settlement. The court explained that 'the antitrust MFN issues raised by the plaintiffs were complex, very expensive to litigate,' and that the litigation has been ongoing for years, including appeals. The court noted that the MFN issue is not a common issue involving antitrust cases in the healthcare arena, and that the complexity, expense and duration factor weighed in favor of class settlement.

Class counsel sought attorney fees in the amount of $8,631,628.67, or approximately 28.78 per cent of the settlement fund and reimbursement of litigation expenses of $3.5 million. The court held that, '[c]ourts in this District have approved attorneys' fees in antitrust class actions anywhere from a 30% to a one-third ratio of the common fund.'[14] Recognizing that 'this action is a complex antitrust class action,' the court found 'that the percentage of the fund method is the proper measure to award attorneys' fees in this case rather than the lodestar method.'[15] This is because the former 'eliminates arguments regarding the reasonableness of rates and hours incurred by the numerous counsel involved in this case and fully aligns with the interest of the Class.'[16] The court concluded that the requested fund percentage was reasonable 'in light of the time and resources expended by Class Counsel in this case.'[17]

No poach agreements: pleading requirements, antitrust standing and arbitration

Blanton v Domino's Pizza Franchising LLC

The plaintiff in *Blanton*[18] brought suit on behalf of himself and all others similarly situated, alleging that no-hire provisions in Domino's standard franchise agreements unlawfully prohibited a Domino's franchisee from recruiting or hiring a current employee of another Domino's franchisee without prior written consent. The plaintiff argued that the defendants 'used the franchise agreements to orchestrate a conspiracy among their franchisees to not compete for labor,' and that the 'no-hire provision is evidence of that conspiracy and violates the Sherman Antitrust Act because it unreasonably restrains competition for Domino's franchise employees and depresses employee wages, lessens employee benefits, and stifles employee mobility.'[19]

In ruling on the defendants' motion to dismiss the plaintiff's claims in May 2019, the court held that the plaintiff had article III standing because he plausibly alleged an economic injury, causation, redressability and an antitrust injury. Though the plaintiff argued that the no-hire

14 *Id.* at *6.

15 *Id.* at *7.

16 *Id.*

17 *Id.*

18 *Blanton v Domino's Pizza Franchising LLC*, No. 18-13207, 2019 U.S. Dist. Lexis 87737 (E.D. Mich. May 24, 2019).

19 *Id.* at *1.

provision at issue was a per se violation, the plaintiff also pled an alternative 'quick look' claim. The court held that the plaintiff 'plausibly pled a contract, combination, or conspiracy affecting interstate commerce, in violation of section 1 of the Sherman Act,' and that the plaintiff 'also plausibly alleged that the agreement is unreasonable under both the per se rule and quick-look analysis.'[20] In particular, the plaintiff sufficiently alleged 'that the agreement has such a clear lack of redeeming value that it is conclusively presumed to be unreasonable' and that 'the anti-competitive effects of the agreement are so obvious that an observer with even a rudimentary understanding of economics could conclude that the agreement in question would have an anti-competitive effect on customers and markets.'[21] The court, however, declined 'to announce a rule of analysis at this juncture,'[22] and held that '[m]ore factual development is necessary.'[23]

The court revisited *Blanton* in October 2019, on the defendants' motion to dismiss, arguing that plaintiffs' employment agreements required arbitration of their claims. At this point in the litigation, a second plaintiff – Derek Piersing – was added and among the plaintiffs seeking relief. Piersing argued that the arbitration clause did not apply to him because the franchise agreement he entered into was with his employer, Carpe Diem Pizza, a franchisee of Domino's, and not Domino's directly. Domino's argued that because Piersing alleged a conspiracy involving Domino's and its franchisees, he was 'estopped from avoiding arbitration by selectively suing only some of the alleged conspirators,'[24] namely Domino's, a non-signatory to the arbitration agreements, and not others.

The court agreed with the defendants, and held that under Washington state law, which was controlling, 'Domino's and Carpe Diem are inseparable. The claims against them are inseparable. Equitable estoppel applies, and Domino's may compel Piersing to arbitration.'[25] Further, finding that, under Washington state law, for the arbitration clause to apply to Piersing's claims, the subject matter of the dispute needed to be 'intertwined with the contract providing for arbitration,'[26] the court held that Piersing's antitrust claims were clearly intertwined with the subject of the arbitration agreement because it covered all claims 'arising out of or relating to Employee's employment with the Company and/or the termination of Employee's employment.'[27]

In re Papa John's Employee and Franchisee Employee Antitrust Litigation

In *In re Papa John's Employee and Franchisee Employee Antitrust Litigation*,[28] the plaintiffs brought claims against defendants, seeking to represent all persons who were employed at a Papa John's restaurant located in the United States between 2010 and the present, arguing that a no-hire

20 *Id.* at *5 (*internal quotations omitted*).

21 *Id.* at *10 (*internal quotations omitted*).

22 *Id.* at *4.

23 *Id.*

24 *Blanton*, No. 18-13207, 2019 U.S. Dist. Lexis 184817 at *3 (E.D. Mich. Oct. 25, 2019).

25 *Id.* at *4.

26 *Id.* at *3 (*internal citation omitted*).

27 *Id.* at *4.

28 No. 3:18-CV-00825-JHM, 2019 U.S. Dist. Lexis 181298 (W.D. Ky. Oct. 21, 2019).

provision contained in franchise agreements was a per se violation of the Sherman Act, in that the no-hire provision acted as a per se horizontal restraint of trade among competitors in the labor market. The defendants moved, in relevant part, to dismiss for failure to state a claim, arguing that the restraint was vertical, and thus the rule of reason standard of review ought to apply. Further, the defendants moved to compel arbitration and dismiss claims of one plaintiff, Jamiah Greer.

On the motion to compel arbitration with plaintiff Greer, the court granted the defendants' motion to dismiss. The plaintiffs argued that Greer's antitrust claim 'arises out of the concerted refusal of any Papa John's franchisee to consider her for a position pursuant to the No-Hire Agreement,'[29] and that the defendants were 'liable for the harm caused (wage suppression) because it orchestrated the No-Hire Agreement, not because it employed Ms Greer.'[30] The court held that '[n]ot only does the arbitration agreement broadly cover all claims, disputes or controversies arising out of or relating to your employment with Papa John's, but the agreement proceeds to provide a non-exhaustive list of potential claims covered by the agreement,'[31] which included 'any violation of any federal, state, or other governmental law, statute, regulation, or ordinance.'[32] Therefore, the court held that the instant claims were covered under the arbitration clause.

The defendants' motion to dismiss or strike the plaintiffs' Sherman Act claims argued that the plaintiffs' failure to allege a relevant market was fatal to their showing of a horizontal unreasonable restraint of trade under the Sherman Act's rule of reason standard. Relying on *Ohio v American Express Co*,[33] the plaintiffs argued that 'when dealing with a horizontal restraint that has an adverse effect on competition, a plaintiff need not define the relevant market.'[34] The court agreed, and found that the plaintiffs set forth factual allegations sufficient from which the court could plausibly conclude that the agreements at issue were horizontal. The court declined to consider the rule of reason analysis, citing *Blanton v Domino's Pizza Franchising LLC*.[35]

The court further held that the plaintiffs sufficiently pled an antitrust injury, noting the plaintiffs' allegation that the no-hire provision at issue was 'an agreement not to compete for labor and that the agreement had the purpose and effect of depressing wages and diminishing employment opportunities' [36] was in line with Sixth Circuit precedent finding that such allegations satisfy the antitrust injury requirement.

29 *Id.* at *4 (*internal quotations omitted*).

30 *Id.* (*internal quotations omitted*).

31 *Id.*

32 *Id.*

33 138 S. Ct. 2274, 2284 (2018).

34 *In re Papa John's*, 2019 U.S. Dist. Lexis 181298 at *9 (*internal citation omitted*).

35 2019 U.S. Dist. Lexis 87737 at *4.

36 *In re Papa John's*, 2019 U.S. Dist. Lexis 181298 at *9 (citing *Blanton*, 2019 U.S. Dist. Lexis 87737 at *4; *Roman v Cessna Aircraft Co.*, 55 F.3d 542, 544 (10th Cir. 1995)).

Class certification and predominance under FRCP 23(b)

Hospital Authority of Metropolitan Government of Nashville and Davidson County, Tennessee v Momenta Pharmaceuticals, Inc

In *Momenta Pharmacy*,[37] NGH, a metropolitan charity hospital, and DC 37, a non-profit health and welfare benefit plan covering public sector employees, retirees and their families, brought four separate claims under the Sherman Act against the defendants, two pharmaceutical companies, based on their agreement to share profits from sales of the generic drug enoxaparin, 'so long as defendants remained the sole source of generic enoxaparin in the United States.'[38] Under the agreement, the defendants received 'milestone payments' so long as they remained the sole supplier of the generic drug, which, the plaintiffs alleged, provided the defendants 'with a powerful incentive to use whatever rights it had to prevent other parties from entering the generic enoxaparin market.'[39] As indirect purchasers of, or entities that provide reimbursement for, enoxaparin and its brand name alternative, the plaintiffs alleged the defendants' anticompetitive activity violated numerous state antitrust, consumer protection and unjust enrichment laws, and caused them to pay more than they would have for the prescription drugs, absent the defendants' conduct.

The plaintiffs sought certification of a class defined as follows:

> *Hospitals, third-party payors and people without insurance who indirectly purchased, paid for, and/or reimbursed some or all of the purchase price for, generic enoxaparin or Lovenox®, in Arizona, Arkansas, California, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin, from September 21, 2011, through September 30, 2015 (the 'Damages Class Period'), for the purpose of personal consumption by themselves, their families, or their members, employees, insureds, participants, patients, beneficiaries or anyone else.*
>
> *With respect to third-party payors and people without insurance, the Damages Class only includes those, described above, who purchased, paid for, and/or reimbursed some or all of the purchase price for, generic enoxaparin or Lovenox® from a pharmacy.*[40]

The court held that the proposed class 'easily' met the requirements of Federal Rule of Civil Procedure 23(a), noting that the proposed class 'consists of thousands of hospitals, insurers, and uninsured, satisfying numerosity,' and that the plaintiffs asserted 'that there are common questions of law and fact, namely the effect Defendants' alleged antitrust activity had on

37 *Hosp. Auth. of Metro. Gov't of Nashville & Davidson Cty., Tennessee v Momenta Pharm., Inc.*, 333 F.R.D. 390 (M.D. Tenn. 2019).

38 *Id.* at 399.

39 *Id.*

40 *Id.* at 399–400.

members of the class and the generic enoxaparin market.'[41] Further, the plaintiffs' claims were 'typical of the class because they were injured in the same way as all members of the proposed class—they paid more for enoxaparin than they would have absent Defendants' alleged anticompetitive behavior.'[42] Finally, the plaintiffs' maintained 'that they are adequate class representatives because: (1) NGH and DC 37 (as well as all members of the proposed class) were harmed by paying more for enoxaparin than they otherwise would have absent Defendants' conduct; and (2) there are no fundamental intra-class conflicts sufficient to defeat certification.'[43]

In determining whether the class met the predominance requirements of Rule 23(b), the court noted that the plaintiffs were required to show 'more than common evidence that defendants colluded to raise prices for generic enoxaparin. Plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy.'[44] The court recognized that '[c]ourts have fairly consistently found that common issues regarding the existence and scope of the conspiracy predominate over other questions affecting only individual members in antitrust price fixing cases,' which 'makes sense because determination of the conspiracy issue will focus on the conduct of the Defendants, not the individual class members.'[45] Thus, the court focused its inquiry on 'impact, as that element poses the more serious impediment to certification.'[46]

In assessing the element of antitrust impact, the court held that plaintiffs needed 'to show that the essential elements of their claims are capable of proof at trial through evidence that is common to the class rather than individual to its members.'[47] The court assessed whether the plaintiffs, through their expert, 'demonstrated . . . by common proof whether hospitals incurred overcharges in the first instance.'[48] Ultimately, the court was persuaded by the plaintiffs' expert's claim that the common proof showing hospitals bore overcharges consisted of: (1) published research showing that direct and indirect purchasers 'realize significant costs savings when generics enter the market;'[49] (2) the defendants' documents, testimony and forecasts, which confirmed that 'when generics enter the market there is a significant cost savings [*sic*] for purchasers;'[50] and (3) sales data for generic enoxaparin confirming that 'competition among generic manufacturers would

41 *Id.* at 403.

42 *Id.*

43 *Id.*

44 *Id.* at 405.

45 *Id.* at 407 (*internal quotations omitted*).

46 *Id.*

47 *Id.* at 408 (*internal quotations omitted*).

48 *Id.* at 409.

49 *Id.*

50 *Id.*

have led to significantly lower prices.'[51] Thus, the court found that the plaintiffs' expert analysis 'sufficiently demonstrates that there is common evidence capable of demonstrating the fact of antitrust impact.'[52]

Noting the defendants' 'speculative concern' that the court's certification of the class would include persons who were not injured by the alleged anticompetitive conduct, the court cited *Kohen v Pacific Investment Management Co LLC*[53] for the proposition that 'a class will often include persons who have not been injured by the defendant's conduct. Such a possibility or indeed inevitability does not preclude class certification, despite statements in some cases that it must be reasonably clear at the outset that all class members were injured by the defendant's conduct.'[54] Thus, the court adopted the holding of the Seventh Circuit in *Kohen* that 'the inability to show injury . . . does not defeat class certification where the plaintiffs can show widespread injury to the class.'[55]

51 *Id.*

52 *Id.* at 410.

53 571 F.3d 672, 677 (7th Cir. 2009).

54 *Momenta Pharm.*, 333 F.R.D. at 410.

55 *Id.* (citing *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 320–21 (E.D. Mich. 2001)).

Eighth Circuit

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Eighth Circuit decisions

Standard for preliminary injunction in merger matters

Federal Trade Commission v Sanford Health

In *Federal Trade Commission v Sanford Health*,[1] the Eighth Circuit considered an appeal by the merging defendants, Sanford Bismark (Sanford), an integrated healthcare system that operates an acute care hospital and multiple clinics in the Bismark area,[2] and Mid Dakota Clinic, PC (Mid Dakota), a multi-specialty physician group that includes approximately 23 adult primary care physicians, six pediatricians, eight OB/GYN physicians and five general surgeons. The Federal Trade Commission (FTC) challenged the merger under section 7 of the Clayton Act, alleging that it would substantially lessen competition in four types of physician services in Bismarck: general surgeon, pediatric, adult primary care and OB/GYN. The defendants sought to overturn the district court's decision granting a preliminary injunction.

The potential merger arose after Mid Dakota offered itself for sale in 2015. Sanford and Catholic Health, the third competitor in Bismarck, both submitted purchase proposals. Mid Dakota and Catholic Health executed a letter of intent but after Catholic Health terminated the deal, Mid Dakota began negotiations with Sanford. The FTC alleged that if the companies merged, Sanford would have the following market shares in Bismarck: 99.8 per cent of general surgeon services, 98.6 per cent of pediatric services, 85.7 per cent of adult primary care physician services and 85.6 per cent of OB/GYN physician services.[3]

1 *Fed. Trade Comm'n v Sanford Health*, 926 F.3d 959 (8th Cir. 2019).

2 The complaint refers to the Bismarck-Mandan area. For brevity and because geographic market definition was not at issue, we refer to Bismarck.

3 *Sanford Health,* 926 F.3d at 959, 962.

In determining the plaintiffs' likelihood of success, the district court relied on the burden-shifting method from *Baker Hughes*.[4] On appeal, the defendants argued that the district court inappropriately shifted the burden of persuasion to the defendants 'when it required them to produce rebuttal evidence that "clearly shows" that no anticompetitive effects were likely.'[5] Specifically, the defendants criticized the district court's citation to *Philadelphia National Bank*,[6] noting that the DC Circuit in *Baker Hughes* found that the Supreme Court, without overruling *Philadelphia National Bank*, had 'lightened the evidentiary burden on a section 7 defendant.'[7] The Eighth Circuit found no error because the district court 'followed the analytical framework of *Baker Hughes*,' specified that '[t]he FTC has the burden of persuasion at all times,' and that, because the plaintiffs 'presented strong evidence of monopolization or near monopolization in each service line, . . . defendants [had] to make a strong presentation in rebuttal.'[8]

The district court employed a hypothetical monopolist test to determine that commercial health insurers in Bismarck would accept an SSNIP[9] rather than market a health insurance plan in Bismarck without physicians providing adult primary care, pediatrician, OB/GYN and general surgeon services. The Court noted that the district court's determination was supported by analysis of claims data and testimony from all three insurers,[10] including Sanford Health Plan, the insurance provider within Sanford's system.[11] The defendants argued that the district court failed to account for Blue Cross' dominant position; a provider in North Dakota could not impose a price increase on Blue Cross. The Eighth Circuit noted that the defendants' arguments misstated the application of the hypothetical monopolist test. When applied to insurers, the test 'evaluates whether an insurer could avoid a price increase by contracting with physicians who offer services that are outside of the proposed service markets or located in a region outside the proposed geographic market.'[12] Blue Cross' market power would not change its ability to find substitutes because the testimony was that there were no functional substitutes.

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4 *Id.* ('Under this approach, the plaintiffs must first present a *prima facie* case that the merger will result in an undue market concentration for a particular product or service in a particular geographic area. That showing creates a presumption that the merger will substantially lessen competition. The burden of production then shifts to the defendant to rebut the presumption, and, on a sufficient showing, back to the plaintiffs to present additional evidence of anticompetitive effects. The ultimate burden of persuasion remains at all times with the plaintiffs.' (discussing *United States v Baker Hughes Inc.*, 908 F.2d 981, 982–83 (D.C. Cir. 1990)).

5 *Id.* at 963.

6 *United States v Philadelphia National Bank*, 374 U.S. 321 (1963).

7 *Sanford Health*, 926 F.3d at 963.

8 *Id.*

9 Small but significant non-transitory increase in price. See *id.*

10 In North Dakota, there are three leading commercial insurers: Blue Cross Blue Shield North Dakota, Medica and Sanford Health Plan, with Blue Cross accounting for 61 per cent of the North Dakota health insurance market in 2016. In addition, 'Blue Cross has a participation agreement with every general acute care hospital in the State and with approximately 99% of practicing physicians. Sanford and Medica accounted for 31% and 8% of the 2016 market, respectively.' *Id.* at 962.

11 *Id.*

12 *Id.* at 964.

Next, the Court considered the defendants' arguments in rebuttal: '(1) market concentration has no relationship to bargaining power in the North Dakota healthcare market, (2) Catholic Health was poised to enter the market to compete with Sanford after the merger, (3) merger efficiencies offset the potential to harm consumers, and (4) Mid Dakota's weakened condition justified the merger.'[13] First, the defendants claimed that Blue Cross sets reimbursement rates using a statewide pricing schedule meaning the merger would not impact prices, and criticized the district court for interpreting the argument as a powerful buyer defense, which, according to the defendants, improperly shifted the burden of persuasion to them. The Eighth Circuit rejected that argument, finding that, regardless of how the argument is described, the district court placed the burden of persuasion on the FTC and, more importantly, that evidence supported the relationship between market concentration after the merger and Blue Cross' leverage including evidence that Blue Cross was forced to modify contract terms with a near-monopoly provider in another area of the state. The Eighth Circuit also credited the district court's findings that Catholic Health would not be able to enter the market quickly due to difficulties recruiting doctors and countering Sanford's name recognition and that the only efficiency unique to the merger did not offset the merger to near-monopoly.[14] Finally, the Court found that the district court appropriately rejected the defendants' argument that Mid Dakota was a weakened competitor because the record showed that Mid Dakota was financially healthy and minutes from a shareholder meeting showed that the motivation to sell was high share value.[15] As a result, the Eighth Circuit affirmed the district court's decision to grant a preliminary injunction.

This case affirms the use of *Baker Hughes*' methodology to analyze a merger in the context of a preliminary injunction in the Eighth Circuit and makes clear that the Eighth Circuit is aligned with the DC Circuit's view of *Philadelphia National Bank*. In addition, the case provides useful guidance to litigants around the analysis of healthcare markets.

District court's review of expert testimony

In re Wholesale Grocery Products Antitrust Litigation

In *In re Wholesale Grocery Products Antitrust Litigation*,[16] the plaintiffs, two corporations that operate supermarkets in the Greater Boston area, sued defendants – SuperValu and C&S Wholesale Grocers, Inc (C&S), two of the largest grocery project wholesalers in the United States – alleging that they 'conspired by way of an Asset Exchange Agreement (AEA) to allocate territory and customers.' The Eighth Circuit considered the plaintiffs' appeal of decisions granting the defendants' summary judgment and *Daubert* motions and denying the plaintiffs' motion for class certification.

SuperValu and C&S were competitors in New England, but C&S did not compete with SuperValu in the Mid-West. The AEA at issue arose when SuperValu's primary competitor in the Mid-West declared bankruptcy and C&S announced its intention to acquire the debtor's assets. Under the

13 *Id.*

14 *Id.* 965–66.

15 *Id.*

16 946 F.3d 995 (8th Cir. 2019).

AEA, SuperValu would receive the debtor's assets and would transfer its New England operations to C&S. The class plaintiffs alleged that the AEA constituted an agreement to allocate territory and customers and allowed each defendant to charge supracompetitive prices.[17] To prove antitrust injury, the plaintiffs' expert used a competitive benchmark – the largest purchaser of wholesale groceries in New England – and argued that the change in price it paid was a 'reasonable reflection of the change in price paid by the independent grocers absent the AEA.'[18] The district court found the benchmark analysis unreliable because it was premised on 'an unfounded assumption that independent retailers' charges … followed the same pattern [as the benchmark] absent the AEA' and that the expert's analysis also failed because he failed to control for non-conspiratorial factors.[19]

The plaintiffs argued that the district court's decision should be overturned because their expert's qualifications were not questioned and his methodology – benchmarking – is a recognized tool for proving antitrust injury. The Eighth Circuit rejected that argument as an incorrect statement of law.[20] Noting that the district court rejected 'the foundation of the assumption underlying the application of the method employed by [the expert] on these facts,' the court held that the district court appropriately exercised its gatekeeping role under *Daubert* because it determined that the expert's assumptions were 'insufficient to validate [his] opinion.'[21] Despite the plaintiffs' expert's use of a regression and their recitation of the evidence and data on which he relied, the Court held that the district court did not abuse its discretion when it found that '[t]here was too great an analytical gap between the facts of the case and the benchmark chosen by [the expert] to support his opinion.'[22]

The Court also held that the district court did not abuse its discretion in rejecting the plaintiffs' expert for failing to account for non-conspiratorial factors and factors that were unique to the benchmark in his analysis. The plaintiffs argued that the district court 'should have assumed all factors affected the comparators equally unless there was proof that the factor at issue affected [the benchmark] and not [the plaintiffs].'[23] Relying on the plaintiffs' burden to establish the reliability of expert testimony 'including a determination of whether other factors affected the pricing at issue, if only to eliminate those factors,' the Court held that the plaintiffs needed to present evidence that the benchmark analysis controlled for all relevant factors.[24] Given the two issues, the Court held that the analysis 'properly reflects the district court's gatekeeping function mandated by *Daubert* and Rule 702' and that the expert opinion was speculative. The Court went

17 *Id.* at 995, 999.

18 *Id.* at 999.

19 *Id.*

20 *Id.* at 1001 ('This line of reasoning [that flaws in analyses are factual issues to be determined by the jury], however, is contrary to precedent supporting the *Daubert* analyses required of the district court at this juncture. The nature of the instant dispute is not factual.' (*citations omitted*)).

21 *Id.* at 1001–1002.

22 *Id.* at 1002.

23 *Id.*

24 *Id.* at 1003.

on to find that absent the expert report, the plaintiffs had insufficient evidence of antitrust injury to survive summary judgment and that the plaintiffs' motion for reconsideration of class certification was moot.

This case establishes that a district court can and should look beyond an expert's credentials and methodology to see if the expert's work fits the facts of the case. Where an expert fails to account for differences between a benchmark and the comparator or fails to consider non-conspiratorial factors that could affect the expert's analysis, the district court properly excludes the expert's testimony under *Daubert* and FRE 702.

District court decisions

Pleading exclusive dealing and tying claims

Wholesale Alliance, LLC v Express Scripts, Inc

In *Wholesale Alliance*,[25] the plaintiff – Pharmacy First, a pharmacy services administrative organization (PSAO) – brought claims for exclusive dealing and tying[26] against the defendant, Express Scripts, a pharmacy benefit manager (PBM). PSAOs provide administrative support to pharmacies, including processing claims, operational support and contract negotiation with insurers and PBMs. As a PBM, Express Scripts administers prescription drug plans for various insurers and health benefit plans by creating pharmacy networks through which their clients' members obtain prescription drugs at covered, discounted rates. Pharmacy First alleged that PBMs manage the prescription drug benefits of 90 to 95 per cent of US citizens with insurance and that Express Scripts controls 30 to 50 per cent of the nationwide PBM market.[27] 'Pharmacies enter into contracts with Express Scripts to obtain access to its network of 83 million insured patients' and frequently rely on PSAOs such as Pharmacy First for the contract negotiation.[28] Pharmacy First manages approximately 2,300 independent pharmacies nationwide.[29]

Pharmacy First's exclusive dealing and tying claims arose out of Express Scripts' cancellation of Pharmacy First's Services Agreement (Agreement). The Agreement recognized Pharmacy First's ability to negotiate on behalf of its pharmacies and provided that Pharmacy First's network of pharmacies would provide benefits to Express Scripts' network.[30] The Agreement 'could "be terminated by [Express Scripts] without cause upon at least thirty (30) days' written notice."'[31] On

25 *Wholesale Alliance, LLC v Express Scripts, Inc.*, 366 F. Supp. 3d 1069 (E.D. Mo. 2019).

26 Pharmacy First also brought state law tort claims and a claim for injunctive relief. See *id*. at 1069, 1074–75. The court declined to exercise supplemental jurisdiction over the state law tort claims and dismissed the claim for injunctive relief as a remedy and not an independent cause of action. *Id.* at 1082.

27 *Id*. at 1073.

28 *Id*.

29 *Id*.

30 *Id*.

31 *Id*.

11 March 2018, Express Scripts terminated the Agreement without cause because Pharmacy First submitted an unsuccessful bid to an Express Scripts' PSAO request for proposal (RFP) process.[32] Express Scripts invited Pharmacy First to engage in the RFP process again in the future.

Pharmacy First alleged that its termination was the result of an agreement between Express Scripts and four other PSAOs that Express Scripts 'determined "best align[ed]" with its "organizational objectives" and "m[et]" Express Scripts' "terms and conditions."'[33] As a result of its termination, Pharmacy First's network of pharmacies had to negotiate directly with Express Scripts or use the PSAO services of one of the authorized PSAOs that controlled approximately 70 per cent of the market for PSAO services. Pharmacy First alleged that independent pharmacies who sought direct access to Express Scripts' network faced the following burdens: '(i) punitively low and non-negotiable reimbursement rates; (ii) fees; (iii) network restrictions; (iv) administrative burdens; and (v) a narrowed list of Express Scripts' selected reconciliation vendors who could be used to process electronic remittance advice from Express Scripts.'[34] As a result of the termination, Pharmacy First alleged that it lost pharmacy customers.[35]

In its motion to dismiss, Express Scripts argued that Pharmacy First failed to plausibly plead an agreement between itself and the four PSAOs to deal exclusively with one another, that Express Scripts had market power in the PSAO market, or that Express Scripts' actions have harmed competition in the market or resulted in anticompetitive effects.[36] Pharmacy First responded that it pled facts in support of 'an express or implied exclusive dealing agreement between Express Scripts and the four PSAOs to "cut off" access to Express Scripts' network by Pharmacy First and the other 17 PSAOs that were terminated . . . .'[37] Pharmacy First also pointed to allegations that Express Scripts' action foreclosed competition in the PSAO-services market, which harms independent pharmacies by increasing their costs and denying them choice in PSAO services as plausibly supporting its antitrust injury.

As to the tying claim, Express Scripts argued that Pharmacy First failed to plausibly allege that Express Scripts 'sells the purported "tying" product—access to Express Scripts' network; that Express Scripts has a direct economic interest in the purported "tied" product—PSAO services from one of the four authorized PSAOs; or that Express Scripts conditions access to its network on using a PSAO.'[38] Pharmacy First responded that Express Scripts' services fee showed that Express Scripts 'sells' access to its network (the alleged tying product) and that it at least implicitly conditions access on the purchase of PSAO services from one of the four authorized PSAOs (the alleged tied product).[39] Further, Pharmacy First argued that its allegations regarding the substantial

32 *Id.* at 1074.

33 *Id.*

34 *Id.*

35 *Id.* It also alleged that access to Express Scripts' network is essential to PSAOs and pharmacies in order to compete in the pharmacy market.

36 *Id.* at 1075.

37 *Id.*

38 *Id.*

39 *Id.*

burdens placed on pharmacies trying to negotiate independently with Express Scripts proved that direct access is economically unviable, which forces the pharmacies to use the PSAOs.[40] Finally, Pharmacy First argued that the Eighth Circuit 'does not require a defendant to have an economic interest in the tied product' to state a tying claim but that Express Scripts did anyway because 'consolidating the PSAOs . . . allows Express Scripts to reduce "administrative costs" and secure a "centralized reimbursement structure."'[41]

The court first considered the plaintiff's exclusive dealing claim under the per se rule. Noting that the per se rule for group boycotts is typically limited to horizontal agreements, the court found that Pharmacy First failed to plead concerted action among horizontal competitors because '[t]he complaint contains no facts plausibly demonstrating that the four PSAOs conspired . . . to enter into an agreement with Express Scripts to refuse to deal with [any of the PSAOs].'[42] Rather, the complaint alleged that Express Scripts chose the PSAOs through a competitive RFP process (that Pharmacy First did not allege was rigged) because they 'best aligned with its organizational objectives and met Express Scripts' terms and conditions.'[43] Thus, the complaint's allegations were just as consistent with Express Scripts' unilateral action.[44] Turning to the rule of reason analysis, the court found that the complaint alleged 'the end result of an RFP process' and failed to 'plausibly suggest any collusion between Express Scripts and the four PSAOs to exclude [the other PSAOs].'[45] Instead, the court found the conduct was consistent with Express Scripts' unilateral determination about which contracts were best for its business and granted the motion to dismiss the exclusive dealing claim.[46]

As to the tying claim, the court noted that Pharmacy First '[did] not plead a typical tying claim, nor [did] it plausibly [plead] facts bringing its atypical claim within the confines of the Sherman Act.'[47] A tying claim typically asserts that the defendant refuses to sell the tying product without the tied product or, in cases where there is no explicit agreement, the defendant's policy makes purchasing the tying and tied products together the only viable economic option. Pharmacy First did not plead an explicit agreement and alleged that approximately 20 per cent of independent pharmacies contracted directly with Express Scripts indicating that it was economically viable to do so.[48] As an additional basis for dismissing the tying claim, the court found that Pharmacy First failed to allege that Express Scripts had an economic interest in the PSAOs. Noting that neither the Supreme Court nor the Eighth Circuit had addressed the issue, the court recognized that 'most courts require the tying product seller to have a direct economic interest in the sale of the

40 *Id.*

41 *Id.* at 1076.

42 *Id.* at 1077.

43 *Id.*

44 *Id.* at 1078.

45 *Id.*

46 *Id.* at 1079.

47 *Id.*

48 *Id.* at 1080.

tied product before an illegal tying arrangement can be found.'[49] The court held that 'if the tying product seller does not have an economic interest in the sale of the tied product, the seller is not attempting to invade the alleged tied product or service market in a manner proscribed by . . . the Sherman Act.'[50] The court held that Pharmacy First's allegations regarding Express Scripts' reduced administrative costs and centralized reimbursement structure did not suggest the sort of 'direct financial benefit' required under the direct economic interest test.[51] Moreover, '[a]bsent such direct economic interest, Express Scripts would have little interest in reducing competition in the PSAO services market because . . . doing so would only increase the remaining PSAOs' bargaining power against Express Scripts.'[52] As a result, the court dismissed the tying claim.

Pleading an unreasonable restraint of trade

Sitzer v National Association of Realtors

In *Sitzer v National Association of Realtors*,[53] the plaintiffs, home sellers who listed their homes on four multiple listing service (MLS) databases in Missouri, alleged that the defendants – the National Association of Realtors (NAR) and a number of corporate real estate companies that operate brokerage services in the relevant MLS geographic regions (the Corporate Defendants) – imposed restrictions that inflated real estate commissions throughout Missouri in violation of section 1 of the Sherman Act as well as Missouri state antitrust statutes.[54] At issue was NAR's adoption and implementation of the Adversary Commission Rule, which 'requires all seller's brokers to make blanket, unilateral and effectively non-negotiable offer [sic] of buyer broker compensation . . . when listing a property on a[n MLS].'[55] The defendants filed motions to dismiss.[56]

The court held that the plaintiffs had adequately pled an agreement among the defendants based on allegations that all of the Corporate Defendants require their subsidiaries[57] to 'join NAR member groups, participate in the MLS, and adhere to all NAR-imposed listing rules and policies including the [Adversary Commission Rule].' In addition, the plaintiffs alleged that various Corporate Defendant executives served in leadership or management positions at NAR or NAR's local chapters, which, the plaintiffs argued and the court agreed, was sufficient to support the Corporate Defendants' agreement to enforce NAR's anticompetitive policies.[58]

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49 *Id.* (citing a circuit split between the Tenth, Fourth, Sixth and Ninth Circuits that have adopted the 'economic interest' test and the Second Circuit).

50 *Id.* at 1081.

51 *Id.*

52 *Id.*

53 420 F. Supp. 3d 903 (W.D. Mo. 2019).

54 *Id.* at 903, 910–11. The Adversary Commission Rule is the plaintiffs' characterization of section 2-G-1 of NAR's MLS Listing Handbook. *Id.* at 911.

55 *Id.*

56 NAR also sought dismissal for lack of personal jurisdiction. The court held that it had personal jurisdiction over NAR based on section 12 of the Clayton Act. *Id.*

57 The Corporate Defendants' corporate structures varied and included subsidiaries, franchises and affiliates. For ease, we refer to all of them as subsidiaries here.

58 *Nat'l Ass'n of Realtors*, 420 F. Supp. 3d at 913.

Turning to whether the complaint plausibly alleged an unreasonable restraint of trade, the court first held that the plaintiffs' product market – 'the bundle of services provided to buyers and sellers of residential real estate' – and geographic market – the areas in which the relevant MLS databases operate – were sufficiently supported by the plaintiffs' allegations, including how the residential market worked, the ubiquitous use of MLS and the limited alternatives to MLS.[59] Next, the court considered whether the plaintiffs stated a claim under the rule of reason.[60] The court dismissed the defendants' arguments that the plaintiffs' allegations demonstrate the pro-competitive nature of MLS as premature holding that it did not need to balance anticompetitive effects against pro-competitive justifications at the motion to dismiss stage.[61] Holding that the challenged conduct plausibly exerts an unreasonable restraint on trade, the court found that the market power of an MLS and 'the fact that each MLS participant must adhere to the NAR listing rules or face professional sanctions and/or repercussions' could 'plausibly create a skewed compensation structure within the residential real estate market leading to inflated commissions.'[62]

Finally, NAR argued that the plaintiffs failed to allege a cognizable injury because the plaintiffs did not allege a failed attempt to negotiate a lower commission with their respective brokers. The plaintiffs argued that, to survive dismissal, all they needed to plead was that the Adversary Commission Rule was 'a material cause, a substantial factor, or a proximate cause' of their injuries.[63] The court determined that the plaintiffs' allegations that the defendants' 'agreement forced them to pay higher total sales commissions when they sold their homes and forced them to pay higher buyer-broker commissions to induce buyer-brokers to show their homes to prospective buyers' was the type of injury redressable under the antitrust laws, and that the plaintiffs' allegations sufficiently linked their injury to NAR's adoption of the Adversary Commission Rule. As a result, the court denied the motions to dismiss.

Pleading monopolization claims

Physician Specialty Pharmacy, LLC v Prime Therapeutics, LLC

In *Physician Specialty*,[64] the district court adopted the report and recommendation of the magistrate judge considering allegations that Prime Therapeutics (Prime), a pharmaceutical benefits manager for Blue Cross Blue Shield companies covering 93 per cent of large group health benefits in Alabama,[65] violated state and federal antitrust law when it unlawfully restrained trade in the Alabama specialty, mail order and retail pharmacy markets by vertically integrating 90 per cent of the market and excluding the plaintiff, Physician Specialty Pharmacy (PSP), from

59 *Id.* at 914.

60 *Id.* at 915. The plaintiffs did not allege a per se violation.

61 *Id.*

62 *Id.*

63 *Id.* at 916.

64 *Physician Specialty Pharm. v Prime Therapeutics*, No. 18-cv-1044 (MJD/TNL), 2019 U.S. Dist. Lexis 53115 (D. Minn. Jan. 23, 2019).

65 *Id.* at *2.

dispensing medications to Prime members. PSP also alleged that Prime conspired and agreed with Walgreens[66] to monopolize the same markets, and that Prime attempted to monopolize the same markets.[67]

First, the court considered PSP's allegation that Prime and Walgreens unreasonably restrained trade in violation of section 1 of the Sherman Act. PSP alleged that the per se standard was appropriate because it alleged that Prime and Walgreens conspired to exclude it from the marketplace and that Prime and Walgreens possessed 'market power or exclusive access to an element essential to effective competition.'[68] The court rejected a per se standard because Prime and Walgreens were not horizontal competitors; Prime is a customer/purchaser of pharmacies such as PSP and Walgreens.[69] Turning to the rule of reason analysis, the court held that PSP failed to plead an appropriate geographic market.[70] Although PSP alleged that the geographic market encompassed the entire state of Alabama because the state controls access to the relevant markets through licensing and regulation, the court found that PSP's retail pharmacy market was too large given that both parties agreed that patients 'rarely leave their locality to obtain mediations.'[71] The court held that the Alabama specialty and mail order pharmacy market also failed because PSP failed to plead facts sufficient to show that the two services were interchangeable. In particular, the court found that Prime and Walgreens' joint venture encompassing both services 'does not mean that those services are interchangeable for the purpose of defining a plausible product market. It simply means that the joint venture offers two different service lines.'[72] Finally, the court held that even if PSP had alleged plausible markets, it failed to demonstrate antitrust injury because '[c]onduct does not cause significant harm to a market when it is alleged to have impacted only a single party, even if the purpose of that conduct is retaliation.'[73] Moreover, the court found that PSP failed to support its claim that it would have been excluded from the market because PSP only pled that it would be excluded from the large group health insurance market, which left another 4 million Alabama residents who receive health insurance through other types of insurers in Alabama.[74]

Turning to the section 2 claims, the court held that PSP's monopolization claims failed because PSP alleged the same failed markets as its section 1 claim.[75] Even if PSP pled a plausible market, PSP could still serve the over 4 million Alabama residents not covered by large group health

66 Allegations relate to Walgreens and its mail-order subsidiary, AllianceRx, but for brevity, we reference Walgreens here.

67 *Physician Specialty*, 2019 U.S. Dist. Lexis 53115 at *4.

68 *Id.* at *10.

69 *Id.* at *11.

70 *Id.* at *13.

71 *Id.* at *13–14.

72 *Id.* at *14, 16.

73 *Id.* at *16.

74 PSP relied on a study for the argument that Blue Cross covered over 90 per cent of large health plans in Alabama. The court relied on that same study to point out that there were another 4 million Alabama residents covered by other types of health insurance.

75 *Physician Specialty*, 2019 U.S. Dist. Lexis 53115 at *20.

insurance plans, which meant Prime lacked monopoly power. The court also found that PSP failed to plead facts showing Walgreens' market share in the relevant markets or that the joint venture between Prime and Walgreens would result in a requirement that Prime members use Walgreens' pharmacies. Noting that a plaintiff can also prove monopoly power through direct evidence, the court found that PSP failed to plead that prices would increase as a result of Prime's conduct.[76] To the contrary, PSP's pleading showed that it was free to continue operating in both markets by serving patients with other benefit plans and PSP failed to allege that Prime or Walgreens 'lost out on short term profits or other benefits' through its termination of PSP.[77] As a result, the court held that PSP's monopolization claim failed to state a claim.[78]

The court then went through a lengthy discussion about whether a plaintiff is required to plead a relevant market when asserting a conspiracy to monopolize claim.[79] Relying on the Supreme Court's analysis in *Spectrum Sports v McQuillan*,[80] the court found that the 'any part' language in section 2 also applies to conspiracy to monopolize claims and therefore requires a plaintiff to plead a relevant market. After finding that a plaintiff must plead a relevant market in an attempted monopolization claim, the court held that PSP failed to plead plausible markets for all of the reasons given in its prior analysis.[81] Finally, the court rejected PSP's claim under section 3 of the Clayton Act – that Prime and Walgreens' prices were negotiated on the understanding that PSP would be excluded from the network – for its failure to establish a relevant market or show that market opportunities were limited after Prime and Walgreens established a joint venture.[82] The district court adopted Judge Leung's report and recommendation and dismissed PSP's complaint with leave to amend.[83]

Pleading parallel conduct in price-fixing cases

In re Pork Antitrust Litigation

In *In re Pork Antitrust Litigation*,[84] a class action consolidating 13 separately filed law suits, three putative classes[85] alleged that the defendants, some of the nation's leading pork producers and integrators, conspired to limit the supply of pork and fix prices in violation of state and federal law.[86] The pork industry is structured with relatively few players that are vertically integrated; the

76 *Id.* at *21–22.

77 *Id.* at *22.

78 *Id.*

79 *Id.* at *24–25.

80 506 U.S. 447 (1993).

81 *Physician Specialty*, 2019 U.S. Dist. Lexis 53115 at *26–27.

82 *Id.* at *27–28.

83 *Physician Specialty Pharmacy, LLC v Prime Therapeutics, LLC*, No. 18-1044 (MJD/TNL), 2019 U.S. Dist. Lexis 52431, at *3–4 (D. Minn. Mar. 28, 2019).

84 No. 18-1776 (JRT/LIB), 2019 U.S. Dist. Lexis 133165 (D. Minn. Aug. 8, 2019).

85 Direct purchaser plaintiffs, consumer indirect purchaser plaintiffs and commercial and institutional indirect purchaser plaintiffs.

86 *In re Pork Antitrust Litig.*, 2019 U.S. Dist. Lexis 133165 at *3.

top four participants control almost 70 per cent market share and the top eight, all of whom were defendants, control over 80 per cent of the market.[87] In addition, the plaintiffs alleged that the market is subject to high barriers to entry thanks to the high costs related to building a facility and long-term contracts between the pork integrators and farmers who raise the pigs.[88] The plaintiffs also allege that pork is a commodity product; defendants are discouraged from raising prices individually because their products are largely interchangeable.[89] 'Finally, the plaintiffs alleged that Defendants were motivated to enter into such an agreement because pork product prices were flat between 2000 and 2009, holding at less than $1.40 per pound.'[90] The plaintiffs further alleged that the defendants carried out the conspiracy through public statements 'emphasizing the need to cut production' and information exchanged through Agri Stats, a benchmarking company.[91] The plaintiffs alleged that the defendants shared detailed metrics with one another through Agri Stats that, while anonymized, could be deciphered to identify the company reporting the data and thus provided a method for the defendants to enforce compliance with the conspiracy.[92] The plaintiffs alleged that the conspiracy was successful; pork production decreased and pork producers also increased pork exports resulting in prices increasing to up to $1.80 per pound in the consumer market and to $50 to $76.30 in the wholesale market.

Defendants filed three motions to dismiss – a consolidated motion to dismiss the Sherman Act claims for failure to state a claim, a consolidated motion to dismiss the indirect purchaser claims, and individual motions to dismiss the claims as to each defendant. After holding that the complaint should be considered under the per se standard as an agreement among competitors and recognizing that the plaintiffs admitted that they had not pled direct evidence of an agreement, the court considered whether the plaintiffs had adduced conscious parallelism and 'plus factors sufficient to support a plausible inference of an agreement.'[93] The court first acknowledged that the plaintiffs' plus factors: 'the collusive and constricted nature of the industry, the inelasticity of pork demand, trade associations attended by the Defendants, actions taken by some of the Defendants against their own self-interests, pricing practices, and the fact that some of these Defendants engaged in similar practices in the chicken industry . . . are undoubtedly strong and are of the type often used to support an inference of an agreement.'[94]

The court still dismissed the complaint without prejudice, however, because the plaintiffs failed to adequately plead parallel conduct sufficient to support an inference of conspiracy.[95] The court found that the plaintiffs' industry-wide data only showed that pork production decreased overall in the years after 2009 but 'does nothing to indicate how any of the individual defendants

87 *Id.* at *5.

88 *Id.*

89 *Id.* at *6.

90 *Id.* at *7.

91 *Id.*

92 *Id.* at *10–13.

93 *Id.* at *20.

94 *Id.* at *21.

95 *Id.* at *20.

acted and that type of information [regarding which, how many, and when individual defendants affirmatively acted to reduce the supply of pork] is vital to pleading parallel conduct.'[96] As a result, the court refused to 'infer that the individual defendants all contributed to the decreased production.'[97] In addition, the court found that the plaintiffs failed to allege parallel conduct that is 'reasonably proximate in time and value' as required by the Eighth Circuit's holding in *Park Irmat* because the plaintiffs failed to allege when each defendant undertook production cuts.[98] As a result, the court found that it could not 'analyze whether [d]efendants' production cuts were temporally proximate.'[99] The court also found the plaintiffs' attempts to rely on public statements by the defendants' executives unavailing. Other than one defendant, the court found that the public statements establish that 'each Defendant simply noticed that the industry's production as a whole was declining.'[100] The court concluded that while it was clear that the pork industry as a whole experienced decreased production of pork:

> *The plaintiffs have not adequately pleaded that this decrease was the result of consciously parallel conduct undertaken by the specific defendants they accuse. Instead, the plaintiffs rely on industry-wide data and vague public statements and ask the court to infer that each defendant engaged in similar parallel conduct because they make up the majority of the industry. It may be true that some of these defendants cut production in the years following 2009. It may also be true that all of these defendants cut production. The fact that the complaints contain this ambiguity is exactly the problem and the court is unwilling to force defendants into significant and costly discovery without plausible allegations that they engaged in the conduct alleged.*[101]

96 *Id.* at *23.

97 *Id.* at *24.

98 *Id.* (citing *Park Irmat Drug Corp. v Express Scripts Holding Co.*, 911 F.3d 505, 516 (8th Cir. 2018)).

99 *Id.*

100 *Id.* at *26.

101 *Id.* at *27–28.

Tenth Circuit

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Tenth Circuit decisions

Sufficiency of the pleadings

Llacua v Western Range Association

In *Llacua v Western Range Association*,[1] the plaintiffs, Peruvian shepherds working in the United States on H-2A agricultural visas, alleged the defendants conspired to fix their wages at the minimum Department of Labor floor.[2] In particular, the shepherds alleged that the defendant rancher associations submitted job orders on behalf of multiple ranches with identical wage rates for all ranches operating in a state without distinguishing between ranches.[3] The rancher associations followed the same pattern with respect to visas by applying without naming the specific ranches, thereby allegedly prohibiting the shepherds from 'shop[ping] between ranches, as in a competitive labor market.'[4] In dismissing the plaintiffs' antitrust claims, the district court held that the shepherds had not met the standard set out by the Supreme Court in *Twombly*: mere allegations of parallel conduct, absent additional contextual facts, fail to state a plausible conspiracy claim.[5]

On appeal, the Tenth Circuit affirmed that the district court correctly applied the *Twombly* framework in dismissing the plaintiffs' claim.[6] First, because the allegations did not directly establish a section 1 agreement[7] and instead the shepherds had asked the court to infer a conspiracy from circumstantial evidence of parallel conduct, *Twombly* was the appropriate standard by

1 *Llacua v W. Range Ass'n*, 930 F.3d 1161 (10th Cir. 2019).

2 *Id.* at 1168.

3 *Id.* at 1172–73.

4 *Id.* at 1173.

5 *Id.* at 1174–75 (citing *Bell Atl. Corp. v Twombly*, 550 U.S. 544, 556–57 (2007)).

6 *Id.* at 1177.

7 For example, there were 'no factual allegations of agreements, no reports, memoranda, or tapes of meetings, no plainly anticompetitive association rules compelling certain behavior.' *Id.* at 1178.

which to analyze the allegations.[8] Second, applying *Twombly*, the Court held that the shepherds failed to alleged facts that would support a plausible inference that the ranch associations were hired to keep wages low.[9] Noting that the Supreme Court has long warned courts to be hesitant about inferring concerted action from evidence that is merely circumstantial,[10] particularly when that circumstantial evidence relates to participating in a business association,[11] the Tenth Circuit found that the allegations simply indicated that member ranches unilaterally decided to join the ranch associations and use their services in filling out paperwork and applying for the appropriate visas.[12] Furthermore, the allegation that ranches participated in a conspiracy to seriously depress wages by their competitors in other states 'does not make economic sense.'[13] Ranchers would not attempt to participate in a conspiracy that 'locks in substantial advantages for their competition' so the factual allegations simply did not plausibly state the existence of a conspiracy to fix wages.[14]

This case is significant because it confirms that the Tenth Circuit will rigorously apply *Twombly* in assessing claims of antitrust conspiracy that do not put forward direct evidence. Plaintiffs must comply with the pleading standards set forth by the Supreme Court and ensure not only that the allegations demonstrate that an agreement existed, but also that that agreement made economic sense and that defendants had an economic motive to conspire.

District court decisions

Monopolization and attempted monopolization

NM Oncology & Hematology Consultants, Ltd v Presbyterian Healthcare Services

In *NM Oncology & Hematology Consultants, Ltd v Presbyterian Healthcare Services*,[15] the plaintiff, New Mexico Oncology and Hematology Consultants, Ltd (NMOHC) is an independent, physician-owned practice providing a full range of oncology-related services.[16] NMOHC brought an action against Presbyterian Healthcare Services, an integrated healthcare system that owns several hospitals, and its subsidiary health insurance company and health plan (Presbyterian Health Plan, Inc (PHP)) (defendants) alleging monopolization of private health insurance services in

8 *Id.* at 1178–79.

9 *Id.* at 1179.

10 See *Matsushita Elec. Indus. Co. v Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *Monsanto Co. v Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984).

11 See generally *Maple Flooring Mfrs.' Ass'n v United States*, 268 U.S. 563, 566 (1925).

12 *Llacua*, 930 F.3d at 1181.

13 *Id.*

14 *Id.*

15 *N.M. Oncology & Hematology Consultants, Ltd. v Presbyterian Healthcare Servs.*, 418 F. Supp. 3d 826 (D.N.M. 2019).

16 *Id.* at 830.

Albuquerque and attempted monopolization of oncology services in Albuquerque.[17] The court granted the defendants' motion for summary judgment on both antitrust claims finding there was no evidence in the record that the defendants engaged in anticompetitive conduct.[18]

To prove its monopolization claims, the court said NMOHC must prove (1) monopoly power in the relevant market, and (2) acquisition or maintenance of that power through anticompetitive, or exclusionary, conduct.[19] To establish that defendants possessed monopoly power, plaintiffs must first 'identify . . . the relevant product market,' and then demonstrate that defendants have 'both power to control prices and power to exclude competition' in that market.[20] In this case, the plaintiff submitted expert testimony regarding the defendants' market share for commercial health insurance purchased by employers in Albuquerque, including the submarkets for both commercial fully insured covered lives and commercial self-insured covered lives, and its market share for Medicare Advantage.[21] The defendants argued that NMOHC's claim failed because its shares of these markets – ranging from 26.3 per cent to 54.7 per cent during the period of 2008 to 2015 – were below the level that could support a claim of monopolization.[22]

The court disagreed. Consistent with Tenth Circuit precedent in *Reazin v Blue Cross & Blue Shield of Kansas*, the court noted that a range of 45 per cent to 62 per cent of a health insurance market gives rise to a presumption that the defendants lack monopoly power, not a conclusion the defendants lack monopoly power as a matter of law.[23] Finding market shares to not alone be dispositive, the court turned to other factors discussed in *Reazin* including: 'the number and strength of the defendant's competitors, the difficulty or ease of entry into the market by new competitors, consumer sensitivity to changes in prices, innovations or developments in the market, [and] whether the defendant is a multimarket firm.'[24] Assessing all the inputs to determine monopoly power, the court held that there could be a genuine issue of fact not as to pure market share numbers but because of high barriers to entry and the defendants' power as a multimarket firm.[25]

Despite the factual issues remaining related to market power, the court granted summary judgment on the monopolization claim because it found that there was no evidence that the defendants engaged in anticompetitive or exclusionary conduct.[26] NMOHC alleged three types of exclusionary conduct: (1) in the most recent provider contract, the defendants lowered reimbursement rates and declined to cover services offered by NMOHC with the intent to 'financially

17 *Id.* at 830–31.

18 *Id.* at 855, 866.

19 *Christy Sports, LLC v Deer Valley Resort Co., Ltd.*, 555 F.3d 1188, 1192 (10th Cir. 2009).

20 *Lenox MacLaren Surgical Corp. v Medtronic, Inc.*, 762 F.3d 1114, 1119–20 (10th Cir. 2014); *Reazin v Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951, 966–67 (10th Cir. 1990).

21 *N.M. Oncology*, 418 F. Supp. 3d at 834.

22 *Id.* at 834–35.

23 *Id.* at 835.

24 *Reazin*, 899 F.2d at 967 n.23.

25 *N.M. Oncology*, 418 F. Supp. 3d at 840.

26 *Id.* at 840–41.

strangle' and eliminate the plaintiff; (2) the defendants entered into an exclusive arrangement with United HealthCare (United), such that United could not take certain actions without the defendants' approval causing significant concentration of the private health insurance market; and (3) the implementation of the defendants' 'mandate' to require certain members to obtain drugs from the defendants.[27] The court assessed and rejected each of these claims of exclusionary conduct. Particularly interesting was the court's assessment of the plaintiff's claim of refusal to deal based on the parties' efforts to negotiate a new contract. The court rejected the notion that the defendants were sacrificing short-term profits or acting irrationally and instead found that they wanted to 'maximize the company's immediate and overall profits' by reducing the reimbursement rates to the plaintiff.[28] Although the court acknowledged that a reasonable juror might well infer from the evidence that the defendants' negotiation strategy was informed by the vision for its cancer center as the dominant oncology services provider in central New Mexico, the court held that a monopoly 'leveraging' claim cannot establish anticompetitive conduct.[29]

The court then engaged in a similar analysis of the attempted monopolization claim. To prove its attempted monopolization claims, the court said NMOHC must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize, and (3) a dangerous probability of achieving monopoly power.[30] Going through the same *Reazin* factors described above, the court noted that it was questionable whether a genuine issue of fact remains as to the dangerous probability that the defendants' will achieve monopoly power despite their market share of only 24 per cent in the market for outpatient oncology services.[31] Nonetheless, the court held it did not need to make that determination since the plaintiff failed as a matter of law to prove anticompetitive, exclusionary conduct.[32]

NMOHC alleged several types of exclusionary conduct but the court focused most directly on whether the defendants' patient retention goals and efforts went beyond unilateral conduct.[33] In particular, the court found that the evidence demonstrates that the defendants implemented a referral management system to steer its own physicians toward making internal referrals (including oncology) where it had the capacity and expertise to treat those patients.[34] The plaintiff claimed this was an effort to monopolize the relevant market but the court rejected that premise noting '[t]he Sherman Act does not force [PHP] to assist a competitor in eating away its own customer base, especially when the competitor is offering [PHP] nothing in return.'[35] Instead, after entering the oncology business by building its own cancer center, the defendant was entitled to 'recoup its investment in a number of ways,' including, as it chose, to pursue strategies to

27 *Id.* at 841, 854.

28 *Id.* at 849.

29 *Id.* at 850.

30 *Christy Sports*, 555 F.3d at 1192.

31 *N.M. Oncology*, 418 F. Supp. 3d at 859.

32 *Id.*

33 *Id.* at 863–64.

34 *Id.* at 864.

35 *Id.* at 865.

reduce external referrals and outmigration of oncology patients.[36] Finally, as a policy point, the court noted that allowing the defendants 'to decide for themselves what blend of vertical integration and third party competition will produce the highest return may well increase competition in the [health services] business as a whole, and thus benefit consumers.'[37]

Application of per se rule to customer allocation

United States v Kemp & Associates

The *United States v Kemp & Associates* case[38] arose from the United States' indictment of Kemp & Associates and its chief operating officer regarding their actions as an 'heir location service,' a term used to describe companies that 'identify heirs to estates of intestate decedents and, in exchange for a contingency fee, develop evidence and prove heirs' claims to an inheritance in probate court.'[39] In particular, the United States alleged that Kemp agreed to allocate customers with a competitor, Blake & Blake, and split the contingency fees collected from those allocated heirs.[40] The district court originally cited three reasons for applying the rule of reason, namely the fact that the agreement (1) was structured in an unusual way in that it only applied to new customers, (2) affected only a small number of customers, those who were contacted by more than one heir location service, and (3) occurred in an obscure industry with an unusual manner of operation.[41]

In an appeal by the government, the Tenth Circuit reversed the district court's ruling that the indictment was beyond the statute of limitations but held that the district court's rule of reason order did not fall within its interlocutory appellate jurisdiction.[42] Although the Tenth Circuit did not find it had jurisdiction to review the order, it noted that '[it] is undisputed that "an agreement to allocate or divide customers between competitors within the same horizontal market, constitutes a per se violation of § 1 of the Sherman Act."'[43] It went on to say that the indictment describes the conduct at issue to do just that: 'a conspiracy "to suppress and eliminate competition by agreeing to allocate customers of heir location services sold in the United States."'[44] Following the reversal on the statute of limitations, the United States filed a motion to reconsider whether the rule of reason or the per se approach should apply to the case.[45] The district court granted the motion.[46]

36 *Id.* at 866 (quoting *Christy Sports*, 555 F.3d at 1195).

37 *Id.*

38 *United States v Kemp & Assocs.*, No. 2:16CR403 DS, 2019 WL 763796 (D. Utah Feb. 20, 2019).

39 *United States v Kemp & Assocs.*, 907 F.3d 1264, 1268 (10th Cir. 2018).

40 *Id.* at 1269.

41 *Kemp*, 2019 WL 763796 at *4.

42 *Kemp*, 907 F.3d at 1272–73.

43 *Id.* at 1273 (quoting *United States v Suntar Roofing, Inc.*, 897 F.2d 469, 473 (10th Cir. 1990)).

44 *Id.*

45 *Kemp*, 2019 WL 763796 at *1.

46 *Id.* at *3.

In accepting the Tenth Circuit's view that horizontal customer allocation agreements are normally subject to the per se approach, the district court analyzed whether the agreement at issue was in fact a horizontal customer allocation agreement and concluded that it was.[47] Important to the court's decision was the fact that the agreement between the parties was 'almost certainly sought to minimize competition' because the 'arrangement allowed the heir location service that first contacted a potential client to offer that client whatever price they chose, while being unrestrained by the natural check that the thought of competition places on business.'[48] The court also noted that no special circumstances applied to require application of the rule of reason because no joint venture existed between the parties and the existence of the product did not depend on such an agreement.[49] Finally, the court addressed its original analysis and acknowledged it was immaterial that the agreement only applied to new customers, affected a small number of customers, and occurred in a niche industry.[50]

Sufficiency of the pleadings

Omnimax International, Inc v Anlin Industries

In *Omnimax International, Inc v Anlin Industries*,[51] in response to the plaintiff's lawsuit against former employees who allegedly misappropriated certain customer lists and confidential information, the defendant asserted that the agreements the former employees signed were unlawful restraints of trade in violation of the Colorado Antitrust Act of 1992 (Act).[52] The court's decision focused on whether the defendant sufficiently alleged antitrust injury and noted that 'the "crucial first step," "screen," or "filter" dispositive of whether an accused's practices harm competition within the meaning of the antitrust statutes is whether that firm possesses "market power."'[53] Here, the court found that the defendant's counterclaim failed to meet the pleading sufficiency

47 *Id.* To prove that such an agreement exists, a plaintiff must show: (1) An agreement between competitors (2) at the same level of the market structure (3) to allocate territories (4) in order to minimize competition. *Id.* at *2 (citing *United States v Topco Assocs.*, 405 U.S. 596, 608 (1972)).

48 *Id.* at *3.

49 *Id.* at *4.

50 *Id.*

51 *Omnimax Int'l, Inc. v Anlin Indus.*, No. 18-cv-01830-DDD-MEH, 2019 WL 2516121 (D. Colo. June 17, 2019).

52 *Id.* at *4. Under the Act, '[e]very contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce is illegal.' Colo. Rev. Stat. § 6-4-104. Analogous to bringing a claim under the Sherman Act, a plaintiff must show (1) the defendant entered into an agreement constituting a contract, combination in the form of a trust or otherwise, or conspiracy; (2) that constitutes an unreasonable restraint on trade; and (3) the plaintiff suffered an antitrust injury. *Omnimax*, 2019 WL 2516121 at *4.

53 *Id.* at *5 (quoting *SCFC ILC, Inc. v Visa USA, Inc.*, 36 F.3d 958, 963 (10th Cir. 1994)).

required by *Twombly*[54] because the company did not 'even hypothetically plead facts to inform the Court of the relevant market, the market power of any party, or how the use of the Agreements causes that or any other antitrust injury[.]'[55]

Chase Manufacturing, Inc v Johns Manville Corporation

In *Chase Manufacturing, Inc v Johns Manville Corporation*,[56] the plaintiff, Chase Manufacturing (Chase), was a new entrant into the production of calsil, an insulation product used in large industrial facilities such as oil refineries, chemical and power generation plants, and pulp and paper mills.[57] At the time Chase began producing calsil in 2018, the defendants owned and operated the only two remaining calsil manufacturing plants in North America, and had a market share of at least 98 per cent.[58] The parties sell their products to national and regional distributors, which then resell the products to industrial customers or plant operators.[59] These end customers require that their distributors carry other construction products made by the defendants, including the defendants' fiberglass and expanded perlite products.[60] After one of the defendants' customers expressed interest in purchasing calsil from Chase, the defendants allegedly began threatening customers that they would not sell them calsil or any other products, including their fiberglass and expanded perlite products, if the customers purchased Chase's product.[61] According to Chase, the defendants' threats included a warning that the defendants were tracking and monitoring import records to enable them to watch the plaintiff's calsil sales.[62] Finally, the complaint also stated that the defendants told customers that Chase's calsil was 'poor quality' and 'cannot be trusted to meet "specifications,"' 'may have asbestos,' and was 'Chinese,' referring to where it was produced.[63]

The plaintiff alleged that the defendants both unfairly created and maintained a monopoly through five types of exclusionary conduct: (1) tying its fiberglass and expanded perlite products to the purchase of calsil, (2) exclusive dealing causing a substantial foreclosure on the plaintiff's ability to compete, (3) refusal to deal as a result of the defendants' threats to refuse to sell products to its customers if those customers purchased calsil from Chase, (4) spying, based on the comments from the defendants that they were tracking Chase's imports, and (5) product disparagement, including statements that the plaintiff's product was poor quality, could not meet specifications

54 *Bell Atlantic Corp. v Twombly*, 550 U.S. 544, 570 (2007).

55 *Omnimax*, 2019 WL 2516121 at *5.

56 *Chase Mfg. v Johns Manville Corp.*, Civil Action No. 19-cv-00872-MEH, 2019 WL 2866700 (D. Colo. July 3, 2019).

57 *Id.* at *1.

58 *Id.*

59 *Id.* at *2.

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.*

and may have asbestos.[64] In granting the defendants' motion to dismiss, the court found that the plaintiff failed to plead a monopoly claim because it did not establish that the defendants acquired or maintained a monopoly through any of the five types of exclusionary conduct alleged.[65]

First, the court held that the complaint failed to state a claim with respect to tying because the plaintiff needed to allege both an appropriate product market and geographic market[66] and could not adequately allege a geographic market.[67] In particular, purchasers of the tying products were regional and national distributors selling throughout the country and there were insufficient allegations as to the defendants' national market share and power.[68] Second, the complaint failed with respect to exclusive dealing because it did not allege sufficient facts suggesting that the defendants' actions foreclosed a substantial share in the calsil market or the plaintiff's ability to compete in that market.[69] Third, the plaintiff waived its monopoly claim based on refusal to deal because, during oral argument, it expressed that it was not relying on that theory.[70] Fourth, although the court recognized that commercial spying can be grounds for exclusionary conduct to support an antitrust monopoly claim,[71] it held that the company here failed to adequately state a claim.[72] Commercial spying sufficient to support a monopoly claim includes such behavior as a company using its employees to infiltrate a competing company to covertly obtain information about the competitor[73] or a company creating code numbers and a network of 'special agents' to tattle tale on distributors who violate the company's resale prices.[74] Here, comments by the defendants stating that they were monitoring the plaintiff's imports simply did not amount to commercial spying.[75] Fifth, the complaint failed with respect to product disparagement because it could not overcome the presumption that the effect on competition is *de minimis*.[76]

64 *Id.* at *4–10.

65 *Id.* at *13.

66 'Market power is important because if the defendant has substantial power in the tying market, then the tie has the potential of injuring competition by forcing consumers to take the tied product just to get the tying one.' *Suture Express, Inc. v Owens & Minor Distrib., Inc.*, 851 F.3d 1029, 1039 (10th Cir. 2017). 'Without power in the tying market, we would expect that a customer would not feel obliged to take the tie, as he could simply go elsewhere to buy the tying and tied products separately.' *Id.*

67 *Chase*, 2019 WL 2866700 at *6.

68 *Id.*

69 *Id.* at *7.

70 *Id.* at *8–9.

71 *Utah Pie Co. v Cont'l Baking Co.*, 386 U.S. 685, 697 (1967).

72 *Chase*, 2019 WL 2866700 at *9.

73 *Utah Pie Co.*, 386 U.S. at 696–97.

74 *Fed. Trade Comm'n v Beech-Nut Packing Co.*, 257 U.S. 441, 455 (1922).

75 *Chase*, 2019 WL 2866700 at *9.

76 *Id.* at *10. In order to rebut this presumption, a section 2 plaintiff must satisfy a six-factor test, showing that the disparagement was: '(1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible to neutralization or other offset by rivals.' *Lenox MacLaren Surgical Corp. v Medtronic, Inc.*, 762 F.3d 1114, 1127 (10th Cir. 2014). Here, the plaintiffs failed to allege facts to meet the third, fourth, fifth and sixth factors. *Chase*, 2019 WL 2866700 at *10.

GDHI Marketing, LLC v Antsel Marketing, LLC

GDHI Marketing, LLC v Antsel Marketing, LLC[77] relates to a dispute between two publishers of magazines marketing the services and products of home-improvement contractors, and allegations that the defendants made false statements about the plaintiff and its operations in an attempt to drive it out of the market.[78] As a threshold issue, the court held that the plaintiff lacked standing to assert an antitrust claim based on its allegations of false advertising.[79] While the Tenth Circuit has not squarely addressed false advertising as causing an antitrust injury, the court noted that other courts have and reiterated that absent 'an accompanying coercive enforcement mechanism of some kind, even demonstrably false commercial speech is not actionable under the antitrust laws.'[80] Here, the plaintiff failed to plead coercive mechanisms and instead focused on 'mere misrepresentations,' which was insufficient.[81] Moreover, the injury the plaintiff is alleged to have suffered is 'one suffered by a competitor, not competition,' which the antitrust laws are not designed to protect against.[82]

Although not required to address the substance of the plaintiff's antitrust claims, the court went on to find that the plaintiff failed to state claims for monopolization, attempted monopolization and conspiracy to monopolize.[83] While the 'allegations generally smack of a *suspicion* that something was wrong or unfair, . . . they do not plausibly allege the elements or requirements necessary for monopolistic power.'[84] In particular, the court focused on the plaintiff's inability to show that the defendants had any kind of power to exclude competitors from entering the home-renovation direct-mail market.[85] Indeed the plaintiff's entry into the market shows the lack of the defendants' alleged monopoly power.[86] 'This is why false advertising, without more, is not an actionable antitrust injury; there is no anticompetitive power inherent to a false statement. There may be consequences, to be sure, but these are not consequences suffered by competition.'[87]

77 *GDHI Mktg. LLC v Antsel Mktg. LLC*, 416 F. Supp. 3d 1189 (D. Colo. Sept. 9, 2019).

78 *Id.* at 1195.

79 *Id.* at 1202–03.

80 *Mercatus Grp. v Lake Forest Hosp.*, 641 F.3d 834, 852 (7th Cir. 2011).

81 *GDHI*, 416 F. Supp. 3d at 1202.

82 *Id.* at 1203.

83 *Id.* at 1203–05.

84 *Id.* at 1204 (*emphasis in original*).

85 *Id.*

86 *Id.*

87 *Id.*

Refusal to deal

Entrata, Inc v Yardi Systems, Inc

Before the court in *Entrata, Inc v Yardi Systems, Inc*[88] was the defendant's motion for summary judgment in a dispute between two software and technology companies producing 'various competing property management software products.'[89] After several years of a 'mutually beneficial relationship,' Yardi allegedly began to communicate false and misleading information to Entrata's current and prospective customers.[90] As a result, Entrata brought antitrust claims under the refusal to deal doctrine – a mechanism by which 'a monopolist [may maintain] its power.'[91]

To invoke the refusal to deal doctrine, the Supreme Court and the Tenth Circuit have explained that at least two features must be present: (1) there must be a preexisting voluntary and presumably profitable course of dealing between the monopolist and rival, and (2) the monopolist's discontinuation of the preexisting course of dealing must suggest a willingness to forsake short-term profits to achieve an anticompetitive end.[92]

In support of its motion for summary judgment, Yardi argued that Entrata changed the preexisting course of dealing when it introduced a product that would compete with Yardi's product.[93] The court disagreed, noting Entrata pointed to ample evidence of a preexisting, profitable course of dealing and provided evidence that Yardi unilaterally ended the relationship, creating a dispute precluding summary judgment.[94] Next, Yardi argued there was no evidence it gave up short-term profits or acted irrationally in refusing to deal with Entrata.[95] The court rejected this argument because Entrata pointed to evidence that Yardi offered substantial discounts to mutual customers to persuade them to remain with Yardi after Yardi cut off Entrata.[96] The court held that a factfinder would need to weigh the evidence to determine whether Yardi's actions were motivated by profits and whether it had a valid business reason for refusing to deal with Entrata.[97] Finally, the court addressed Yardi's reliance on Tenth Circuit precedent, *SOLIDFX, LLC v Jeppesen Sanderson, Inc*.[98] In *SOLIDFX*, the court referenced decisions from other Circuits stating that a company's 'unilateral refusal to sell or license copyrighted expression' to a competitor triggers a 'presumptively rational business justification for a unilateral refusal to deal.'[99] In that case, it was undisputed that the antitrust plaintiff required access to the defendant's copyrighted toolkits

88 *Entrata, Inc. v Yardi Sys.*, No. 2:15-cv-00102, 2019 WL 4597519 (D. Utah Aug. 14, 2019).

89 Compl. at ¶ 6, *Entrata, Inc. v Yardi Sys.*, No. 2:15-cv-00102, 2015 WL 13828831 (D. Utah Feb. 12, 2015).

90 *Id.* at ¶ 35.

91 *Entrata*, 2019 WL 4597519 at *6 (citing *SOLIDFX, LLC v Jeppesen Sanderson, Inc.*, 841 F.3d 827, 841 (10th Cir. 2016)).

92 *Novell, Inc. v Microsoft Corp.*, 731 F.3d 1064, 1074–75 (10th Cir. 2013).

93 *Entrata*, 2019 WL 4597519 at *6.

94 *Id.*

95 *Id.* at *6–7.

96 *Id.* at *6.

97 *Id.* at *7.

98 *Id*. at *8–9.

99 *SOLIDFX*, 841 F.3d at 841–42.

to develop its product but because the defendant cut off the plaintiff's access to its software in order to develop its own product using its own intellectual property, it was shielded from antitrust liability.[100] Here, the court found that there was a genuine issue of material fact about whether Entrata actually requires access to any of Yardi's intellectual property or that Yardi's refusal to deal was a result of its efforts to innovate a new competitive product.[101] Thus, unlike in *SOLIDFX*, it is not 'undisputed that, in order' for Entrata to develop its custom integration products, it 'needs to access' Yardi's copyrighted materials.[102]

100 *Entrata*, 2019 WL 4597519 at *8.

101 *Id.*

102 *Id.* at *9.

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