GCR AWARDS 2021

Individual Awards

Lawyer of the Year

Amanda Reeves (Latham & Watkins)

Amanda Reeves wins the award for Lawyer of the Year, marking the second consecutive year that a Latham & Watkins partner has been recognised in this category. Reeves beat several other top antitrust practitioners, including Skadden Arps Slate Meagher & Flom partner Steven Sunshine, Arnold & Porter partner Axel Gutermuth and Cleary Gottlieb Steen & Hamilton partner Antoine Winckler.

Q&A

What are the most significant cases you worked on in 2020 and what challenges did they present?

Three cases in 2020 stand out for me. The first is the Federal Trade Commission's ongoing litigation against Surescripts, which falls squarely at the intersection of how to analyse anticompetitive harm in two-sided markets – and all of the open questions from the Supreme Court's decision in *American Express* – and how the law should treat pricing conduct in the context of loyalty agreements. It is unusual in that the FTC sought disgorgement in a federal antitrust case, the legality of which is the subject of the AMG case currently before the Supreme Court. That court could decide that any day, so stay tuned for what happens next! [Editor's note: the Supreme Court handed down its judgment on 22 April, confirming that the FTC cannot seek disgorgement under section 13(b) of the FTC Act]

The second was Intuit's acquisition of Credit Karma, which involved combining together two complementary companies in the dynamic fintech space, along with a remedy in an environment where the Department of Justice and FTC are as tough on remedies as ever and where timing became a factor towards the end. It came down to the wire, and at times we were on the cusp of litigating the fix, but we thankfully got it done.

The third was the DOJ's landmark decision to arbitrate market definition in *Novelis/Aleris* in a trial that – somewhat surreally in retrospect – wrapped up right before we went into the pandemic lockdown. Negotiating the right to arbitrate and the right to do a hold separate and post-closing litigation was key in allowing the deal to close. I could write a treatise on the pros and cons of that experience.

The conversation surrounding "killer acquisitions" has persisted throughout multiple administrations. Do you feel like the agencies have struck the correct balance in how they approach such deals?

It's too soon to say. Part of the challenge is situating what it means to be a "killer acquisition" in the context of the law. Section 7 of the Clayton Act requires proof that a transaction may "substantially lessen competition in a relevant antitrust market" and section 2 of the Sherman Act requires proof that a firm with monopoly power in a relevant market is engaged in exclusionary conduct. When the agencies approach mergers during the investigation phase, if they apply these principles, the bar can – and in some cases, should – get animated and say the agencies are being aggressive in their theory; but if the law allows it, it's hard to say what the agencies are doing is over the line.

The bigger risk is when the guardrails come down during the investigative phase, given that not every deal has the financing to hold itself together for more than 18 months. In some of the public dialogue surrounding "killer acquisitions", there is sometimes a tendency to suggest that anytime a company has market or monopoly power, section 7 or section 2 preclude that company from acquiring any company in the same generalised space under the theory that the purpose of the deal is to block a nascent competitor from emerging. But that is not the law. Over the past few years, it's safe to say that matters have gone both ways at the agencies – there are some where, by public accounts, the "killer acquisition" concept took on an unsubstantiated life of its own, and others where I observed the staff and economists asked hard questions based on outside-the-box theories, but where they ultimately found an absence of competitive effects in a relevant market and closed the investigation. We are about to see the courts make law on this topic over the next few years, so that will tell us more.

What advice would you give a young competition lawyer starting out in their career?

First, study the big picture on your matters. Ask why certain arguments are made, what the team's overall strategy is, learn the policy undercurrents that are driving antitrust analysis that might be in play and understand the law.

Second, become the expert on the minute details on your matters. Study what drives pricing, marketing, distribution and innovation in the industry that you are focused on. If you can master that, you will be a better critical thinker and advocate around the ultimate question of whether there is a real competitive issue at hand.

Third, get outside your law firm and get to know the bar. The global antitrust bar can be daunting because there are so many of us, but we all have one thing in common – we love what we do. Get involved in your bar association, go to a networking event, attend the ABA Antitrust Spring Meeting and GCR conferences. You will be amazed at how friendships you form at the beginning of your career will carry on for decades as you move through life.

Fourth, read the newspaper and set up news alerts on the companies you are representing. If you read the business section, so much of what we do, even before antitrust law became trendy in the past few years, was all over the papers in less explicit ways. Companies like it when you know what is going on with their business and it will make you a savvier consumer of global markets and economic trends.

Finally, make sure you have fun. This is one of the most exciting times to be an antitrust lawyer in decades. Pay attention to what is swirling around us and take it all in. We all work so hard that we need to remember what an exceptional time it is to be practising antitrust law in 2021.

What are your predictions for antitrust enforcement under Joe Biden's administration – in 2021 and beyond?

It seems clear that there will be more scrutiny of vertical mergers and potential competition cases. We are going to get an early read on the success of these efforts when the FTC's challenge to *Illumina/GRAIL* goes

"We all work so hard that we need to remember what an exceptional time it is to be practising antitrust law in 2021."

to trial on a vertical potential competition theory. Prior similar litigation efforts in the context of the DOJ's challenge to *AT&T/Time Warner* (which was vertical) and the FTC's challenge in *Steris/Synergy* (which was based on potential competition) have proved unsuccessful in comparison with the success the agencies have had when challenging deals under a horizontal theory. Of course, if parties are unable to litigate, it remains unclear whether behavioural remedies that featured prominently in the Obama administration and then fell by the wayside in the Trump administration will have a revival. That may be the most important question of all for vertical deals.

On the technology side, there is a whole morass of questions percolating on how to think about harm in two-sided markets and in the context of platforms, as well as how, and to what extent, questions around big data should collapse into a section 2 and section 7 analysis, and whether more explicit regulation at the industry level is needed to provide a hook for addressing new theories of harm. Much of that is playing out on Capitol Hill, but I would expect to see the DOJ and FTC asking questions through the lens of more novel theories than in the past.

Last but not least, the one sure bet is that we will see more antitrust litigation and, as a nice side effect perhaps, the creation of more common law. With the agencies advancing novel theories in conduct and merger challenges, companies will have a greater incentive to litigate if they can. Expect the courts to be busier with antitrust challenges from the FTC, DOJ and state attorneys general than ever before.